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.

MOTION FOR RECONSIDERATION

Pursuant to Rule 60(b), Plaintiffs NAVAJO NATION and CURTIS BITSUI, request reconsideration of this Court's *Memorandum Opinion and Order Granting Defendants' Amended Motion for Judgment on the Pleadings and Denying Plaintiffs' Amended Motion for Judgment on the Pleadings* ("*Opinion*") (Doc. 34) and *Judgment* (Doc. 35) issued on April 11, 2017. Plaintiffs request reconsideration of the Court's finding that the doctrine of collateral estoppel bars it from considering whether the state court had subject matter jurisdiction over an action arising in Indian Country, on an Indian allotment.

LEGAL STANDARD

Under F.R.C.P. 60(b)(6), "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for…any other reason that justifies relief." The Tenth Circuit held that "[g]rounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does,* 204 F.3d 1005, 1012 (10th

Cir. 2000). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.*

Federal policy mandates that matters arising in Indian Country are fundamentally federal in nature and state court jurisdiction is pre-empted. *See Seneca-Cayuga Tribe of Oklahoma v. State of Okl. ex rel. Thompson*, 874 F.2d 709, 713 (10th Cir. 1989) ("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n. 18 (1987) (presumption against state jurisdiction in Indian Country). Reconsideration is warranted here where the Court applied the general rule of "finality of jurisdictional determinations," 18A Fed. Prac. & Proc. § 4428, without consideration of the exception to that rule where federal policy dictates a federal forum. Because of the strong policy concerns that underlie the pre-emption of state court jurisdiction, a state court determination that a parcel of land is not an Indian allotment, and therefore not Indian Country, is subject to collateral challenge in federal court. Without such an exception, Plaintiffs are collaterally estopped from challenging the findings of a state court that was so determined to maintain jurisdiction that it ignored all the documentary evidence and testimony submitted by the Bureau of Indian Affairs, an agency of the United States, evincing that the Allotment was held in trust by the United States. In order to prevent "manifest injustice," Plaintiffs submit that the state court jurisdictional determinations are subject to review in federal court.

ARGUMENT

The *Opinion* concludes that the question of whether the Allotment is located within Indian country "has already been answered, and collateral estoppel bars this Court from answering it again." Doc. 34 at 18. In so concluding, the *Opinion* is consistent with the general

rule of "finality of jurisdictional determinations." 18A Fed. Prac. & Proc. § 4428; *see U.S. v. Bigford*, 365 F.3d 859, 864 (10th Cir. 2004) ("[A] collateral attack on jurisdictional grounds is precluded in a subsequent proceeding where the jurisdictional issue was 'fully and fairly litigated and finally decided' in the prior proceeding.") (citing *Durfee v. Duke*, 375 U.S. 106, 111 (1963)). However, "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling." 375 U.S. at 114. For example, because the Federal Quiet Title Act "vests *exclusive* original jurisdiction of such suits in the federal district courts," *Key v. Wise*, 454 U.S. 1103, (1981), *denying certiorari* (J. Brennan dissenting), and "nothing in *Durfee* remotely suggests that the District Court should have afforded estoppel effect to the state court's determination that it had jurisdiction in the face of the explicit provision of the Quiet Title Act to the contrary." *Id. at* 1108. Where the federal courts have exclusive jurisdiction, there is "a clear exception to the 'general rule" stated in *Durfee*." *Id.* at 1108. Because of the important federal interests that pre-empt state court jurisdiction in Indian Country, federal review of state court jurisdictional determinations should not be barred on grounds of collateral estoppel.

There are important policy reasons for the primacy of federal courts in Indian Country. The Supreme Court has recognized the historical tension between states and tribes and "state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." *Oneida Indian Nation of N. Y. State v. Oneida County, New York*, 414 U.S. 661, 678 (1974). Although the Supreme Court has allowed tribal water rights to be adjudicated in state courts, the Court has recognized that tribes view state courts as "inhospitable to Indian rights" and that this argument "has a good deal of force." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566-67 (1983).

This Court has recognized that that "federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian country." Doc. 34 at 12 (*Citing Seneca-Cayuga Tribe of Okla.*, 874 F.2d at 713). However, the *Opinion* also found that "the question of whether an 'offense' was committed on 'Indian country' is not reserved for federal courts." *Id.* The Court's reliance on *State v. Frank*, 132 N.M. 544 (2002) and *State v. Quintana*, 143 N.M. 535 (2008) for the proposition that state courts can adequately determine whether an offense was committed in Indian Country is misplaced. In both of those cases, the state court was tasked with determining whether the incident occurred in a "dependent Indian community" as that phrase is used in 18 U.S.C. § 1151(b). A "dependent Indian community" is not a defined term, and the determination of whether a particular piece of land is a dependent Indian community is fundamentally different than whether the land is Indian reservation or an allotment. The court in *Frank* acknowledged that the Supreme Court "did not interpret the term 'dependent Indian communities' until 1998 when the Court decided *Venetie*…[and before] the *Venetie* decision, lower courts employed various tests in defining the term "dependent Indian communities." 132 N.M. at 547.

