IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION and CURTIS BITSUI,

Plaintiffs,

v.

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.

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Navajo Nation and Curtis Bitsui, move this Court for a declaration that the state court lacks subject matter jurisdiction over matters arising on an Indian allotment held in trust by the United States. *Amended Complaint for Declaratory Relief* (Doc. 5) ("Amended Complaint"). Because the alleged misconduct giving rise to the State Court Action[1] occurred in Indian country, state court jurisdiction is preempted by 18 U.S.C. § 1152. Under these circumstances, the *Younger v. Harris* abstention doctrine is inapplicable. This Motion for Judgment on the Pleadings is made in accordance with the *Stipulated Briefing Schedule* (Doc. 15) and responds to various assertions made in Judge Rael's *Amended Motion for Judgment on the Pleadings* (Doc. 22) ("Defendant's Motion").

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[1] Plaintiffs adopt Defendant Rael's designation of the state court action in *State v. Bitsui*, D-1333-CV-2015-00228 (N.M. Thirteenth Judicial District) as the "State Court Action."

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 pursuant to the Act of Congress of July 4, 1884, otherwise known as "the Indian Homestead Act." Patent 1137489 (Doc. 1-1) (the "Patent"). The United States holds the Allotment in trust for all of the beneficial owners. Bureau of Indian Affairs Title Status Report (Jan. 29, 2016) (Doc. 1-2). Mr. Bitsui acquired his interest in the Allotment as a descendent of the original grantee, Francisco Pieseto. Plaintiff Navajo Nation, a federally recognized Indian tribe, acquired an interest in the Allotment by purchasing numerous undivided fractional interests through a federal program, and is also a beneficial owner of the Allotment. Bureau of Indian Affairs Title Status Report (Sep. 6, 2016) (attached as Exhibit A).[2]

In September 2015, the State of New Mexico brought a criminal action against Plaintiff Bitsui in the 13th Judicial District Court alleging that he committed the offense(s) of Criminal Damage to Property (under $1000); Interference with Ditch /Illegal Use of Water; and Interference With Irrigation Ditch Easement. That action was dismissed without prejudice on September 28, 2015.

In December 2015, the State of New Mexico, by and through Defendant Martinez, filed a *Complaint for Injunctive Relief* pursuant to NMSA 1978, Sections 73-2-4, 73-2-5, 73-2-6 and 73-2-64, seeking a permanent injunction against Curtis Bitsui "to remove any and all diversions,

[2] The Title Status Report of September 6, 2016 was compiled by the Bureau of Indian Affairs after this action was filed and was submitted as an exhibit at the hearing in the State Court Action on September 7, 2016. This Title Status Report reflects the fact that the Navajo Nation acquired interests in the Allotment not described in the Title Report of January 29, 2016.

channels, culverts, pipes, hoses, ponds, structures and halt any and all surface activities which impairs the San Jose de la Cienega Community Ditch Association form [sic] accessing, maintaining, or improving the ditch and its channel to the point of diversion." Doc. 1-3 at 5. On two separate occasions, Mr. Bitsui moved to dismiss the State Court Action on the grounds that the action was directed at activities occurring on an Indian allotment, that the Allotment is Indian country pursuant to 18 U.S.C. § 1151(c); and therefore, the state court lacked subject matter jurisdiction. Defendant Rael, Judge for the Thirteenth Judicial District of New Mexico, denied these motions, finding, *inter alia*, that the Patent, issued in 1953, had expired by its terms. The rulings of the court were premised on Defendant Rael's erroneous finding that because the Patent provided that the United States would hold the land in trust for the period of twenty-five (25) years, the trust period had expired and the lands could no longer be held in trust. The decisions in the State Court Action ignore the uncontroverted testimony of the Bureau of Indian Affairs agent that the land continues to be held in trust by the United States. Mr. Bitsui also moved to dismiss the State Court Action pursuant to Rule 1-019 NMRA because the United States is an indispensable party in the adjudication of matters concerning the status of Indian allotments, and the determination of the trust status of the land requires joinder of the United States. Defendant Rael denied this motion as well.

