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.

REPLY IN SUPPORT OF JUDGE NASH'S MOTION TO DISMISS

Plaintiffs' Response to Judge Nash's Motion to Dismiss is inadequate. First, Plaintiffs cannot ask for a declaration that IGRA does not permit jurisdiction shifting and then claim that the action is not brought under IGRA. This vitiates their argument that *Seminole Tribe* does not apply here. Second,

I. Plaintiffs Cannot Deny the Applicability of *Seminole Tribe* While Arguing That IGRA Bars Jurisdiction-Shifting to State Court.

Plaintiffs respond to the argument that their action is barred by *Seminole Tribe of Florida v. Florida*[1] by arguing that they are not trying to enforce any provision of IGRA, but rather asserting that IGRA does not alter the "federal common law principle that tribes have exclusive jurisdiction over" the claims similar to those in the state court case.[2] But that is not what their complaint or the compact says. The complaint seeks a declaration "that the Indian Gaming

[1] 517 U.S. 44 (1996).
[2] (Resp. to Judge Nash's Mot. Dism. 2.)

Regulatory Act does not permit the shifting of jurisdiction"[3] to state court for claims such as those asserted by the state court Plaintiffs here. This tracks the language of the compact between the Pueblo and the State of New Mexico, which provides that personal injury claims stemming from casino operations "may be brought in state district court, including claims arising on tribal land, *unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court*."[4] The compact does not condition the jurisdiction-shifting provision on federal common law principles, but on IGRA. Plaintiffs' case stands or falls on IGRA, and this subjects it to the 11th Amendment and *Ex parte Young* bars set forth in *Seminole Tribe*.[5] Second, Plaintiffs are incorrect in arguing that Judge Nash is acting in the absence of any jurisdiction; therefore, the FCIA amendment to 42 U.S.C. § 1983 barring injunctive relief against state judges does apply here. Third, Plaintiffs overestimate the effect their tribal status has on the bar to their suit imposed by the Anti-Injunction Act.[6] Fourth, Plaintiffs ignore the state interest plainly manifest here and misunderstand the scope of the Attorney General's representation of Judge Nash.

II. Judge Nash Is Acting in Her Judicial Capacity and Has Jurisdiction to Hear the State Case.

[3] (Compl. 5.)
[4] *Id.* at 3-4 (emphasis supplied by Plaintiffs).
[5] *Seminole Tribe*, 517 U.S. at 47.
[6] 28 U.S.C. § 2283.

Plaintiffs assert that the FCIA amendments to 42 U.S.C. § 1983 do not apply because they claim that Judge Nash is acting in the absence of any jurisdiction. But this argument fails. The language of the compact makes this clear. Personal injury claims such as those brought by the state court plaintiffs may be brought in state district court unless a state or federal court issues a final determination that IGRA does not permit state court jurisdiction. No such final determination exists; ergo, state court jurisdiction still exists.

Based on paragraph 12 of the Complaint, it is anticipated that Plaintiffs would respond that only explicit action by Congress can permit a Tribe or Pueblo to consent to suit in state court, and therefore there is a complete absence of state court jurisdiction. But this is nonsense. If it is "inherent in the nature of sovereignty not to be amenable to suit of an individual without . . . consent,"[7] it follows that the power to consent to suit is also inherent in sovereignty. Otherwise, Hamilton would have stopped after "individual." Tribes may consent to suit.[8] Here, the Pueblo consented to suit, but it now seeks to withdraw that consent on the basis that it did not have the power to consent in the first place.[9]

III. Plaintiffs Are Incorrect in Arguing That the Anti-Injunction Act Does Not Apply Here.

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[7] *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011) (quoting THE FEDERALIST NO. 81 (Alexander Hamiltion)) (emphasis removed).

[8] *E.g.*, *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983).

[9] This argument is here developed only to the extent necessary to show that there is state court jurisdiction sufficient to invoke the FCIA amendment to § 1983. As discussed *infra*, the State of New Mexico would have a great deal more to say on the issue.

