UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE and
BUFFALO THUNDER, INC.,

Plaintiffs,

vs. Cause No.: 1:20-CV-00166-JB-GBW

HONORABLE BRYAN BIEDSCHEID, individually and in his official capacity as District Judge, New Mexico First Judicial District Division VI; and RUDY PENA,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES (DOCs. 67 & 69) TO MOTION TO RECONSIDER ORDER DENYING MOTION FOR SUMMARY JUDGMENT (Doc. 61)

Plaintiffs, Pueblo of Pojoaque and Buffalo Thunder, Inc., through undersigned counsel, Ripley B. Harwood, Esq. (Ripley B. Harwood, P.C.), reply as follows in support of their Motion to Reconsider:[1]

I. THE ABSTENTION-CHANGING FACT IS THAT PLAINTIFFS' SUMMARY JUDGMENT MOTION DID NOT ASK FOR INJUNCTIVE RELIEF

There is little that needs addressing with respect to Mr. Pena's Response, as most of it consists of statements of fact and attempts to divorce them from *Dalley* which the Court has already expressly, if provisionally, rejected. Doc. 67, 1-4; *compare* Doc. 61, 11-13. However, both Pena and Judge Biedscheid seemed perplexed regarding what abstention-changing facts Plaintiffs claim the Court misapprehended. Doc. 67 at 3; Doc. 69 at p. 5. Second, both parties exaggerate the significance of Plaintiffs'

[1] For the Court's convenience Plaintiffs had planned a consolidated reply to the responses of both defendants, but inasmuch as Judge Biedscheid's response date was extended, Plaintiffs reply separately to avoid transgressing D.N.M.LR-Civ. 7.4(a).

requested injunctive relief, with Pena going so far as to say that Plaintiffs' summary judgment motion asked for injunctive relief. Doc. 67 at 4.

At the risk of repeating a point thought to have been adequately expressed in the Motion, Plaintiffs again point to the clear record establishing that their summary judgment motion sought only a declaration of federal law; not injunctive relief. Their motion expressly *excluded* injunctive relief. Doc. 36 (summary judgment requested *only* to bullets A & B of the prayer for relief in their complaint). Plaintiffs' briefing conceded that injunctive relief would likely only be available if the state court were to violate this Court's declaration of federal law. Doc. 36-1 at fn. 8; but *see* Point II, below.

In their summary judgment reply, Plaintiffs were careful to request that the Court only authorize them to seek injunctive relief in the event the state court were to proceed with the Pena lawsuit despite the declaration of federal law their summary judgment motion requested. Doc. 44 at p. 12 (prayer for relief). As that event was at the time of summary judgment nothing more than a future possibility, the fact which Plaintiffs respectfully assert the court misapprehended in its abstention analysis was that while Plaintiffs' Complaint asked for injunctive relief, their summary judgment motion did not. If there is any merit to Mr. Pena's contention that this was not clearly enough stated in their Motion, Plaintiffs take the opportunity to do so now. If the Court got the point, then they apologize for repetition.

II. ADDITIONAL AUTHORITY DISCOUNTENANCES ABSTENTION UNDER THE PRESENT CIRCUMSTANCES AND EVEN SUPPORTS *SUA SPONTE* INJUNCTIVE RELIEF[2]

The Tenth Circuit recently handed down its decision in the case of *Ute Indian Tribe of the Uintah and Ouray Reservation* v. *Lawrence*, 22 F.4th 892 (10th Cir. 2022).[3] Beyond the inconsequential distinction that *Lawrence* arose out of a contract dispute, the analytical parallels to the case before this Court are both close and compelling.

Albeit under a different federal statute, the *Lawrence* court, citing *Dalley*, held that the state court lacked subject matter jurisdiction over the contract dispute because the statute at issue failed to evince clear congressional subject matter jurisdiction-shifting authorization. 22 F.4th at 903 & 907, compare Doc. 61 at p. 13.

More importantly, the Tenth Circuit concluded that absent such clear congressional jurisdiction-shifting authorization, and therefore absent any basis for state court jurisdiction, *Younger* abstention was *per se* inapplicable. *Id*., fn. 17 ("*Colorado River* itself recognized that such exceptional circumstances do not exist 'if the state court ha[s] no jurisdiction to decide th[e] claims.'"); compare Doc. 61 at p. 5.

The *Lawrence* court also took the unusual step of ordering the district court on remand to grant the permanent injunction which Plaintiffs requested. *Id*. at 910-11. The court rejected the arguments that the plaintiff below had an interest in adjudication in state court and that the state had an interest in adjudicating the contract dispute. *Id*. at 910. Given the lack of subject matter jurisdiction, the Court found that neither the state nor the plaintiff below had any such interests in the first place. *Id*.

---

[2] This is merely new authority in support of existing points; not new argument violating the prohibition against "reply waylay". That rule however, is nullified where, as here, the issues are of jurisdictional importance. *New Mexico Cattle Growers Ass'n. v. U.S. Fish & Wildlife Service*, 81 F. Supp.2d 1141, 1149 (D. N.M. 1999); rev'd. on other grounds, *New Mexico Cattle Growers Ass'n. v. U.S. Fish & Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001).

[3] Defendant, Lynn D. Becker, applied to the United States Supreme Court for *certiorari* on April 11, 2022. That application is still under review.

Last but by no means least, while Plaintiffs here did not request injunctive relief on summary judgment, it is noteworthy that the Tenth Circuit questioned whether the Anti-Injunction Act even bars injunctions respecting claims for relief brought by Indian Tribes under 28 U.S.C. §1362; citing authority for the proposition that injunctions against state proceedings may well be authorized under such circumstances. Id. at fn. 22, citing *Sac & Fox Nation* v. *Hanson*, 47 F.3d 1061, 1063 & fn. 1 (10th Cir. 1995); compare Doc. 61 at p. 3-4. Even had the Plaintiffs here requested injunctive relief in their summary judgment motion, *Lawrence* supports the argument that this Court could have granted that relief as well, notwithstanding the Anti-Injunction Act. As is the case here, Plaintiffs' opponents in *Lawrence* never raised the issue, and the court declined to take it on *sua sponte*. *Id*., fn. 22.

For all of the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its Order denying Plaintiffs' motion for summary judgment. Plaintiffs ask that the Court exercise its authority to grant their motion for summary judgment, and hold that IGRA and *Dalley* invalidate state court jurisdiction over the Pena complaint. The Court should reconsider and reject *Younger* abstention as being *per se* inapplicable to Plaintiffs' request for declaratory judgment on the federal Indian law question at issue.

Respectfully submitted,

RIPLEY B. HARWOOD, P.C.

By: /s/ *Ripley B. Harwood*

RIPLEY B. HARWOOD, ESQ.
Attorneys for Defendant Buffalo Thunder/Pueblo of Pojoaque
201 Third Street NW Suite 500
Albuquerque, NM 87102
505-299-6314
505 480 8473 (c)

I HEREBY CERTIFY that on the 3rd day of May, 2022, a true and correct copy of the foregoing *Reply to Defendants' Responses to Motion to Reconsider Order Denying Plaintiffs' 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:

LINDA J. RIOS, ESQ.
MICHAEL SOLON, ESQ.
Counsel for Defendant Rudy Pena:
linda.rios@lrioslaw.com
michael.solon@lrioslaw.com

NICHOLAS SYDOW, Esq.
Office of the Attorney General
Counsel for Defendant Biedscheid
nsydow@nmag.gov

/s/ Rip Harwood
RIPLEY B. HARWOOD