IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HAMAATSA, INC., a New Mexico Not-for-Profit Corporation,

Plaintiff-Appellee,

vs.

No. 31,297
Dist. Ct. # D-1329-CV-2010-03108

PUEBLO OF SAN FELIPE, a Federally Recognized Indian Tribe,

Defendant-Appellant.

Appeal from the District Court, Sandoval County
Before the Honorable George P. Eichwald, Thirteenth Judicial District

ANSWER BRIEF IN CHIEF OF PLAINTIFF/APPELLEE HAMAATSA, INC.

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STATEMENT OF COMPLIANCE

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I. SUMMARY OF THE PROCEEDINGS

A. Nature of the Case

Hamaatsa, Inc., ("Hamaatsa") a New Mexico nonprofit corporation, purchased property in Sandoval County. From the early 1900s, the property was accessed via a public road statutorily created pursuant to 43 U.S.C. § 932 (also referred to as Revised Statute 2477) (hereinafter "R.S. 2477") while the property was owned by the United States Bureau of Land Management (BLM). BLM later conveyed the property to the Pueblo of San Felipe (the "Pueblo") in fee. Thereafter, the Pueblo informed Hamaatsa that its continued use of the road constituted a trespass. When the Pueblo published its intention to include the road in a fee-to-trust application submitted to the U.S. Department of the Interior ("Interior"), Hamaatsa sued to have the road declared public. By so doing prior to final action on the fee-to-trust application, Hamaatsa ensured state court subject matter jurisdiction over the matter. Jicarilla Apache Tribe v. Board of County Commissioners, County of Rio Arriba, 118 N.M. 550, 883 P.2d 136 (1994).

The Pueblo moved to dismiss the action based upon the defense of sovereign immunity. However, the Pueblo failed to recognize that sovereign immunity is not a bar to an action such as this which requires the Court to exercise only its *in rem* jurisdiction over the road at issue. Further, even for actions *in personam*, an Indian tribe lacks sovereign immunity for claims involving solely equitable relief.

Finally, based upon public policy, applicable statutes, and other considerations, sovereign immunity does not apply. Thus, the district court thus properly denied the Pueblo's motion to dismiss.

B. Summary of Relevant Facts

This matter is before the Court on interlocutory appeal from the denial of the Pueblo's motion to dismiss. In its "Summary of Facts," and despite recognizing that "the Court must accept as true all material allegations of the complaint," (Aplt. Brf. at 3 and n.2), the Pueblo included facts that are not in the record. This Court must disregard all facts in the Pueblo's summary that do cite to the record. 12-213(A)(3) NMRA ("Such summary [of proceedings] shall contain citations to the record proper ... supporting each factual representation," emphasis added).

This dispute centers on a road located in Sandoval County, New Mexico traversing Lots 1 through 4 in Section 3, Township 13 North, Range 6 East, NMPM.[1] (RP 2, ¶ 4). Pursuant to 43 U.S.C. Section 932, Rev. Stat. § 2477 (R.S. 2477), the Northern 2477 Road is a public road, and has been since the early 1900s. (RP 3, ¶ 15).[2] While the issue of how Hamaatsa accesses its property is

[1] As in the district court, Hamaatsa refers to the road at issue as the "Northern 2477 Road".

[2] The Pueblo takes issue with Hamaatsa's characterization that the Northern R.S. 2477 Road is a public road. (Aplt. Brf. at 4, n.4). However, as the Pueblo admits, for purposes of a motion to dismiss, this characterization *must be accepted as true.* (Aplt. Brf. at 2, n.2, citing Forest Guardians v. Powell, 2001-NMCA-028, ¶ 5, 130

irrelevant to the determination of whether this is a public R.S. 2477 road, Hamaatsa owns property which it accesses over the Northern R.S. 2477 Road. (RP 2, ¶ 10).[3]

> 43 U.S.C. § 932 (Revised Statute 2477), originally passed in 1866, stated:
>
> **Right of way for highways**. The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

43 U.S.C. § 932. It is undisputed that although the statute was repealed in 1976, roads in existence prior to that date, not otherwise abandoned or vacated, remain public R.S. 2477 roads.[4]

N.M. 368, 24 P.3d 803, *cert. denied*, 130 N.M. 459 (2001), the court must "accept as true all material allegations of the complaint."). Further, between the issuance of the district court's order and this appeal, Interior issued a letter opinion stating: "To establish proof that the subject roadway is an historic trail/road all one has to do is refer to official BLM survey plats dated 1856. In 1856 the BLM map shows the trail was already established...years ago. The 1906 BLM map shows the road was established across Lots 1, 2 and 3 as it exists today-105 years later. The official BLM survey maps verify that the subject road has been used by the public for at least 155 years, if not longer." (Hamaatsa's Motion to Supplement the Record, Ex. A at 7).

[3]Appellant's apparent assertion that by not specifically identifying its land, the Complaint is somehow deficient lacks foundation. (Aplt. Brf. at 4, n.5). That Hamaatsa and its predecessors in interest have and continue to use the road is relevant simply to demonstrate that the road has been used as a public road.

