UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA, and
TAMAYA ENTERPRISES, INC.,

Plaintiffs,

v. **Case No: 1:11-cv-00957-BB-LFG**

THE HONORABLE NAN G. NASH, *et al.*,

Defendants.

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

This suit must be dismissed under 12(b)(1), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure.[1] First, Judge Nash is immune from this suit under the 11th Amendment and under the doctrine of judicial immunity.[2] Second, the Anti-Injunction Act[3] and the *Younger*[4] doctrine bar the Court from enjoining Judge Nash's performance of her duties. Finally, the Plaintiffs have failed to join an indispensable party; i.e., the State of New Mexico.

I. Judge Nash Is Immune from This Suit.

[1] Judge Nash cannot and does not here take any position on the underlying merits of the pending state court action.
[2] *E.g.* 42 U.S.C. § 1983 ("[I]n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").
[3] 28 U.S.C. § 2283.
[4] *Younger v. Harris*, 401 U.S. 37 (1971).

Judge Nash may not be sued to enforce the Plaintiffs' interpretation of Indian Gaming Regulatory Act.[5] First, as the Supreme Court discussed in *Seminole Tribe of Florida v. Florida*,[6] there is no waiver of 11th Amendment immunity under IGRA. Second, Judge Nash is immune from suit, even for injunctive relief for actions taken in her official capacity.

A. *Seminole Tribe* Bars This Action.

In *Seminole Tribe*, the plaintiff tribe sued the State of Florida and its erstwhile governor, Lawton Chiles, under 25 U.S.C. § 2710, the very same provision Plaintiffs seek to use to bar the state court action in the instant case. In *Seminole Tribe*, the issue was whether a District Court could compel a State and its officials to enter into good-faith negotiations for a gaming compact under IGRA. In ruling for the State and Governor Chiles, the Court held: first, that the Indian Commerce Clause does not grant Congress the power to abrogate the States' sovereign immunity, and IGRA therefore cannot grant jurisdiction over a State that does not consent to be sued;[7] and second, that the doctrine of *Ex Parte Young*[8] may not be used to enforce IGRA against a state official.[9]

Here, as in *Seminole Tribe*, the Plaintiffs ask this Court to command a state official to act in accordance with its proposed interpretation of IGRA and the

[5] 25 U.S.C. § 2701 *et seq.*
[6] 517 U.S. 44 (1996).
[7] *Id.* at 47.
[8] 209 U.S. 123 (1908).
[9] *Seminole Tribe*, 517 U.S. at 47.

compact between Plaintiff Santa Ana and the State of New Mexico.[10] Here, as in *Seminole Tribe*, there is no waiver of 11th Amendment immunity or recourse to *Ex Parte Young*.

B. Judicial Immunity Bars This Suit as to Judge Nash.

Under federal law, this Court may not enjoin Judge Nash from presiding over the state court action. In 1996, Congress passed the Federal Courts Improvement Act,[11] which, among other things, amended 42 U.S.C. § 1983 to bar injunctive relief against state judicial officers.[12]

Prior to this amendment, the law of this Circuit did not extend judicial immunity to prospective injunctive relief against state judges.[13] This was because of the Supreme Court's decision in *Pulliam v. Allen*,[14] which said in no uncertain terms, "We conclude that judicial immunity is not a bar to prospective relief injunctive relief against a judicial officer acting in her judicial capacity."[15]

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[10] It should be noted that Plaintiffs' reading of IGRA has been rejected by the New Mexico Supreme Court. *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-30, ¶ 3, 258 P.3d 1050, 1052 (reversing Judge Nash's dismissal of the state court case at issue here); *Doe v. Santa Clara Pueblo*, 2007-NMSC-08, ¶ 1, 141 N.M. 269, 270-71, 154 P.3d 644, 645-46.

[11] Pub. L. No. 104-317, 110 Stat. 3847.

[12] *Id.* at § 309(c) (adding ", except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable" to the first sentence of 42 U.S.C. § 1983).

[13] *See, e.g.*, *Lemmons v. Law Firm of Morris & Morris*, 39 F.3d 264, 267 (10th Cir. 1994).

