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 IN OPPOSITION
TO PLAINTIFFS' MOTION FOR RECONSIDERATION

In their Motion for Reconsideration, Plaintiffs do not appear to contest that the basic elements of collateral estoppel are met. Nor do Plaintiffs dispute the general principle that even a court lacking jurisdiction can make a finding that is binding for collateral estoppel purposes. Instead, Plaintiffs argue for an exception to an exception. With little, if any, direct authority, Plaintiffs contend that because issues of tribal jurisdiction are implicated, a federal court can revisit a state court's determination that a particular piece of property is Indian Country. Preclusion law does not support this exception.

Judge Rael's finding that the subject property in the state court action was not Indian Country was a fact-bound inquiry that should not be revisited by this Court. Despite Plaintiffs' argument, this ruling was not a determination as to

"whether the state court had subject matter jurisdiction over … an Indian allotment," Mot. Reconsideration at 1 (the "Motion"), but whether the property was an Indian allotment in the first instance. As the Court noted, this ruling was not an interpretation of federal Indian law over which federal courts have an especially strong interest,[1] but a reading of historical property records for a single plot of land. (Mem. Op. & Order Granting Defs.' Am. Mot. J. Pleadings & Denying Pls.' Am. Mot J. Pleadings (ECF No. 34) ("Mem. Op.") at 11–12.) Judge Rael's conclusion that he had jurisdiction was carefully reasoned and correct, but even if it were mistaken and he lacked jurisdiction, the ruling is entitled to preclusive effect. Therefore, the Court properly granted Defendants' motions for judgment on the pleadings.

I. The Standard for a Motion for Reconsideration.

It is unclear whether Plaintiffs are moving for relief from a judgment under Federal Rule of Civil Procedure 60, or to alter a judgment under Rule of Civil Procedure 59. Plaintiffs state that their Motion is brought under Rule 60, but quote the standard for a motion under Rule 59. (Motion at 1 (*quoting Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).) Although there is no motion for reconsideration recognized by the Federal Rules of Civil Procedure, such motions are treated as motions to alter a judgment under Rule 59 if filed within 28 days of a judgment, as here. *Williams v. Akers*, 837 F.3d 1075, 1077 n.1 (10th Cir. 2016). Therefore, to prevail on their motion, Plaintiffs must establish "the need to correct

[1] Notwithstanding this admittedly strong interest, state courts regularly can and do address issues of federal Indian law. *See, e.g., Lewis v. Clarke*, 135 A.3d 677 (Conn. 2016), *rev'd* 137 S. Ct. 1285 (2017).

clear error or prevent manifest injustice." *Servants of Paraclete*, 204 F.3d at 1012.[2] If Plaintiffs' motion were considered under Rule 60, the task would be even more difficult, "keeping in mind that Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances." *Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016) (internal quotation marks and citation omitted).

II. Judge Rael's Ruling Is a Proper Basis for Collateral Estoppel.

Plaintiffs appear not to dispute that the elements of collateral estoppel are met in this case. In state court, Curtis Bitsui litigated and lost the issue to which the Court found collateral estoppel applied: whether the property on which the state court action arose was Indian Country. This issue was necessarily decided in the state court case, which contains a different cause of action than this case. Nothing more is required to establish collateral estoppel.

Under the Full Faith and Credit statute, New Mexico's collateral estoppel law applies to this case. 28 U.S.C. § 1738; *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) ("a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation").[3] In New Mexico, collateral estoppel or "issue preclusion bars re-litigation of the same issue if (1) the party to be estopped was a

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[2] Plaintiffs do not argue that the other grounds for a Rule 59 motion—an intervening change in controlling law or new evidence previously unavailable—apply.

[3] The Court and parties have addressed both state and federal preclusion law. (*See* Mem. Op. at 14–15 & n.8; Def. Martinez' Resp. to Pls' Mot. Reconsideration (ECF No. 37) at 1–2.) The standards are similar and, either way, support collateral estoppel.

party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation." *Ideal v. Burlington Res. Oil & Gas Co. LP*, 2010-NMSC-022, ¶ 9, 148 N.M. 228, 231–32, 233 P.3d 362, 365–66. All four requirements are satisfied here.