[4]The apparent intent of R.S. 2477

> ....was to record the federal government's acquiescence in the construction of public-sponsored highways as well as the building of roads by private industry, and to sanction the custom of taking public lands for common wagon roads....The statute was enacted at a time when the national government encouraged expansion, exploitation,

Hamaatsa continually used the Northern R.S. 2477 Road to access its property. (RP 2, ¶ 10). Around August 2009, Hamaatsa received a letter from the Pueblo stating that Hamaatsa's use of the Northern R.S. 2477 Road was a trespass and that Hamaatsa had no legal right of access to its property. (RP 3, ¶ 18). When Hamaatsa learned that the Pueblo applied to Interior's Bureau of Indian Affairs (BIA) to have numerous parcels of property, including the road at issue, placed into trust for the Pueblo, Hamaata filed this litigation. (RP 3, ¶ 19). This property was not at that time, nor at the present, taken into trust and is held by the Pueblo in fee simple. (RP 3, ¶ 19; RP 1, ¶ 2).

Hamaatsa filed suit to have the Northern R.S. 2477 Road declared public to preclude the Pueblo, its leaders, and all others from treating the road as private. (RP 4-5).[5]

II. ARGUMENT

A. THE DISTRICT COURT HAS IN REM JURISDICTION OVER THE NORTHERN R.S. 2477 ROAD

> and development of public lands.... This suggests that the concept of acceptance by public usage is to be applied liberally.

Luccheti v. Bandler, 108 N.M. 682, 684, 777 P.2d 1326 (Ct. App. 1989).

[5] Whether Hamaatsa has alternative access to its property or whether the BLM has offered alternative access (Aplt. Brf. at 35, n.12; BLM has never offered Hamaatsa such access and the Pueblo points to no record evidence supporting its incorrect and arbitrary statement) are irrelevant to whether an R.S. 2477 road exists and the whether the Pueblo is immune from suit.

1. The Applicable Standard of Review

The Court of Appeals reviews "de novo the legal question of whether an Indian tribe, or an entity under the tribe's control, possesses sovereign immunity." Martinez v. Cities of Gold Casino, 2009-NMCA-87, ¶ 22, 146 N.M. 735, 740-741, 215 P.3d 44, *cert. denied*, 147 N.M. 361 (2009), citation omitted. The same de novo standard of review applies more generally to questions of subject matter jurisdiction. State v. Atcitty, 2009-NMSC-86, ¶ 13, 146 N.M. 781, 215 P.3d 90, *cert. quashed*, 149 N.M. 65 (2010).

2. Preservation

The district court denied the Pueblo's motion to dismiss, in part because it found that the proceeding was *in rem*. This issue was preserved at RP 27-29; Trans. 19, 21, 23, 31.

3. The *Yakima* Decision and its Allow the Court to Exercise *In Rem* Jurisdiction over the Northern R.S. 2477 Road

Putting the cart before the horse, the Pueblo asserts that because it did not waive its sovereign immunity from suit, Hamaatsa cannot pursue a claim against it. However, unless this is the type of case to which sovereign immunity attaches in the first instance, the Court need not address whether such immunity has been waived. Where an action is *in rem*, sovereign immunity does not apply.

The United States Supreme Court decision relevant to this analysis is County

of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L.Ed.2d 687 (1992) ("*Yakima*"). In that case, the County of Yakima (the "County") initiated litigation to foreclose upon fee property held by the Yakima Indian Nation (the "Tribe"), after the Tribe failed to pay both *ad valorem* and excise taxes on these parcels. Simultaneously, the Tribe sued the County in federal court for declaratory and injunctive relief, contending the County lacked jurisdiction to levy both types of taxes. Id., 502 U.S. at 256. The Supreme Court found that the Tribe was subject to the *ad valorem* tax, which was levied directly against the fee property, but not the excise tax, which was levied not against the property, but against the property's owner. Id. at 266 ("[l]iability for the *ad valorem* tax [which] flows exclusively from ownership of realty on the date of assessment ...., creates a burden on the property alone ...."); 269 ("The excise tax remains a tax upon the Indian's activity of selling the land, and is thus void..."). In so concluding, the Court expressly pointed out that the County's jurisdiction over the fee land with regard to the *ad valrem* taxes "is *in rem* rather than *in personam*." Id. at 265.

The Tribe in *Yakima* did not contend that it was immune from the federal suit (it could not, as the Tribe is the one that brought the federal action in the first place); however, the Supreme Court nonetheless implicitly found that the County could *enforce* the *ad valorem* tax by *foreclosing* on the property, but had no means

to enforce the excise tax, because there was jurisdiction over the *res* but not over the Tribe. Id. at 265 (as to *ad valorem* tax, noting the power to "assess *and collect* a tax on certain real estate" is not disruptive of tribal self-government, emphasis added); id. at 270 (the federal General Allotment Act "does not allow the County *to enforce* its excise tax on the sale of such land," emphasis added).

