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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

NAVAJO NATION, a federally recognized Indian tribe, et al., Plaintiffs, v. SAN JUAN COUNTY, a Utah governmental sub-division; Defendant.	**SAN JUAN COUNTY'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Civil No. 2:12-cv-00039-RJS Judge Robert J. Shelby **ORAL ARGUMENT NOT REQUESTED**

Defendant San Juan County, by and through counsel, hereby submits this *Reply Memorandum* in further support of its *Motion to Dismiss.*

ARGUMENT

I. PLAINTIFFS' RESPONSE FAILS TO RECOGNIZE THE BREADTH OF THE COURT'S RETAINED JURISDICTION UNDER THE *JUDGMENT BY CONSENT*.

Beginning with their characterization of the 1983 suit by the United States of

America and the resulting *Judgment by Consent* in the Introduction to their *Response to San Juan County's Motion to Dismiss* (hereinafter the "*Response*"),[1] and continuing through the response to each argument advanced by San Juan County in support of its *Motion to Dismiss*,[2] Plaintiffs erroneously attempt to construe narrowly both the scope of the *Judgment by Consent* and the Court's continuing jurisdiction thereunder. Therefore, San Juan County will address scope of the *Judgment by Consent* generally here to avoid extended reiteration under each of the three points of the *Motion to Dismiss.*

Seeking to avoid the conclusive effects of the broad continuing jurisdiction of the Court under the *Judgment by Consent*[3] entered in the 1983 action, *United States of America v. San Juan County, et al.*, District of Utah Case No. 83-1286W (hereinafter the "*1983 Suit*"), Plaintiffs' *Response* points to the allegations of the *Complaint* in that case,[4] suggesting that the sole purpose of that suit (and therefore that the scope of the agreed settlement embodied in the *Judgment by Consent*) was limited to the implementation of a process to eliminate at-large voting districts for County Commissioners, even while acknowledging the Court's retention of jurisdiction to remedy any situation in which "the

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[1] Doc. 101.

[2] Doc. 98.

[3] Doc. 98-2.

[4] Doc. 98-1.

County should for any reason to modify the process for leading to the selection of County Commissioners . . .."[5]

The full context of the quoted language from *Judgment by Consent* makes very explicit that the expected process of selecting County Commissioners includes much more than the simple elimination of at-large voting districts. Rather the contemplated process is the actual selection of County Commissioners, not merely the process to implement single-member Commission districts, and must entail:

> an optional form of government consisting of fairly drawn single member districts . . .. If the County should *for any reason* . . . should fail to modify the process leading the selection of County Commissioners in San Juan County, Utah; so same is *Constitutionally permissible*, and *consistent with the Voting Rights Act*, then *plaintiff* [United States of America] *may make application to this Court* for whatever remedy it believes may be appropriate.[6]

In addition, in expressing the scope of the Court's retained jurisdiction, the *Judgment by Consent* broadly states, "This Court has jurisdiction over this matter and *shall retain jurisdiction for all purposes*."[7] The *Judgment by Consent* includes no date for the relinquishment of the Court's continuing jurisdiction and, to Defendant's knowledge, no order has been entered ending that retained jurisdiction.

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[5] Doc 101, p. 2 (*quoting* the *Judgment by Consent*, p. 2) (emphasis added).

[6] Doc. 98-2, p. 2 (emphasis added).

[7] *Id*. at p. 3 (emphasis added).

Plaintiffs assert that their *First and Second Claims for Relief* do not seek to overturn or modify any of the terms of the *Judgment by Consent* because they are seeking to enforce rights under both the Voting Rights Act (to which the *Complaint* in the *1983 Suit* was explicitly addressed) but also under the Equal Protection Clause for alleged failure of San Juan County to re-apportion those districts.[8] However, as shown above, the scope of the *Judgment by Consent* and the continuing jurisdiction thereunder covers the process of selecting County Commissioners, not just the process of substituting three single-member districts in the place of three commissioners all elected at large. Moreover, the Court in the *1983 Suit* established a specific mechanism—application by the United States to the Court—for redressing *any* failure of San Juan County to establish and maintain an election process that satisfies both the Voting Rights Act requirements and is consistent with Constitutional provisions, including the Equal Protection Clause.

Therefore, Plaintiffs' *First and Second Claims for Relief* must be dismissed because (1) in light of the continuing jurisdiction in the *1983 Suit*, this Court lacks subject matter jurisdiction over these collateral attacks on the *Judgment by Consent*, (2) they fail to state a claim because the *Judgment by Consent* cannot be modified in this proceeding (or even in further proceedings in the *1983 Suit*, except under certain limited circumstances) as a contract among the parties to that action, and (3) Plaintiffs have failed

[8] Doc. 101, p. 3

to join the United States of America, an indispensable party, in light of the both its status as the plaintiff in the *1983 Suit*, and its continuing oversight and its right under the *Judgment by Consent* to make application to redress *any* failure on the part of San Juan County to maintain a constitutional selection process for County Commissioners.