Plaintiffs argue that the Anti-Injunction Act does not apply in this case. This argument fails for three reasons. First, as discussed *supra*, the FCIA amendment to §1983 does apply, so there is no express authorization. Second, Plaintiffs' reliance on 9th Circuit law, primarily *White Mountain Apache Tribe v. Smith Plumbing Company, Inc.*[10] is misplaced. Third, Plaintiffs misstate the reach of 28 U.S.C. § 1362—it does not permit Plaintiffs to bring *any* suit that the United States could bring as trustee.

A. Case Law Does Not Support Application of the "in aid of" exception to the Anti-Injunction Act.

Plaintiffs argue that their claims fall within the "in aid of" exception to the Anti-Injunction Act. But this claim fails.[11]

Generally, application of the "necessary in aid of jurisdiction" exception to the Anti-Injunction Act is limited to parallel state *in rem*, rather than *in personam*, actions.[12] The Supreme Court has noted that the language of this exception implies that "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to

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[10] 856 F.2d 1301 (9th Cir. 1988)

[11] The following is taken largely verbatim from *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 U.S. Dist. LEXIS 109908 (E.D. Cal. Oct. 15, 2010).

[12] *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977) ("The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was meant to alter this balance.").

seriously impair the federal court's flexibility and authority to decide that case."[13] As such, circuit courts have applied this exception where conflicting orders from different courts would only serve to make ongoing federal oversight unmanageable,[14] or where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of consolidated, mulitdistrict federal litigation.[15] But "[t]he mere existence of a parallel action in state court does not rise to the level of interference with federal jurisdiction necessary to permit injunctive relief under the 'necessary in aid of' exception."[16]

Indeed, the Supreme Court has expressly excluded from the "necessary in aid of jurisdiction" exception cases that merely implicate preemption issues or exclusively federal rights.[17] "[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, *even when the interference is unmistakably clear*."[18] "This rule applies

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[13] *Atl.Coast Line R.R. Co. v. Bhd. Of Locomotive Eng'rs*, 298 U.S. 281, 295, 90 S. Ct. 1739, 1747, 26 L. Ed. 2d 234, 245-46 (1970).
[14] *See Garcia v. Bauza-Salas*, 862 F.2d 905, 909 (1st Cir. 1988).
[15] *Id; Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 197 (3rd Cir. 1993); *In re Baldwin-United Corp.*¸770 F.2d 328, 336 (2nd Cir. 1985); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir. 1981).
[16] *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d, 1267, 1272-73 (9th Cir. 1982).
[17] *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988).
[18] *Id.* (quoting *Atl. Coast Line*¸298 U.S. at 294 (emphasis added)); *see NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971) ("There is in the Act no express authority for the Board to seek injunctive relief against pre-empted state action."); Alton Box, 682 F.2d at 1273 ("The possibility that [a] state claim may

regardless of whether the federal court itself has jurisdiction over the controversy."[19]

Moreover, the Supreme Court has expressly rejected the argument that § 2283 "does not apply whenever the moving party in the District Court alleges that the state court is '*wholly without jurisdiction over the subject matter*,' having invaded a field pre-empted by Congress."[20] In *Amalgamated Clothing Workers*, the Court noted that in enacting the Anti-Injunction Act, Congress left no justification for the recognition of such an exception.[21]. The Court further reasoned that such an exception would not be easily applied as areas of law that are "withdrawn from state power are not susceptible of delimitation by fixed meets and bounds. What is within exclusive federal authority may first have to be determined by this Court to be so."[22] Moreover, "[t]o permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established," including appellate review of the "collateral issue."[23] After underscoring its confidence in

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be preempted by federal law is not sufficient of itself to invoke the second exception of the Act.").

[19] *Atl. Coast Line*, 398 U.S. at 294.

[20] *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 515, 75 S. Ct. 452, 99 L. Ed. 600 (1955) (emphasis added); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 637, 97 S. Ct. 2881, 2891, 53 L. Ed. 2d 1009, 1022 n.8 (discussing *Amalgamated Clothing Workers* and the Court's holding that "exclusive federal jurisdiction was not sufficient to render § 2283 inapplicable").

[21] *Amalgamated Clothing Workers*, 348 U.S. at 516.

[22] *Id.* (internal quotations and citations omitted).

