

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' REPLY TO DEFENDANT MARTINEZ' RESPONSE
TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs Navajo Nation and Curtis Bitsui reply¹ to *Defendant Martinez' Response to Plaintiffs' Motion for Judgment on the Pleadings* (ECF No. 27) (“Martinez Response”).

**I. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE PLEADINGS
AGAINST DEFENDANT MARTINEZ**

District Attorney Martinez brought criminal and civil actions in state court arising out of Indian Country. Plaintiffs are entitled to a declaration from this Court that District Attorney Martinez has no authority to pursue the State Court Action or take any other legal action in state court arising from the Allotment. This action does not seek either money damages from or injunctive relief against District Attorney Martinez, instead Plaintiff Bitsui brings this action

¹ The *Second Unopposed Motion to Amend Stipulated Briefing Schedule* (ECF No. 26) provides that the deadline for Plaintiffs' Response is February 29 [March 1], 2017. In substance, *Plaintiffs' Amended Motion for Judgment on the Pleadings* (ECF No. 25) was also a response to *Judge Rael's Amended Motion for Judgment on the Pleadings* (ECF No.18). Defendant Martinez filed a *Notice of Joinder in Defendant Rael's Amended Motion for Judgment on the Pleadings* (ECF No. 22). Since this “response,” permitted by the briefing schedule is substantially a reply to the Martinez Response, it is designated as a “reply.”

alleging that “under color of state law, and without jurisdiction over the subject matter of the lawsuit” in the State Court Action, Defendant Martinez violated 42 U.S.C. § 1983. Amended Complaint (ECF No. 5) at 5. District Attorney Martinez does not enjoy absolute prosecutorial immunity in actions seeking declaratory relief pursuant to 42 U.S.C. § 1983.

The Martinez response relies on *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) and *Imbler v. Pachtman*, 424 U.S. 409 (1976) for the proposition that District Attorney Martinez has “absolute immunity.” Martinez Response at 1. Neither case supports the proposition that prosecutors are immune from suits seeking non-monetary relief. In both cases, the plaintiffs sought monetary relief pursuant to 42 U.S.C. § 1983 alleging damages as a result of actions taken by prosecutors. Although the Supreme Court held in both cases that the prosecutors were immune from monetary liability, the Supreme Court did not extend such “absolute liability” to shield the prosecutors from non-monetary liability. In *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, the Supreme Court confirmed although prosecutors enjoy absolute immunity from monetary damages, *Imbler* is not a bar against suits seeking injunctive relief or declaratory judgments against prosecutors in actions essential to protect civil rights. 446 U.S. 719 (1980):

Prosecutors enjoy absolute immunity from damages liability, *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), is only one of a myriad of such cases since *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. *If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims.*

446 U.S. at 736-37 (emphasis added). New Mexico courts are in accord, recognizing that declaratory judgments against prosecutors are actionable in suits brought pursuant to 42 U.S.C. § 1983:

Because of absolute prosecutorial immunity, Defendant cannot be sued for monetary damages. *See Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). Instead, Plaintiff seeks a declaratory judgment, which is not precluded by prosecutorial immunity, declaring that his civil rights were violated by Defendant's past conduct. *See Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 736-37, 100 S.Ct. 1967, 1977, 64 L.Ed.2d 641 (1980).

Johnson v. Lally, 887 P.2d 1262, 1264, 118 N.M. 795, 796, 1994-NMCA-135, ¶1 (1994).

This action, filed pursuant to 42 U.S.C. § 1983, seeks a declaratory judgment² that Defendant Martinez has no authority to take action in the State Court Action or in any other legal action in state court against Plaintiff Bitsui arising from the Allotment. District Attorney Martinez may have absolute immunity with respect to suits for monetary damages, but he has no immunity from this suit. District Attorney Martinez violated Plaintiff Bitsui's civil rights by prosecuting him in a court that has no jurisdiction in Indian Country.

II. 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

² Although Plaintiffs do not seek injunctive relief in this action, injunctive relief against District Attorney Martinez would still be available. With the passage of the Federal Courts Improvement Act of 1996, judicial immunity to most actions seeking prospective injunctive relief is no longer available under 42 U.S.C. § 1983; however, this immunity has not been extended to prosecutorial officials. *Jones-Soderman v. Executive Secretary of the State Board*, 2010 WL 3800908 (E.D. New York) at n. 9

Court to address the threshold question of whether the state court has subject matter jurisdiction makes application of the *Younger* abstention doctrine inappropriate. *Id.* District Attorney Martinez' analysis of *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428 (9th Cir. 1994) and *Sycuan Bank of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), Martinez Response at 5, misses the mark. In these cases, the Ninth Circuit acknowledged that the state had legitimate interests in bringing the enforcement actions; however, "the threshold issue of the State's jurisdiction to prosecute is a matter of federal, not state, law... [and b]ecause the jurisdictional question is paramount and federal, *Younger* abstention would not be appropriate." *Fort Belknap* 43 F.3d at 431-32.

The fact that neither *Fort Belknap* or *Sycuan Bank* "involved water rights, unquestionably an important state interest" to New Mexico, Martinez Response at 5, does not provide a basis for this Court to abstain. In the first instance, the State Court Action is a trespass action, not a water rights action, and even if it pertained to water rights, such issues can only be heard in the general stream adjudication which has *exclusive* jurisdiction to hear such water rights matters. NMSA 72-4-17; see *Plaintiffs' Response* (ECF No. 30) at 7-9. Like Montana's legitimate interest in the enforcement of its liquor law in *Fort Belknap*, New Mexico's legitimate state interest to protect acequias from interference does not vest that state court with subject matter jurisdiction where the jurisdictional issue in Indian Country is "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).

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 1st day of March, 2017.

NAVAJO NATION DEPARTMENT OF JUSTICE

/s/ Stanley M. Pollack

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CERTIFICATE OF SERVICE

I certify that on March 1, 2017, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Stanley M. Pollack

Stanley M. Pollack