II. BECAUSE OF THE CONTINUING JURISDICTION OF THE COURT IN ANOTHER CASE, PLAINTIFFS' FIRST AND SECOND CLAIMS FOR RELIEF MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiffs' *Response* asserts that their *First and Second Claims for Relief* are not collateral attacks on the *Judgment by Consent* by attempting to construe narrowly both the *Judgment by Consent* (and the Court's continuing jurisdiction) and claiming that those claims "do not attack the substance of the 1984 Agreed Settlement and Order."[9] As elaborated above, this position fails in light of the breadth of the express language of the *Judgment by Consent* and the broad continuing jurisdiction of the Court thereunder to address and remedy any continued failure to maintain a constitutionally and statutorily complaint process for selecting County Commissioners.

Furthermore, Plaintiffs' *Response* acknowledges that Plaintiffs were not parties to the *1983 Suit.*[10] For the reasons articulated in San Juan County's *Motion to Dismiss*, and supported by the authorities cited therein, a separate suit by non-parties that in substance

[9] Doc. 101, p. 5.

[10] Doc. 101, p. 2.

seeks to modify the scope of a consent decree over which the issuing court has continuing jurisdiction cannot be maintained because such continuing jurisdiction in the prior case divests the Court of subject matter jurisdiction and such claims must be dismissed.

The case of *Marino v. Ortiz*,[11] cited by Plaintiffs in opposition to the *Motion to Dismiss* does not support Plaintiffs' position here. Indeed, the *Marino* decision explicitly reaffirms the position that a separate suit by non-parties to a case in which a consent decree was entered, and over which the issuing court retained jurisdiction, constituted an impermissible collateral attack on the consent decree. As stated by the Second Circuit Court of Appeals:

> It is well settled that collateral attacks on consent decrees . . . are not permitted. . . . Allowing the terms of a consent decree to be contested in separate lawsuits would raise the specter of inconsistent or contradictory proceedings, would promote continuing uncertainty thus undermining the concept of a final judgment . . ..
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> Appellants' proper course, as in most cases where collateral attacks have been dismissed, would have been to intervene in the lawsuit from which the consent decree issued . . ..[12]

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[11] 806 F.2d 1144 (2nd Cir. 1986), *aff'd*, 484 U.S. 301 (1988)(per curiam).

[12] 806 F.2d at 1146 (citations omitted). *See also American Petroleum Institute v. EPA*, 216 F.3d 50, 54-55 (10th Cir. 2000)(action to enforce or interpret a consent decree must be brought in the court that issued the decree); *Figures v. Board of Public Utilities of Kansas City*, 967 F.2d 357, 361 (10th Cir. 1992); *Rueb v. Ortiz*, 384 Fed. Appx. 723, 725 (10th Cir. 2010)(unpublished); *see generally Klein v. Zavaras*, 80 F.3d 432, 435 (10th Cir. 1996)(holding that a state court had no jurisdiction to enforce a consent decree entered in federal district court).

Plaintiffs' argument that a consent decree cannot be used as a shield against future suits for conduct that had not occurred at the time a consent decree was entered is also inapplicable under the present circumstances. The scope the *Judgment by Consent* clearly contemplates continuing jurisdiction over future conduct (or failure to act) in violation thereof of the very nature asserted by Plaintiffs in this case. Moreover, it provides a specific means of remedying any such future failure by application to the Court by the United States. San Juan County is not asserting here that the Court "is doomed to . . . enforce and interpret a preexisting decree without . . . pausing to question whether changing circumstances have rendered the decree unnecessary, outmoted or even harmful to the public interest,"[13] but only that Plaintiffs are not the proper parties to seek such reconsideration, and this separate action is not the proper forum for doing so in light of the breadth of the *Judgment by Consent*.

Precisely as in the *Marino*, as non-parties to the *1983 Suit*, Plaintiffs' proper course to bring its *First* and *Second Claims for Relief*, which allege that San Juan County has failed to maintain a process for electing County Commissioners that is constitutional and compliant with the Voting Right Act, would be to intervene in the *1983 Suit*. Plaintiffs having brought a separate suit, this Court lacks subject matter jurisdiction over their *First* and *Second Claims for Relief*, and they should be dismissed.

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[13] Doc. 101, p. 6 & n. 6 (quoting *Jones'El v. Schneitter*, 2006 WL 2168682, at *4 (W.D. Wis. 2006)(unpublished).