At a hearing held on September 7, 2016, witnesses on behalf of the San Jose de la Cienega Community Ditch Association offered testimony concerning past actions of Mr. Bitsui. However, contrary to the assertions made in Defendant's Motion, there was no testimony concerning a bulldozer destroying a ditch nor was there testimony that Mr. Bitsui destroyed the irrigation channel in any manner. Defendant's Motion at 3. Judge Rael's decision makes no such finding. *See Decision Regarding Water Access* (Nov. 14, 2016) (Doc. 18-6, filed Dec. 1, 2016).

Testifying on behalf of Mr. Bitsui, the agent for the Bureau of Indian Affairs who prepared the two Title Status Reports submitted in the State Court Action confirmed that Plaintiffs Bitsui, along with numerous other Indian allottees, and the Navajo Nation are beneficial owners of the Allotment, held in trust by the United States, and that the Navajo Nation acquired its interests in the Allotment through the Department of the Interior's Land Buy Back Program.[3] The Title Status Report of September 6, 2016, attached as Exhibit A, reveals that the Navajo Nation holds an interest in the Allotment of more than 34%.

Plaintiff Bitsui filed his Notice of Appeal in the New Mexico Court of Appeals on December 8, 2016.

I. STANDARD OF REVIEW FOR MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiffs agree with Defendants that there are no material facts in dispute and this matter can be resolved by way of motion for judgment on the pleadings pursuant to the standard articulated by Defendants. *See Defendant's Motion* at 5, ¶ II.

II. THE ALLOTMENT IS INDIAN COUNTRY AND THE STATE COURT LACKS SUBJECT MATTER JURISDICTION

The alleged wrongdoing by Mr. Bitsui that is the subject of the State Court Action occurred in Indian country as defined by federal law. "Indian country" includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government ..., (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian

[3] The Federal Buyback Program allows Indian tribes to purchase fractional shares held by tribal allottees. More information about the program can be found at: https://www.doi.gov/buybackprogram/about/

> titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). When a criminal offense is alleged to have been committed in Indian country, the United States has the "sole and exclusive jurisdiction." 18 U.S.C. § 1152. While the State Court Action is civil in nature, the Supreme Court has held that the interest of the United States in Indian country is pervasive and has generally applied 18 U.S.C. § 1152 to prohibit state court jurisdiction over all actions arising in Indian County. *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). "For purposes of both civil and criminal jurisdiction, the primary definition of Indian country is 18 U.S.C. § 1151." *Buzzard v. Oklahoma Tax Comm'n*, 992 F. 2d 1073, 1076 (10th Cir. 1993).

Absent Congressional authorization, state courts have no jurisdiction in Indian country. *Williams v. Lee*, 358 U.S. 217, 221 (1959) ("Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction..."); *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254, 1262 (D. N.M. 2013) ("*Santa Ana II*") ("Generally, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country.")

Despite the testimony and exhibits submitted in the State Court Action affirming that the Allotment continues to be held in trust by the United States, Judge Rael found below, and argues here, that the Allotment is not Indian country. Judge Rael first argues that the Patent was issued under the Stock Raising Homestead Act, Act of December 29, 1916 (39 Stat. 862), so the Allotment is not an Indian allotment and second that the United States does not hold the land in trust. Both of assertions are unfounded.

A. The Patent for the Allotment was issued under the Indian Homestead Act.

Although Judge Rael asserts that the history surrounding the issuance of the Patent is "muddled," *Defendant's Motion* at 8, the express terms of the Patent, indicating that it was issued under the Indian Homestead Act, the Act of Congress July 4, 1884, are clear. On its face, the Patent evinces that it was issued pursuant to the Indian Homestead Act:

> WHEREAS, There is now deposited in the Bureau of Land Management of the United States a Certificate of the Land and Survey Office at Santa Fe, New Mexico, whereby it appears that pursuant to the provisions of the Revised Status of the United States, Chapter Five, Title thirty-two, in relation to homesteads on the public lands, and supplemental statues, and of the *Act of Congress of July 4, 1884*, entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes . . .
>
> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and *in accordance with the provision of the said Act of Congress of July 4, 1884*, 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 . . .

