

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

NAVAJO NATION and CURTIS BITSUI,

Plaintiffs,

v.

No. 1:16-cv-00888

HONORABLE PEDRO G. RAEL, Judge,  
New Mexico Thirteenth Judicial District, and  
LEMUEL L. MARTINEZ, District Attorney,  
New Mexico Thirteenth Judicial District,

Defendants.

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**MOTION FOR EXPEDITED TEMPORARY RESTRAINING ORDER**

Plaintiffs Navajo Nation and Curtis Bitsui, request that this Court issue a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b), ordering Defendants to refrain from (1) taking any further action in the case captioned *State of New Mexico v. Curtis Bitsui*, No: D133 CV 2015 00228 (13<sup>th</sup> Judicial District, Cibola County, New Mexico) or (2) asserting subject matter jurisdiction over or prosecuting any matter concerning the land described as described as New Mexico Principal Meridian, New Mexico, T. 10 N., R. 7 W., Section 4, Lots 10, 11, 12, 13, 14.

**FACTUAL BACKGROUND**

Plaintiff Bitsui is an enrolled member of the Navajo Nation, who resides upon an Indian allotment, in which he holds a beneficial interest, near San Fidel, New Mexico (the "Allotment"). The patent for the Allotment was issued on January 21, 1953 to Mr. Bitsui's predecessors in interest, and the land was to be held in trust for the period of twenty-five years, "and at the

expiration of said period the United States[was to] convey the same by patent to [Mr. Bitsui's predecessors in interest] in fee." Patent 1137489, attached to the Complaint in this action as Exhibit A. The Allotment continues to be held in trust by the United States and was never conveyed to Plaintiff Bitsui in fee. Bureau of Indian Affairs, Title Status Report (Jan. 29, 2016); attached to the Complaint in this action as Exhibit B.

On September 14, 2015, Defendant Martinez, on behalf of the State of New Mexico, initiated a criminal action in the case of *State of New Mexico v. Curtis Bitsui*, No. M-61-MR-2015-00447, filed in the Magistrate Court in Cibola County, charging Mr. Bitsui with Criminal Damage to Property (under \$1000); Interference with Ditch / Illegal Use of Water; and Interference with Irrigation Ditch Easement. The criminal action was subsequently dismissed; on its face, 18 U.S.C. §1152 prohibits a state court from asserting criminal jurisdiction over offenses committed in Indian Country, including Indian allotments.

On December 16, 2015, Defendant Martinez, on behalf of the State of New Mexico filed a complaint for injunctive relief against Mr. Bitsui in New Mexico state court, alleging that Mr. Bitsui was interfering with the rights of the San Jose de la Cienega Community Association to use a ditch that traverses the Allotment. The complaint in the state court action is attached to the Complaint in this action as Exhibit C. On February 2, 2016, Plaintiff Curtis Bitsui filed a motion to dismiss, alleging that the Thirteenth Judicial District Court of New Mexico has no subject matter jurisdiction over the claims made by the State because the Allotment is Indian Country. Following a hearing on March 4, 2016, held in the Cibola County Thirteenth Judicial District Court of New Mexico, Judge Rael denied Plaintiff Bitsui's motion to dismiss. Judge Rael's decision of March 4, 2016 is attached to the Complaint in this action as Exhibit D.

Judge Rael has scheduled a trial on the merits in the *State v. Bitsui* lawsuit for September 7, 2016.

Plaintiffs Navajo Nation and Curtis Bitsui seek equitable relief in this action to ensure that New Mexico state courts do not assert subject matter jurisdiction over the Allotment.

### **LEGAL BASIS FOR INJUNCTIVE RELIEF**

Pursuant to Rule 65, a party requesting a preliminary injunction or temporary restraining order must demonstrate that four equitable factors weigh in favor of the injunction:

(1) irreparable injury in the absence of the injunction, (2) the threatened injury to the moving party outweighs the harm to the opposing party resulting from the injunction, (3) the injunction is not adverse to the public interest, and (4) the moving party has a substantial likelihood of success on the merits.

*Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). All four factors are present here and strongly favor this Court granting a temporary restraining order.

**A. Plaintiff would be Irreparably Harmed if a Temporary Restraining Order is not Issued.**

Defendant has ordered a trial on the merits, scheduled for September 7, 2016, in a state court proceeding to determine if actions taken on an Indian allotment, held in trust by the United States violate certain provisions of New Mexico statutes. The Indian allotment is “Indian Country” pursuant to 18 U.S.C. §1151(c). *Pittsburg & Midway Coal Min. Co. v. Watchman*, 552 F.3d 1531, 1541 (10<sup>th</sup> Cir. 1995) (“The plain language of 18 U.S.C. § 1151(c) defines Indian country to include: ‘all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.’”). Accordingly, the New Mexico state court lacks civil subject matter jurisdiction over the actions occurring on this land. *See: Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998); *DeCoteau v. District County Court for*

*Tenth Judicial Dist.*, 420 U.S. 425, 427, n. 2 (1975). Plaintiff Bitsui has a liberty interest secured by the due process clause of the 14th Amendment to the U.S. Constitution to have the matters arising out of the *State v. Bitsui* lawsuit tried in a court that has jurisdiction over the subject matter. If Plaintiff Bitsui is forced to defend an action in a court without jurisdiction, such a violation of his constitutional rights constitutes irreparable harm as a matter of law. *See Elrod v. Burns*, 427 U.S. 347, 373–374 (1976).