[14] 466 U.S. 522 (1984).

[15] *Id.* at 541-42.

But the 10th Circuit has since acknowledged that the amendment to Section 1983 has "effectively reversed *Pulliam*,"[16] and as a result, "the doctrine of judicial immunity now extends to suits against judges where a plaintiff seeks not only monetary relief, but injunctive relief as well."[17]

Plaintiffs may point to *Crowe & Dunlevy, P.C. v. Stidham*,[18] which denied the judicial immunity of a tribal judge against injunctive relief. But *Crowe & Dunlevy* may be distinguished. Section 1983 applies to deprivation of rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[19] In *Crowe & Dunlevy*, the defendant judge was acting under color of the law of a tribe, not a State or Territory or the District of Columbia. Thus, the 1996 amendment to Section 1983 had no bearing on the *Crowe & Dunlevy* decision. In this case, it is not *Crow & Dunlevy*, but *Lawrence* that governs, and Plaintiffs' suit is barred.

II. The Court Should Not Enjoin the Action Pending before Judge Nash.

In addition to being barred by *Seminole Tribe* and the judicial immunity expressed in Section 1983, the Plaintiffs' action is barred by the Anti-Injunction

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[16] *Lawrence v. Kuenhold*, 271 Fed. Appx. 763, 766 n.6 (10th Cir. 2008); *see also Braverman v. New Mexico*, 2011 U.S. Dist. LEXIS 138808, at *67 (D.N.M. Oct 19, 2011).
[17] *Id.*
[18] 640 F.3d 1140 (10th Cir. 2011).
[19] 42 U.S.C. § 1983.

Act[20] and the doctrine of *Younger v. Harris*,[21] particularly as expressed in *Juidice v. Vail*[22] and *Moore v. Sims*.[23]

A. The Anti-Injunction Act Prevents the Court from Enjoining the State Action.

The Anti-Injunction Act forbids federal courts from "grant[ing] an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[24] There is no judgment to protect or effectuate here, nor is the sought-after injunction necessary in aid of this Court's jurisdiction. The only question is whether there is express authorization by Congress to enjoin the state court proceedings. There is no such express authorization.

As discussed above, Section 1983 excepts injunctions against judicial officers performing judicial duties from its reach. The other statute under which Plaintiffs bring this action is 28 U.S.C. § 2201. But Section 2201 does not expressly authorize injunction of state proceedings. "[W]here an injunction is improper under § 2283, declaratory relief should not be given."[25]

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[20] 28 U.S.C. § 2283.
[21] 401 U.S. 37 (1971).
[22] 430 U.S. 327 (1977).
[23] 442 U.S. 415 (1979).
[24] 28 U.S.C. § 2283.
[25] *Chandler v. O'Brien*, 445 F.2d 1045 (10th Cir. 1971) (citing *Samuels v. Mackell*, 401 U.S. 66 (1971)).

In *Samuels v. Mackell*, the Supreme Court noted "the propriety of declaratory and injunctive relief should be judged by essentially the same standards."[26] This is because declaratory relief "would have much the same effect as an injunction . . . ."[27]

B. The Doctrine of *Younger v. Harris* Prevents the Court from Enjoining the State Action.

In addition to the statutory bar provided by the Anti-Injunction Act, *Younger* and its progeny bar Plaintiffs' action. In *Younger*, the Supreme Court struck down an injunction of a state court proceeding as violative "of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."[28]

The Court later extended this doctrine, and in *Juidice v. Vail*,[29] it held that where "it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings,"[30] that is sufficient to invoke *Younger* abstention.[31] In the instant case, not only did Plaintiffs have the opportunity, but actually litigated their federal issue all the way to the New Mexico Supreme Court.[32]

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[26] *Samuels*, 401 U.S. at 72.
[27] *Green v. Mansour*, 474 U.S. 64, 72 (1985)(discussing *Samuels*).
[28] *Younger*, 401 U.S. at 41.
[29] 430 U.S. 327 (1977)
[30] *Juidice*, 430 U.S. at 336.
[31] *Id.*
[32] *Mendoza v. Tamaya Enters., Inc.*, 2011-NMSC-30, ¶ 12-15, 258 P.3d 1050, 1054-55.