Patent, Doc. 1-1 (emphasis added). The Patent's only reference to the Stock Raising Homestead Act is in the final sentence of the reservation clause, which reserves to the United States the right to prospect for minerals pursuant to the "provisions and limitations of the Act of December 29, 1916 (39 Stat. 862)." *Id.* The reservation of such rights to the United States under the Stock Raising Homestead Act does not support the allegation that the Patent was issued under that Act, especially when the language of the Patent makes clear in two separate places that it was issued pursuant to the Indian Homestead Act. Moreover, the stated purpose of the Patent is "fulfilling treaty stipulations with various Indian tribes," *id.*, not stock raising.

Even if the Patent had been issued under the Stock Raising Homestead Act, the Allotment is still Indian country. Although neither the Patent nor the Title Status Report use the term "Indian allotment," the fact that the land is held in trust by the United States for Indian beneficiaries is dispositive. Any land held in trust by the United States for an Indian is considered to be an allotment. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 Ed.) § 16.03[1] ("Allotment is a term of art in Indian Law, describing either a parcel of land owned by the United States in trust for an Indian ("Trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment)."). All Indian homesteads held in trust by the United States are considered "allotments." *U.S. v. Jackson*, 280 U.S. 183, 193 (1930) ("[I]t has long been the settled ruling of the department [sic] of the Interior, both under the very statutes here involved and under other statutes enacted by Congress with similar purpose and pursuant to its general plan with respect to Indian allotments and homesteads, that Indian allotments and Indian homesteads are in all essential respects upon the same footing, and that each is equally within the purview of a statute in which the Congress may use only the terms 'allottee' and 'allotment.'"). Subsequently, when Congress codified the definition of Indian country in 1948, it did so to include "*all* Indian allotments" in recognition that "trust" allotments and Indian homesteads, otherwise known as "restricted" allotments, should be treated identically for virtually all purposes. COHEN, *supra*. (emphasis added).

Finally, whether the Patent was issued under the Indian Homestead Act or the Stock Raising Act is of no consequence. The Allotment is held in trust by the United States and is Indian country pursuant to 18 U.S.C. 1151(c).

B. The Allotment has been Held in Trust by the United States continuously since 1953.

The Allotment has been held in trust by the United States for the benefit of Indian owners since 1953. Judge Rael argues that the trust expired by the terms of the Patent in 1978, twenty-five years after it was issued.[4] *Defendant's Motion* at 10. However, this conclusion ignores the clear status of the trust as evinced by the testimony[5] of the Bureau of Indian Affairs at the September 7, 2016 hearing in the State Court Action and by the two Title Status Reports. Doc. 1-2 ("Tract 791 258921 is held by the United States of America in trust for the land owner(s) with trust interests and/or by the land owner(s) with restricted interests and/or fee simple interests, as listed in Appendix "A" attached to and incorporated in this Title Status Report."); Exhibit A (same).

The Act of June 21, 1906 (34 Stat. pp. 325, 326; USCA tit. 25, Sec. 391) authorizes the President to extend restrictions on the alienation of Indian allotments "for such period as he may deem best." The authority to extend the restrictions on alienation applies to all Indian allotments and homesteads. *Jackson*, supra. The trust period for the Allotment was extended on four occasions. 25 CFR, Appendix, Chapter I:

- Order of the Deputy Assistant Secretary of the Interior, Dec. 7, 1973, extended the trust periods expiring during calendar years 1974 through 1978 for a period of five (5) years. 38 FR 34463 (Dec. 14, 1973);
- Order of the Secretary of the Interior, Nov. 24, 1978, extended the trust periods expiring during calendar years 1979 through 1983 for a period of five (5) years. 43 FR 58368 (Dec. 14, 1978);

[4] The initial trust period for the Allotment would have expired on January 21, 1978, twenty-five years after the Patent was issued on January 21, 1953.

