

and *Fourth Claims for Relief*.¹

STANDARD OF REVIEW

Summary judgment should be refused when the nonmoving party has not had an opportunity to discover evidence that is essential to opposing that *Motion*.² Courts, therefore, should allow a party time for discovery under *Federal Rule of Civil Procedure 56* when there has been no prior opportunity of discovery.³ Before summary judgment may be entered, all parties must be given notice of the *Motion* and the opportunity to respond, which necessarily includes time for the discovery essential to develop facts justifying opposition to the *Motion*.⁴ Simply stated when, as in the instant case, the party opposing a *Motion for Summary Judgment* has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, discovery should be allowed before the Court

¹ Doc. 99 and 100. “Navajo Nation” as used in this *Motion* also refers to the other individual plaintiffs in this case.

² *Training Center, Inc v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993).

³ *United States on Behalf and for the Benefitted of Army Athletic Ass’n v. Reliance Ins. Co.*, 799 F.2d 1382, 1388 (9th Cir. 1986).

⁴ *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985).

rules on a *Motion for Summary Judgment*.⁵

INTRODUCTION

The Navajo Nation has asked the Court to enter summary judgment in favor of their *Second, Third, and Fourth Claims for Relief* without first allowing San Juan County the opportunity to engage in sufficient discovery. Moreover, despite refusing to provide San Juan County with responses to its discovery, Navajo Nation now seeks summary judgment in its favor.

Under these circumstances, the Court should deny the *Motions for Partial Summary Judgment*, or in the alternative, allow discovery before considering that *Motion*. San Juan County's 56(d) *Motion* is supported by the following *Declaration of Jesse Trentadue*.

DECLARATION

Pursuant to 28 U.S.C. § 1746 I, Jesse Trentadue, hereby submit this *Declaration* based upon personal knowledge:

1. I am a resident of Salt Lake County, Utah.

⁵ *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980).

2. I am more than 18 years of age. If called upon to testify about the matters of this declaration, I could and would competently do so.

3. I represent San Juan County in the above captioned case.

4. On February 19, 2014, the Navajo Nation filed a *Motion for Partial Summary Judgment* on its *Fourth Claim for Relief*.⁶ That *Motion* was based entirely upon the unsworn statement of the Navajo Nation's purported expert witness William S. Cooper.⁷

5. On February 20, 2014, the Navajo Nation filed a *Motion for Partial Summary Judgment* on its *Second and Third Claims for Relief*.⁸ That *Motion* was likewise based entirely upon the unsworn statement of the Navajo Nation's purported expert witness William S. Cooper.⁹

6. On March 10, 2014, the Navajo Nation filed a "*Notice of Errata*" on

⁶ Doc. 99.

⁷ See Doc. 99-1, p. 42.

⁸ Doc. 100.

⁹ See Doc. 100-1, p. 42.

its pending *Motions for Partial Summary Judgment*.¹⁰ In that *Notice*, the Navajo Nation amended its *Motions* to include a sworn and modified declaration by Mr. Williams as well as additional evidence.

7. Fact discovery concludes on May 30, 2014.¹¹ The Navajo Nation's expert reports are due July 31, 2014.¹² San Juan County, however, has not received a report from the Navajo Nation's experts, including Mr. Cooper.

8. Meanwhile, San Juan County served *Interrogatories* and *Document Requests* upon the Navajo Nation. The Navajo Nation's responses to that discovery are attached hereto as Exhibit 1.

9. The Navajo Nation failed to completely respond to San Juan County's discovery. San Juan County sent a request for supplementation of its responses.¹³ The parties have met and conferred on supplementation of responses to their respective discovery requests. The Navajo Nation has not yet fully supplemented

¹⁰ Doc. 102.

¹¹ Doc. 85, ¶ 5a.

¹² *Id.* at ¶ 4a

¹³ *See* Letter dated February 4, 2014 to Navajo Nation's counsel, attached as Exhibit 2.

its discovery responses. The parties have agreed to respond by March 21, 2014.

10. The discovery provided by the Navajo Nation, as well as the declaration submitted in support of its *Motions for Partial Summary Judgment*, have revealed the need for additional discovery by San Juan County to allow its expert to adequately analyze the Navajo Nation's positions. San Juan County needs complete responses to the previously propounded discovery to the Navajo Nation in order to fully and fairly respond to the *Motions*. In addition, San Juan County needs the following additional discovery in order to fully and fairly respond to those *Motions*:¹⁴

INTERROGATORIES

INTERROGATORY NO. 1: The *Cooper Declaration* refers to three plans for County Commissioner Districts: (a) "The Navajo Nation plan"; (b) "Commissioner Districts Plan A"; and (c) "Commissioner Districts Plan B." *Identify*, which, if any, of such three plans corresponds to the *Navajo Nation Commissioner District Proposal* or to *Navajo Nation Option A*, as the case may be.

