UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

THE PUEBLO OF POJOAQUE, POJOAQUE PUEBLO GAMING COMMISSION, and POJOAQUE GAMING, INC.,

Plaintiffs,

v. No. 1:21-CV-00373-MV-JHR

HONORABLE MATTHEW J. WILSON, District Judge, and HENRY MARTINEZ,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANT HONORABLE MATTHEW J. WILSON'S RESPONSE (Doc. 29) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Doc. 25)

Plaintiffs, Pueblo of Pojoaque, Pojoaque Pueblo Gaming Commission, and Pojoaque Gaming, Inc. (hereafter collectively "Pojoaque"), through undersigned counsel, Ripley B. Harwood, Esq. (Ripley B. Harwood, P.C.), Reply as follows to Defendant Honorable Matthew J. Wilson's Response and in support of their Motion for Summary Judgment:

I. RESPONSE TO ADDITIONAL MATERIAL FACTS

1. Plaintiffs admit Judge Wilson's additional statements of undisputed material facts A-H. Doc. 29, p. 3-4.

II. WHETHER JUDGE WILSON IS BOUND BY *DALLEY* IS UNCLEAR

Judge Wilson's first point is that he was bound by *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, not by *Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018). Doc. 29, p. 4-7. He argues that there is "parallelism but not paramountcy" between state and federal courts in the interpretation of federal law and that unless and until the United

States Supreme Court rules on an issue of federal law, the state of New Mexico remains free to endorse its own views. *Id*.

This may or may not be true. No New Mexico court has ever ruled on this precise issue. The Supreme Court has said that state courts apply federal law to federally controlled issues arising in state court, just as federal courts apply state law to cases filed in federal court but governed by state law. *Hook* v. *Hook*, 1984-NMSC-068, ¶6. It has noted more specifically that where a claim involves a federal statute, federal law governs the resolution of the issue. *Ocana* v. *Am. Furniture Co.*, 2004-NMSC-018, ¶ 15, as corrected (June 9, 2004). In applying federal law, New Mexico follows the precedent established by the federal courts, particularly the United States Court of Appeals for the Tenth Circuit. *State* v. *Snyder*, 1998-NMCA-166, ¶ 9.

Moreover, the issue as framed by Judge Wilson is under-stated. While state and federal courts may be free to adopt differing views of, for example, the constitutionality of federal laws,[1] it is questionable whether a state's courts remain free to regard state precedent as binding when it comes into direct conflict with federal precedent within the same circuit, involves the interpretation of a federal statute, and falls within an area where federal law expressly preempts the field. *See e.g.*, *Pueblo of Pojoaque et al. v. State of New Mexico, et al.*, No. CIV 15-0625 JB/GBW, Doc. 149, p. 161.

This is the more precise issue at work in this case and it appears never to have been specifically addressed in any reported decision, much less in the specific context of Indian law or IGRA. Even with respect to the broader issue framed in the Judge's Response, a split of authority has long existed on the subject. *See Duty of State courts to follow decisions of Federal courts, other than the Supreme Court, on Federal*

[1] *U.S. ex. rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970).

Questions, 147 A.L.R. 857 (1943).

Whether or not New Mexico state district court judges are right or wrong in perceiving that *stare decisis* holds them hostage to *Doe*, the point is that federal law completely controls the interpretation of IGRA. This Court should accordingly not hesitate to exercise its jurisdiction to reaffirm applicable federal law on this subject nor to enjoin actions based on misinterpretation and misapplication of that law by New Mexico's district courts.

III. THIS COURT SHOULD NOT ABSTAIN FROM EXERCISING ITS JURISDICTION

Judge Wilson's main Response theme is that this Court should endorse *Mhoon*[2] abstention factors and decline to exercise jurisdiction over Plaintiffs' Complaint and this Motion. Doc. 29, p. 7-10. Perhaps because *Younger* abstention has been so categorically rejected in cases similar to this one, Judge Wilson instead urges the application of factors gleaned from a case involving the interpretation of an insurance policy under state law. Doc. 29, p. 7-8. *Mhoon* factors appear to be applied primarily to declaratory judgment actions involving insurance policy interpretations under state law where declaratory judgment would be equally available in the state forum. *See e.g., Martinez v. State Farm Fire & Cas. Co.*, No. 1:20-CV-01278-KWR-SCY, 2021 WL 2279778. As far as Plaintiffs can determine, *Mhoon* has never been applied to any case involving questions arising under federal law. Indeed, whether the presence of a federal question forecloses abstention altogether itself remains an open question. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1184 (10th Cir. 2002), citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 290 (1995).

