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 RESPONSE TO
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS[1]

Plaintiffs ask the Court to stop an enforcement action, pending in the New Mexico Court of Appeals, to protect the State's centuries-old water rights. Where a water rights lawsuit is pending in state court, this Court should abstain from deciding the same issues. If the Court does decide whether New Mexico's courts have jurisdiction over the water rights enforcement action, it should find that such jurisdiction exists.

The land across which the acequia at issue travels was issued to Plaintiffs' predecessors-in-interest under the Stock-Raising Homestead Act, and therefore is not Indian Country. Plaintiffs' repeated invocations to the Bureau of Indian Affairs' Title Status Report cannot refute the contrary—and controlling—evidence of the

[1] Pursuant to the Stipulated Briefing Schedule in this case (ECF Nos. 15, 17, & 19),

patent for the land. Furthermore, even if the acequia did cross Indian Country, state-court jurisdiction would be proper given the unique issues of water law involved. The language of the patent, coupled with federal statutes, permits state courts to adjudicate the water rights reserved in the patent. Finally, the preservation of an ancient acequia system, needed for the irrigation of a desert state, presents the "exceptional circumstances" warranting jurisdiction, even if all other bases for jurisdiction fall short.

Plaintiffs' reliance on general Indian law preemption doctrines fails to grapple with the particular facts and circumstances of this case. As the Supreme Court has recognized while addressing Indian sovereignty: "[W]ater rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions. *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983).

I. The Court Should Abstain From Deciding the Same Issues Pending in the New Mexico Court of Appeals.

The State Court Action[2] that is the subject of this lawsuit is now pending in the New Mexico Court of Appeals. (Pls.' Am. Mot. J. Pleadings ("Plaintiffs' Motion, ECF No. 25) at 4.) The same challenges to state court jurisdiction that are raised here are being litigated in the State Court Action. (Judge Rael's Motion at 3-4.) The Court should abstain from acting as an appellate court, reviewing Judge Rael's

[2] A summary of the State Court Action is provided in Judge Rael's Amended Motion for Judgment on the Pleadings ("Judge Rael's Motion," ECF No. 21) at 2-5.

determination that he has jurisdiction over the civil enforcement action against Curtis Bitsui.

Plaintiffs' arguments that abstention is not warranted where a state court asserts jurisdiction over an action arising in Indian Country do not acknowledge the distinguishing features of water rights litigation. (*See* Plaintiffs' Motion at 9-11.) Initially, Plaintiffs' argument assumes the judgment they seek: per Plaintiffs' authority, only if the state court lacks jurisdiction is a federal declaratory judgment action proper. Judge Rael asks the Court, pursuant to *Younger v. Harris*, not to make this determination in the first place.

Furthermore, the cases Plaintiffs rely upon to argue that *Younger* abstention is not required do not involve the facts at issue here: a pending appeal to determine the enforceability and protection of state water rights. In *Pueblo of Santa Ana v. Nash*, the New Mexico Supreme Court already had issued an opinion and the case involved gaming regulations, not water rights that pre-date the State itself. 854 F. Supp. 2d 1128, 1132 (D.N.M. 2012); *id.* at 1141-42 (explaining state interests at issue). *Joe v. Marcum* does not address abstention at all, and involved a final garnishment judgment that had already been entered in the state court. 621 F.2d 358, 360 (10th Cir. 1980). *Sycuan Band of Mission Indians v. Roache* involved a prosecution that appears to have been enjoined before it commenced, and also concerned state gaming regulations. 54 F.3d 535, 537 (9th Cir. 1994). Lastly, in *Fort Belknap Indian Community v. Mazurek*, the state court ruling regarding its liquor

laws already had reached and been decided by the Montana Supreme Court. 43 F.3d 428, 430 (9th Cir. 1994).

In contrast to these cases, the State Court Action involves a uniquely critical state interest—the water that is the lifeblood to New Mexico's residents and the agriculture that feeds them. (*See* Judge Rael's Motion at 7.) Not only do water rights constitute an important state interest for the *Younger* abstention inquiry, but water rights are an area where the Supreme Court has recognized that states have a special interest in applying and enforcing their own laws. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 810-11 (1976)[3] ("'In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof….'" (quoting S. Rep. No. 755, 82d Cong., 1st Sess., at 2)); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-65 (1935) (describing state authority to determine water laws). Given this strong state interest and the harms of interfering with pending state court proceedings, *Younger* abstention is merited.