INTERROGATORY NO. 2: To the extent you

¹⁴ See *San Juan County's Second Set of Interrogatories and Requests for Production of Documents to Plaintiffs*, Exhibit 3.

have not already done so, describe the basis, specifications, methodology and data sources used by or on behalf of, or relied upon by, Mr. William S. Cooper, including any and all other possible configurations that may have been considered or developed in connection with the process that led to each of the three plans for County Commissioner Districts referred in the *Cooper Declaration* and identified in Interrogatory No. 1.

INTERROGATORY NO. 3: Describe the basis, specifications, methodology and data sources used by or on behalf of, or relied upon by, Mr. William S. Cooper, including any and all other possible configurations that may have been considered or developed in connection with the process that led to each of: (a) “School Board Districts Plan A”; and (b) “School Board Districts Plan B” referred in the *Cooper Declaration*.

INTERROGATORY NO. 4: *Identify* all persons, organizations and entities who participated in the research, assembly, and/or collection the documents included in the subdirectory “Mette Research” on the flash drive provided as part of your *Supplemental Initial Disclosures*.

INTERROGATORY NO. 5: Describe the manner in which the lists of voters by San Juan County Precinct and party affiliation included in the subdirectory “Voters by Precinct & Party” in the subdirectory “Navajo Election Office” on the flash drive provided as part of your *Supplemental Initial Disclosures* were created, including the sources of the information from which the lists were compiled, together with the frequency with

which such lists are created or updated, and the purpose(s) for which the Navajo Election Office creates and maintains such lists.

INTERROGATORY NO. 6: *Identify* the source of, and *identify* all persons, organizations and entities who participated in the creation and maintenance of, the lists of voters by San Juan County Precinct and party affiliation documents included in the subdirectory “Voters by Precinct & Party” in the subdirectory “Navajo Election Office” on the flash drive provided as part of your *Supplemental Initial Disclosures*.

INTERROGATORY NO. 7: *Identify* which decade’s census geography upon which was created each of the shape data files produced in response to Request Nos. 1, 2, 3 and 4 in the Requests for Production of Documents below.

INTERROGATORY NO. 8: Specify which, if any of the plans for San Juan County Commission and School Board Districts utilized, created, prepared and/or analyzed by William S. Cooper as a basis for the *Cooper Declaration* (and produced in response to Request Nos. 1, 2, 3 and 4 in the Requests for Production of Documents below) were based upon whole census data blocks, as identified by the Census Bureau’s TIGER data files for the particular decade to which they related as identified in your response to Interrogatory No. 7 above, and which, if any, used any split blocks. With respect to any such plans in which any split blocks were used, *identify* the U.S. Census Bureau’s GeoID code associated with each such split census block, and describe the

manner and methodology used to create the split blocks, and the manner and methodology used to break apart the relevant census data (including the total population, the total voting age population, the total population and vote age population within each relevant and ethnic origin groups) in each such block, specify all such relevant census data related to all portions into which each such block was split.

INTERROGATORY NO. 9: Describe the manner and methodology used to create the Navajo Nation voting precincts included in Navajo Nation Voter Registration List produced in response to *San Juan County's September 26, 2013 Discovery*.

DOCUMENT REQUESTS

REQUEST NO. 1: To the extent that you have not done so already, produce all *documents* including, but not limited to correspondence, statistical data, studies, reports, shape data files, maps, etc. that, directly or indirectly, relate to the development of each of the three alternative plans for San Juan County Commission Districts referred to the *Cooper Declaration*, and identified in Interrogatory No. 1 above, as well as any alternatives thereto developed or considered by Mr. Cooper.

REQUEST NO. 2: Produce all *documents* including, but not limited to correspondence, statistical data, studies, reports, shape data files, maps, etc. that, directly or indirectly, relate to the development of each of the two alternative plans for San Juan County School

Board Districts referred to the *Cooper Declaration* as “School Board Districts Plan A” and “School Board Districts Plan B,” as well as any alternatives thereto developed or considered by Mr. Cooper.