[2] *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979 (10th Cir. 1994).

Plaintiffs believe that the *Mhoon* factors have no application to the declaration of federal law which they seek. Alternatively, Plaintiffs argue that *Mhoon* factors should be regarded as entirely subsumed when the subject matter of the declaratory judgment involves paramount questions of federal law in an area where federal law preempts the field. After diligent search, Plaintiffs found no authority applying the *Mhoon* factors to declaratory judgments involving the application or interpretation of a federal statute, much less involving the Indian Gaming Regulatory Act.

Abstention generally has already been addressed and rejected in the closely analogous case of *Pueblo of Santa Ana v. Nash,* 854 F.Supp.2d 1128, 1140-42 (D. N.M. 2012). When the core issues are paramount and federal and involve predominant federal policies, abstention is inappropriate. *Id*. at 1141. Where the law and the interests at stake are quintessentially federal, and where a state lacks jurisdiction, state interests in litigation are reduced "to the vanishing point." *Id*. at 1142 (citations to supporting authority omitted). Abstention from the exercise of federal jurisdiction is "an extraordinary and narrow exception to the duty of a district court to adjudicate the controversy properly before it." *Id*.

This issue was again neatly and thoroughly analyzed in the recent albeit unreported decision of *Navajo Nation v. Rael*, 2017-WL-3025917. In that case, Judge Johnson noted that the common thread in the cases rejecting Younger abstention (principally those involving Indian law sovereign immunity issues), is that

> where the issue before a federal court is "paramount" and "federal"—particularly where the question is whether state court has jurisdiction over a particular category of cases—*Younger* is not appropriate because that question must be resolved in federal court based on federal law.

Rael, supra, 2017 WL 3025917 at *6. Notably, Judge Johnson regarded the *Nash* decision as settling the jurisdictional question not only in that case but as to all personal injury lawsuits brought in state courts pursuant to IGRA against Indian tribes or their gaming enterprises. *Id*.

Lastly, to the extent that *Brillhart* abstention might even be applicable when the subject matter of the declaratory judgment involves paramount questions of federal law in an area where federal law preempts the field, it does not apply where the action also involves good faith claims for injunctive relief. *THI of N.M. at Las Cruces, LLC v. Fox,* 727 F.Supp.2d 1195, 1203 (D.N.M.2010)(Browning, J.)(recognizing that the Tenth Circuit "has cited favorably" cases which hold that abstention under *Brillhart v. Excess Ins. Co.* is inappropriate when a party seeks an injunction or other coercive relief); *see Royal Indem. Co. v. Apex Oil Co.,* 511 F.3d 788, 795 (8th Cir.2008); *Great Am. Ins. Co. v. Gross,* 468 F.3d 199, 211 (4th Cir.2006).

Plaintiffs' Complaint does not affirmatively seek injunctive relief at this time only because that would be premature and would invite other attacks. "Injunctive relief against a judicial officer will not be granted unless a declaratory decree was violated or declaratory relief was unavailable." *Nash, supra,* 854 F.Supp.2d at 1140, citing *Knox v. Bland,* 632 F.3d 1290, 1292 (10th Cir.2011).

Thus, while Plaintiffs are technically foreclosed from seeking injunctive relief at this time, they argue that *Brillhart* abstention should be categorically rejected in cases such as this where injunctive relief may foreseeably be required in the event that the Court's declaration of law (or re-declaration in this case), alone proves insufficient to halt a state court action from proceeding without subject matter jurisdiction, in derogation of federal law. The obligation to enforce federal law, to assure that it is uniformly applied,

and to prevent its misapplication, calls for the exercise, not the abdication, of jurisdiction.

