Jesse C. Trentadue (#4961)
Carl F. Huefner (#1566)
Britton R. Butterfield (#13158)
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 532-7300
Facsimile: (801) 532-7355
E-Mail: jesse32@sautah.com
E-Mail: chuefner@sautah.com
E-Mail: bbutterfield@sautah.com

Attorneys for Defendant
San Juan County, Utah

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 MOTION TO DISMISS** Civil No. 2:12-cv-00039-RJS Judge Robert J. Shelby **ORAL ARGUMENT NOT REQUESTED**

MOTION

In their *Second Amended Complaint*, Plaintiffs are suing in their *First* and *Second Claims for Relief* under the *Voting Rights Act*, 42 U.S.C. §§ 1973 *et seq*., and 42 U.S.C. §1983 to change the boundaries of voting districts for the election of San Juan County Commissioners in light of the results of the 2010 *U.S.*

Census.[1] Specifically, Plaintiffs are asking the Court for an *Order* requiring San Juan County to drastically redraw its three Commission Election Districts in accordance with Plaintiff's own proposed redistricting plan.[2] However, the San Juan County Commission Election Districts are the result of a 1983 lawsuit that was brought in the District of Utah by the United States of America against San Juan County, Utah, the San Juan County Commission, the individual San Juan County Commissioners and the San Juan County Clerk (collectively "*San Juan County Defendants*").[3] More importantly, the boundaries of those Commission Election Districts were established as the result of the *Judgment by Consent* between the United States of America and the *San Juan County Defendants* entered by the Honorable David K. Winder in that 1983 lawsuit.[4] Moreover, in that *Judgment by Consent* the Court retained continuing jurisdiction.[5]

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[1] *Second Amended Complaint,* Doc. 75, ¶¶ 14 - 52.

[2] *See* Doc. 2-1, pp. 1 through 5.

[3] *United States of American v. San Juan County, et. al.,* District of Utah Case No. 83-1286. A copy of the *Complaint* in that action is attached hereto as Exhibit 1.

[4] *Id.* at Doc. 2. A copy of that *Judgment by Consent* is attached hereto as Exhibit 2.

[5] *Judgment by Consent*, p. 3.

A judgment by consent, however, is a contract that cannot even be modified by the Court that entered the Judgment, and most certainly should not be set aside or modified by the Court in a another case in which not all of the parties to the former action are present. In fact, this Court does not have the subject matter jurisdiction to hear Plaintiffs' *First* and *Second Claims for Relief* because those claims constitute an improper collateral attack on the *Judgment by Consent*. Furthermore, because a judgment by consent is a contract, the United States of America is an indispensable party. But the United States of America is not a party in this action,[6] and based upon its sovereign immunity the federal government cannot be joined.

WHEREFORE, pursuant to *Federal Rules of Civil Procedure* 12(b)(1), 12(b)(6), 12(b)(7), 12(c) and 19, San Juan County hereby moves to dismiss Plaintiffs' *First* and *Second Claims for Relief* without prejudice.[7] **Oral argument is not requested**.

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[6] San Juan County has consistently raised Plaintiffs failure to join an indispensable party as an *Affirmative Defense*. *See Answer to Second Amended Complaint*, Doc. 80, p. 18; *Answer to First Amended Complaint*, Doc. 52, p. 18.

[7] *Second Amended Complaint,* Doc. 75, ¶¶ 14 - 52.

ARGUMENT: LACK OF SUBJECT MATTER JURISDICTION

The Court does not have subject matter jurisdiction because Plaintiffs' *First* and *Second Claims for Relief* constitute an improper collateral attack on the *Judgment by Consent*. In *O'Burn v. Shapp*,[8] a case on point, non-minority applicants to the Pennsylvania State Police and non-minority state police officers, through their union, sued state officials alleging reverse discrimination. However, the state officials' hiring and promotion practices were governed by a consent decree entered by the court in another action in which minority individuals alleged that the state officials had discriminated against minorities in state police hiring and promotions.

The court dismissed the case because it did not have subject matter jurisdiction. The court said "[t]hough this Court would have subject matter jurisdiction over reverse discrimination cases in general, we do not have jurisdiction over these specific cases, because they are **improper collateral attacks upon a consent decree** over which this Court continues to exercise jurisdiction. Accordingly, the instant actions are dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil

[8] 70 F.R.D. 549 (E.D. Pa 1976).