Applying *Yakima*, several courts have concluded that where there is jurisdiction over the *res*, there need not be jurisdiction over an Indian tribe, and therefore sovereign immunity does not bar such a suit in state court.

In Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 130 Wash. 2d 862, 929 P.2d 379 (1996), the tribe argued that the court lacked personal and subject matter jurisdiction over it. The court rejected the tribe's argument, applied *Yakima*, and concluded the state court had *in rem* jurisdiction to quiet title and partition fee property held by an Indian tribe:

> A&M's action ... involves no taking of property. It merely seeks a judicial determination of the co-tenants' relative interests in real property and a division of that property according to those interests. The Quinault Nation would lose no property or interest for which it holds legal title.
>
> Under the Supreme Court's holding in *County of Yakima*, it is reasonable to conclude that the ... County Superior Court had proper *in rem* jurisdiction over A&M's suit to quiet title and partition alienable and encumberable fee patented property .... An action for partition of real property is a proceeding *in rem*.
>
> * * * * *
>
> Because the *res* or property is alienable and encumberable

> under a federally issued fee patent, it should be subject to a state court *in rem* action which does nothing more than divide it among its legal owners.... Reacquisition of a portion of the land by a federally recognized Indian tribe does not alter this result because tribal reacquisition of fee land does not affect the land's alienable status. This conclusion is consistent with *County of Yakima.*

Id. at 872-874.

The Anderson court also rejected the tribe's argument that the court required not just *in rem* jurisdiction over the property, but also *in personam* jurisdiction over the tribe, finding: "the decision in *County of Yakima*, which based state jurisdiction to tax and foreclose on reservation fee land exclusively *in rem*, contradicts that contention." Anderson at 875-876.[6] Thus, the Pueblo's argument in this case that *in rem* jurisdiction cannot be invoked because it avoids sovereign immunity should likewise be rejected (Aplt. Brf. at 23-24). Either the district court has jurisdiction *in rem* over the road or it does not; the reasons for seeking such jurisdiction are irrelevant to the legal analysis.

Further supporting Hamaatsa's position, in Cass County Joint Water Resources Dist. v. 1.43 Acres of Land, 2002-ND-83, 643 N.W.2d 685 (N.D. 2002), the County condemned Indian fee land. Id., 2002-ND-83, ¶ 4. In so holding, it

[6] The Pueblo's attempt to distinguish Anderson (Aplt. Brf. at 28-30) is based upon the incorrect contentions that the Anderson court misunderstood *Yakima* and that the tribe in Anderson was not a necessary party to the litigation under Washington law, a finding that is simply absent from the Anderson decision (which found the United States was not a necessary party to the litigation, Anderson at 878).

found the "primary issue...is apparently one of first impression nationally: May a state condemn land within its territorial boundaries which has been purchased in fee by an Indian tribe, but which is not reservation land, aboriginal land, allotted land, or trust land?" Id., 2002-ND-83, ¶ 6. The court answered in the affirmative, finding the tribe's sovereign immunity did not deprive the district court from exercising its *in rem* jurisdiction, in which the court could determine "rights in a ... specific property, against all the world, equally binding on everyone." Id., 2002-ND-83, ¶¶ 8, 9. The court concluded:

> The land at issue is this case is essentially private land which has been purchased in fee by an Indian tribe....Under these circumstances, the State may exercise territorial jurisdiction over the land, including in an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated.

Id., 2002-ND-83, ¶ 21. Thus, sovereign immunity does not preclude actions *in rem* involving fee property held by a tribe. See also Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot., Case No. 2D11-2797, 2011 Fla. App. LEXIS 20828, 5-6 (Fla. Dist. Ct. App. Dec. 30, 2011) (applying Cass County to deny certiorari following the lower court's decision that, on "the issue of sovereign immunity,...a condemnation action is an action *in rem* rather than *in personam*.... Because a proceeding *in rem* is an action against the property itself, the court is not required to acquire *in personam* jurisdiction over the landowner as a prerequisite to a valid court action....Instead, 'the purpose of service of the summons and complaint upon

the landowner is only to provide notice and an opportunity to be heard'").

The Pueblo's reliance on the Oneida Indian Nation, New York ("OIN") case at its various levels of appeal (Aplt. Brf. at 24-25) is misplaced. There, the district court found that the action before the federal court was not *in rem* because it constituted an actual taking of the tribe's property. Oneida Indian Nation v. Madison County, 401 F. Supp. 2d 219, 229 (N.D.N.Y 2005). By contrast, Hamaatsa does not seek to "take" anything from the Pueblo; it simply seeks a declaration that property now owned by the Pueblo has had a public road running over it since the early 1900s.