II. Because the Acequia Is Not in Indian Country, State Court Jurisdiction Is Proper.

Plaintiffs' entire case is premised on the contention that the acequia at issue in the State Court Action is part of Indian Country. Plaintiffs appear not to contest

[3] Although the *Colorado River* abstention doctrine reflects the strong state interest in the enforcement of water laws and general principle against federal court involvement in such actions, Judge Rael does not argue for abstention under *Colorado River*—as opposed to *Younger*—because the State Court Action is not a water rights adjudication. It is a water rights enforcement action.

that if the acequia is not part of Indian Country, a civil enforcement action can be brought against Mr. Bitsui in state court. Instead, Plaintiffs rely extensively on the Title Status Report created by the Bureau of Indian Affairs, describing the subject property as being held in trust by the United States for Mr. Bitsui and others. (Plaintiffs' Motion at 4, 5, 8.) However, the Title Status Report is not a definitive statement of property rights and must yield to the terms of the actual patent it describes.

The patent itself reflects that Plaintiffs' property rights derive from the Stock-Raising Homestead Act, not the Indian Homestead Act. (Judge Rael's Motion at 7-10.) Although the historical record is mixed, the strongest evidence suggests that a Stock-Raising Homestead patent was issued. In particular, the number of acres issued in the patent was too large to be issued under the Indian Homestead Act—a fact Plaintiffs do not refute. (*Id.* at 9.) As well, while different forms and language were used in the application process—referencing both the Stock-Raising and Indian Homestead Acts—the Bureau of Land Management decision awarding the patent states that the patent is being issued "in connection with the stockraising homestead entry." (*Id.* at 8-9.) Finally, even if the patent is some sort of hybrid grant pursuant to both laws, the reservation of water rights is specifically made pursuant to the Stock-Raising Homestead Act. (*Id.* at 9-10.) Therefore, the patent should be considered a stock-raising patent at least as concerns water rights.

Plaintiffs argue that the language of the patent suggests that it was issued pursuant to the Indian Homestead Act. (Plaintiffs' Motion at 6.) However, the

patent also references the Stock-Raising Homestead Act ("the Act of December 29, 1916 (39 Stat. 862)"). (Compl. Injunctive & Decl. Relief, Ex. A (ECF No. 1-1).) The fact that this reference is contained in the section of the patent regarding water rights, rather than the introductory language, supports the conclusion that the Stock-Raising Homestead Act governs the reserved water rights in the acequia. Additionally, Plaintiffs' contention that "the stated purpose of the Patent is 'fulfilling treaty stipulations with various Indian tribes,'" Plaintiffs' Motion at 6, is not supported by the language of the patent. The quoted language is part of the title of the Indian Homestead Act, not a declaration of the patent's purpose. (Compl. Injunctive & Decl. Relief, Ex. A (ECF No. 1-1).)

Because the patent and its supporting documents reference both the Stock-Raising Homestead Act and the Indian Homestead Act, it cannot be determined by their language alone under which act the patent was issued. *See United States v. Krause*, 92 F. Supp. 756, 763-64 (W.D. La. 1950) (although "some of the paper work, some of the original applications, etc., behind these patents, referred to the Act of July 4, 1884, and served as the basis for the patents; nevertheless, there was legal issuance of the patents under the general homestead laws…."). For the reasons discussed above—including, crucially, that the 177.82 acres conveyed by the patent could not have been legally accomplished by the Indian Homestead Act—the Court should conclude that the patent, or at least its reservation of water rights, was made under the Stock-Raising Homestead Act.

Because the patent was issued under the Stock-Raising Homestead Act, the subject property is not Indian Country and Judge Rael properly had jurisdiction over the State Court Action. Homesteads created under the general homestead laws (including the Stock-Raising Homestead Act) are not Indian allotments. The case Plaintiffs' cite to the contrary, *United States v. Jackson*, makes this exact distinction. In *Jackson*, the Supreme Court explained that the Act of June 21, 1906, which allowed the President to extend restrictions on alienations on patents, did not extend to Indians making claims under the general homestead laws when mentioning "allotments:"

> "Our inquiry is whether Congress intended to include within the meaning of the word 'allottees' as used in the latter act, Indian wards of the United States holding homestead lands by virtue of the act of 1884. It is argued that Congress did so intend, but that the legislators used only the term 'allottee' and did not add 'or Indian homesteader' because, while such addition would have prevented the question here involved from arising, it would have added further confusion for the reason that the language is too broad and would include as well as tribal Indians claiming as wards of the United States under the act of 1884, Indians claiming as citizens—not as Indian wards—under the general homestead laws."

