UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION and CURTIS BITSUI,

Plaintiffs,

v. Case No. 1:16-cv-888 WJ/LF

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

Defendants.

JUDGE RAEL'S
AMENDED[1] MOTION FOR JUDGMENT ON THE PLEADINGS

The Honorable Pedro G. Rael ("Judge Rael") made a careful determination that he had jurisdiction over the State of New Mexico's civil enforcement action against Curtis Bitsui.[2] The state court's finding of jurisdiction should not be declared void by this Court. Under *Younger v. Harris*, this Court should abstain from interfering with a pending, state court action involving important state interests. Here, the underlying litigation concerns the State's efforts to protect an ancient acequia that provides critical water in a desert landscape.

[1] This Amended Motion does not differ in substance with the original Motion (ECF No. 18) filed on December 1, 2016 and later withdrawn. The Amended Motion merely removes some exhibits and highlights others, so as to comply with D.N.M.LR-Civ. 10.5 and 10.6. Textual references to the exhibits in the body of the motion have also been edited to reflect these changes.

[2] This lawsuit, *State v. Bitsui*, D-1333-CV-2015-00228 (N.M., Thirteenth Judicial District), is referred to herein as the "State Court Action."

If the Court does consider the merits of this case, it should conclude that Judge Rael has jurisdiction over the State Court Action. The State Court Action involves actions on an acequia that crosses through land awarded by the United States in a 1953 Patent (the "Patent"). Because this Patent was issued pursuant to the Stock-Raising Homestead Act, rather than the Indian Homestead Act of 1884, the land underlying the acequia is not Indian Country. Furthermore, even if the Patent land was Indian Country when granted in 1953, the express terms of the Patent permit state jurisdiction. The trust period during which the Patent was held by the United States—and during which an allotment could have been created—expired after 25 years. As well, the Patent states that it is "subject to any vested and secured water rights … as may be recognized and acknowledged by the local customs, laws, and decisions of courts." Finally, even if the state court ordinarily would not have jurisdiction over the Patent land, the Court should permit such jurisdiction given the exceptional circumstances at issue with imperiled water rights that date to Spanish colonial rule.

Pursuant to Local Civil Rule 7.1(a), Judge Rael states that based on prior conversations with Plaintiffs' counsel, he understands this motion to be opposed.

I. BACKGROUND

The State of New Mexico, through its Thirteenth Judicial District Attorney, brought a civil enforcement action against Curtis Bitsui ("Bitsui"). Compl. Injunctive Relief (Dec. 16, 2015), State Court Action, attached as Ex. C to Compl. Injunctive & Declaratory Relief (the "Federal Complaint") (ECF No. 1-3.). The State

accuses Bitsui of rerouting the acequia that crosses his leased property to divert water, of destroying part of the irrigation channel with a bulldozer, and of refusing access to his property for maintenance of the acequia. *Id.* ¶ 6 & attached Tafoya Aff., ¶¶ 6-14. As a result, the State seeks an injunction against Bitsui, preventing him from disrupting or destroying the acequia and requiring him to permit maintenance access to the acequia. *Id.*, "Wherefore" ¶¶.

Bitsui moved to dismiss the State Court Action, contending that the state court lacked jurisdiction because the action arose on a property he claims is Indian Country. Def.'s Mot. Dismiss Lack Subject Matter Jurisdiction (Feb. 2, 2016), State Court Action.[3] The State responded that the state court had jurisdiction because the property was not Indian Country, as it had been granted under the Stock-Raising Homestead Act, and that the Patent was expressly subject to existing water rights and local laws to enforce such rights. Resp. Def.'s Mot. Dismiss (Feb. 15, 2016), State Court Action, attached as Exhibit A.[4]

Judge Rael denied Bitsui's motion to dismiss. He held that the Patent created a trust for a U.S. citizen (under the Stock-Raising Homestead Act), rather than specifically for a tribal member (under the Indian Homestead Act of 1884). Decision & Order on Def.'s Mot. Dismiss Lack Subject Matter Jurisdiction at 2 (March 4, 2016), attached as Ex. D to Federal Complaint (ECF No. 1-4.) Judge Rael further

[3] The state court motions and briefing discussed in this factual background are not attached, except where specific reference is made to them by citation. However, counsel for Judge Rael is happy to provide copies of any state court pleadings upon request.