The OIN appellate court did not address the contention that the proceeding was *in rem*. Therefore, to the extent the Pueblo suggests that the appellate court rejected an *in rem* argument, that assertion is incorrect. Notably, after the appellate court ruled that the tribe was not amenable to suit based upon sovereign immunity, the U.S. Supreme Court granted *certiorari*, 131 S. Ct. 459, 178 L. Ed. 2d 286 (2010), to consider the immunity argument. After that Court granted *certiorari*, the Nation decided not to continue its sovereign immunity fight, passing "a tribal declaration...waiving 'its sovereign immunity to enforcement of real property taxation through foreclosure....'" Madison Cty. v. Oneida Indian Nation, 131 S. Ct. 704, 178 L. Ed. 2d 587 (2011). The combination of the OIN appellate court's lack of discussion of *in rem* jurisdiction and the Nation's decision to quit the arena

before a decision issued from the Supreme Court demonstrate the irrelevance of the OIN cases to Hamaatsa's arguments with regard to *in rem* jurisdiction in the present matter.

4. The Proceeding Before the District Court was *In Rem*

The Pueblo's primary argument on the issue of *in rem* jurisdiction is its assertion that Hamaatsa is seeking to quiet title, and a quiet title action is *in personam*. (Aplt. Brf. at 12-19). The Pueblo fails to point to any case actually holding that an action seeking to declare a road as public creates jurisdiction other than *in rem*. Nor does the Pueblo raise a viable, properly preserved argument that if the court affirms that this proceeding is *in rem*, other affirmative defenses bar the Complaint.[7] Finally, the Pueblo does not assert any reason why, if the court finds

[7] Without any record citation as to where or how it preserved and presented these issues below for decision, the Pueblo asserts that the Complaint could also be dismissed for lack of standing or failure to name the County as a party to this litigation, citing Percha Creek Mining, LLC v. Fust, 2008-NMCA-100, 144 N.M. 569,189 P.3d 702 (Aplt. Brf. at 18, n.8). However, as Hamaatsa does not seek to impose maintenance requirements upon the County following declaration of the Northern R.S. 2477 Road as a public road (unlike the plaintiff in Percha Creek), the County is not an indispensible party. See McGarry v. Scott, 2003-NMSC-016, ¶ 17, 134 N.M. 32, 72 P.3d 608 (citing various cases, including an R.S. 2477 case, and noting "these cases involve the recognition of a public right of way through a public prescriptive easement or implied dedication. However, none of these cases created maintenance obligations on a county based upon prescription or implied dedication through public use"). As the topic of when a county is an indispensable party in a public road case could consume an entire brief of its own, and because it is not properly before this court, the court should not consider it here.

this is properly an action *in rem*,[8] that the Complaint should otherwise be dismissed. Thus, if this Court affirms the trial court's ruling, Hamaatsa must prevail on appeal.

For the proposition that "actions affecting the title to real property... are actions *in personam*" (Aplt. Brf. at 16), the Pueblo relies upon State ex rel. Truitt v, District Court of Ninth Jud'l Dist., 44 N.M. 16, 96 P.2d 710 (1939). However, Truitt was not a quiet title action and the Court later negated any *dicta* addressing such an action in State ex rel. Hill v. District Court of 8th Judicial Dist., 79 N.M. 33, 439 P.2d 551 (1968):

> The *Truitt* case involved an attempted reformation of a sublease and it was there determined that personal service within the state was required before the court could acquire jurisdiction over the defendant. The holding of the *Truitt* case is in accordance with the weight of authority. However, the lengthy opinion contains various statements that were not necessary for that decision. The case sought reformation and, under the facts there present, constituted an action *in personam*. Thus any discussion in the opinion of other types of action was dicta and will not be considered as binding upon us.

Hill, 79 N.M. at 34-35, emphasis added. The sole New Mexico case actually addressing whether an action to quiet title is *in rem* answered that question in the affirmative. In Sullivan v. Albuquerque Nat. Trust & Savings Bank of

[8] Even were there an issue as to the manner in which the claim was pled, the proper relief would not be dismissal, but instead to provide the pleader with a chance to amend under Rule 1-015 NMRA. Malone v. Swift Fresh Meats Co., 91 N.M. 359, 362, 574 P.2d 283 (1978) ("Neither the filing nor granting of...a motion [to dismiss] before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper...").

Albuquerque, 51 N.M. 456, 188 P.2d 169 (1949), the prayer for relief sought entry of a decree "adjudging plaintiff to be the sole owner of the real * * * property" and a declaration that "equitable ownership of real estate is sufficient to support a suit to quiet title thereto." Id., 51 N.M. at 463. In that case,