280 U.S. 183, 192-93 (1930). Therefore, the Court concluded by holding that:

> "Nothing herein contained must be taken as intimating that the Act of June 21, 1906, has any application to the acquisition of homestead rights under the general homestead laws by persons of the Indian race who have acquired or seek to acquire such rights as citizens rather than as Indian wards of the United States."

Id. at 197. General allotments, that happen to be made to a tribal member, are not "Indian allotments" for the purpose of 18 U.S.C. § 1151.

Plaintiffs' contention that the property is held in trust by the United States according to the Bureau of Indian Affairs' Trust Status Report must yield to evidence from the patent itself that the patent was issued pursuant to the Stock-Raising Homestead Act. The Trust Status Report is the opinion, based on incomplete research, of a government agency. A patent is "the most accredited type of conveyance known to our law." *United States v. Creek Nation*, 293 U.S. 103, 111 (1935). That is, "'[a] patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which the holder can rely for peace and security in his possession.'" *Murphy v. Burch*, 205 P.3d 289, 294 (Cal. 2009) (quoting *Brown v. Northern Hills Regional R.R. Auth.*, 732 N.W.2d 732, 739 (S.D. 2007)).

Finally, because the patent was issued pursuant to the Stock-Raising Homestead Act, even if a trust was properly created by the United States in 1953, it expired after 25 years. As Plaintiffs' note, the presidential authority to extend restrictions on the alienation of Indian allotments in the Act of June 21, 1906 (codified at 25 U.S.C. § 391). (Plaintiffs' Motion at 8.) The Supreme Court ruled in *Jackson v. United States* that homesteads provided to tribal members under the general allotment laws are not subject to this authority. *Jackson*, 280 U.S. at 197; *see supra* p. 8. The orders of the Secretary of the Interior to which Plaintiffs cite to not apply to the patent at issue here.[4] *See, e.g.,* 38 FR 34463-02 (Dec. 14, 1973)

[4] Judge Rael does not dispute that, if the patent was issued pursuant to the Indian Homestead Act, that the 25-year trust period was extended by the executive actions cited in Plaintiffs' Motion. (Plaintiffs' Motion at 8-9.)

(covering "any patent applying to Indian lands, whether of a tribal or individual status"). And after any trust expired, the land ceases to be Indian Country. (Judge Rael's Motion at 10-11.)

The property across which the acequia in the State Court Action crosses is not part of Indian Country. It was granted to Plaintiffs' predecessors-in-interest as under the Stock-Raising Homestead Act, and not as an Indian allotment. Therefore, Judge Rael properly determined that he had jurisdiction over the State Court Action, which did not arise in Indian Country.

III. Even If the Property the Acequia Crosses Is Indian Country, State Court Enforcement of the Water Rights in the Acequia Is Proper.

The patent's express reservation of water rights and "rights to ditches" is enforceable in state court. This language in the patent is derived from the Mining Act of 1866, as codified at 43 U.S.C. § 661. (Judge Rael's Motion at 11-12.) This statute, coupled with the complementary McCarran Amendment, 43 U.S.C. § 666, preempts federal law and provides for state court jurisdiction over the water rights in the acequia. Lastly, were these statutory provisions insufficient to create state court jurisdiction, the Court should permit such jurisdiction given the "exceptional circumstances" of an enforcement effort to protect an ancient irrigation system.