[5] Judge Rael's *Decision Regarding Water Access*, Nov. 14, 2016, (Doc. 18-6) makes no reference to the testimony of the Bureau of Indian Affairs. The transcript of the September 7, 2016 hearing in the State Court Action is not yet available.

- Order of the Secretary of the Interior, Jul. 20, 1983, extended the trust periods expiring during calendar years 1984 through 1988 to January 1, 1989. 48 FR 34026 (Jul. 27, 1983); and

- Order of the Secretary of the Interior, Feb. 23, 1988, extended the trust periods expiring during calendar years 1989 through 1993 to January 1, 1994. 53 FR 30674 (Aug. 15, 1988).o s for a period of five (5) years. 43 FR 58368 (Dec. 14, 1978).

As a result of these Secretarial Orders, the twenty five year limitation in the Patent was extended to January 21, 1993, and in 1990, Congress extended the trust periods indefinitely. COHEN notes:

> The Indian Reorganization Act of 1934 extended restrictions indefinitely for allotments subject to it, and the Secretary of the Interior regularly extended the restrictions on most other allotments. In 1990, Congress applied the indefinite statutory extension to all allotments. As a result, no allotment restrictions are presently expiring by their own terms.

COHEN at § 16.03[4][b].

The Allotment has been held in trust by the United States continuously since 1953 and is Indian country pursuant to 18 U.S.C. § 1151(c). The state court lacked subject matter jurisdiction and Judge Rael is without authority to decide the State Court Action.

III. THIS COURT HAS JURISDICTION TO DETERMINE WHETHER THE STATE COURT ACTION IS PREEMPTED BY FEDERAL LAW AND *YOUNGER* ABSTENTION IS NOT APPROPRIATE

Congress has vested the federal courts with jurisdiction over matters arising in Indian country. 18 U.S.C. § 1152; *Buzzard, supra.* Concomitantly, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country. *Santa Ana II* at 1262, *citing* COHEN 2012 ed. 7.03(1)(a)(ii) at 609; *see* discussion at III *supra*.

This Court has not hesitated to determine whether a state court has properly exercised its state civil adjudicatory authority in Indian country. *See e.g. Santa Ana II* at 1262 (finding that "state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country."). The Tenth Circuit has affirmed determinations made by this Court that state courts lack jurisdiction over pending state court actions. *See Joe v. Marcum*, 621 F.2d 358, 361 (10th Cir. 1980) (concluding that "the action of the federal district court was correct" in its determination that a state court lacked jurisdiction over an ongoing garnishment proceeding in Indian country).

Judge Rael argues that even if there is federal jurisdiction, the Court should abstain from exercising jurisdiction under the rationale of *Younger v. Harris*, 401 U.S. 37 (1971). The Supreme Court, in *Sprint Communications, Inc. v. Jacobs*, recently reviewed both the obligations of the federal courts to decide cases within its jurisdiction and the limited exceptions in which abstention is warranted. As a general proposition, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging'." *Sprint Communications, Inc. v. Jacobs*, __ U.S. __, 134 S.Ct. 584, 586 (2013) *quoting Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Here, there is an ongoing state judicial proceeding. However, as the Supreme Court observed in *Sprint*, "[t]here is no doctrine that ... pendency of state judicial proceedings excludes the federal courts." 134 S.Ct. at 588 *quoting New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989). And whatever the state interests that may exist, resolution of the jurisdictional question implicates the sovereignty of Plaintiff Navajo Nation and the Fourteenth Amendment right of Plaintiff Bitsui to have the matter tried in a court with competent jurisdiction. These issues are "paramount and federal," and appropriate for resolution

by this Court. *Pueblo of Santa Ana v. Nash*, 854 F. Supp. 2d) 1128, 1140 (D N.M. 2012) (*Santa Ana I) citing Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d at 713) ("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country"). In *Santa Ana I*, this Court held that "due to the primacy of th[e] federal jurisdictional issue," the state's interest in the litigation was not "significant enough to justify *Younger* abstention." *Id*. The need for this Court to address the threshold question of whether the state court has subject matter jurisdiction makes application of the *Younger* abstention doctrine inappropriate. *Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 431–32 (9th Cir.1994) (threshold question whether the state had jurisdiction to prosecute was "paramount and federal"); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir.1994) (*Younger* abstention was inappropriate where threshold issue was whether state had jurisdiction to prosecute Indians).