> ... all non-resident defendants...not served, appeared specially...and joined in the motion to quash service and dismiss the complaint upon the ground that the action was one *in personam* either to cancel the aforementioned deed or to reform same. If it was, of course [an action *in personam*], neither personal service outside nor service by publication within the state would give the court jurisdiction over the persons of the non-resident defendants. The chief question, then, is whether the plaintiff's complaint is accurately appraised as one *in personam* as to the real estate. The defendants mainly rely on our former decision in *State ex rel. Truitt....See, also, Rosser v. Rosser, 42 N.M. 360, 78 P.2d 1110.*
>
> We think neither case is decisive of this one. Stripped of unessential allegations and verbiage,...the complaint does have allegations sufficient to enable it to withstand the motion to dismiss, treated as a complaint in a suit to quiet title to real estate. As much cannot be said of the complaints in the *Truitt* and the *Rosser* cases, cited above, the allegations of which more properly classified each as an action *in personam*, as we held.
>
> * * * * *
>
> It does not require citation of authority to support the proposition that constructive service suffices to bring the defendants before the court for purposes of the decree in a suit to quiet title. Nor can we refrain from observing the anomalous situation to result, if it could be said a claimant to full ownership of either real or personal property located in this state, could not have his claim adjudicated here because, perchance, of the non-residence of other claimants to rights or interests in such property on whom the resident claimant could not secure personal service in New Mexico.

Sullivan, 51 N.M. at 461-462, 464, emphasis added`.

More generally, *in rem* actions are "directed, not against the property per se, but rather at resolving the interests, claims, titles, and rights in that property...." State v. Nuñez, 2000-NMSC-13, ¶ 78, 129 N.M. 63, 2 P.3d 264. Thus, even if this were an action to quiet title (and it is not), it would be *in rem* to resolve the public's right to a public road.

However, this is *not* an action to quiet title in real estate. The New Mexico Quiet Title Act, NMSA 1978, 42-6-1 *et seq.*, establishes that in a complaint to quiet title, the plaintiff must set forth the nature of the plaintiff's estate in title to be quieted. NMSA 1978, § 42-6-2 ("The plaintiff must file his complaint in the district court, setting forth the nature and extent of his estate...and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the plaintiff, and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any lien upon or any right or title to the premises, adverse to the plaintiff, and that plaintiff's title thereto be forever quieted and set at rest"). In the pending Complaint, Hamaatsa does not claim to be the dominant estate holder with a right to title. Instead, Hamaatsa asserts it is simply one member of the public with a right to use a public road. (RP 3 at ¶ 15). It does not seek to quiet title in that road itself, but to have the road declared to be public. It is not seeking to deprive the Pueblo of anything; the Pueblo took the estate in fee subject

to a pre-existing public road under R.S. 2477. Wilson v. Williams, 43 N.M. 173, 177, 87 P.2d 683 (1939) ("A settler upon the public lands of the general government, upon which there is a road in common and general use as a highway, takes subject to the public easement of a right of way on such road, although the same was never established by the public authorities under the general road laws of the state," applying R.S. 2477).

The Pueblo attempts to avoid the district court's *in rem* ju risdiction by reading into various cases facts and legal conclusions that those cases did not address. (Aplt. Brf. at 14-16). In reality, for example, neither Wilson nor Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864 (1946) (in which the court discussed primarily the issues of what constitutes acceptance of the statutory offer to dedicate land to public use), discussed whether the establishment of an R.S. 2477 road requires *in rem* or *in personam* jurisdiction. As a result, the citation to those and other similarly irrelevant cases for the proposition that R.S. 2477 requires *in personam* jurisdiction is simply unsupportable. Nor is the citation to Algermissen v. Sutin, 2003-NMSC-001, 133 N.M. 50, 61 P.3d 176, for this proposition any more availing. That court was silent on the issue (which was not raised by the parties) of the basis for its jurisdiction. (Aplt. Brf. at 15, n.5). Finally, not a single one of the five cases cited by the Pueblo in its brief at 14, n.5 for the proposition that various courts have described suits under R.S. 2477 as *"in*

personam" even uses that term or addresses the issue of jurisdiction, calling into question the basis for this and similar citations in the Pueblo's brief.

The Pueblo also seeks to distinguish federal cases which have expressly held that an action for declaration of a public road is not an action to quiet title, basing its argument on the assertion that a holding under the federal Quiet Title Act cannot be applied to New Mexico's law. (Aplt. Brf. at 17-18). However, New Mexico law supplied the basis for the decision that declaration of a public road is not an action to quiet title:

> The plaintiffs ...do not assert that their interest is an easement or any similar right; instead, as mentioned above, the right is claimed by them as members of the public. The substantive law in New Mexico for quiet title actions refutes the notion that the public has a real property interest[9] in public roads. A quiet title action may be brought by anyone claiming an interest in the real property....The interest, however, must be some interest in the title to the property....An attempt to remove a cloud from title presupposes that the plaintiff has some title to defend....
>
> Members of the public as such do not have a "title" in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road.

Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978) (citations, all to New Mexico state court cases, omitted; emphasis added).

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[9] That the New Mexico public has an interest in the declaration, creation and use of public roads is not discussed. However, in Algermissen, *supra*, there is no bar to the creation of a public prescriptive easement, another type of public road that can be created outside of the state's statutory highway creation scheme.

