COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BOARD OF TRUSTEES OF CEBOLLETA LAND GRANT,
Plaintiff,

v.

ROBERT ARMIJO, CEBOLLETA RANCH LTD., SILVER DOLLAR RANCH LLC, PUEBLO OF LAGUNA, and All Unknown Claimants of Interest in the Premises Adverse to Plaintiff,
Defendants;

ROBERT ARMIJO,
Cross-Claim Plaintiff-Appellee,

v. No. 29,893

PUEBLO OF LAGUNA,
Cross-Claim Defendant-Appellant.

Interlocutory Appeal from the Thirteenth Judicial District Court
Cibola County, Honorable William A. Sanchez
No. D-1333-CV-2008-0405

PUEBLO OF LAGUNA'S BRIEF IN CHIEF

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

In April 2008, the Pueblo of Laguna ("Pueblo") purchased an 8,353-acre portion of the former L-Bar Ranch, for which two prior decrees had quieted title in the Pueblo's predecessors against the Board of Trustees for the Cebolleta Land Grant ("Board"). *See L Bar Cattle Co. v. Board of Trustees of Town of Cebolleta Land Grant* ("*L Bar Cattle*"), 46 N.M. 26, 120 P.2d 432 (1941); *Reserve Oil & Minerals Corp. & Sohio W. Mining Co. v. Bd. of Trustees of Cebolleta Land Grant*, ("*Reserve Oil*"), No. 9245 (N.M. Ct. App. Sept. 10, 1987); Record Proper ("RP") 40-51 (decree), 58-107 (chain of title). Eight months later, the Board filed this action against Robert Armijo ("Armijo"), the Pueblo, and other named and unnamed claimants to quiet title to a 640-acre portion of that ranch. RP 6-7. Armijo then asserted title to the same section of land based in part on a 1994 deed from the Board. RP 108-113. Following stipulated dismissal of the Board's quiet title claims based on the later prior quiet title decree and dismissal of Armijo's counterclaims against the Board except for breach of warranty covenants, RP 118-119, the Pueblo moved to dismiss Armijo's adverse possession cross-claims against it and other, nonappearing defendants based on sovereign immunity and indispensability, respectively. 120-126. The District Court denied that motion, RP 185-86, 216, and this interlocutory appeal followed, RP 219-220.

II. SUMMARY OF FACTS AND COURSE OF PROCEEDINGS

The Pueblo is a federally recognized Indian tribe "organized under the Indian Reorganization Act, 25 U.S.C. § 476." *Laguna Indus., Inc. v. New Mexico Taxation & Rev. Dep't*, 114 N.M. 644, 645, 845 P.2d 167, 168 (Ct. App. 1992), *aff'd*, 115 N.M. 553, 855 P.2d 127 (1993). As such, the Pueblo is "acknowledged to have the immunities and privileges" associated with its status as a federally recognized Indian tribe, 73 Fed. Reg. 18,553, 18,555 (Apr. 4, 2008) (listing tribes).

In April 2008, the Pueblo of Laguna purchased an approximately 8,353-acre ranch commonly known as the Silver Dollar Ranch. *See* RP 106-107.[1] That property includes Section 16 in projected Township 12 North, Range 6 West ("Section 16"), within the Cebolleta Land Grant, in Cibola County. *See* RP 107. All of the Silver Dollar Ranch is part of the former L-Bar Ranch, and the Pueblo's title to this property derives from predecessors in title who prevailed in two separate quiet title actions against the Board in the 1940s and the 1980s.[2]

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[1] Because the lower court did not make factual findings, the Pueblo hereby requests that this Court take judicial notice of certain facts based on the Record Proper, including the Pueblo's deed and chain of title for the property at issue. *See* Rule 11-201(D) NMRA ("A court shall take judicial notice if requested by a party and supplied with the necessary information."); Rule 11-201(F) NMRA ("Judicial notice may be taken at any stage of the proceeding."); Rules 11-803(N)-(O) NMRA (public records of and statements therein affecting property interests are hearsay exceptions).