Procedure."[9]

In the present case, the Commission Election Districts were, much like the hiring and promotion practices in *O'Burn*, set by a consent decree wherein the original Court retained jurisdiction. And it is settled that a consent decree is not subject to collateral attack,[10] especially when the court that entered that decree continues to exercise jurisdiction.

ARGUMENT: A JUDGMENT BY CONSENT CANNOT BE MODIFIED

A judgment by consent or by stipulation is an agreement between the parties.[11] The essence of a judgment by consent is that the parties to the litigation have voluntarily entered into an agreement settling their dispute and, upon that agreement, the court has entered judgment conforming to the terms of the agreement.[12] It is a contract,[13] which means that a Court is not empowered to modify a judgment by consent to impose additional conditions or duties upon the

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[9] *Id*. at 553 (emphasis added).

[10] *See Dennison v. City of Los Angeles,* 658 F.2d 694, 695 (9th Cir. 1981). *Cf. Heck v. Humphrey*, 512 U.S. 477 (1994)(judgment of conviction cannot be collaterally attack in another case).

[11] *In Matter of Estate of Anderson*, 671 P.2d 165, 168 (Utah 1983).

[12] *Bernett v. Bernett*, 745 A.2d 827, 831 (Conn. 1999).

[13] *United States v. ITT Continental Banking Co.,* 420 U.S. 223 (1975).

parties to that contract.[14]

Yet, the declaratory and injunctive relief sought by Plaintiffs in their *First* and *Second Claims for Relief* clearly asks this Court to do so by disregarding the Commission Election District boundaries agreed upon by the United States of America and the *San Juan Defendants,* and approved by Judge Winder and entered as a *Judgement by Consent*. San Juan County, therefore, respectfully submits that this Court should not and cannot do so by way of this collateral attack upon the *Judgment by Consent* entered by Judge Winder in the 1983.[15] Plaintiffs' *First* and *Second Claims for Relief*, therefore, do not state a claim for which their requested relief to redraw the Commission Election Districts can be granted.

ARGUMENT: THE UNITED STATES IS AN INDISPENSABLE PARTY

Indispensability is an issue that one can raise at anytime, and which the Court has an independent duty to raise *sua sponte.*[16] It is likewise well established

[14] *See International Technologies Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1387 (9th Cir. 1998); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

[15] *See O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. PA 1976).

[16] *See Thunder Basin Coal Co. v. S.W. Pub. Serv. Co.*, 104 F.3d 1205, 1211 (10th Cir. 1997).

that a "contracting party is the paradigm of an indispensable party."[17] And the fact that the United States is a party to a contract that is, directly or indirectly, in litigation but the federal government is not a party does not alter the foregoing statements of the law with respect to indispensability.

In *Ogden River Water Users' Association v. Weber Basin Water Conservancy,*[18] for example, the Ogden River Water Users' Association entered into a contract with the United States for the construction of an irrigation project. Thereafter, the United States contracted with the Weber Basin Water Conservancy for the construction of another irrigation project, which involved work on the Pine View Dam and Reservoir. The Pine View Dam and Reservoir constituted the core of the Ogden River Water Users' irrigation project. Consequently, the United States' contract with the Weber Basin Water Conservancy contained a clause whereby the federal government would not start work on the Weber Basin project

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[17] *Rozsenzweig v. Brunswick Corp.*, No. 08-807, 2008 U.S. Dist. LEXIS 63655, 2008 WL 3895485, at *6 (D.N.J. Aug. 20, 2008); *Travelers Indem. Co. V. Household Int'l, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). *See also* *Capitol Med. Ctr., LLC v. Amerigroup Md., Inc.*, 667 F. Supp.2d 188, 192-93 (D.D.C. 2010)(finding that seller hospital corporation was a party to a medical services contract and thus indispensable).

[18] 238 F.2d 936 (10th Cir. 1956). *See also* *Mescalero Apache Tribe v. State of New Mexico,* 131 F.3d 1379, 1383 (10th Cir. 1997)(United States was found not to be an indispensable party in a lawsuit to have a tribal-state compact declared invalid because the federal government was not a party to that compact).

until the Weber Basin Water Conservancy essentially obtained the approval of the Ogden River Water Users' Association. However, the Weber Basin Water Conservancy never obtained the approval of the Ogden River Water Users' Association.