The Pueblo also asserts that *in rem* jurisdiction is defeated by the request for relief that mentions the Pueblo. However, Hamaasta sought no injunctive relief against the Pueblo in its Complaint. Instead, the Complaint has a single cause of action seeking a declaration that the Northern R.S. 2477 Road is public, and therefore, based upon such a declaration, that the Pueblo cannot restrict Hamaatsa's use of the road:

> WHEREFORE, plaintiff requests that the Court declare Northern R.S. 2477 Road is a public road and therefore that defendant cannot restrict plaintiffs use of the Northern R.S. 2477 Road as a member of the public and the owner of property contiguous to the road, and for other relief which is just and proper.

(RP 3). Because the underlying action seeks simply a declaration of rights to use property and to enjoin any use contrary to those rights, it is an action *in rem*. This conclusion is bolstered by case law involving Indian treaty fishing rights, in which sovereigns and others both before the court and those not before the court were bound by a decision that applied not to the individual parties, but to the *res* itself:

> The original action, by seeking a declaration of treaty fishing rights, sought to apportion the Columbia River anadromous fishery among competing sovereigns. It thus has been recognized as analogous to an equitable action *in rem*. ... In such an action, "a court possessed of the *res* in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody."

United States v. Oregon, 657 F.2d 1009, 1016 (9th Cir. 1981) (citations omitted, emphasis added). The language about enjoining those who would interfere "referred to enjoining non-parties," and therefore, even in an action purely *in rem*,

a court has the authority to enjoin interference with the *res* before it. Id., n.16.

Were this Court to conclude that language barring the Pueblo from interfering with the *res* does not create *in rem* jurisdiction, such a finding would not require dismissal of the entire Complaint. Instead, it would, at most, require an amendment asking the district court to simply declare the Northern R.S. 2477 Road is a public road. (However, as set forth in detail *infra* in the next section, sovereign immunity does not bar an action for injunctive relief against the Pueblo, even in an action *in personam*).

Finally, the Pueblo's citation to Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L.Ed.2d 683 (1977) (Aplt. Brf. at 19-20), a case involving *personal,* not subject matter, jurisdiction is misplaced. First, the Pueblo fails to note how and where it preserved this issue. This is of particular import since the Pueblo's failure to object to personal jurisdiction in its motion to dismiss waived any such defense. Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 690, 789 P.2d 1250 (1990) (a defense of lack of personal jurisdiction "must be asserted at the outset of an action; otherwise these defenses are waived...."); Rupp v. Hurley, 1999-NMCA-57, ¶ 43, 127 N.M. 222, 979 P.2d 733 ("Under Rule 1-012(H)(1), a challenge to personal jurisdiction is waived if not consolidated in a pre-answer motion....[P]laintiff lost her waiver defense by not raising it until appeal").

Second, the issue of sovereign immunity implicates subject matter, not

personal jurisdiction. The Pueblo cannot contend that the district court lacks personal jurisdiction over it – the Pueblo is located in Sandoval County and transacted business there when it obtained the property at issue, and therefore it clearly has minimum contacts with both New Mexico and the Thirteenth Judicial District. NMSA 1978, § 38-1-16.

Third, the property at issue here is real property located in the State of New Mexico owned by the Pueblo. In Heitner, the plaintiff owned personal property (one share of a large company), and had no minimum contacts with Delaware, the state in which the company's bank accounts were held. Heitner is thus irrelevant to the analysis herein.

B. PRINCIPLES OF SOVEREIGN IMMUNITY DO NOT BAR AN ACTION AGAINST AN INDIAN TRIBE FOR DECLARATORY OR INJUNCTIVE RELIEF

1. The Applicable Standard of Review

As set forth *supra* in Section V, A, 1, the standard of review is de novo.

2. Preservation

The district court denied the Pueblo's motion to dismiss, finding no immunity in part because Hamaatsa was not seeking damages. This issue was preserved in the record at RP 33-35; Trans. 23-24, 31.

3. An Indian Tribe Has No Sovereign Immunity with Regard Claims Seeking Equitable Relief, Not Damages

a. The U.S. Supreme Court's Decision in *Kiowa* Does not Compel a Finding of Sovereign Immunity

In Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("*Kiowa*"), an Indian tribe signed a promissory note (the tribe executed the note while the signatory was off of the tribe's reservation), on which it then defaulted. The noteholder sued the tribe for breach of contract in state court and the tribe moved to dismiss the claim based upon its sovereign immunity. Id., 523 U.S. at 753-754. Overturning the lower court's finding that the tribe was not immune from suit, the Supreme Court concluded: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Id. at 760. Despite finding immunity in that action for contract *damages*, the Court noted there "are reasons to doubt the wisdom of perpetuating the doctrine [of sovereign immunity]", stating in "our interdependent and mobile society,...sovereign immunity extends beyond what is needed for tribal self-governance. This is evident when tribes take part in the Nation's commerce." Id. at 758.