[4] For space and brevity, only those exhibits to the State's Response to the Motion to Dismiss that are referenced in this motion are included in Exhibit A.

reasoned that even if the Patent created an Indian allotment, the trust and allotment expired after 25 years and that the Patent reserved rights to the acequia that are enforceable in state court. *Id.*

Five months later, and as trial was approaching in the State Court Action, Bitsui filed both this declaratory judgment action in federal court and a second motion to dismiss in state court. Federal Complaint (ECF No. 1) (Aug. 3, 2016); Def.'s Second Mot. Dismiss (Aug. 16, 2016), State Court Action. In his second motion to dismiss, Bitsui argued that the State had failed to join the United States as an indispensable party[5] and renewed his argument that the court lacked jurisdiction. Bitsui argued that the state court's conclusion that the patent expired was incorrect, and that although the allotment was subject to rights-of-way, this did not change its status as Indian Country.

The State's response to Bitsui's second motion to dismiss explained in greater detail that the Patent—and, in particular, the Patent's recognition of water rights—was made subject to the Stock-Raising Homestead Act, not the Indian Homestead Act of 1884. State's Resp. Def.'s Second Mot. Dismiss at 2-4 (Sep. 16, 2016), State Court Action. The State also argued that the Patent's trust expired after 25 years. In reply, Bitsui did not address the Stock-Raising Homestead Act, but argued that even if the trust expired, the United States never transferred the land with a fee patent. Def.'s Reply to State's Resp. (Oct. 13, 2016), State Court Action. Judge Rael

[5] The failure to join an indispensable party in the State Court Action is not at issue here. If anything, this argument suggests that Plaintiffs should have joined the United States in this action.

denied the second motion to dismiss. He held that the trust had expired after 25 years, that the Patent's express language made the property subject to state laws regarding the acequia, and that Bitsui did not refute the State's factual history of the property and the Patent. Decision Regarding Water Access (Nov. 14, 2016), State Court Action, attached as Exhibit B. Therefore, Judge Rael enjoined Bitsui from preventing acequia officials from entering the property to maintain the acequia. This injunction was limited to the access reasonably necessary to exercise the water rights in the acequia. *Id.* at 3.

II. STANDARD FOR MOTIONS FOR JUDGMENT ON THE PLEADINGS

Any party may move for judgment on the pleadings if no material facts are in dispute and the dispute can be resolved on both the pleadings and any facts of which the Court can take judicial notice. *Ramirez v. Wal–Mart Stores, Inc.*, 192 F.R.D. 303, 304 (D.N.M. 2000) (citing Fed. R. Civ. P. 12(c)). A motion for a judgment on the pleadings will be granted if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* Here, given that the litigation centers on questions of law—specifically, whether the Court should hear this case and whether the state court has jurisdiction, resolution of the case on dispositive briefing is possible. (*See* Minutes of Aug. 11, 2016, Status Conf. (ECF No. 12).)

III. THE COURT SHOULD DECLINE TO HEAR THIS ACTION UNDER THE *YOUNGER* ABSTENTION DOCTRINE

Because the State Court Action is a civil enforcement lawsuit to protect important state interests, this Court should abstain from deciding this case under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The Supreme Court has

recognized limited categories of cases where federal-court abstention is required under *Younger*; these include "civil enforcement proceedings." *Sprint Commn's, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367-68 (1989)). The State Court Action is undoubtedly a civil enforcement proceeding, as it is an action by the State to enforce its laws prohibiting interference with irrigation and ancient acequias. *See* Compl. Injunctive Relief ¶¶ 8-14 (citing relevant state statutes), State Court Action, attached as Ex. C to Federal Complaint (ECF No. 1-3.).

"Under *Younger*, federal courts must abstain from exercising jurisdiction when three conditions are satisfied:

1. There is an ongoing state proceeding.
2. The state court provides an adequate forum for the claims raised in the federal complaint.
3. The state proceedings 'involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.'"

Columbian Fin. Corp. v. Stork, 811 F.3d 390, 395-96 (10th Cir. 2016) (quoting *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999)). As noted above, there is a state civil enforcement proceeding ongoing. Bitsui has an opportunity to appeal Judge Rael's order issuing an injunction, which he must do before seeking relief in this court. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) ("a necessary concomitant of *Younger* is that a party … must exhaust his state appellate remedies before seeking relief in the District Court…."). Even if an appeal in the State Court Action would be lengthy, it is still an ongoing state proceeding for the purpose of *Younger*. *Sanchez v. Wells Fargo Bank, N.A.*, 307 Fed. App'x 155, 158

(10th Cir. Jan. 9, 2009). Nor is there any question that Bitsui can raise his jurisdictional challenges in state court, as he already has. *See supra* pp. 3-5.