Nevertheless, despite that lack of approval Weber Basin Water Conservancy and the United States went ahead with the Weber Basin Irrigation Project. The Ogden River Water Users' Association sued for a declaratory judgment that it owned the equitable title to the Pine View Dam and Reservoir. Defendant Weber Basin Water Conservancy brought several *Motions to Dismiss*, including one grounded on the assertion that the United States was an indispensable party. The District Court granted the *Motions*, including the failure to join an indispensable party.

On appeal, the Tenth Circuit affirmed the District Court and in doing so stated that although any relief that the District Court might grant to the Ogden River Water Users' Association would not be binding upon the United States, it would nevertheless serve to embarrass the federal government's title to the project and throw confusion upon the project. Therefore, "[i]n the absence of the United States, this portion of the relief sought [by the Ogden River Water Users'

Association] would be improper."[19]

The analysis requires the Court to employ a two-part analysis in determining whether the United States is an indispensable party. First, under *Federal Rule of Civil Procedure* 19(a), the Court must determine whether the federal government is necessary to the suit and, therefore, must be joined if feasible. The United States is clearly a necessary party because it was a party to the *Judgment by Consent*, which Plaintiffs now wish to set aside by redrawing the San Juan County Commission Election Districts that were agreed to between *San Juan County Defendants* and the United States in the 1983.[20] The United States, however, cannot be joined based upon its sovereign immunity.[21] Hence, the Court must determine under *Federal Rule of Civil Procedure* 19(b) if the United states is an indispensable party[22] and, if so, then Plaintiffs' *First* and *Second Claims for Relief*

[19] *Id.* at 942.

[20] *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)("no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable").

[21] *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction"); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992)(explaining that in civil suits against the federal government, "the available remedies are not those that are appropriate but only those for which sovereign immunity has been expressly waived").

[22] *See Mescalero Apache Tribe,* 131 F.3d at 1383.

should be dismissed without prejudice.

Rule 19(b) states that the Court must consider the following factors in determining whether the United States is also an indispensable party so as to require dismissal: (1) the extent to which a judgment rendered by the Court might prejudice the United States or *San Juan County Defendants*; (2) the extent to which any prejudice to the United States or *San Juan County Defendants* could be lessened or avoided by protective provisions in the judgment, by the shaping of relief or other measures; (3) whether a judgment rendered by the Court would be adequate in the absence of the United States; and (4) whether the Plaintiffs have an adequate remedy if their *First* and *Second Claims for Relief* are dismissed for non-joinder of the federal government?[23]

Rule 19(b) does not state what weight is to be given each of the foregoing factors. Rather, the Court must determine the importance of each factor based upon the facts of the case.[24] Furthermore, *Rule* 19(b) does not require that every factor support the Court's determination.[25] However, the Tenth Circuit has

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[23] *See Fed. R. Civ. P.* 19(b).

[24] *Glenny v. American Metal Climax, Inc.*, 494 F.2d 651, 653 (10th Cir. 1974).

[25] *Uinversal Reinsurance Company, LTD. v. St. Paul Fire and Marine Insurance Company*, 312 F.3d 82, 88-89 (2nd Cir. 2002).

adopted the view of other Circuits that "[w]hen, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b), because immunity 'may be viewed as one of those interests compelling by themselves."[26] Thus, under the *Enterprise Mgt. Consultants* decision, the Court need not even consider the *Rule* 19(b) factors to find that in equity and good conscience Plaintiffs *First* and *Second Claims for Relief* should be dismissed.

Nevertheless, under the facts particular to this case, the United States would still be an indispensable party even if the Court under took the *Rule* 19(b) analysis. The first *Rule* 19(b) factor, for example, is whether redrawing the Commission Election Districts as requested by Plaintiffs would be prejudicial to the United States or to the *San Juan County Defendants.*[27] The answer to this question is obviously "yes" as to both the federal government and *San Juan County Defendants*.

If those Commission Election Districts were to be changed as a result of this

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[26] *Enterprise Mgt. Consultants v. U.S. ex rel Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)(quoting from *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986).