This Court can determine whether the state court has jurisdiction over the pending State Court Action.

IV. THE TERMS OF THE PATENT DO NOT AUTHORIZE STATE COURT JURISDICTION TO ENFORCE VESTED WATER RIGHTS

As previously discussed, when Congress intends to confer state court adjudicatory authority in Indian Country it does so expressly. *Santa Ana II* at 1262. Judge Rael makes a rather circuitous argument that the language of the Patent, issued by the Executive branch and not by act of Congress, by invoking the Mining Act of 1866 confers jurisdiction on the state court to enforce the rights of the acequia. *Defendant's Motion* at 11. The relevant language in the Patent states:

> NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in accordance with the provision of the said Act of Congress of July 4, 1884,

> 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, an, *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, discharged of said trust and free from all charge and encumbrance whatsoever; subject to any vested and accrued water rights for mining, agricultural, manufacturing. or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of the courts . . .*

Doc. 1-1, (emphasis added). There is no language in the Patent that expressly confers jurisdiction on the state court to enforce any vested water rights. On the contrary, the Patent simply provides that the grant of fee title, should it occur in the future, shall be subject to certain vested water rights. As discussed in III.B above, the Allotment continues to be held in trust by the United States and is Indian country. Not until the trust has been discharged will the state court have jurisdiction over the former trust lands and authority to enforce any terms of the Patent. The Patent language relied on by Judge Rael is irrelevant here.

Judge Rael argues that language in the Patent making the land subject to "any vested and accrued water rights" is taken from the Mining Act of 1866, and should be read as a Congressional grant of state court jurisdiction to enforce such rights. *Defendant's Motion* at 11-12.

There is nothing in 43 U.S.C. § 661 that confers jurisdiction to enforce vested water rights on any court, let alone an express grant of state court jurisdiction in Indian Country. The language concerning vested rights was not intended to be a grant of jurisdiction, but "recognition of a pre-existing right of possession, constituting a valid claim to its continued use . . . and to make it clear that the grantees of the United States would take their lands charged with the

existing servitude." *California Oregon Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142, 155 (1935).

Congress was aware that lands allotted out of the public domain for homesteads, Indian or non-Indian, might be subject to vested water rights or rights to ditches; nevertheless, when defining Indian country, Congress expressly recognized "all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same"* as part of Indian country. 18 U.S.C. § 1151(c) (emphasis added). In other words, vested rights of access within the public domain were not intended to be exempted from the Indian country designation.

Finally, Judge Rael argues *Portland Cement* provides authority for state court jurisdiction to enforce water rights that vested in the public domain. In *Portland Cement* the Supreme Court confirmed that the Desert Lands Act of 1877 severed the land in the public domain from the water running through it to give each state the right "to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." *Id.* at 164. The "implied grant of jurisdiction to the state" alleged by Judge Rael in *Defendant's Motion* at 12, was a grant to each western state the right to determine its own "customs, laws and judicial decisions" with respect to water rights, not a grant of jurisdiction to enforce its customs, laws and judicial decisions in Indian country.[6]

There is simply no authority for the proposition that Congress has ever expressly authorized the New Mexico state courts to enforce any rights an acequia may have in Indian Country. There is simply nothing in the Patent, or the Mining Law of 1866, that confers state court jurisdiction to enforce any such rights.

[6] Ironically, the dispute in *Portland Cement* concerning the applicable water law in Oregon was brought in the Federal District Court in Oregon.