New Mexico's water rights, including the ancient acequias that date to Spanish colonial rule, are an important state interest that meet the third condition for *Younger* abstention. Land use regulations are regularly considered important state interests for the purpose of *Younger*. *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005). This includes, in particular, the regulation of scarce water resources. *Sierra Club v. Cal. Am. Water Co.*, 2010 WL 135183, at *7 (N.D. Cal. Jan. 8, 2010). Indeed, as the Supreme Court has recognized, "[i]t is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 804 (1976). Given that all three criteria for *Younger* abstention are met, the Court should dismiss this action. *Columbian Fin. Corp.*, 811 F.3d at 395-96.

IV. THE PROPERTY UNDERLYING THE ACEQUIA IS NOT INDIAN COUNTRY, BECAUSE IT WAS GRANTED UNDER THE STOCK-RAISING HOMESTEAD ACT

The Patent granting the property underlying the acequia at issue was awarded pursuant to the Stock-Raising Homestead Act. In particular, the history of the Patent application and express language in the Patent suggests that the Patent was issued pursuant to this Act. As a result, the property and the reserved water rights for the acequia are not Indian Country and state jurisdiction exists.

After a careful examination of the language and history of the Patent, Judge Rael correctly determined that the Patent was issued pursuant to the Stock-Raising

Homestead Act, P.L. 64-290 (Dec. 29, 1916). Admittedly, this history is somewhat muddled. Before Francisco Pieseto submitted his application for the Patent, there were communications between the Special Allotting Agent of the Indian Field Service and the Register of the U.S. Land Office. The Indian Field Service informed the Land Office that no proof of the applicant's tribal membership was needed because he was applying under the Stock-Raising Homestead Act, which was available to all U.S. citizens. Ex. 7 to Ex. A (Mar. 23, 1929, letter of Chas. E. Roblin to U.S. Land Office). The Land Office responded that, instead, it filed the application as an Indian homestead because it was unaccompanied by any fees. Ex. 11 to Ex. A (Mar. 29, 1929, letter by Land Office Register to Roblin). However, the next year the initial application for the Patent would be submitted on a Department of the Interior "Original Stock-Raising Homestead Entry" form. Ex. 5 to Ex. A.[6]

Perhaps due to Francisco Pieseto's death, the original application was not completed until decades later. In 1951, Pablita Pieseto, Mr. Pieseto's widow, filed a Final Proof, with testimony about the claimed land. This too was submitted on a Stock-Raising Homestead form, with substantial detail about the property of the land. Ex. 8 to Ex. A. On May 27, 1952, the Bureau of Land Management issued a decision approving Ms. Pieseto's application for a patent. The decision stated, "The abovenamed party, having complied with the requirements of the acts designated above [citing *both* the Indian Homestead Act of 1884 and the Stock-Raising Homestead Act], *in connection with the stockraising homestead entry referred to*

[6] The top left corner of this form has handwriting referencing the Indian Homestead Act of 1884. The significance of this, or when it was written, is not apparent.

above, is entitled to a patent…." Ex. 9 to Ex. A (emphasis added). This decision suggests that even if the application was submitted pursuant to both the Indian Homestead Act and the Stock-Raising Homestead Act—perhaps to avoid an application fee—that the Patent was issued as "stockraising homestead."

The Patent itself also evidences that it was issued pursuant to the Stock-Raising Homestead Act. As with the BLM's decision, the Patent references *both* the Indian Homestead Act of 1884 and the Stock-Raising Homestead Act (referenced as "the Act of December 29, 1916 (39 Stat. 862))." (Federal Complaint, Ex. A, p. 1.) However, the Patent was for 177.82 acres, more than the 160 acres permitted by the Indian Homestead Act, suggesting that the Patent could only have been issued under the Stock-Raising Homestead Act, which permitted patents up to 640 acres. *Compare* 25 U.S.C. § 336 (proving 160 acres for Indian homestead) *with* P.L. 64-290 § 4 (640 acres for stock-raising homestead); *see also* Heirs of George Martinez, Interior Board of Land Appeals, 103 IBLA 375, 1988 WL 238467, at *4 (discussing ability to get more than 160 acres with Stock-Raising Homestead Entry rather than Indian allotment). Also of note, the language in the Patent limiting the conveyance based on preexisting water rights is where the reference to the Stock-Raising Homestead Act is contained, declaring that the property is:

> "subject to any vested and secured water rights for mining, agricultural, manufacturing, or other purposes, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to

> the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862)."

(Federal Complaint, Ex. A, p. 1.) Therefore, even if the Patent was issued in part pursuant to the Indian Homestead Act, it should be interpreted as recognizing water rights pursuant to the Stock-Raising Homestead Act, and the acequia should not be considered Indian Country.