[27] *Id.*

lawsuit, it would put *San Juan County Defendants* in breach of the *Judgment by Consent* and expose them to being in contempt of court. This is so because one may be still held in contempt for violating a court *Order* notwithstanding that another court has issued a contrary *Order*.[28] It would also expose *San Juan County Defendants* to potential litigation to enforce the *Judgment by Consent* from the United States and/or others who do not necessarily share Plaintiffs views or motives for redrawing the Commission Election Districts. It is not surprising, therefore, that the threat of "inconsistent or contradictory proceedings" is prejudice for purposes of a *Rule* 19 analysis.[29]

Redrawing the Commission Election Districts would likewise deprive both *San Juan County Defendants* and the United States of the benefit of their negotiated settlement in the 1983 case especially when "[t]he parties . . . conferred and agree[d] that the controversy should be settled without the necessity and expenses of litigation."[30] Redrawing the Commission Election Districts would undermine the sovereignty of the Untied States which, based upon the authority

[28] *See* 17 *Am Jur 2d* Contempt § 114.

[29] *See O'Burn*, 70 F.R.D. at 552-53.

[30] *Judgment by Consent*, p. 1.

conferred by Congress,[31] ultimately determined the boundaries of those Districts and did so in the exercise of its sovereign rights.[32] If the Commission Election Districts need to be reconfigured, that is a decision for the United States to make, Plaintiffs.

The second factor for the Court to consider under *Rule* 19(b) is the extent to which a judgment entered in this case could be crafted so as to lessen or avoid the prejudice to *San Juan County Defendants* or the United States. The answer is that the prejudice cannot be lessened or avoided because Plaintiffs are essentially seeking to set aside the *Judgment by Consent*, which was a negotiated settlement of the 1983 case. More importantly, this Court does not have the requisite subject matter jurisdiction to set aside or modify, either directly or indirectly, the *Judgment by Consent* entered by Judge Winder in the 1983 case.

The third factor to be considered by the Court is whether in the absence of the United States a judgment entered in this case would be adequate. And it most certainly will not be adequate because: (1) *San Juan County Defendants* would still be subject to and bound by the *Judgment by Consent* in the 1983 case,

[31] 42 U.S.C. § 1971(c).

[32] *See id.* at pp. 2-3.

including the threat of contempt as well as other "inconsistent or contradictory proceedings;" and (2) as a matter of law, the Commission Election Districts cannot be redraw in this action. Moreover, as previously noted, this Court, being of equal rather than appellate jurisdiction and authority, cannot and should not set aside that *Judgement by Consent*, or do anything to further Plaintiffs' collateral attack upon that *Judgment by Consent*.

Finally, under *Rule* 19(b) the Court is to consider whether the Plaintiffs will be left with an adequate remedy if their *First* and *Second Claims for Relief* are dismissed without prejudice based upon their inability to join the United States, and they do have an adequate remedy. If the Commission Election District boundaries established as a result of the *Judgment by Consent* need to be redrawn, that is a matter that the United States may revisit in the 1983. But, the absence of an adequate remedy is not a sufficient ground for the Court to deny San Juan County's *Motion to Dismiss*. In fact, cases are frequently dismissed because an indispensable party could not be joined even though the plaintiffs in those case were left without any remedy.[33]

[33] *See e.g., Lomayaktewa, supra*, 520 F.2d at 1324; *Confederated Tribes v. Lujan*, 928 F.2d 1496 (9th Cir. 1991); *Clinton v. Babbett*, 180 F.3d 1081 (9th Cir. 1999).

CONCLUSION

Plaintiffs' *First* and *Second Claims for Relief* should be dismissed without prejudice.

DATED this 13th day of February, 2014.

SUITTER AXLAND, PLLC.

/s/ jesse c. trentadue
Jesse C. Trentadue
Attorneys for Defendant
San Juan County, Utah

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 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:

Steven C. Boos
Maya Leonard Kane (Pro Hac Vice)
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
835 East Second Avenue, Suite 123
P.O. 2717
Durango, CO 81301
E-Mail: sboos@mbssllp.com
E-Mail: mayacahn@gmail.com
Attorneys for Plaintiffs

Eric P. Swenson
1393 East Butler Avenue
Salt Lake City, Utah 84102
E-Mail: e.swenson4@comcast.net
Attorneys for Plaintiffs

D. Harrison Tsosie
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515-2010
E-Mail: htsosie@nndoj.org
Attorneys for Plaintiffs

/s/ jesse c. trentadue

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