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' RESPONSE
TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs Navajo Nation and Curtis Bitsui, respond to *Judge Rael's Corrected Response to Plaintiff's Motion for Judgment on the Pleadings* (Doc. 29) ("Rael Response"). Judge Rael continues to insist, without basis, that the Allotment owned by the United States and held in trust for Plaintiffs was issued under the Stock-Raising Act; that the Allotment is not Indian Country; and the State Court Action is justiciable. Further, the Rael Response introduces the new and novel argument that even if the Allotment were Indian Country, the State Court Action is a "water rights enforcement action" and the McCarran Amendment both waives the sovereign immunity of the United States and preempts federal law so that the State Court Action may proceed. Rael Response at 1-2. These arguments fail for the reasons set forth below, and Plaintiffs are entitled to a declaration that the state court lacks subject matter jurisdiction over matters arising on an Indian allotment held in trust by the United States.

I. THE TRUST PATENT FOR THE ALLOTMENT WAS ISSUED UNDER THE INDIAN HOMESTEAD ACT AND IS INDIAN COUNTRY

The provenance of the Allotment is clear - the express terms of Patent 1137487 (Doc. 1-1) ("the Trust Patent") affirm that it was issued under the 1884 Indian Homestead Act, the Act of Congress July 4, 1884 (23 Stat. 96) ("1884 Indian Homestead Act")[1] and that the Allotment was to be held in trust by the United 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 . . .

Doc. 1-1 (emphasis added). The Allotment continues to be held in trust by the United States by virtue of the Act of June 21, 1906, (36 Stat. 182) ("1906 Act"),[2] four executive orders issued pursuant to that Act, and 25 U.S.C. § 478-1, by which Congress in 1990 extended the trust period indefinitely for all Indian allotments. *See Plaintiffs' Amended Motion for Judgment on the Pleadings* ("Plaintiffs' Motion") (Doc. 25) at 8-9.

The fact that the Allotment is held in trust by the United States is evinced by the Bureau of Indian Affairs Title Status Reports. Doc. 1-2 and Appendix "A" attached to Plaintiffs' Motion. The fact that the Navajo Nation is a beneficial owner of the Allotment is further evidence of the Allotment's trust status; the Nation was able to acquire its interest in the Allotment precisely because it is held in trust by the United States and therefore eligible for acquisition pursuant the Department of Interior's Land Buy Back Program. *See* Plaintiffs'

[1] For the convenience of the Court, the Act of July 4, 1884, 23 Stat. 96, ("1884 Indian Homestead Act") is appended here as "Attachment 1."

[2] For the convenience of the Court, the Act of June 21, 1906, 36 Stat. 182, ("1906 Act") is appended here as "Attachment 2."

Motion at 4. In the end, whether the Trust Patent was issued pursuant to the Indian Homestead Act or the Stock-Raising Homestead Act is irrelevant - the Allotment is held in trust by the United States and state court jurisdiction is preempted.

Judge Rael's contention that the Allotment is not Indian Country is predicated on his insistence that the Trust Patent was issued under the Stock-Raising Homestead Act; [3] and that the President was not authorized to extend the trust period for such patents. Rael Response at 4-9. The language of the Trust Patent is clear and dispositive; nonetheless, Judge Rael relies on the reference in the last sentence of the Patent to the Act of December 29, 1916, reserving the mineral estate to the United States, as proof that the Trust Patent was issued under the Stock-Raising Homestead Act, despite the two prior and clear statements of authority under the Indian Homestead Act, to the contrary.

The language of the Trust Patent largely incorporates the language of the 1884 Indian Homestead Act, which requires that patents issued under that Act be held in trust by the United States:

> All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

Act of Congress July 4, 1884, 23 Stat. 96 (emphasis added). Similarly, the terms of the Trust Patent state:

[3] For the convenience of the Court, the Stock-Raising Homestead Act, Pub. L. 64-290, 39 Stat. 862 (Dec. 29, 1916) ("Stock-Raising Homestead Act") is appended here as "Attachment 3."

> 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 were such land is located, and at the expiration of said period the United States will convey the same by patent to said Widow and Heirs of Francisco Pieseto in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

Doc. 1-1.

In contrast to the 1884 Indian Homestead Act, there is no authority in the Stock-Raising Homestead Act authorizing lands to be held in trust for *any* period. Instead the Secretary of the Interior has authority to designate 640 acre parcels as "stock-raising lands":

> That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family. . . .