[2] *See L Bar Cattle*, 46 N.M. 26, 120 P.2d 432 (1941); Judgment, *Reserve Oil*, No. CV-82-134 (N.M. 11th Jud. Dist. Mar. 5, 1986) (RP 40-51), *aff'd*, Mem. Op., No. 9245 (N.M. Ct. App. Sept. 10, 1987) (RP 52-56); RP 43 (1986 decree that lands "are the same lands as are described in the Judgment and Decree in the case of *L-Bar*

Eight months after the Pueblo's purchase of the Silver Dollar Ranch, in December 2008, the Board filed this action to quiet title to Section 16, *see* RP 6-7. The Board sued Armijo, the Pueblo, former owners, and other unnamed claimants. *Compare id. with* RP 98, 102. In March 2009, the Pueblo moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 1-012(B)(1) NMRA, indispensability under Rule 1-019(B) NMRA, and alternatively, under Rule 1-012(G), for failure to state a claim under Rule 1-012(B)(6) NMRA based on claim preclusion. *See* RP 29-39.[3] Later that same month, Armijo filed an answer to the Board's complaint, asserting counterclaims against the Board for quiet title, adverse possession, and breach of warranty covenants, and cross-claims against the Pueblo and the remaining Defendants for adverse possession. RP 108-112. Armijo asserted his claims based in part on a 1994 deed from the Board. RP 109-13.

Cattle"), 49 (including Section 16), 54-55 (1987 Court of Appeals discussion of 1941 decree); 43 U.S.C. § 751 para. third (federally prescribed section numbering regime); RP 57 (BLM manual figure illustrating same); RP 58-105 (intervening chain of title). The Pueblo hereby requests that this Court take judicial notice of these prior quiet title decrees, *see Frost v. Markham*, 86 N.M. 261, 263, 522 P.2d 808, 810 (1974); *Cartwright v. Pub. Serv. Co. of N.M.*, 68 N.M. 418, 420, 362 P.2d 792, 797 (1961), appellate decisions, *see State v. Deats,* 83 N.M. 154, 157, 489 P.2d 662, 665 (Ct. App. 1971), and geographic divisions relevant to real property identification, *see Trujillo v. Dimas*, 61 N.M. 235, 244, 297 P.2d 1060, 1066 (1956).

[3] As noted below, RP 36, it is unknown whether Cross-Claim Plaintiff-Appellee Robert Armijo is the same Robert Armijo who was one of the Board's trustees named in a prior quiet title decree. *See* RP 42-43 (*Reserve Oil* decree identifying Robert Armijo as Board trustee); *cf. Armijo v. Cebolleta Land Grant*, 105 N.M. 324, 324, 732 P.2d 426 (1987) ("[Robert] Armijo served as president of the Cebolleta Land Grant Board of Trustees from April, 1981 until April, 1983.").

In April 2009, all three appearing parties (expressly including Armijo) stipulated per Rule 1-041 NMRA to dismiss with prejudice the Board's complaint, based on the preclusive effect of the second prior quiet title decree between the Board and the Pueblo's predecessors in title. RP 118-119. They also stipulated to withdrawal of the Pueblo's first motion to dismiss as moot and to dismissal of Armijo's counterclaims against the Board for quiet title and adverse possession. *Id.* Thus, the only remaining claims are: (1) "Armijo's counterclaim against the Board for breach of warranty covenants," and (2) "Armijo's cross-claims against the Pueblo and nonappearing defendants for adverse possession[.]" *Id.*

Later in April 2009, the Pueblo moved to dismiss all Armijo's cross-claims for adverse possession, based on tribal sovereign immunity and indispensability. RP 157-162. Following briefing, RP 132-62, and oral argument, RP 188-218, the District Court adopted Armijo's arguments and denied the motion because of "basic fairness" and "because this matter arises outside the reservation[.]" RP 185, 216. In September 2009, Armijo and the Pueblo agreed to and the Court entered an order on that motion, certifying the order for interlocutory appeal in compliance with NMSA 1978, Section 39-3-4(A), and staying all proceedings in the action pending resolution of the Pueblo's interlocutory appeal. RP 185-187. In October 2009, the Pueblo applied for an interlocutory appeal, which Armijo opposed. In November 2009, this Court granted the application. RP 219-220.

ARGUMENT

I. INTRODUCTION

The Pueblo's sovereign immunity precludes the District Court from having subject matter jurisdiction over Armijo's cross-claims for adverse possession against the Pueblo and others. In particular, the District Court's denial of the Pueblo's motion to dismiss "because the matter arises outside of the reservation" and based on "basic fairness[,]" RP 185-186, 216, directly contravenes well established federal and New Mexico case law. That case law establishes that tribal sovereign immunity extends to nongovernmental activities outside of the reservation and that considerations of fairness or equity are irrelevant. Moreover, the Pueblo's sovereign immunity and its legal interest in the real property at issue render it an indispensable party for assertion of adverse possession claims against others. Given this, all of Armijo's cross-claims for adverse possession should be dismissed, and this case should be remanded for further proceedings on the one remaining claim in this case—Armijo's claim for breach of warranty covenants against the Board, which does not require any other parties.