III. THE 1984 CONSENT DECREE ENCOMPASSES THE REVISED COUNTY COMMISSION DISTRICTS AND THEREFORE IS NOT SUBJECT TO MODIFICATION IN A SEPARATE ACTION

Plaintiffs argument in opposition to San Juan County's position that their *First and Second Claims for Relief* fail to state a claim upon which relief can be granted is also grounded in Plaintiffs' misreading of the scope of the *Judgment by Consent* and the Court's continuing jurisdiction thereunder. Plaintiffs' assert that, because the *Judgment by Consent* did not "approve or adopt any boundaries for the Commission election districts,"[14] their *First and Second Claims for Relief* do not seek a modification thereof. However, as demonstrated in Point I above, the *Judgment by Consent* explicitly covered the entire process by which San Juan County established (and continues to establish) election districts for County Commissioners, and provides a mechanism—under the terms of the *Judgment by Consent* itself—to remedy any failure on the part of San Juan County to establish and maintain constitutionally and statutorily valid election processes, including districting. Moreover, the *Judgment by Consent* explicitly encompasses the continuation of the process begun by the County under its Resolution No. 1984-1 to adopt an optional form of government to establish three single member districts, and specifically contemplates the creation of a district "containing the largest number of

[14] Doc. 101, p.7.

minorities."[15] Moreover, the *Judgment by Consent* provides a mechanism whereby the United States, as plaintiff in the *1983 Suit*, could take action should the County fail to proceed with that process or to remedy any constitutional or statutory problems with the process selected by the County, by application to the Court.[16] Neither the United States nor the Court entered any objection to the County's establishment of its Commission Election Districts, and therefore it may reasonably be concluded that the districting plan adopted by the County was consented to and approved by the United States.

Contrary to the Plaintiffs' assertion,[17] San Juan County does not assert that the *Judgment by Consent* is an "immutable contract." Rather, San Juan County's position is that, because a consent decree partakes of the elements of a contract,[18] the *Judgment by Consent* must be interpreted as a contract among the parties thereto in accordance with the terms thereof, and that a claim for relief in a separate proceeding seeking relief at odds with the terms thereof does not state a claim upon which relief can be granted.[19] San

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[15] Doc. 98-2, pp. 2-3.

[16] *Id*. at p. 2.

[17] Doc. 101, p. 8.

[18] *See Sinclair Oil Corp. v. Scherer*, 7 F.3d 191, 194 (10th Cir. 1993)(quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975)).

[19] Nor does San Juan County argue that the *Judgment by Consent* is a final judgment nor that the matters encompasses therein are subject to the principles of *res judicata*. As such, Plaintiffs' extended discussion of those principles (Doc. 101, pp. 8-10) is inapposite here.

Juan County fully acknowledges that a consent decree may be modified, but only under certain limited circumstances, including the consent of the parties or by proper action of the court in which it was entered after notice to all parties thereto and after offering them to present relevant evidence and argument.[20] The basis for San Juan County's *Motion to Dismiss* is that the Court in this separate case cannot grant Plaintiffs' *First and Second Claims for Relief* which seek relief within the scope of the *Judgment by Consent* and without involving all of the parties thereto. Therefore, this Court should dismiss those claims under Rule 12(b)(6) for failure to state a claim that can be granted in this action.

IV. PLAINTIFFS' FIRST AND SECOND CLAIMS FOR RELIEF MUST BE DISMISSED FOR FAILURE TO JOIN AN INDISPENSABLE PARTY, THE UNITED STATES OF AMERICA

Plaintiffs' response to San Juan County's position that their *First and Second Claims for Relief* must be dismissed pursuant to Rules 12(b)(7) and 19 for failure to join the United States as an indispensable party is premised on the same erroneously narrow reading of the *Judgment by Consent* and the Court's continuing jurisdiction thereunder that is discussed in detail in Point I above, as well as their dismissive response concerning the contractual nature of consent decrees, which is discussed in Point III above. Those

[20] *See, e.g., United States v. State of Colorado*, 937 F.2d 505, (10th Cir. 1991); *see also Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 384-84 (1992)(court which entered a consent decree may modify it for changed circumstances); *see generally David C. v. Leavitt*, 242 F.3d 1206 (10th Cir.2001)(authority of court entering a consent decree to modify the terms thereof).

discussions will not be repeated here, except to note those elements of the *Judgment by Consent* that render the United States an indispensable party to any attempt to circumvent the broad continuing jurisdiction of the Court in the *1983 Suit* in a separate proceeding.

San Juan County's position is that, precisely because the *Judgment by Consent* (1) requires San Juan County to implement and maintain constitutionally and statutorily valid processes for the election of Commissioners and expressly provides that it is the United States that is authorized to apply to the Court under that *Judgment* to remedy any alleged failures on the part of San Juan County, and (2) is to be interpreted as a contract, the United States is an indispensable party to the suit for Plaintiffs' *First and Second Claims for Relief*, even if this Court determines that it has subject matter jurisdiction to consider those claims and that they state a cause of action upon which this Court may grant relief despite the San Juan County's arguments in Points II and III above.

CONCLUSION

Based on the foregoing arguments, Plaintiffs' *First* and *Second Claims for Relief* should be dismissed without prejudice.

DATED this 20th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th 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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