First, Curtis Bitsui is a party to the state court action. (Compl. Injunctive Relief, *State v. Bitsui*, D-1333-CV-2015-00228 (N.M., 13th Jud'l Dist., Dec. 16, 2015) (the "State Court Action") (ECF No. 1-3).) While the Navajo Nation is not a party to the state court case, it is in privity with Mr. Bitsui for the purposes of this issue. (*See* Mem. Op. at 15, n.8.) Mr. Bitsui and the Navajo Nation seek the same relief in this action. (Compl. Injunctive & Decl. Relief (ECF No. 1).) Mr. Bitsui has been represented by the Navajo Nation in the state court case. (*See, e.g.,* Def.'s Mot. Dismiss for Lack of Subject Matter Jurisdiction, State Court Action (ECF No. 18-1).) And the Navajo Nation and Mr. Bitsui share the common interest of asserting sovereign immunity and jurisdictional defenses to state court jurisdiction. In these circumstances, there is a "substantial identity between the issues in controversy" raised by the two Plaintiffs and for the purposes of this action Plaintiffs are "really and substantially in interest the same." *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 4, 139 N.M. 637, 640, 137 P.3d 577, 580, *as corrected* (June 29, 2006) (*quoting St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1174 (10th Cir. 1979)). Indeed, the Plaintiffs' complete alignment in this litigation proves this uniformity in

interest, in contrast with the typical privity fact pattern where preclusion is based on a ruling against someone not a party to the second suit.

The other requirements for collateral estoppel are easily met. The cause of action in the state court case—to prevent the interference with an acequia in violation of state statutory law—differs from the cause of action here, a declaratory judgment regarding the state court's jurisdiction. Further, the issue of whether the property at issue was Indian Country was actually litigated and necessarily determined in Judge Rael's ruling on two motions to dismiss by Mr. Bitsui. (*See* Judge Rael's Am. Mot. Judgment on the Pleadings at 3-5 (ECF No. 21).) Finally, to the extent that collateral estoppel requires a final judgment, the general rule is that the pendency of an appeal does not prevent application of the collateral estoppel doctrine, unless the appeal involves a full trial de novo. *See Ruyle v. Cont'l Oil Co.*, 44 F.3d 837, 846 (10th Cir. 1994).[4] Therefore, Judge Rael's ruling that the property on which the state court action arose was not Indian Country estops Plaintiffs from re-litigating the same question here.

III. No Exception to Collateral Estoppel Is Warranted.

Rather than arguing that the requirements for collateral estoppel are not met, Plaintiffs contend that an exception to the "rule of finality of jurisdictional determinations" is merited given the paramount federal interest in issues of tribal jurisdiction. (Motion at 2-3.) Initially, it is unnecessary even to reach the rule of finality of jurisdictional determinations, given that the issue of whether the

[4] I am unaware of any New Mexico courts having addressed whether a judgment that has been appealed is considered final for collateral estoppel purposes.

property is Indian Country is not a wholesale jurisdictional ruling, but a fact-bound finding that resulted in a jurisdictional ruling. But assuming the rule applies, Plaintiffs fail to point to any authority in which a court has held that questions of tribal jurisdiction constitute an exception by which a party that has lost in state court can re-litigate the jurisdictional question in federal court. Lastly, Plaintiffs' criticisms of Judge Rael's ruling are unfounded, but if anything should be raised on appeal in state court, not by collateral attack.

The rule of finality of jurisdictional determinations is an exception whereby even a court that lacks jurisdiction may create an enforceable ruling for preclusion purposes. *See United States v. Bigford*, 365 F.3d 859, 864–65 (10th Cir. 2004); Wright et al., 18A Fed. Prac. & Proc. § 4428. Because Judge Rael did not lack jurisdiction and because Judge Rael's ruling regarding the status of the property as Indian Country was not a jurisdictional decision in itself, but a predicate decision, the Court need not even reach the applicability of this rule. Nonetheless, if the Court does address the rule, it supports the application of collateral estoppel. As the Tenth Circuit has held, "[o]f course, 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." *Bigford*, 365 F.3d at 865 (internal quotation marks omitted).[5]

[5] The "fully and fairly litigated" language in *Bigford* comes from the standard for collateral estoppel in federal court. *See Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009). Because New Mexico preclusion law governs this case, as is discussed above, the standard should be slightly different: that the issue was actually litigated and

Plaintiffs' attempts to craft an exception to this general rule fall short. Plaintiffs point to no case in which a federal court has declined to apply otherwise-applicable preclusion principles because the case raised questions of tribal jurisdiction. Instead, Plaintiffs rely on general authority that Indian law is a paramount federal concern and that federal courts have primacy over such matters. (Motion at 3–4.) These cases cannot support a departure from the rule of finality of jurisdictional determinations. As a leading treatise reasoned, even where there is federal preemption of state law, this "need not of itself defeat the preclusion effects of a state judgment," particularly where there is no pending federal proceeding that is imperiled. Wright et al., 18A Fed. Prac. & Proc. § 4428, at nn. 45–48.