II. PRESERVATION OF ISSUES

The Pueblo preserved below its assertion of tribal sovereign immunity and indispensability in its motion to dismiss Armijo's cross-claims, RP 120-26, in its reply in support thereof, RP 157-62, and in its oral argument thereon, RP 188-218.

III. STANDARD OF REVIEW

A decision on a motion to dismiss for lack of jurisdiction under Rule 1-012(B)(1) NMRA is a ruling on a question of law, which is reviewed de novo. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668. This court also reviews de novo whether an Indian tribe retains its sovereign immunity. *See Hoffman v. Sandia Resort and Casino*, 2010-NMCA-___, ¶ 12, __, __ N.M. __, __ P.3d __, No. 28,444 (N.M. Ct. App. Jan. 26, 2010); *Holguin v. Tsay Corp.*, 2009-NMCA-056, ¶ 9, 146 N.M. 346, 210 P.3d 243.

IV. SOVEREIGN IMMUNITY PRECLUDES SUBJECT MATTER JURISDICTION OVER ARMIJO'S CROSS-CLAIM AGAINST THE PUEBLO.

"'Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Gallegos*, 2002-NMSC-012, ¶ 7 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). In addition, tribal sovereign immunity is an issue of subject matter jurisdiction that may be asserted in a motion to dismiss. *See* Rule 1-012(B)(1) NMRA (authorizing dismissal for "lack of jurisdiction over the subject matter"); *Gallegos*, 2002-NMSC-012, ¶ 7 (affirming such dismissal based on tribal sovereign immunity); *Holguin*, 2009-NMCA-056, ¶¶ 3, 9 (same). Consequently, without an unequivocal waiver by an Indian tribe or an express congressional authorization, a tribe retains its sovereign immunity and "state courts lack the power to entertain lawsuits

against tribal entities." *Gallegos*, 2002-NMSC-012, ¶ 7. As explained below, these rules preclude subject matter jurisdiction over Armijo's cross-claim against the Pueblo, and therefore require dismissal of that cross-claim.

A. Tribal Sovereign Immunity Extends to Off-Reservation Activities Including Armijo's Adverse Possession Claim.

The District Court erred in concluding that tribal sovereign immunity does not bar the cross-claim against the Pueblo "because this matter arises outside the reservation." RP 185, 216. This holding directly contravenes the United States Supreme Court's ruling in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), which held as "a matter of federal law" that tribes enjoy sovereign immunity from suit regardless of whether the activities at issue "involve governmental or commercial activities and whether they were . . . on or off a reservation." *Id.* at 759-60. Given this, *Kiowa* precludes reliance on *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), for this point, as asserted by Armijo and adopted by the District Court, *see* RP 207-208, 216. Indeed, both the New Mexico Supreme Court and the U.S. District Court for New Mexico have recognized that *Kiowa* "implicitly overruled" *Padilla* on this "matter of federal law[.]" *Gallegos*, 2002-NMSC-012, ¶¶ 7, 25 (citing *Kiowa*, 523 U.S. at 760); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1229, 1305 (D.N.M. 2009) (citing *Gallegos*, 2009-NMSC-012, ¶ 25, and *Kiowa*, 523 U.S. at 756).

Neither the District Court below nor this Court may decline to follow this "legitimate legal doctrine of significant historical pedigree" established by superior courts. *Hoffman*, 2010-NMCA-___, ¶¶ 5-6. The fact that Armijo's claim concerns land title is irrelevant for avoiding application of tribal sovereign immunity. *See Pueblo of Santo Domingo v. Rael*, 209 F.R.D. 470, 471, 474 (D.N.M. 2002). Likewise, the fact that there is a general statutory basis for quiet title actions in New Mexico state court, *see* NMSA 1978, Section 42-6-1, cannot abrogate tribal sovereign immunity here because "'tribal immunity is a matter of federal law and is not subject to diminution by the States[,]'" *Bales*, 606 F. Supp. 2d at 1305 (quoting *Kiowa*, 523 U.S. at 756).