[23] *Id.* at 519.

state courts to recognize the "demarcation between exclusive federal and allowable state jurisdiction," the Court held that exclusive federal jurisdiction does not provide an exception to the Anti-Injunction Act.[24]

"Rather, when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court."[25] "[S]tate litigation must, in view of § 2283, be allowed to run its course, including the ultimate reviewing power in" the United States Supreme Court.[26] Further, if a plaintiff believes a claim brought in state court is completely preempted by federal law, "the appropriate course of action is to seek removal of the action to the appropriate federal district court . . . ."[27]

In this case, Plaintiff Tamaya Enterprises apparently never sought timely removal to federal court.

But under Supreme Court precedent, the existence of exclusive federal rights is an insufficient basis to invoke the necessary in aid of jurisdiction exception, "even

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[24] *Id.* at 519, 521; *see Vendo*, 433 U.S. at 632, 635-39 (holding that even though § 16 of the Clayton Act provided a "uniquely federal right or remedy" that could only be brought in federal court, an exception to the Anti-Injunction Act was not warranted); *see also Texas Emp'rs Ass'n v. Jackson*, 862 F.2d 491, 498-99, 504 (5th Cir. 1988) (holding that a "complete lack of subject matter jurisdiction, due to federal preemption, comes within none of the exceptions to section 2283 and provides no basis for avoiding the prohibition of 2283").

[25] *Chick Kam Choo*, 486 U.S. at 149; *see Tunica-Biloxi Tribe of La. v. Warburton/Buttner*, No. Civ. A. 04-1516, 2005 U.S. Dist. LEXIS 16878, at *12 (D.D.C. July 20, 2005) ("[S]tate courts are well within their authority to make such preemption determinations").

[26] *Amalgamated Clothing Workers*, 348 U.S. at 521.

[27] *Tunica-Biloxi*, 2005 U.S. Dist. LEXIS 16878, at *12-13.

when the interference is unmistakably clear."[28] Rather, the appropriate avenue for relief is appeal through the state court system (which has been done) and, potentially, to the United States Supreme Court.[29] Plaintiff sought such relief, appealing the Court of Appeals decision to the New Mexico Supreme Court. It was only after such appeals proved unsuccessful that Plaintiffs seek to collaterally attack the state court proceeding in a federal district court. To permit such attack would undermine the fundamental and vital role of comity the Supreme Court asserts is inherent in our federalism.[30]

Plaintiffs' reliance on the Ninth Circuit's decision in *Sycuan Band of Mission Indians v. Roache*[31] is misplaced. In *Sycuan Band*, Indian tribes that operated gaming centers on their reservations sought a federal injunction and declaratory relief against California's criminal prosecution of individuals employed in the tribes' gaming centers.[32] The court held that because IGRA mandated exclusive federal jurisdiction over criminal enforcement of Class III state gaming laws in Indian

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[28] *Chick Kam Choo*, 486 U.S. at 149; *see Vendo*, 433 U.S. at 639 ("Given the clear prohibition of § 2283, the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to over-ride historical concepts of federalism underlying § 2283.").
[29] *See Atl. Coast Line*, 398 U.S. at 296 ("Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions 'necessary in aid of its jurisdiction.'").
[30] *See Atl. Coast Line*, 398 U.S. at 286.
[31] 54 F.3d 535 (9th Cir. 1995).
[32] *Id.* at 537.

country, the state proceedings were in derogation of federal jurisdiction.[33] But the application of the "necessary in aid of jurisdiction" exception to exclusive federal jurisdiction over a criminal prosecution as in *Sycuan Band* is clearly distinguishable from application of the same exception to a civil matter. Unlike a civil litigant, a criminal defendant simply does not have the option to remove a state criminal prosecution that he asserts is preempted by federal law. Unlike a civil litigant, a criminal defendant may be subject to punitive sanctions as a result of a state criminal prosecution, including imprisonment, during the pendency of any appeal relating to a preemption defense. As such, the application of a narrow exception to the Anti-Injunction Act may be warranted in the context of a criminal prosecution exclusively entrusted to federal jurisdiction but certainly alien to civil litigation.

Moreover, the particular criminal statute before the court in *Sycuan Band* presented a unique issue with respect to the federal court's ability to enforce the exclusive criminal prosecution provision set forth in 18 U.S.C. § 1166.[34] 13 Under § 1166(a), Congress provided that for purposes of IGRA, all state law pertaining to the licensing, regulation, or prohibition of gambling, including state criminal prosecution for violations of such laws, would apply in Indian country in the same manner and to the same extent as they applied in the State. But § 1166(c) provided that the United States has exclusive jurisdiction over criminal prosecution of

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[33] *Id*. at 540.