Plaintiff Navajo Nation is a sovereign with the “inherent power to prescribe laws for their members and to punish infractions of those laws.” *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978); *see also: Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (tribes have sovereignty and right to enforce laws in their own forum). Plaintiff Navajo Nation asserts territorial jurisdiction over all Navajo Indian Country, including all land within the exterior boundaries of the Navajo Indian Reservation and all Navajo Indian allotments. 7 Navajo Nation Code § 254(A); *See: Watchman, supra*. (“18 U.S.C. § 1151 defines Indian country for civil jurisdiction purposes. We hold § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes.”); *Indian Country U.S.A. Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir.1987) (“[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian lands.”). Clearly, the Allotment is Indian Country, and civil authority over such lands is held by the Navajo Nation and not the State of New Mexico.

Plaintiff Navajo Nation would be irreparably harmed if New Mexico state courts interfered with its inherent territorial jurisdiction. *Williams v. Lee*, 358 U.S. 217, 223 (1959) (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the

authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”).

**B. The Balance between the Harm to Plaintiffs and the Harm to Defendant Favors the Plaintiffs.**

Where a court lacks jurisdiction, enjoining the exercise of such jurisdiction is not a harm. *See Browning Debenture Holders' Comm. v. DASA Corp.*, 454 F. Supp. 88, 105 (D.C.N.Y. 1978), *aff'd* 605 F.2d 35 (2d Cir. 1978) (“In a case such as this it would be a disservice not only to the defendants, but also to the state judiciary, to allow the entire record to be placed in the lap of the New York State courts to be argued over by lawyers and puzzled over by judges for years to come.”). There is no harm to enjoining Judge Rael from exercising jurisdiction where there is none.

Conversely, Plaintiff Bitsui would be harmed if forced to defend an action in a court without jurisdiction. *Elrod, supra*.

The balance of harms strongly weighs in favor of a temporary restraining order.

**C. A Temporary Restraining Order is not Adverse to the Public Interest.**

It is axiomatic that the public interest is served when courts act only within the scope of their jurisdiction.

**D. Plaintiffs will Prevail on the Merits.**

Clearly, the Allotment is held in trust by the United States for the benefit of individual Indians and is Indian Country pursuant to 18 U.S.C. §1151(c). As Indian Country, New Mexico state courts do not have subject matter jurisdiction in the case captioned *State of New Mexico v. Curtis Bitsui*, which concerns the actions of Plaintiff Bitsui occurring on the Allotment.

The state court refuses to acknowledge that the Allotment is held in trust by the United States despite the fact that the Title Status Report issued by the United States Bureau of Indian Affairs verified that the Allotment was held in trust by the United States. Judge Rael found that the trust terminated after twenty five years based on the following language in the original patent:

The UNITED STATES OF AMERICA, ... hereby declares that it does and will hold the land above described for the period of twenty-five years, in trust for the sole use and benefit of the said Widow and Heirs of Francisco Pieseto and to their heirs, according to the laws of the State where such land is located, and at the end of said period the United States will convey the same by patent to the said Widow and Heirs of of [sic] Francisco Pieseto in fee, discharged of said trust and free from all charges and encumbrances whatsoever....

Decision and Order at 2. Notwithstanding the language of the patent that full title would be conveyed to the allottee after 25 years, the Allotment is still held in Trust by the United States and the United States has not conveyed full title of the land to Plaintiff Bitsui. Although Congress had originally intended that the United States would only hold lands in trust for the benefit of individual Indians for 25 years, with the passage of the Indian Reorganization Act, 25 U.S.C. § 462, the trust period of 25 years was extended indefinitely. The Tenth Circuit has observed that

the trust period of 25 years was extended indefinitely by virtue of 25 U.S.C. § 462 enacted in 1934. Under this statutory design, the United States is an indispensable party in any action determining a dispute arising over the possession of allotted land by virtue of its trust relationship and *state courts do not have any jurisdiction over such disputes.*

*Begay v. Albers*, 721 F.2d 1274, 1279-80 (10th Cir. 1983) (emphasis added).

There is no justiciable question that the Allotment is held in trust by the United States, that the Allotment is Indian County, and the New Mexico state court does not have jurisdiction over the Allotment.

**RELIEF REQUESTED**

For the reasons set forth above, the Court should issue a temporary restraining order enjoining Defendants from taking any further action in the case captioned *State of New Mexico v. Curtis Bitsui*, No: D133 CV 2015 00228 (13<sup>th</sup> Judicial District, Cibola County, New Mexico) until this Court can enter a permanent order as requested in the Complaint. Expedited consideration of this matter is requested because the trial in the state court matter is scheduled for September 7, 2016.

Respectfully submitted this 3rd day of August, 2016.

NAVAJO NATION DEPARTMENT OF JUSTICE

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