V. EVEN IF THE PROPERTY WAS INDIAN COUNTRY WHEN GRANTED IN 1953, THE PATENT'S EXPRESS TERMS PERMIT STATE JURISDICTION

Even if the Patent was granted pursuant to the Indian Homestead Act when it was issued in 1953, the Patent's terms permit state jurisdiction to protect the acequia that crosses the Patent land. First, the trust created by the Patent expired after 25 years, after which the land ceased to be an Indian allotment. Further, regardless of whether the Patent land is Indian Country, the Patent expressly reserved State jurisdiction to enforce the State's rights in the acequia.

a. The Trust Created by the Patent Expired on its Own Terms After 25 Years, Permitting State Jurisdiction After That Date

By its terms, the trust created by the Patent expires after 25 years:

> "[T]he 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 used and benefit of the said Widow and Heirs of Francisco Pieseto … and at the expiration of said period the United States will convey the same by patent to the said Widow and Heirs of Francisco Pieseto in fee…."

(Federal Complaint, Ex. A, p. 1.) Once land is no longer held in trust by the United States, it ceases to be an Indian allotment and Indian Country for the purposes of

18 U.S.C. § 1152. 25 U.S.C. § 349 ("At the expiration of the trust period … each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."); *see also United States v. Stands*, 105 F.3d 1565, 1574 (8th Cir. 1997) (after expiration of trust, land ceases to be Indian Country).

Plaintiffs contend that the trust period was extended indefinitely by the Indian Reorganization Act, 25 U.S.C. § 462. (Federal Complaint ¶ 10.) This argument fails to confront the fact that the Patent was drafted well after the Indian Reorganization Act's passage in 1934. P.L. 73-383 (Jun. 18, 1934). By 1953, the drafters of the Patent would have known that the trust period for Indian allotments was indefinite. The fact that the Patent was drafted to still include a 25-year trust suggests that the Patent was not intended to create an indefinite trust, and thus, that any Indian allotment would expire in 1978. *See Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944) (it is generally assumed that drafters are aware of previous interpretations of wording).

b. The Patent's Terms Allow Continuing State Jurisdiction to Enforce Water Rights

Even if the Patent is deemed to have created an indefinite Indian allotment, express language in the Patent carves out rights to the acequia that are enforceable in state court. The Patent, *see supra* p. 9, makes the land subject to "any vested and accrued water rights" and "rights to ditches" "as may be recognized and acknowledged by the local customs, laws, and decisions of courts." This language is

taken directly from the Mining Act of 1866, as is now codified (among other places) at 43 U.S.C. § 661.

The Supreme Court has held that post-Mining Act patents convey only title to water rights "as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location." *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). Further, such protected water rights are given with an implied grant of jurisdiction to the state, if needed, by the federal government: "If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by legislation … cannot be doubted." *Id.*

Therefore, the Patent's language reserving existing water rights in the acequia "as recognized by the local customs, laws, and the decisions of the courts" should be interpreted as authorizing state jurisdiction as needed to protect such water rights. Such jurisdiction is permitted by 43 U.S.C. § 661, which vests the states with any needed jurisdiction to protect riparian rights reserved from patents issued by the United States: "the possessors and owners of such vested rights shall be maintained and protected in the same."

VI. EXCEPTIONAL CIRCUMSTANCES MERIT STATE COURT JURISDICTION, REGARDLESS OF ANY OTHER LIMITATIONS

"In 'exceptional circumstances,' a State may assert jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional intent to do so. *Gobin v. Snohomish Cty.*, 304 F.3d 909, 917 (9th Cir.

2002) (citing *California v. Cabazon Band of Mission Indians*, 420 U.S. 202, 214-15 (1987)). Such exceptional circumstances are weighed against Indian sovereignty and tribal self-determination, self-sufficiency, and economic development. *Id.*

Of course, demonstrating a departure from the general rule against state jurisdiction over tribal members on Indian Country is a weighty task. But the circumstances here are exceptional, involving an exceedingly important state interest. As noted above in the discussion of *Younger* abstention, *supra* pp. 6-7, the State has a great interest in its ancient acequias and the water supply they provide. Indeed, in a desert state, there may be no greater interest than water. Additionally, there is little, if any, legitimate tribal interest in destroying or disrupting an acequia's water supply. In these circumstances, state jurisdiction over the State Court Action is warranted—even if all of other bases for state jurisdiction fall short.

VII. CONCLUSION

For the foregoing reasons, Judge Rael respectfully requests that the Court enter judgment in his favor, finding that Plaintiffs are not entitled to declaratory judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 15, 2016, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Nicholas M. Sydow
Nicholas M. Sydow