[34] *See Morongo Band of Mission Indians v. Stach*, 951 F. Supp. 1455, 1466 (C.D. Cal. 1997), *judgment vacated and remanded for dismissal as moot*, 156 F.3d 1344 (9th Cir. 1998).

violations of such state laws that were made applicable to Indian tribes under § 1166(a). Because the federal law expressly incorporated state law, and because a defendant cannot be prosecuted twice for the same offense, a federal court's power to enforce § 1166(c) would be "effectively crippled" unless a state court prosecution for violations of the incorporated state gambling law was enjoined.[35] Such a unique situation, implicating the constitutional infirmity of double jeopardy, is not present in this case.

As set forth above, *Sycuan Band* is distinguishable. Rather, in *Amalgamated Clothing Workers*, the Supreme Court expressly found that a party's assertion that "a state court is wholly without jurisdiction over the subject matter" is an insufficient basis for applying an exception to the Anti-Injunction Act.[36] Indeed, even if the state court mistakenly interprets that it has jurisdiction, state court litigation "must be allowed to run its course."[37]

In addition, the court's decision in *Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.*,[38] is instructive. In *Jena Band*, the defendants sued a federally recognized Indian tribe in state court for breach of contract arising out of

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[35] *Id.* (citing *Schiro v. Farley*, 510 U.S. 222, 229, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994)).
[36] 348 U.S. at 515; Jackson, 862 F.2d at 498 ("Nor is the result any different because the federal preemption is such as to deprive the state court of jurisdiction").
[37] *Amalgamated Clothing Workers*, 348 U.S. at 520-21 ("Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them.").
[38] 387 F. Supp. 2d 671 (W.D. La. 2005),

agreements between the parties to develop a casino.[39] The tribe did not seek to remove the action, but brought suit in federal court seeking a declaration that the contracts were void as unapproved management contracts under IGRA and that the state court lacked subject matter jurisdiction to hear the breach of contract claims.[40] The federal court stayed its proceedings pursuant to the Anti-Injunction Act, and the state court subsequently ruled that it had subject matter jurisdiction over the parties' dispute. The tribe then resubmitted its request that the federal district court issue a declaratory judgment that the state court was without jurisdiction to hear the defendant's breach of contract claim.[41] The district court held that the tribe had fully litigated the issue of subject matter jurisdiction before the state court, which had been appealed and upheld by the state appellate court. Therefore, under principles of *res judicata*, the district court was bound by the state court's determination.[42]

The facts before the court in *Jena Band* are strikingly similar to the facts before the court in this case. In both cases, defendants brought claims related to IGRA. In both cases, despite later raising the spectre of exclusive federal jurisdiction under IGRA, plaintiffs failed to seek removal. In both cases, the tribes

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[39] *Id.* at 673.
[40] *Id.*
[41] *Id.* at 674.
[42] *Id.* at 674-75 ("When the jurisdiction of a tribunal is actually brought into question in the proceeding before it, such tribunal has the power to determine its own jurisdiction, and once determined, whether right or wrong, that decision cannot ordinarily be attacked collaterally.") (internal quotations omitted).

challenged the subject matter jurisdiction of the state court and unsuccessfully appealed adverse determinations to the state appellate court. Just as the *Jena Band* court determined that it was precluded from reviewing the state court's conclusions regarding jurisdiction, this Court should similarly find that principles of equity, comity, federalism, and *res judicata* preclude what is, at its core, a review of a state court's determination of its jurisdiction over litigation.[43]

White Mountain Apache Tribe v. Smith Plumbing Co., Inc.,[44] which Plaintiffs rely on for their "in aid of" argument, cannot support the weight Plaintiffs entrust to it. As an initial matter, the Anti-Injunction Act discussion in *White Mountain Apache* is at best perfunctory.[45] Second, the Anti-Injunction Act discussion barely qualifies as *dicta*. It is not only unnecessary to the holding, it points in the other direction from the holding—the court dissolved the injunction of state proceedings.[46] Third, not only has the decision been criticized by other courts,[47] it