V. "EXCEPTIONAL CIRCUMSTANCES" DO NOT FORM THE BASIS FOR STATE COURT JURISDICTION.

Judge Rael makes the alternative argument that "exceptional circumstances" warrant state court jurisdiction over tribal members even in the absence of express Congressional authority to do so. *Defendant's Motion* at 12-13. For this proposition Judge Rael cites *Gobin v. Snohomish Cty.*, 304 F.3d 909, 917 (9th Cir. 2002) and *California v. Cabazon Band of Mission Indians*, 420 U.S. 202, 214-15 (1987), but neither case provides support the assertion that state *adjudicatory* jurisdiction in Indian country can be justified without Congressional authorization due to "exceptional circumstances."

In *Gobin*, Snohomish County attempted to assert land use regulatory jurisdiction, not state adjudicatory jurisdiction, over fee land owned by a tribal member located within the reservation of the Tulalip Tribe. The County conceded it did not have jurisdiction over lands held in trust within the Reservation, but claimed an "exceptional interest" to regulate the fee parcel. The Ninth Circuit found that the tribe's strong interests in self-determination and self-government outweighed the County's claimed "exceptional interest" in land use regulation . *Gobin* at 917. Nevertheless, even if the Ninth Circuit had recognized an "exceptional interest" in the County to assert regulatory jurisdiction, there is nothing in the opinion that suggests that such authority could be enforced within Indian county in a state court proceeding absent Congressional authorization.

Similarly, in *Cabazon*, the State of California sought to impose state gaming regulatory laws over on-reservation casinos alleging that jurisdiction was necessary to prevent "the infiltration of the tribal games by organized crime." 420 U.S. at 221. The Supreme Court rejected California's assertion of regulatory jurisdiction, finding that "the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state

regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them." *Id.* at 221-22. Again, even if the Supreme Court had found that the State of California could regulate on-reservation casinos, there is nothing in *Cabazon* that suggests that the State could enforce such regulations in state court absent authorization from Congress.

Judge Rael does not cite any authority for the proposition that state courts may exercise jurisdiction over matters arising in Indian country without Congressional authorization due to "exceptional circumstances," or for any other reason, because such authority does not exist. *Santa Ana II* at 1262. ("Generally, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country.")

VI. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE PLEADINGS

Plaintiffs seek declaratory relief from this Court that the Allotment is Indian country and that New Mexico state courts do not have jurisdiction over actions arising on the Allotment. *Amended Complaint* at 6. Concomitantly, Plaintiffs seek an order declaring that Defendant Judge Pedro G. Rael cannot exercise jurisdiction over the State Court Action and that Defendant District Attorney Lemuel L. Martinez has no authority to initiate the State Court Action or any other state court action against Plaintiff Bitsui for alleged wrongful acts occurring on the Allotment. *Id*.

The Plaintiffs and the Defendants agree that this litigation centers on a question of law, specifically whether the state court has subject matter jurisdiction over the State Court Action. *See Defendant's Motion* at 5, ¶ II; *see also Order Setting Hearing on Request for Injunctive Relief* (Doc.4) at 2 ("To what extent can a federal court determine whether a state court has jurisdiction over a case pending in that court?"). As discussed in Section IV above, the need for this Court to address the threshold federal question of whether the state court has subject matter

jurisdiction makes application of the *Younger* abstention doctrine inappropriate. Accordingly, this Court should determine whether the state court has jurisdiction over the pending State Court Action.

Plaintiffs have demonstrated that the Allotment is held in trust by the United States for the benefit of Plaintiffs and other beneficial owners. Consequently, the Allotment is Indian country and the state court lacks jurisdiction over actions arising thereon. Congress has not granted authority to the courts of the State of New Mexico to assume jurisdiction over the Allotment. The State Court Action threatens the sovereignty of Plaintiff Navajo Nation in Indian country and the Fourteenth Amendment right of Plaintiff Bitsui to have the claims asserted against him tried in a court with competent jurisdiction.

Plaintiffs are entitled to Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c) and the relief requested in the Amended Complaint.

Respectfully submitted this 17th day of January, 2017.

NAVAJO NATION DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I certify that on January 17, 2017, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ *Stanley M. Pollack*
Stanley M. Pollack