Stock-Raising Homestead Act (emphasis added). Lands designated for stock-raising were intended to be in parcels of six hundred and forty (640 acres), because such lands were not susceptible of irrigation and large parcels would be needed to support stock-raising. *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1277 (9th Cir. 1977) ("[T] he public lands involved were semi-arid, an area of 640 acres was required to support the homesteader and his family by raising livestock.") The Trust Patent for the Allotment was for only 177.82 acres, [4] substantially less than the patents authorized by the Stock-Raising Homestead Act. However, Judge Rael argues that because the "number of acres issued in the patent was too large to be

[4] A map of the Allotment, an odd-shaped triangular parcel, is appended here as "Attachment 4."

issued under the Indian Homestead Act," it must have been issued under the Stock-Raising Homestead Act, despite the language in the Trust Patent to the contrary. Rael Response at 5.

The size of the Allotment is not dispositive of its provenance under the Indian Homestead Act– that act does not specify a limit to the size of an allotment. The 1884 Homestead Act provided that "such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States." *Judge Rael's Amended Motion for Judgment on the Pleadings* alleges that patents issued under the Indian Homestead Act were limited to 160 acres, but his authority is 25 U.S.C. § 336,[5] not the Indian Homestead Act. *Id.* at 9. The appropriate source for any limitation in the size of Indian homesteads granted pursuant to the 1884 Indian Homestead Act is the 1862 Homestead Act, Pub. L. 37-64, 12 Stat. 392 (May 20, 1862),[6] as amended. While originally providing for homesteads on the public domain limited to 160 acres, *id.* at § 1, the 1909 Enlarged Homestead Act, Act of February 19, 1909, 35 Stat. 639, [7] made special provision for the arid conditions of the west, including New Mexico, by authorizing "enlarged homesteads" of 320 acres. Accordingly, the size of the Allotment is consistent with the general homestead laws incorporated by reference in the 1884 Indian Homestead Act, and supports rather than undermines Plaintiffs' arguments that the Allotment was granted under the 1884 Indian Homestead Act.

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[5] 25 U.S.C. § 336 recites that it codifies the Act of Feb. 28, 1891, ch. 383, § 4 (26 Stat. 795), the Act of June 25, 1910, ch. 431, § 17 (36 Stat. 860), and the 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876 (60 Stat. 1100).

[6] For the convenience of the Court, the 1862 Homestead Act, Pub. L. 37-64, 12 Stat. 392 (May 20, 1862) is appended here as "Attachment 5."

[7] For the convenience of the Court, the 1909 Homestead Enlargement Act, Act of February 19, 1909, 35 Stat. 639, is appended here as "Attachment 6."

Finally, Judge Rael argues that *United States v. Jackson*, 280 U.S. 183 (1930), provides authority for his proposition that the Act of June 21, 1906 did not vest the President with authority to extend the period for restrictions on alienation of the Allotment. Rael Response at 7-8. The 1906 Act amended the General Allotment Act and provides in relevant part:

> That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best . . .

The issue in *Jackson* was whether Congress' use of the term "Indian allottee" in the 1906 Act applied to allotments created under the Indian Homestead Act as well as allotments created under the General Allotment Act for purposes of the President's authority to extend the restrictions upon alienation of the allotment. The Supreme Court confirmed that "the Indian Homestead Act of July 4, 1884, and the General Allotment Act of February 8, 1887, with its various amendments, constitute part of a single system evidencing a continuous purpose on the part of the Congress;" therefore, the President has authority to extend restrictions on the alienation on patents issued under the Indian Homestead Act. 280 U.S. at 196. Judge Rael's reliance on d*icta* in the penultimate paragraph of *Jackson* that "the Act of June 21, 1906, has [no] 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," 280 U.S. at 197 (emphasis added), is unavailing. The Court in *Jackson* was simply distinguishing between entries made by Indians pursuant to statutes enacted for the benefit of Indians seeking to establish homesteads on the public domain, whether in the Indian homestead acts or Indian allotments acts, to which the 1906 Act was found to apply, and entry by Indians pursuant to the general homestead laws, where the 1906 Act had no application. Plaintiff

Bitsui acquired his interest in the Allotment pursuant to the Indian homestead laws, and the language in *Jackson* on which Judge Rael relies has no more application here than it did in the case before the Court in that instance. Contrary to the assertions of Judge Rael, the decision in *Jackson* confirms that the 1906 Act vested the President with authority to extend the trust period for the Allotment, which was done on four occasions; the trust period was extended indefinitely by Congress in 1990. The Allotment continues to be held in trust by the United States.

