

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NAVAJO NATION, a federally recognized
Indian tribe, et al.,

Plaintiffs,

v.

SAN JUAN COUNTY, a Utah governmental
subdivision,

Defendant.

**ORDER APPOINTING
A SPECIAL MASTER**

Case No. 2:12-cv-00039-RJS-DBP

Judge Robert J. Shelby

Magistrate Judge Dustin B. Pead

This case is in its remedial phase. The court previously found the San Juan County School Board and County Commission election districts unconstitutional under the Equal Protection Clause of the U.S. Constitution.¹ After the court found these districts unconstitutional, the parties prepared and submitted at the court's request proposed remedial districts for both the School Board and the County Commission. The court intended to adopt the County's proposed districts if it concluded they were legally sound. But the court recently concluded it could not adopt the County's proposed remedial districts because they were also unconstitutional under the Equal Protection Clause.²

The court must now act expeditiously to put in place legally sound School Board and County Commission election districts before the 2018 elections. To do so, the court must adopt

¹ Dkt. 281; dkt. 312.

² Dkt. 397.

final election districts by about December 15, 2017, or soon thereafter. The court concludes that to effectively and properly address this critical posttrial issue, the appointment of a Special Master pursuant to Federal Rule of Civil Procedure 53(a)(1)(c) is necessary and appropriate.³

Pursuant to Rule 53(a), and in exercise of its inherent powers, the court hereby appoints Dr. Bernard Grofman to serve as Special Master in this action and to proceed with all reasonable diligence to implement this Order and fulfill his duties and responsibilities.⁴ Dr. Grofman has notified the court he is willing to accept such authority; and pursuant to Rules 53(a)(2) and 53(b)(3), the Special Master has supplied the court with an affidavit establishing he has no relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455. The court finds no grounds for disqualification under 28 U.S.C. § 455. The Special Master and the parties shall notify this court immediately if they become aware of any potential grounds that would require disqualification.

I. DUTIES AND SCOPE OF WORK

1. The Special Master shall prepare and submit a report and recommendation to the court proposing legally sound redistricting plans for the San Juan County School Board and County Commission.
2. The Special Master's proposed districts shall:

³ The court acknowledges that Plaintiffs do not consent to the appointment of a Special Master and have stated that related proceedings are not a waiver of their objections. Dkt. 400. The court finds that the procedures and timelines stated in this Order will allow for effective and timely resolution of this matter prior to the deadlines for the 2018 election and, consequently, the consent of the Plaintiffs is not required. In the interest of completeness, the court observes Plaintiffs previously consented to the appointment of a Special Master at the inception of the remedial proceedings, but the County objected. The parties now appear to have swapped positions.

⁴ Pursuant to Rule 53(b)(1) and this court's Memorandum Decision and Order, and subsequent Order, the court provided notice of its intent to appoint the Special Master and an opportunity to be heard with respect to such appointment. Dkt. 397; dkt. 399.

- a. Comply with the Constitution, the Voting Rights Act, and respect traditional redistricting principles to the extent possible.
 - b. Divide the County into three single-member County Commission districts.
 - c. Divide the County into five single-member School Board districts.
3. The submitted report and recommendation shall include:
- a. A color map showing each of the proposed remedial plans, together with sufficient inset or separate localized maps to clearly show boundaries that divide the cities, towns, or census-designated places in the County;
 - b. Shapefiles and block equivalency files compatible with ArcGIS software for redistricting for each of the proposed remedial plans; and
 - c. Discussion and analysis explaining the bases for the proposed remedial plans and why these districts are consistent with the directives of this Order, and the court's prior Orders. Specifically, the Special Master must discuss the facts and legal analysis supporting the proposed districts' compliance with the Constitution, the Voting Rights Act, and traditional redistricting principles.

II. AUTHORITY

4. The Special Master shall have all authority provided under Fed. R. Civ. P. 53(c). The Special Master shall have the authority to take all appropriate measures to perform the assigned duties fairly and efficiently, including reviewing evidence on the record; setting a date, time, and place for hearings; presiding over hearings; conducting telephonic conferences; and reviewing and drafting remedial plans and making recommendations.
5. The court expects the Special Master can perform his duties based on the extensive evidence currently on the record. The Special Master also has authority to take evidence

and conduct evidentiary hearings if he deems it necessary to perform his duties. The parties shall not submit any evidence or argument that is outside of the record to the Special Master unless requested to do so.

6. The Special Master is authorized to retain appropriate assistants and experts, including attorneys or other staff in his office, as may be reasonably necessary to accomplish this task within the time constraints imposed by this Order.
7. All pleadings shall be filed with the court via the court's Electronic Case Filing ("ECF"). The Master's reports, orders, and decisions shall be filed in the record and served pursuant to Rule 53(d).