In addition, Armijo and the District Court by adoption cannot evade tribal sovereign immunity based on *City of Sherrill v. Oneida Indian Nation* ("*Sherrill*"), 544 U.S. 197 (2005), and *Oneida Tribe of Wisconsin v. Village of Hobart* ("*Hobart*"), 542 F. Supp. 2d 908 (E.D. Wis. 2008). *See* RP 195-201, 205, 207, 211, 216 (referencing same). *Sherrill* addressed whether a city possessed regulatory authority to impose property taxes on land owned in fee by an Indian tribe. *Sherill*, 544 U.S. at 202. The Supreme Court did not address whether the tribe there was immune from suit, since tribe was the plaintiff. *Id.* at 211. The same basic distinction applies to *Hobart*, which was filed by an Indian tribe challenging local regulatory authority. *Hobart*, 542 F. Supp. 2d at 909. Plainly,

tribal immunity from suit was not at issue in either of those cases as it is here, where the Pueblo is a defendant.

Moreover, unlike those cases, there is no dispute here about the scope or application of state taxation or other regulatory authority. *See* RP 213. Instead, any such reliance on *Sherill* and *Hobart* necessarily fails due to the basic distinction reaffirmed in *Kiowa* that "[t]o say substantive state laws apply to off-reservation [tribal] conduct . . . is not to say that a tribe no longer enjoys immunity from suit." *Kiowa*, 523 U.S. at 755. The United States Supreme Court has even applied that rule to bar states from enforcing taxation authority against Indian tribes. *Id.* (discussing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* ("*Potawatomi*"), 498 U.S. 505, 510, 514 (1991)). In contrast, Armijo's cross-claim presents nothing more than a private, nongovernmental claim like that which was barred in *Kiowa*, *see id.* at 753 (noting that case concerned promissory note for "$285,000 plus interest"). Given all this, the District Court's denial of tribal sovereign immunity for a post-purchase adverse possession claim based on off-reservation location is meritless under governing federal and state law.

B. "Basic Fairness" is Not a Factor in Application of Tribal Sovereign Immunity.

The District Court also wrongly concluded that "basic fairness" prevented it from granting the Pueblo's motion to dismiss. *See* RP 216. "The proposition that tribal immunity is waived if a party is otherwise left without a judicial remedy is

inconsistent with the reasoning of *Santa Clara Pueblo* [*v. Martinez*, 436 U.S. 49, 58-59 (1978),]" wherein the United States Supreme Court "did not consider such factors as the availability or absence of an alternate forum . . . ." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1266 n.8 (10th Cir. 1998). Thus, the United States Supreme Court "has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.* at 1267 (citing *Kiowa*, *Potawatomi*, and *Santa Clara Pueblo*); *see also Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (quoting *Kiowa* and *Ute Distribution Corp.*). Consistent with these federal decisions on this federal issue, the New Mexico Supreme Court has twice recognized that "'the public interest in protecting tribal sovereign immunity surpasses a plaintiff[']s interest in having an available forum for suit.'" *Gallegos*, 2002-NMSC-012, ¶ 51 (quoting *Srader v. Verant*, 1998-NMSC-025, ¶ 33, 125 N.M. 521, 964 P.2d 82). Accordingly, notions of fairness and equity are not factors in the application of tribal sovereign immunity and do not overcome governing legal authority.

Here, the Pueblo is a federally recognized Indian tribe "acknowledged to have the immunities and privileges" associated with that status. 73 Fed. Reg. 18,553, 18,555 (Apr. 4, 2008). Armijo has not alleged and cannot establish either that the Pueblo has unequivocally waived its sovereign immunity or that Congress

has expressly abrogated that immunity here, *see* RP 111-112. Accordingly, the Pueblo possesses sovereign immunity for Armijo's cross-claim against it, and the Court lacks subject matter jurisdiction over that claim, which must be dismissed.

Finally, the lower court's conclusion regarding the fairness of a remedy for Armijo is factually unfounded. Armijo still has a remedy through his counterclaim for breach of warranty covenants against the Board once he is realigned and substituted as the party plaintiff. *See City of Indianapolis v. Chase Nat'l Bank of New York*, 314 U.S. 63, 69 (1941) ("It is our duty . . . to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute'.") (citation omitted); *Ruiz v. Garcia*, 115 N.M. 269, 271, 850 P.2d 972 (1993) (noting realignment of parties in which former third-party defendant was substituted as party plaintiff). Accordingly, the Court's lack of subject matter jurisdiction over the cross-claim against the Pueblo does not preclude Armijo from pursuing the alternative remedy he has already asserted.