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[43] *See Alt. Coast Line*, 398 U.S. at 296 ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.").
[44] 856 F.2d 1301 (9th Cir. 1988).
[45] *See id.* at 1304.
[46] *Id.* at 1306.
[47] *See, e.g.*, *Bess v. Spitzer*, 459 F. Supp. 2d 191, 203 (E.D.N.Y. 2006) ("[T]o the extent that the plaintiff argues that the cases support the argument that the presence of federal Indian law issues itself justifies enjoining a state court proceeding called upon to determine those issues, the Court believes that [*White Mountain*] conflict[s] with a clear expression of the United States Supreme Court. As noted above, the Supreme Court has stated that 'a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear.'") (quoting *Chick Kam Choo*, 486 U.S. at 149); *Oglala Sioux*

was not even mentioned in *Shingle Springs Band*,[48] a case arising out of the very circuit in which *White Mountain Apache's* language would be binding if it were not *dicta* contrary to its own result, and was not followed in *Morongo Band*.[49] *Tonoho O'odham Nation v. Shwartz*, which actually did enjoin a state proceeding, is also not binding on this Court and has received similar criticism.[50] *Bowen v. Doyle*[51] is similarly treated.[52]

In short, Plaintiffs have amassed a line of authority based on dicta in a 9th Circuit case that dissolved, not upheld, an injunction. In contrast, the stern and repeated command of the Supreme Court is to construe the exceptions to the Anti-Injunction Act narrowly and in favor of state court jurisdiction.[53] The "in aid of" exception does not apply here.

B. 28 U.S.C § 1362 Cannot Save Plaintiffs from the Anti-Injunction Act.

Tribe v. C & W Enters., 2006 U.S. Dist. LEXIS 61113, at *13 (D.S.D. Aug. 28, 2006) (declining to follow *White Mountain Apache*); *Morongo Band of Mission Indians v. Stach*, 951 F. Supp. 1455, 1464 (C.D. Cal. 1997) *vacated and remanded for dismissal as moot*, 146 F.3d 1344 (9th Cir 1998).

[48] *See generally* 2010 U.S. Dist. LEXIS 109908.

[49] *Morongo Band*, 951 F. Supp. at 1464-68.

[50] *Bess*, 459 F. Supp. 2d at 202-03.

[51] 880 F. Supp. 99 (W.D.N.Y 1995)

[52] *See Morongo Band*, 951 F. Supp. at 1465 ("It is clear that the Bowen v. Doyle court's reliance on the 'necessary in aid of jurisdiction' exception to the Act as a basis for granting the injunction was simply dicta, and unnecessary to its decision.").

[53] *See, e.g.*, *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375, 180 L. Ed. 2d 341, 349 (2011); *Atl. Coast Line*, 398 U.S. at 287, 297.

Plaintiffs assert that because the United States could bring this action as a trustee they are not barred by the Anti-Injunction Act, But § 1362 "does not grant jurisdiction to every suit by a tribe where the United States could bring an action on behalf of the tribe under 25 U.S.C. § 175. Thus a simple contract dispute, raising no federal question is not within the statute."[54]

In this case, § 1362 does not apply because, under either state court party's interpretation of jurisdiction, the litigation is based on a tort claim that fails to raise a federal question. It is ultimately a dram shop case, not arising under federal law.[55]

In *Shingle Springs Band*, the court declined "to strain interpretations of § 1362 . . . to allow the Tribe to do under one exception that which it could not under the other."[56] The Court should do the same here.

Plaintiffs rely on *Moe v. Confederated Salish and Kooenai Tribes of the Flathead Reservation*[57] for this argument. While the Court did hold that § 1362 permitted the Tribes to proceed in the face of the Tax Injunction Act,[58] that application has not been extended by any binding authority that counsel has been

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[54] 13D WRIGHT, FEDERAL PRACTICE & PROCEDURE: JURISDICTION & RELATED MATTERS § 3579; *see Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980) (holding that § 1362 did not apply because "[t]here is nothing in the present case which suggests that the action is anything more than a simple breach of contract case").
[55] *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980)
[56] *Shingle Springs Band*, 2010 U.S. Dist. LEXIS 109908 at *46.
[57] 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976).
[58] 28 U.S.C. § 1341.

able to locate to the Anti-Injunction Act.[59] The two injunction Acts implicate different concerns; i.e., non-interference with state taxation in the case of the Tax Injunction Act, which is a frequent source of tension between Native Americans and the States, and basic principles of judicial federalism and comity between the United States and the several States in the case of the Anti-Injunction Act. This provides a sound basis to treat the two differently under § 1362.