Without a doubt, the relief sought by the *Kiowa* plaintiffs was monetary – damages for breach of contract. It is also beyond doubt that the *Kiowa* Court was not asked to, and therefore did not address the issue of sovereign immunity in the

context of a request solely for equitable relief. The *Kiowa* dissent expressly noted that the Supreme Court has not decided whether a state court has jurisdiction to enjoin a tribe's off-reservation actions. Id. at 763. Nor was there any discussion of whether principles of sovereign immunity apply to disputes involving "*purely* off-reservation conduct." Id. at 764 (Stevens, J. dissenting, emphasis added). Thus, while the *Kiowa* Court signaled its belief that tribal sovereign immunity should be restricted, it found sovereign immunity continues to apply in actions for money damages, regardless of where the wrong occurred. However, *Kiowa*'s narrow breadth does not include the facts of this case. Instead, the court must turn to more recent Supreme Court pronouncements and federal case law to address whether sovereign immunity applies where the sole relief sought is equitable.

b. The *Sherrill* Case

The Court's decision in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L.Ed.2d 386 (2005) ("*Sherrill*"), demonstrates that *Kiowa* does not apply to litigation seeking only equitable relief. In *Sherrill*, decided seven years after *Kiowa*, the U.S. Supreme Court noted that an Indian tribe could not claim immunity as a defense to an action to evict the tribe from fee land. The *Sherrill* litigation involved two separate lawsuits between the same parties. The Oneida Indian Nation filed a federal action challenging the City of Sherrill, New York's ability to tax the Nation's fee land. The City filed its own

action in state court against the Nation, seeking to evict the tribe from its fee property. Id., 544 U.S. at 211 ("The city of Sherrill initiated eviction proceedings in state court, and the OIN sued Sherrill in federal court").

While most of the Supreme Court's decision addressed whether the tribe was immune from taxation (concluding in the negative), it also addressed the unavailability of the defense of sovereign immunity from suit in the state court eviction action. In his dissent, Justice Stevens noted that, based upon the majority's decision, the Nation would be able to assert immunity as a defense to the action in state court. In response, Justice Ginsberg (writing for the majority) expressly stated:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill....We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

Id. at 214, n.7 (emphasis added). The Court's statement thus supports the conclusion that where a claim seeks solely equitable relief against an Indian tribe related to its non-trust, fee property, the defense of sovereign immunity is unavailable. As stated perhaps more succinctly,

> ... it is clear from the Supreme Court's decision in *Sherrill* that a tribe can be prevented from invoking a defense of sovereign immunity where equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land. In other words, the *Sherrill* Court held that the OIN could not invoke sovereign immunity to defend against local real property tax enforcement proceedings,

> including eviction proceedings....Specifically,...Justice Stevens argued in his dissent that tribal immunity could be raised "as a defense against a state collection proceeding."...However, the majority opinion specifically rejected that reasoning. *See [Sherrill] at 214 n.7* ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding against Sherrill. We disagree.");...Thus, *Sherrill* allows a tribe to be sued by a state or town ... to enforce its laws with respect to a parcel of land if equitable principles prevent the tribe from asserting sovereignty with respect to that land. To hold otherwise would completely undermine the holding of *Sherrill* because, if defendants are immune from suit, plaintiffs here would be left utterly powerless to utilize the courts to avoid the disruptive impact that the Supreme Court clearly stated they have the equitable right to prevent.

New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (citations omitted, emphasis added).

After *Kiowa*, but prior to the Court's decision in *Sherrill*, at least one Circuit Court presaged the *Sherrill* conclusion, holding that Indian tribes are not immune from suit where only equitable relief is sought. In T.T.E.A. v. Ysleta del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999), the Fifth Circuit recognized that claims for injunctive relief against an Indian tribe require a different outcome from *Kiowa*:

> Kiowa ... was an action for damages, not a suit for declaratory or injunctive relief. This difference matters....
>
> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible, and nothing in Kiowa undermines the relevant logic. State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See* Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign

> immunity. Thus, while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief.

T.T.E.A., 181 F.3d at 680-681, emphasis added. The Fifth Circuit again precluded the application of sovereign immunity in another action for declaratory relief against an Indian tribe: "In the case *sub judice*, the oil companies sought declaratory relief against the Tribe. T.T.E.A. is, therefore, dispositive on the issue of the tribe's asserted immunity. As such, we find that the district court erroneously concluded that the Tribe was entitled to sovereign immunity against the oil companies' claims for equitable relief." Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes, 261 F.3d 567, 571-572 (5th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002). See also Shinnecock Indian Nation, 523 F. Supp. 2d at 297-299, n.74 ("The Supreme Court's decision in Kiowa Tribe...was addressing sovereign immunity of federally-recognized Indian tribes from damages actions, not for injunctive relief").

Post-*Sherrill*, *Kiowa* presents no bar to a claim for equitable relief against an Indian tribe, particularly where the equitable relief sought relates to land held, not in trust, but in fee.

c. *Armijo* does not Require a Contrary Result

The court's opinion in Armijo v. Pueblo of Laguna, 2011-NMCA-006, 149 N.M. 234, 247 P.3d 1119, *cert. denied*, No. 32,687, 263 P.3d 269 (2010), does not

preclude the result sought by Hamaatsa. Armijo was an action for adverse possession involving *in personam* jurisdiction. Therefore, the case did not assess the availability of an action *in rem* against fee property held by a Pueblo.