V. CROSS-CLAIMS AGAINST NONAPPEARING PARTIES ALSO MUST BE DISMISSED AS THE PUEBLO'S IMMUNITY AND ITS INTEREST IN THE LAND AT ISSUE MAKE IT INDISPENSABLE.

Given the improper denial of immunity for Armijo's adverse possession cross-claim against the Pueblo, the District Court also wrongly failed to dismiss Armijo's adverse possession cross-claims against all the remaining, nonappearing defendants based on the Pueblo's indispensability.

An Indian tribe qualifies as a necessary party under Rule 1-019(A) NMRA where it has "interest as a sovereign entity in participating any litigation where its rights and obligations might be adjudicated." *Gallegos*, 2002-NMSC-012, ¶ 42. This includes economic interests, an interest in protecting tribal resources, and "a compelling interest 'in protecting its sovereign right to litigate on its own behalf and in the forum of its choice.'" Id. ¶¶ 46-47 (quoting *Golden Oil Co. v. Chace Oil Co.*, 2000-NMCA-005, ¶ 13, 128 N.M. 526, 994 P.2d 772). In contrast, landowners are not necessary parties to a quiet title action when their property interests will not be truly affected by the adjudication of the dispute. *Alston v. Clinton*, 73 N.M. 341, 345, 388 P.2d 64, 67 (1963).

In New Mexico, claims should be dismissed based on the indispensability of a person who cannot be made a party, based on consideration of the following specified factors:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Rule 1-019(B) NMRA

The analysis under the first of these factors mirrors that of the "interest" inquiry of Rule 1-019(A)(2), under which an Indian tribe has a sovereign interest

"in protecting its tribal resources" and "in participating in any litigation where its rights and obligations might be adjudicated" *Gallegos*, 2002-NMSC-012, ¶¶ 42, 47, 50. For the second factor, "no court-fashioned measures could alleviate the possible prejudice to [an Indian tribe] from not being present in an adjudication of its rights . . . ." *Id.* ¶ 50. And for the last factor, "the Plaintiff's lack of remedy in state court . . . is not a factor to be considered in the indispensability analysis by the court where the necessary party is a tribal entity." *Id.* ¶ 51 (citing *Srader*, 1998-NMSC-025, ¶ 33).

Consideration of these factors in light of the Pueblo's deed and chain of title and the stipulation entered into in this case readily establishes the Pueblo's indispensability for all adverse possession cross-claims against nonappearing defendants. The Pueblo has documented through undisputed judicially noticeable facts that it holds legal title to the property at issue dating back to two quiet title decrees. *See supra* notes 1-2 and accompanying text. In addition, pursuant to Rule 1-041(A)(1)(b) NMRA, all appearing parties in this case—expressly and necessarily including Armijo—stipulated to the Pueblo's interest in the subject property based on the later prior quiet title decree. RP 118. Given these circumstances, the Pueblo has an acknowledged interest in protecting its rights to that property, which cannot be alleviated by protective court-ordered provisions or measures. Also, any judgment on Armijo's cross-claims against other defendants

in the Pueblo's absence could not provide complete relief for any party because it would remain subject to the Pueblo's stipulated and judicially noticeable interest in the property. Finally, any concern about a lack of a forum for Armijo's adverse possession claims is superseded by "'the public interest in protecting tribal sovereign immunity[,]'" *Gallegos*, 2002-NMSC-012, ¶ 51 (quoting *Srader*, 1998-NMSC-025, ¶ 33), and the fact Armijo does not need the Pueblo or any other parties to pursue his claim for breach of warranty covenants against the Board.

In sum, the Pueblo is indispensable for all of Armijo's adverse possession cross-claims against the nonappearing defendants concerning the disputed land. Because this indispensability is readily apparent now and immutable, resolution of that issue now is neither premature nor speculative. Accordingly, all the cross-claims should be dismissed without waiting for one of the other named or unnamed defendants to appear and assert this same defense under Rule 1-019(B). *See* Rule 1-001(A) ("These rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

CONCLUSION

For the foregoing reasons, the Pueblo of Laguna requests that this Court reverse the decision below and remand this case to the District Court with directions to dismiss Armijo's cross-claim against the Pueblo for lack of subject

matter jurisdiction and to dismiss Armijo's cross-claims against all other named and unnamed defendants because of the Pueblo's indispensability.

Respectfully filed this 8th day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing Pueblo of Laguna's Brief in Chief have been served on each of the following parties by first-class mail this 8th day of February 2010:

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