IV. Plaintiffs Do Not Give Sufficient Credit to Either State Interests or the Adequacy of the State Courts.

Plaintiffs accurately set forth the three-part test for *Younger* abstention, and they concede the first prong: the existence of an ongoing state proceeding. The ongoing state proceeding is, of course, the reason for their suit. But they inaccurately claim that the other two prongs are not met.

First, Plaintiffs challenge the adequacy of the forum to hear the claims raised in the federal complaint. For this, their primary authority (although they cite to their section on their failure to join, which will be discussed below) is *Seneca-Cayuga Tribe v. Oklahoma*.[60] But that court declined to abstain based on lack of a state interest.[61] Because of this, the court decided it "need not address the

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[59] *See Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 n.1 (10th Cir. 1995) (mentioning but declining to address the issue because it was not preserved below); *see also. Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 831, 117 S. Ct. 1776, 1782, 138 L. Ed. 2d 34, 43 (1997) (acknowledging that analysis under 28 U.S.C. § 1341 and 28 U.S.C. § 2283 may not be the same).
[60] 874 F.2d 709 (10th Cir. 1989).
[61] *Id.* at 711.

adequacy of the opportunity to raise the federal claim in state court."[62] The Court is left with the bare assertion that because Plaintiffs claim to assert exclusively issues of federal law, the state forum is not adequate. But "[m]inimal inimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."[63] Instead, the Court "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."[64]

Second, Plaintiffs claim that there is no important state interest at stake here. Even under their theory that the Court must look only to the matter before the state court, "the interpretation and application of state common law implicates important state interests."[65] In the state court case here, there are not only state common law, but state statutes at issue.[66] But beyond that, the issue raised in this case *was raised and litigated* by Plaintiff Tamaya in the state court proceedings (In a footnote, Plaintiffs note that the Pueblo is not a party to the state court litigation. But Tamaya, which is wholly owned and controlled by the Pueblo and represented by the same counsel, is. This is truly a distinction without a difference).[67]

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[62] *Id.*
[63] *Middlesex Cty. Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 102 S. Ct. 2515, 2521, 73 L. Ed. 2d 116, 125 (1982).
[64] *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, 107 S. Ct. 1519, 1528, 95 L. Ed. 2 1, 18 (1987).
[65] *Shingle Springs Band*, 2010 U.S. Dist. LEXIS 109908, at *51 (citing *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499-500, 61 S. Ct. 643, 85 L. Ed 971 (1941)).
[66] *See Mendoza v. Tamaya Enterps., Inc.*, 2011-NMSC-30 ¶ 9, 258 P.3d 1050, 1053.
[67] *Id.*at ¶¶ 12-15.

Plaintiffs, in the same footnote and their response to the state court plaintiffs' motion to dismiss, argue that the claims they bring here were not litigated in the state courts. But the New Mexico Supreme Court did confront the issue of its jurisdiction.[68] If the Plaintiffs chose not to ask the Court to revisit *Doe v. Santa Clara Pueblo*[69] despite the issue being live in the case because of their jurisdictional challenge, that should not be a basis for this Court to decline to apply *Younger*. Such a ruling would lead to the artful exclusion of claims and defenses in hopes of getting a better forum and at the cost of duplicative proceedings.

The State's interest in the integrity of the compact cannot be excluded on the basis that it is not a part of the state court proceeding. If the Court grants the relief sought, it will fundamentally alter the understanding of not only the compact between Plaintiff Pueblo and the State, but the other gaming compacts to which the State is a party.[70]

V. The State is Manifestly a Necessary and Indispensable Party, which Plaintiffs Concede It May Not Be Feasible to Join.

The State is absent in these proceedings. It was not sued by Plaintiffs, nor would it consent to such suit in federal court. Plaintiffs argue that Judge Nash has not met the initial burden of showing that the State is a necessary party. But the

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[68] *Id.* at ¶¶ 3, 12-15 (particularly "Accordingly, by virtue of Section 8 of the Compact, the Pueblo unambiguously agreed to proceed in state court . . . .").
[69] 2007-NMSC-08, 141 N.M. 269, 154 P.3d 644.
[70] *See id.* at ¶ 1 n.1 (providing a link (http://www.nmgcb.org/tribal/2001compact.pdf to the form compact used for all compacts, leaving only the State's counterparty blank).