III. PARTIES' DUTIES TO ASSIST THE SPECIAL MASTER

8. The San Juan County Clerk/Auditor's Office, which handles election administration for San Juan County, is directed to cooperate fully in providing the Special Master access to information, data, facilities, and technical support, as well as any assistance that may facilitate and expedite the work of the Special Master.
9. Upon request from the Special Master, the parties shall promptly make available to him electronic copies of their respective redistricting plans previously submitted to the court, as well as electronic copies of related materials.
10. The court expects the Special Master will want to consult each of the parties' redistricting experts about the methodologies, considerations, and data used in the formulation of the remedial plans submitted to the court. The parties are directed to make their redistricting experts available to the Special Master. The parties' redistricting experts are directed to cooperate fully with the Special Master in the process of formulating the remedial plans.

11. The Special Master may consult with the Superintendent of San Juan County School District about issues effecting the School Board election districts, including but not limited to the community school concept.

IV. PROCEDURES

12. *Ex Parte* Communications:

- a. Pursuant to Rule 53(b)(2)(B), the Special Master may communicate *ex parte* with the court at any time. The court previously communicated to the parties that it intended these *ex parte* communications to be mainly procedural, as is its normal practice. Upon further consideration, given the time constraints and issues before the Special Master, the court may need to have some substantive *ex parte* communications with the Special Master. This Order authorizes those communications.
- b. The Special Master may not communicate *ex parte* with any party or counsel for any party.
- c. The Special Master may not have *ex parte* communications regarding work pursuant to this Order with anyone outside of the court, and any assistants or experts retained to assist him, and those parties detailed above in Section III.

13. Preservation of Materials and Preparation of Record:

- a. Pursuant to Rule 53(b)(2)(C), the Special Master shall maintain orderly files consisting of all documents submitted to him by the parties and any written orders, findings, and recommendations. All other materials relating to the Special Master's work should be preserved until relieved of this obligation by the court. The Special Master shall preserve all datasets used in the formulation of

redistricting plans, and any drafts considered but not recommended to the court, in their native format.

14. Review:

- a. Pursuant to Rules 53(f)(3)–(5), the court shall review all factual findings made or recommended by the Special Master for clear error, all legal conclusions made or recommended by the Special Master *de novo*, and review procedural matters for an abuse of discretion.
- b. Pursuant to Rule 53(f)(1), in acting on an order, report, or recommendation of the Special Master, the court shall afford the parties an opportunity to present their positions and, in its discretion, may receive evidence, and may adopt or affirm; modify; wholly or partly reject or reverse; resubmit to the Special Master with instructions; or make any further orders it deems appropriate.

V. DEADLINES

15. The court intends to establish remedial redistricting plans by December 15, 2017.

Accordingly, subject to further revision by the court, the Special Master and the parties shall adhere to the following expedited schedule:

- a. The Special Master shall submit his report and recommendation to the court no later than November 15, 2017.
- b. The parties shall submit any comments on and/or objections to the Special Master's proposed plans no later than November 29, 2017.
- c. The court shall hold a hearing on the proposed plans on December 1, 2017.

d. The court shall issue a ruling approving or rejecting the Special Master's recommended remedial plans by December 15, 2017, or as soon thereafter as practicable.

16. If the court rejects the Special Master's proposed plan, it shall, at the same time, order that the Plaintiffs' proposed remedial plans for the San Juan County Commission and School Board be established as interim plans until the court can establish final plans or otherwise direct local officials to disregard state election deadlines and establish new deadlines that permit full implementation of court-adopted remedial plans.

VI. COMPENSATION

17. All reasonable costs and expenses of the Special Master, including reasonable compensation to the Special Master, his research assistants, and any expert advisors and assistants he may retain, shall, subject to approval by this court, be paid in full by San Juan County within forty-five (45) days after court approval.

18. The Special Master's rate shall be 350 dollars per hour.

19. The Special Master shall preserve all records of time and expenses incurred.

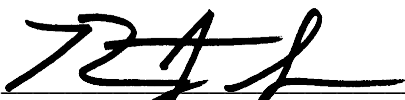
VII. AMENDMENT AND OBJECTIONS

20. Pursuant to Rule 53 (b)(4), the court may amend this Order at any time after notice to the parties and an opportunity to be heard.

21. Any objection to this Order must be filed within three (3) days of its entry.

SO ORDERED this 29th day of September, 2017.

BY THE COURT:



ROBERT J. SHELBY
United States District Judge