In contrast, the determination of whether a parcel of land is an Indian allotment is clear and can be confirmed from title reports. Thus, there are no reported cases in New Mexico where the trial court was tasked with determining whether an allotment is really an allotment for purposes of 18 U.S.C. § 1151(c). The Court's reliance on *Tempest Recovery Services, Inc. v. Belone*, 134 N.M. 133 (N.M. 2003) [cite check: 74 P.3d 67, 2003-NMSC-019] is also misplaced. The issue there was not whether the allotment was an allotment for purposes of 18 U.S.C. § 1151(c), but whether tribal court civil jurisdiction extended to an allotment defined as Indian

Country pursuant to 18 U.S.C. § 1151(c). 134 N.M. at 134.[1] The *Opinion* cites no precedent for the proposition that a federal court is estopped from reviewing a state court's determination of whether a parcel of land alleged to be an Indian allotment is actually an Indian allotment for purposes of 18 U.S.C. § 1151(c), and Plaintiffs are not aware of such authority.

The determination of whether a parcel of land is an Indian allotment should be straightforward. However, in this case the concerns that gave rise to exclusive federal jurisdiction over matters arising in Indian County are borne out. The state court did not "fully and fairly" decide the issue as required to confer the decision with preclusive effect under the holding in *Dunfee*. Judge Rael did not produce a "measured and detailed opinion [concerning whether the allotment was Indian country] based on the evidence and testimony presented in the state court litigation" as represented in the *Opinion. Opinion* at 12. On the contrary, Judge Rael's findings were tailored to ensure that jurisdiction would vest in the state court. In order to find that the Allotment was not Indian Country, Judge Rael found that the trust period for the Allotment had expired. In doing so, Judge Rael did not consider the effect of the Act of June 21, 1906 (34 Stat. pp. 325, 326; 25 U.S.C. § 391) authorizing the President to extend restrictions on the alienation of Indian allotments "for such period as he may deem best," which extended the trust period indefinitely. *See* Doc. 25 at 8-9. Judge Rael also ignored the testimony of the Bureau of Indian Affairs realty officer, the only witness to testify about the status of the Allotment, who confirmed that the Allotment is presently held in trust. *Id*. And Judge Rael disregarded the two Title Status reports, which unequivocally confirmed that the Allotment is

[1] In *Tempest*, the New Mexico Supreme Court also recognized that state court jurisdiction was pre-empted when an action "involves a proprietary interest in Indian land...." 134 N.M. at 137, *quoting Found. Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 515 (1987).

held in trust by the United States. Instead, Judge Rael focused on the boilerplate language at the bottom of each Title Status Report that stated:

> This report does not state the current ownership of the interests owned in fee simple but states the *ownership at the time the interest ceased to be held in trust* or restricted ownership status.

Doc. 1-4 (emphasis added by Judge Rael). Judge Rael chose to rely on the italicized language to conclude that the Allotment is no longer held in trust, when the clear meaning of this language is that the Reports do not describe current ownership interests held in fee, *if any*. The language relied upon by Judge Rael simply states that for any interest in the parcel no longer held in trust, the ownership of such interest is identified as of the time the interest ceased to be held in trust. Significantly, the Title Status Report did not identify *any* interest in the Allotment that had ceased to be held in trust, and the language relied on is irrelevant. Docs. 1-2 and 24-1.

Simply put, where state court jurisdiction is expressly preempted such as in Indian County, a state court cannot be allowed to create jurisdiction where none exists. The United States Supreme Court has held that "[t]he judicial determination of controversies concerning [allotted] lands has been commonly committed exclusively to federal courts." *State of Minnesota v. U.S*, 305 U.S. 382, 389 (1939). The Supreme Court noted that in actions where a state is attempting to extinguish an interest in an allotment, the United States is an indispensable party. *Id.* at 386; *see also U.S. v. City of Tacoma, Wash.*, 332 F.3d 574, 581 (2003) ("The superior court [] lacked jurisdiction to condemn the five Indian allotments in which the United States continued to hold a valid property interest, and the proceedings are therefore void. "). The Tenth Circuit is in accord. *Begay v. Albers*, 721 F.2d 1274, 1280 (10th Cir. 1983) ("[T]he United States is an indispensable party in any action determining a dispute arising over the possession of allotted land by virtue of its trust relationship *and state courts do not have any jurisdiction over*

such disputes.") (Emphasis added). Judge Rael's finding that the United States' interest in the Allotment was extinguished after twenty-five years diminishes the property interest of the United States, and the beneficial interests of the Navajo Nation and Mr. Bitsui, in the Allotment. *Defendant's Second Motion to Dismiss*, Doc. 18-3, contested the jurisdiction of the State Court Action for failure to join the United States as an indispensable party; however, Judge Rael never addressed the issue. *See Decision Regarding Water Access*, Doc. 18-6. In short, the bases for the state court's assertion of jurisdiction did not receive full and fair review in the state court, the state court decision is not entitled to preclusive effect and this Court is not estopped from hearing the matter.

In order to prevent "manifest injustice," Plaintiffs move for reconsideration and submit that this Court should enter a declaratory judgment that the state court lacked jurisdiction to hear the State Court Action.

Respectfully submitted this 9th day of May, 2017.

NAVAJO NATION DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I certify that on May 9, 2017, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ *Stanley M. Pollack*
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