State is manifestly necessary. First, Plaintiffs not only concede, they allege as part of their complaint that the compact is between the Pueblo and the State.[71] Second, the State negotiated, and the Pueblo agreed to, the jurisdiction shifting provision, which provides state court jurisdiction out of the desire to protect the citizens of the State. Third, the text of the Compact itself provides:

> The State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation to promote the best interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and *respecting the interests of each party* and have agreed to this Compact.[72]

Now, the Pueblo, faced with a lawsuit, does not respect the interests of its counterparty the State. It has instead chosen to argue both in the context of *Younger* abstention and in the context of the failure to join, that there is no state interest here. Plaintiffs would have the Court rule on the validity of a provision of a compact between two sovereigns in the absence of one of them.

Plaintiffs' contention that the compact "merely provides that *until* that federal law issue is finally decided in the negative, the tribes agree" to state court jurisdiction is troubling. It at least suggests that the Pueblo agreed to a provision that it believed was contrary to law.

Despite Plaintiffs contention that having the State ensure that its citizens able to pursue their injuries in state court is not even an interest, but a hassle,[73] the

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[71] (Compl. 3, ¶ 7.)
[72] NMSA 1978, § 11-13-1 (emphasis added).
[73] (*See* Resp. at 16-17.)

State of New Mexico has a strong interest in the welfare of its citizens. That welfare is, in fact, the reason for the existence of the State's government.

Finally, the mere fact that Judge Nash is represented by the Attorney General does not mean that the State's interests are represented in this case. The Attorney General represents Judge Nash, as is his duty under NMSA 1978, § 8-5-2(C). Judge Nash's interests are not identical to those of the State. Judge Nash is not a party to the compact. Judge Nash is called upon to decide the construction of the compact and the law governing it, not to advocate for the State's position on that law. Judge Nash has presided over cases to which the State is a party, and in that capacity—the capacity in which she is being sued here—she has ruled adversely to the State. The singular nature of the Attorney General's office and responsibilities means that he must tread carefully and be mindful of who the client is in a particular case, particularly if, as here, there is not a unity of interest within the corporate body of the State.

Judge Nash's interest here is in the integrity of her state court proceeding and the ability to carry out her duty as a judge—respecting both state and federal law, and operating in a spirit of comity. The State's interest, on the other hand, is to maximize the welfare of its citizens. That interest is not represented here, and the Attorney General cannot adequately represent that interest by arguing in Judge Nash's name without jeopardizing her ability to proceed without the appearance of partiality. If counsel were to take the State's position on Judge Nash's behalf and

prevail, Plaintiff Tamaya might have cognizable concerns about her ability to proceed impartially in the state court proceeding. Counsel has attempted to avoid this hazard by limiting the argument to such arguments as are necessary to preserve the integrity of the state court proceeding, not the integrity of the jurisdiction-shifting provision. The latter needs the advocacy of the State as a party. As such, it is necessary, and indispensable, and as Plaintiffs concede (mildly in their explicit language and implicitly by failing to argue otherwise), infeasible to join.

Finally, Plaintiffs assert that the State is not indispensible because the "only adequate forum is federal court."[74] But the mere fact that Plaintiff Tamaya lost the appeal of its Motion to dismiss does not render state court inadequate. State courts are courts of general jurisdiction, presumed to be competent to decide questions of federal law. While there are areas where federal jurisdiction is exclusive, those areas are limited and not applicable here.

CONCLUSION

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

Respectfully submitted,
GARY K. KING, Attorney General

By /s/ Matthew Jackson 2/17/12
Matthew E. Jackson

[74] (Resp. at 17.)

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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.

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CERTIFICATE OF SERVICE

I certify that on February 17, 2012, the foregoing was served via CM/ECF on counsel of record for all parties.

/s/ Matthew Jackson 2/17/12

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