Given that Plaintiffs' Complaint involves a fundamental question of subject matter jurisdiction involving paramount issues of federal law, it seems improbable that abstention could ever be justified upon any ground. The schizophrenic legal history surrounding this particular jurisdictional issue as it has bounced up and down with inconsistent results in multiple cases through New Mexico's state courts and our federal district and appeals courts, underscores the need for the dispositive and controlling precedent that the Plaintiffs here ask this Court to declare. A vexatious scenario involving fundamental questions of Indian sovereignty and basic subject matter jurisdiction that legal history proves is capable of tiresome recurrence, might well be regarded as the least likely candidate for abstention on any grounds. The federal courts exist to bring clarity, finality, and uniformity to such questions. State interests must yield to federal interests in uniform sovereign immunity law as it pertains to the scope of permissible waivers under IGRA. Abstention under any of the various doctrines should therefore be rejected.

IV. REMOVAL WAS NOT AN OPTION

Judge Wilson asserts that the Pueblo's declaratory judgment lawsuit constitutes 'procedural fencing' and warrants this Court declining to exercise jurisdiction. Doc. 29, p. 10-11. The basis for this accusation appears to be that Henry Martinez' state court lawsuit presented an "obvious basis for federal jurisdiction". *Id*., p. 10.

First, if Mr. Martinez' first amended state court complaint presents an 'obvious basis' for removal to federal court, it is not obvious to the Plaintiffs. Mr. Martinez' first

amended state court complaint is nothing more than a garden variety tort claim against various Pueblo affiliated names, enterprises and tribal corporations. *See* attached Exhibit A**.** It asserts no federal claims against the Plaintiffs. It was not removable pursuant to 28 U.S.C. §1331.

Mr. Martinez' first amended state court complaint was also not removable under 28 U.S.C. §1332. Indian Tribes are not citizens of any state. *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002). The presence of an Indian tribe as a named party destroys diversity. *Ninigret Dev. Corp. v. Narragansett* Indian *Wetuomuck Hous. Auth.,* 207 F.3d 21, 27 (1st Cir.2000). Even if a tribal entity named as a defendant in Mr. Martinez' lawsuit is incorporated (Pojoaque Gaming, Inc.), the law deems it to be a citizen of the state in which it is incorporated for diversity purposes, such that not even that defendant would be diverse to him. *American Vantage, supra,* at fn. 1 (collecting cases).

Second, if the end result is that the case should have ended up in federal court as Judge Wilson appears to argue, how is it procedural fencing that it arrived there by virtue of Plaintiffs' declaratory judgment complaint as opposed to a notice of removal? The end result is the same. The Plaintiffs instead afforded the state district court the first opportunity to dismiss Mr. Martinez' lawsuit. Had the Plaintiffs sought immediate removal of the case they would have been confronted with the argument that they failed to give the state court a diplomatic opportunity to dispose of the case by Rule 1-012.B(6) motion.

Judge Wilson's criticism that the Pueblo ignored a "clear path to relief" and that its Complaint is a mere "subterfuge" to achieve removal,[3] turns out to be both unfair

[3] Doc. 29, p. 11.

and unfounded. Nor is it grounds for concluding that an abstention factor "weighs heavily" against the Pueblo.

V. NEW MEXICO APPELLATE COURTS AND PARTICULARLY THE NEW MEXICO SUPREME COURT, HAVE REPEATEDLY DECLINED OPPORTUNITIES TO HARMONIZE *DOE V. SANTA CLARA*

Judge Wilson also argues that the state court lawsuit and New Mexico's courts would be the best means of resolving tensions between state and federal interpretations of IGRA. Doc. 29, p. 11-13. Most of these abstention arguments were already reviewed and addressed in *Pueblo of Santa Ana v. Nash, supra.* That court concluded that the quintessential forum for resolution of differences over the interpretation of a federal statute affecting fundamental Indian sovereignty and subject matter jurisdiction interests arising in an area where federal law preempts the field, is the federal courts. With all due respect to New Mexico's Supreme Court, *Doe v. Santa Clara* is a prime example of how things can go awry when state courts hazard guesses as to Congressional intent and exclusive federal policies, and then fail to rectify them when proven wrong.