43 U.S.C. § 661 provides that "[a]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights…." That is, any federal preemption of state water laws—including because they are being

applied in Indian Country—yields to the water rights created in the patent. This principle was recognized by a federal court interpreting 43 U.S.C. § 661, which in denying the United States' motion to dismiss reasoned: "[T]he plain language of the federal statute allows for the accrual and vesting of rights as recognized and acknowledged by [state] customs, laws and court decisions; the statute expressly provides in relevant part that '[a]ll ... preemption ... shall be subject to any vested and accrued water rights, or rights to ditches….'" *Luciano Farms, LLC v. United States*, No. 2:13-CV-02116-KJM-AC, 2014 WL 1912356, at *9 (E.D. Cal. May 13, 2014). Therefore, the court rejected (at the motion-to-dismiss stage) the United States' attempt to apply federal regulations contrary to state law. *Id.*

The McCarran Amendment, contained in the same chapter of the U.S. Code as 43 U.S.C. § 661, waives sovereign immunity and federal preemption arguments "in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights…." 43 U.S.C. § 666(a). The Amendment provides that "[t]he United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction…." *Id.*

In *Arizona v. San Carlos Apache Tribe*, the Supreme Court held that the McCarran Amendment's conferral of state jurisdiction over water adjudication and administration applied extended to jurisdiction over Indian tribes. 463 U.S. 545

(1983). "[W]hatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights," the Court explained, "those limitations were removed by the McCarran Amendment." *Id.* at 564. Thus, the Court concluded, it is proper for a federal court to abstain from deciding a pending state court water adjudication, even if it involves Indian water rights. *Id.* at 569-70.

Although the State Court Action is not a water rights adjudication in the guise of *Colorado River*, the McCarran Amendment's conferral of state court jurisdiction still covers the case. First, as noted above, federal preemption of state law is subject to the reserved rights to the acequia, under 43 U.S.C. § 661. Second, the McCarran amendment applies both to suits for the adjudication of water rights *and for the administration* of such rights, which the enforcement action is. 43 U.S.C. § 666(a). Finally, as recognized by the Nevada Supreme Court, a tribe's purchase of water rights that are subject to—and have been subject to—state court jurisdiction, constitutes a waiver of sovereign immunity in actions for the enforcement of such water rights. *S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev. v. Sixth Jud'l Dist. Court ex rel. Cty. of Humboldt*, 7 P.3d 455, 458 (Nev. 2000).

If all other bases for state court jurisdiction falter, the Court should find that "exceptional circumstances" merit such jurisdiction. (Judge Rael's Motion at 12-13.) Plaintiffs contend that the cases cited for this proposition entail state regulatory jurisdiction, rather than state adjudicatory jurisdiction. (Plaintiffs' Motion at 14-

15.) Yet concomitant with the ability for a state to regulate activities on Indian Country—including, here, the water that passes through it—is the ability to enforce such regulations.

Furthermore, the state interests suggested by the Supreme Court as to what would constitute "extraordinary circumstances" are the same, scarce natural resources at issue here. In *New Mexico v. Mescalero Apache Tribe*, the Court stated that "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." 462 U.S. 324, 331-32 (1983). For this proposition, the Court cited to *Puyallup Tribe v. Wash. Game Dept.*, 433 U.S. 165 (1977), and noted the state's interest in conserving a scarce, common resource (there, an endangered species). *Mescalero Apache Tribe*, 462 U.S. at 332, n.15.

Here, New Mexico has sought to protect its scarce water, channeled for irrigation in acequias dating to the 17th Century.[5] The enforcement of these water rights is a "virtually unique type of proceeding" under "virtually unique federal statute[s]," that merits state court jurisdiction, even where such jurisdiction would ordinarily not exist. *San Carlos Apache Tribe*, 463 U.S. at 571. Therefore, Judge Rael respectfully requests that the Court enter judgment in his favor, finding that Plaintiffs are not entitled to declaratory judgment.

Respectfully submitted,

HECTOR H. BALDERAS
NEW MEXICO ATTORNEY GENERAL

[5] For a history of New Mexico's acequias, see "Water Matters!, ch. 4, *available at* http://uttoncenter.unm.edu/pdfs/water-matters-2015/04_Acequias.pdf (last checked Feb. 8, 2017).

/s/ Nicholas M. Sydow

Nicholas M. Sydow
Rebecca A. Parish
Assistant Attorneys General
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Tel.: (505) 717-3571
Fax: (505) 490-4881
nsydow@nmag.gov
rparish@nmag.gov

Counsel for the Hon. Pedro G. Rael

CERTIFICATE OF SERVICE

I certify that on February 8, 2016, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Nicholas M. Sydow
Nicholas M. Sydow