In *Moore v. Sims*,[33] the Court made clear that federal interference with state court proceedings is unwarranted in cases where important state interests are involved,[34] and in such cases, *Younger* abstention applies.[35] In this case, the important state interest is the interpretation of the compact between the Santa Ana Pueblo and the State of New Mexico. This is particularly problematic when, as here, Plaintiffs have failed to join the State as a party in a lawsuit that could potentially affect the working of a compact to which the State is a party.

III. Plaintiffs Failed to Join the State of New Mexico.

Despite the fact that they are asking this Court to invalidate the jurisdiction shifting provision of the Pueblo's compact with the State of New Mexico, have not joined the State. As discussed above, the State is immune from this suit under *Seminole Tribe*, so it is not feasible to join the State. As discussed below, the State: 1) will suffer prejudice if this action proceeds; 2) this prejudice cannot be alleviated; 3) judgment entered in the State's absence would not be adequate; and 4) Plaintiffs have an adequate remedy if this action is dismissed for nonjoinder.[36]

First, the State will suffer prejudice if this action proceeds. Plaintiffs ask this Court to interpret a key provision of the compact between one of the Plaintiffs, the Pueblo of Santa Ana, and the State of New Mexico. This compact is a contract between two sovereigns, but in this contractual interpretation dispute, only one of

[33] 442 U.S. 415 (1979).
[34] *Id.* at 423.
[35] *Id.*
[36] *See* FED. R. CIV. P. 19(b).

the parties to the contract is present. Not only would this Court's decision on the merits affect the compact between Santa Ana and the State, but it would jeopardize the current understanding of identical language in all of the State's gaming compacts under IGRA.

Second, this prejudice cannot be alleviated. Judge Nash can and does here advocate for her ability to perform her duties under State law, but it is not appropriate for her to address here the merits of Plaintiffs' complaint. That is for the State. It may be said that by consenting to waive its immunity as a sovereign and intervening or permitting itself to be joined, the State could advocate its position on the merits, but that merely exchanges the prejudice of being excluded from the case for the prejudice of waiving a constitutional protection essential to maintaining a healthy and robust federalism.

Third, judgment in the State's absence would not be adequate. This cannot be separated from the prejudice threatened to the State by this suit, because the declaratory relief sought by Plaintiffs necessarily affects the State and its interests.

Fourth, Plaintiffs have multiple adequate remedies. They have already exercised one of those, which was to appeal the Court of Appeals Decision[37] to the New Mexico Supreme Court.[38] They did not prevail, and Judge Nash is bound by

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[37] *Mendoza v. Tamaya Enters.*, 2010-NMCA-74, 148 N.M. 534, 238 P.3d 903 (reversing Judge Nash's dismissal of the plaintiffs in the state court suit).

[38] *See Glenny v. Am. Metal Climax, Inc.*, 494 F.2d 651 (10th Cir. 1974) ("Unquestionably appellants have a satisfactory forum available in state court. This conclusion is attested to by the fact that appellants already have filed an action in

law to follow the New Mexico Supreme Court's decisions. If Plaintiffs are aggrieved by the New Mexico Supreme Court's ruling, they may seek review by the United States Supreme Court.

CONCLUSION

For the reasons stated above, the complaint must be dismissed. Judge Nash respectfully requests that the Court grant this Motion.

Respectfully submitted,
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the District Court of Kay County, Oklahoma, against Blackwell Zinc, AMAX and ALZ seeking the same relief.").

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CERTIFICATE OF CONFERENCE

Pursuant to LR-CV 7.1(a), I certify that on December 29, 2011, I telephoned counsel for Plaintiffs to determine whether the motion is opposed. The motion is opposed.

/s/ Matthew Jackson 12/30/11

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CERTIFICATE OF SERVICE

I certify that on December 30, 2011, the foregoing was served via CM/ECF on counsel of record for all parties.

/s/ Matthew Jackson 12/30/11

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