The Allotment is "Indian Country" as defined in 18 U.S.C. § 1151(c), and absent Congressional authorization, state courts have no jurisdiction in Indian country. *See* Plaintiffs' Motion (Doc. 25) at 4-5. Further, the Act of May 8, 1906 (34 Stat. 182) [8] amended the General Allotment Act to provide "[t]hat until issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States. The retention of federal jurisdiction applies equally, under the rationale of *Jackson*, to the Allotment, which was acquired under the 1884 Indian Homestead Act. *See* 34 Stat. 182, codified at 25 U.S.C. § 349. Plaintiffs do not possess fee-title patents for the Allotment, which remains under the exclusive jurisdiction of the United States.

II. THE McCARRAN AMENDMENT DOES NOT VEST THE STATE COURT WITH JURISDICTION OVER AN ALLEGED TRESPASS IN INDIAN COUNTRY

Judge Rael seeks to recast the trespass claim in the State Court Action as a water rights "enforcement action" in an attempt to avail himself of the "McCarran Amendment's conferral of state court jurisdiction." Rael Response at 11. Judge Rael's reliance on the McCarran Amendment is misplaced. It is true that the McCarran Amendment, 43 U.S.C. § 666, is an

[8] For the convenience of the Court, the Act of May 8, 1906, 34 Stat. 182, is appended here as "Attachment 7."

express waiver of the sovereign immunity of the United States, permitting the adjudication of Indian water rights held in trust by the United States in comprehensive state water rights adjudications. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 548-49 (1983). However, the McCarran Amendment is a limited waiver, applicable only to general or comprehensive stream adjudications. *United States v. Idaho*, 508 U.S. 1 (1993) ("The McCarran Amendment allows a State to join the United States as a defendant in a comprehensive water right adjudication."). A comprehensive water right adjudication requires joinder of "all of the claimants to water rights along the river." *Dugan v. Rank*, 372 U.S. 609, 618 (1963); *see also United States v. State of Oregon*, 44 F.3d 758, 769 (9th Cir. 1994) ("These cases [*Idaho* and *Dugan*] make clear that the adjudication must include the undetermined claims of all parties with an interest in the relevant water source.")

The State Court Action is not a "comprehensive state water rights adjudication;" therefore, the McCarran Amendment does not vest the state court with jurisdiction and federal abstention is not warranted. Consistent with the requirements of the McCarran Amendment, a general stream adjudication in New Mexico must include "all those whose claim to the use of such waters." NMSA 72-4-17. The State Court Action seeks to enforce a right of access to a ditch; it does not seek a determination of "all those who claim the rights to use water within the stream system," or even the water rights of the San Jose De la Cienega Community Ditch or the Allotment.[9]

The Allotment is located within the Rio San Jose basin in New Mexico, which is the subject of the general stream adjudication *State of New Mexico ex rel. State Engineer v. Kerr-*

[9] The State Court Action was not brought pursuant NMSA Title 72 pertaining to Water Rights, instead it was brought pursuant to NMSA Title 73 pertaining to Special Districts. Complaint (Doc 1-3) at ¶3 ("The State has authority to bring this action under NMSA 1978, Sections 73-2-4, 73-2-5, 73-2-6 and 73-2-64.").

McGee Corporation, et al., Nos. CB-83-190-CV and CB-83-220-CV (Consolidated) (13 Jud. Dist. NM). This Court has held that the *Kerr-McGee* general stream adjudication is "sufficiently comprehensive" to join the federal interests pursuant to the McCarran Amendment. *U.S. v. Bluewater-Toltec Irr. Dist*. 580 F. Supp. 1434, 1438 (D. NM. 1984). However, the State Court Action was not brought as part of the general stream adjudication.

Judge Rael's claim that the State Court Action is an "enforcement action" of water rights is also contrary to New Mexico law, which provides that:

> The court in which any suit involving the adjudication of water rights may be properly brought *shall have exclusive jurisdiction* to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved;

NMSA 72-4-17 (emphasis added). In other words, even if the State Court Action was intended to be an "enforcement action" of water rights, Judge Rael lacked jurisdiction to enforce such water rights under New Mexico law.

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

This Court has jurisdiction to determine whether a state court has properly exercised its civil adjudicatory authority in Indian country. *See* Plaintiffs' Motion at 9-11. 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. *Id.* Judge Rael's response to Plaintiffs' analysis is that it did not "acknowledge the distinguishing features of water rights litigation." Rael Response at 3. As discussed in II, *supra*, even if the State Court Action can be re-characterized as "water rights litigation," that Action does not satisfy the requirements of the McCarran Amendment or New Mexico law for a general stream adjudication.

Regardless of any state interests allegedly implicated in the State Court Action, 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). This Court can and should determine whether the state court has jurisdiction in the pending State Court Action.

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 27th day of February, 2017.

NAVAJO NATION DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I certify that on February 27, 2017, I served the foregoing on counsel of record for all parties via the CM/ECF system.

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