REQUEST NO. 3: Produce the shape data files for the current San Juan County Commission Districts and San Juan County School Board Districts created and/or used by Mr. Cooper in his analysis of the current district configurations for purposes of making the *Cooper Declaration*.

REQUEST NO. 4: Produce the shape data files utilized by William S. Cooper in analyzing demographics for San Juan County Commission and School Board Districts (and any alternatives thereto) for all decades prior to 2010 referred to or identified in the *Cooper Declaration*.

REQUEST NO. 5: Produce all *documents* including, but not limited to correspondence, statistical data, shape files, studies, reports, maps, etc. that, directly or indirectly, incorporate or constitute the relevant census data for each split census block identified described in your response to Interrogatory No. 8 above.

REQUEST NO. 6: Produce the list of residential addresses for incumbent San Juan County Commissioners and San Juan County School Board Members referred to in Section 15 of the *Cooper Declaration*, together with any shape data file prepared or utilized by or William S. Cooper with respect to that list.

REQUEST NO. 7: Produce the shape data files for each of the eight chapters of the *Navajo Nation*, into which the Navajo Reservation is divided, referred to in Section 109 of the *Cooper Declaration* and shown on the map in Figure 3, on page 32 of the *Cooper Declaration*, as well as for each of the Navajo Nation Precincts referred to in Navajo Nation Voter Registration List produced in response to *San Juan County's September 26, 2013 Discovery*.

REQUEST NO. 8: Produce all *documents* constituting, embodying or related to communications between the *Navajo Nation* or its counsel and the United States Department of Justice, or any other federal agency, about, concerning and/or directly or indirectly related to (1) enforcement or modification of the *Judgment by Consent* entered in *United States of American v. San Juan County, et. al.*, District of Utah Case No. 83-1286, and/or (2) the current lawsuit.

11. San Juan County cannot respond to the Navajo Nation's *Motions for Summary Judgment* until it receives the Navajo Nation's responses to its discovery requests set forth herein above, and its expert has an opportunity to review and analyze the data upon which the factual assertions upon which those *Motions* are based.
12. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 19th day of March, 2014.

/s/ jesse c. trentadue
Jesse C. Trentadue

ARGUMENT

The Court should defer consideration of, or deny, Plaintiffs' *Motions for Summary Judgment*. “If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it.”¹⁵

Rule 56(d) motions “should be liberally treated.”¹⁶ To justify the deferral of summary judgment, the nonmoving party must “identify the probable facts not available and what steps have been taken to obtain these facts.”¹⁷ Importantly, a “movant’s exclusive control of . . . information is a factor weighing heavily in

¹⁵ *Fed. R. Civ. P.* 56(d),

¹⁶ *Comm. For the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (quoting James W. Moore & Jeremy Wicker, *Moore’s Federal Practice* ¶ 56.24 (1988)).

¹⁷ *Taylor v. Sparxent, Inc.*, No. 2:10cv1007, 2001 U.S. Dist. LEXIS 30158 at *3 (D. Utah Mar. 22, 2011) (quoting *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1308 (10th Cir. 2007)).

favor of relief under [Rule 56(d)].”¹⁸

The *Declaration of Jesse Trentadue* and the facts set out above clearly satisfy the criteria for denial or deferral under *Rule 56(d)*. The Navajo Nation has failed to fully respond to the San Juan County’s discovery requests and, San Juan County has additional discovery that it needs from the Navajo Nation in order to fully and fairly respond to the *Motions for Partial Summary Judgment*.

Furthermore, much, if not all, of the information San Juan County seeks to respond to the Navajo Nation’s *Motions for Partial Summary Judgment* is in the Navajo Nation’s possession. San Juan County has not had an opportunity to conduct the necessary discovery that is need to respond to the Navajo Nation’s *Motions for Partial Summary Judgment* and, therefore, those *Motions* should be denied.

CONCLUSION

The Court should deny the Navajo Nation’s *Motions for Partial Summary Judgment* or in the alternative, defer consideration of those *Motions* until San Juan County is able to complete all necessary discovery.

¹⁸ *Price v. W. Res., Inc.*, 232 F.3d 779 , 783 (10th Cir. 2000).

DATED this 19th day of March, 2014.

SUITTER AXLAND, PLLC

/s/ jesse c. trentadue

Jesse C. Trentadue

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Britton R. Butterfield

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2014, I electronically filed the foregoing document with the U.S. District Court for the District of Utah.

Notice will automatically be electronically mailed to the following individual(s) who are registered with the U.S. District Court CM/ECF System:

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