The Pueblo has no interest in increasing friction between state and federal courts but the notion that its declaratory judgment complaint is responsible for doing so is also unfair and wrong. Mr. Martinez charted that course for all litigants by electing to file suit in New Mexico's First Judicial District Court with full knowledge of *Nash* and *Dalley*. It is this tactic, not the Pueblo's federal lawsuit, which has ensnared Judge Wilson in a *stare decisis* conundrum. The Pueblo's only interest is in preserving its declared rights under federal law, and in preventing the kind of erosion of those rights (and of federal law), which Mr. Martinez' state court lawsuit represents.

It is also noteworthy that Mr. Martinez and Judge Wilson take contrary positions on New Mexico's ostensible receptiveness to harmonizing *Doe* with *Dalley*. Judge Wilson says that if the Pueblo would only tolerate the state court lawsuit through trial (notwithstanding the affront to its sovereignty and the lack of subject matter jurisdiction), New Mexico's appellate courts stand ready and willing to embrace a resolution. Doc. 29, p. 11-12.

Mr. Martinez takes the position that New Mexico's Supreme Court is done with this issue. He theorizes that New Mexico's High Court believes *Doe* to be its final word on the subject of the scope of IGRA's waiver. *See* Martinez' Response to Pueblo's Motion to Dismiss at p. 9, attached as Exhibit B. He points out that over and over again New Mexico's Supreme Court has declined *certiorari* in cases involving similar issues. *Id*.

On this sole point, the Plaintiffs agree with Mr. Martinez. Judge Wilson chastises them for not pursuing interlocutory appeal of his decision to deny their Motion to Dismiss in this case. Doc. 29 at p. 2 & 10. However, in a closely analogous slip-and fall case which is now also the subject of a separate declaratory judgment complaint before this court,[4] the Pueblo's application for interlocutory appeal was summarily denied. *See* Order Denying Application for Interlocutory Appeal, attached as Exhibit C. It seems overly harsh under such circumstances to fault the Plaintiffs for a strategic decision in this case to not commit finite resources to an avenue of recourse so recently denied it in a closely analogous slip-and-fall casino floor case.

Additionally, as Mr. Martinez points out, notwithstanding the New Mexico Court of Appeals' recent certification of two separate cases raising similar issues which it characterized as involving important questions of constitutional law of significant public

[4] *See* Doc. 25-1, fn. 2 at p. 4

interest, the New Mexico Supreme Court denied *certiorari* without comment. *See* 9/14/2020 Order Certifying to the New Mexico Supreme Court and 11/92020 *certiorari* denial, attached as Exhibit D. The Pueblo cannot help but share Mr. Martinez' perspective that New Mexico's Supreme Court appears content to leave its increasingly problematic *Santa Clara Pueblo* opinion intact and un-revisited.

In sum, the recent history of rejection of this issue by New Mexico's appellate courts is a frail basis for the suggestion that this Court should decline to exercise jurisdiction and leave the Plaintiffs to tilt again at what has thrice now proven to be the wholly illusory windmill of state court relief.

Sovereign immunity relieves an immune defendant from the burden and expense of defending against unauthorized lawsuits. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). "The entitlement is an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). It is an affront to Plaintiffs' sovereignty to be repeatedly subjected to the indignity and expense of being hailed into the courts of another sovereign and forced to defend against claims such as this up and down through those courts. The cause of this recurrence is a misinterpretation of a federal statute and a continued misapplication of federal law which this Court has the power and duty to declare and to thereafter enjoin, should that declaration not suffice.

For all of the foregoing reasons, Pojoaque requests that this Court declare that the exclusive venue for unintentional torts of whatever kind and character, occurring in Indian Country at Indian gaming facilities operating under the auspices of IGRA, shall be in the tribal courts. Plaintiffs request that this Court grant this Motion and authorize them to thereafter seek injunctive relief in the event that the state district court were to

proceed with Mr. Martinez' lawsuit despite this Court's declaration. Plaintiffs request such other and further relief as this Court deems proper.

Respectfully submitted,

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By: **/s/** *Ripley B. Harwood*

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I HEREBY CERTIFY that on the 3rd day of October, 2021, a true and correct copy of the foregoing Plaintiffs' Reply to Honorable Matthew J. Wilson's Response in Support of Motion for Summary Judgment was filed electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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