In fact, federal courts have applied collateral estoppel to state court rulings even where such rulings concerned federal Indian law. *See Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 323 (1st Cir. 2001) (no general exception from preclusion principles in cases challenging state authority over Indian tribes). For example, in *Comanche Indian Tribe of Oklahoma v. Hovis*, the Tenth Circuit held that collateral estoppel barred a tribe from re-litigating a finding that the state court had jurisdiction because the relevant parties were not residing on tribal land. 53 F.3d 298, 303 (10th Cir. 1995). The decision afforded collateral effect in *Hovis* is precisely the sort of jurisdictional fact that this Court found preclusive here.

As this Court explained, Judge Rael's ruling that the subject property is not Indian Country was not an interpretation of federal jurisdictional statutes,

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necessarily determined. This makes Plaintiffs' criticisms of Judge Rael's opinion as not fully and fairly decided, Motion at 5, inapposite.

including 18 U.S.C. § 1151. (Mem. Op. at 11–12, 14.) The issue of whether a particular property is Indian Country is one previously and properly decided by New Mexico state courts. *See State v. Quintana*, 2008-NMSC-012, 143 N.M. 535, 178 P.3d 820; *State v. Frank*, 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404. Plaintiffs' objection that the New Mexico Supreme Court cases deciding whether property is Indian Country involve dependent Indian communities, not allotments, grasps at a distinction without a difference.[6] In both instances, state courts apply facts to a federal-law standard and determine whether a particular property is Indian Country under that standard. This is a fact-intensive, particularized inquiry well suited to state courts that does not require reinterpreting federal law regarding jurisdiction.[7]

Finally, Plaintiffs' contention that Judge Rael did not "fully and fairly" decide the issue of whether the subject property is Indian Country does not preclude collateral estoppel. After considering documentary evidence, testimony, and several rounds of briefing, Judge Rael issued reasoned and thoughtful opinions denying Mr. Bitsui's motions to dismiss. (*See* Judge Rael's Am. Mot. Judgment Pleadings at 3–5

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[6] Plaintiffs note that before the Supreme Court's *Venetie* decision, there were various tests employed to determine whether property was a dependent Indian community. (Motion at 4.) But because both *Quintana* and *Frank* post-date *Venetie*, any work that was necessary in applying such tests is irrelevant to the tasks undertaken by the New Mexico Supreme Court.

[7] Plaintiffs assert that "the determination of whether a parcel of land is an Indian allotment is clear and can be confirmed from title reports." Yet as the facts of this case show, that is not always true and title reports are not irrefutable evidence of a property's legal status. (*See* Judge Rael's Resp. to Pls.' Mot. Judgment on the Pleadings at 4–9 (discussing how Title Status Report must yield to more direct evidence) (ECF No. 29).)

(summarizing history of the state court litigation) (ECF No. 21).) This is all collateral estoppel requires, as Mr. Bitsui was able to actually litigate the issue of whether the property is Indian Country, which was necessarily decided in denying his motions to dismiss. *Ideal*, 2010-NMSC-022, ¶ 9. Plaintiffs can challenge Judge Rael's determination in their appeal to the New Mexico Court of Appeals.

Moreover, Plaintiffs' criticisms of Judge Rael's ruling are meritless. Judge Rael found that the plain language of the patent controlled its date of expiration, rather than the extension of Indian allotments by Congress. This ruling is in keeping with Judge Rael's determination that the patent was issued under the Stock-Raising Homestead Act. (*See* Judge Rael's Resp. to Pls.' Mot. Judgment on the Pleadings at 8–9 (discussing expiration of Stock-Raising Homestead Act patents) (ECF No. 29).) Likewise, Judge Rael's decision to prioritize the direct evidence of the patent rather than the summary Title Status Report was proper. Lastly, Plaintiffs' argument that the United States was an indispensible party to the state action misconstrues the state court case as one to determine the ownership of property. (*See* Motion at 6–7.) The state court action was not an action affecting the title to property, and thus the United States was not a necessary party.

IV. Conclusion.

The requirements for collateral estoppel have been met as to Judge Rael's ruling that the property on which the state court action arose was not Indian Country. Plaintiffs' attempts to justify a departure from general preclusion principles are not warranted, particularly where Judge Rael's ruling did not

interpret federal Indian law but a made fact-bound ruling about a particular property. Therefore, Judge Rael respectfully requests that the Court deny Plaintiffs' Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 6, 2017, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Nicholas M. Sydow
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