Further, Armijo presumed that the tribe enjoyed sovereign immunity from suit, and that sovereign immunity applied absent an exception under federal law or a waiver. It thus commenced its analysis one step too far – it did not determine whether the judicially-created doctrine allowing tribal sovereign immunity applied to suits either *in rem* or for solely equitable relief. If an action is *in rem*, the court need not even reach the issue of sovereign immunity. Similarly, under *Sherrill*, T.T.E.A., and Comstock, where a tribe is sued for purely declaratory or injunctive relief (but not for damages), sovereign immunity simply does not apply and therefore no waiver analysis is necessary. As Armijo noted, it is these federal cases and not New Mexico state precedent that controls. Armijo, 2011-NMCA-6, ¶ 21 ("tribal sovereign immunity is a matter of federal law thereby making any reliance on state case law interpretations of federal law and cases questionable," citation omitted).

While Armijo correctly noted that the bulk of *Sherrill* addressed issues of sovereign jurisdiction, rather than sovereign immunity, it appears that neither of the parties pointed the court to the brief discussion in *Sherrill* of that Court's statement that the tribe could not raise immunity as a defense in the state court

eviction proceeding. Thus, the Pueblo has no immunity from suit and the waiver analysis undertaken in Armijo is inapplicable.

d. Sovereign Immunity Does Not Bar a Claim Where the Road Came into Existence Prior to the Sovereign's Acquisition of the Property

The Pueblo argued that Hamaatsa's action is one to quiet title and therefore is not *in rem*. Even were this accurate and Hamaatsa sought to establish an easement across the Pueblo's fee property, this type of equitable claim against a sovereign is not barred. A sovereign has no immunity from suit by a private party seeking to establish that an easement was created before the sovereign took title. See, e.g., Heuer v. County of Aitkin, 645 N.W.2d 753, 759 (Minn. Ct. App. 2002) ("Appellants contend that...they have established a prescriptive easement...since they, or their predecessors in title, had established such an easement before Aitkin County purchased those parcels for public use....Because the road was apparently in use for a period of 15 years before respondent [County] gained ownership of those two parcels, appellant may be able to establish that a prescriptive easement was established before they were purchased for public use"). This is also true under the federal Quiet Title Act. Bunyard v. United States, 301 F. Supp. 2d 1052, 1054 (D. Ariz. 2004) ("Plaintiffs argue that if a prescriptive easement was established prior to the acquisition of the land in question by the United States, then Plaintiffs may bring suit to quiet title to such an easement under the Quiet

Title Act, 28 U.S.C. § 2409a. ... In response, Defendant asserts that a prescriptive 'easement cannot be claimed against the United States' ...Defendant appears to be mistaken.....Kinscherff v. United States, 586 F.2d 159, 161 (10th Cir. 1978) (easements are real property interests subject to quiet title actions)"). Thus, the Pueblo is required to defend the claims raised by its purchase of property subject to an easement prior to its acquisition, as is any other sovereign.

C. SOVEREIGN IMMUNITY DOES NOT BAR THIS ACTION INVOLVING THE DECLARATION OF A PUBLIC ROAD OVER NON-TRUST PROPERTY HELD IN FEE BY THE PUEBLO

1. The Applicable Standard of Review

As set forth *supra* in Section V, A, 1, the standard of review is de novo.

2. Preservation

This issue was preserved in the record at RP 28-33.

3. Legal Argument

If the Pueblo's own ership of fee property is immune from suit, s uch a finding would render irrelevant a whole panoply of statutes regarding Indian trust land (and how such trust land is created), other federal laws, and statutes regarding roads in Indian country.

Indian sovereign immunity was judicially, not legislatively, created and defined. *Kiowa* at 757 ("Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident," detailing

Supreme Court case law establishing sovereign immunity on behalf of Indian tribes). See also Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, Accident, And Policy In The Development Of Sovereign Immunity Doctrine*, 43 Wake Forest L. Rev. 765, 778 (Winter 2008) ("Although tribal sovereign immunity appears to derive from the same common law tradition that informs the Supreme Court's state sovereign immunity jurisprudence, little case law exists specifically delineating the evolution of the doctrine as it applies to tribes. In reaffirming that sovereign immunity doctrine applies to tribes, the Supreme Court has noted that the doctrine 'developed almost by accident' - that is, through aggressive readings of early case law that assumed, while failing to hold explicitly, that a doctrine of tribal sovereign immunity existed").

The contours of when tribal immunity applies continue to develop, expand, and retract. Thus, as set forth *supra*, sovereign immunity simply does not apply to *in rem* proceedings against fee property, or to wholly equitable actions against a tribe. As set forth below, Indian sovereign immunity does not apply to equitable relief sought with regard to Indian owned fee land that is not held in trust and which is freely alienable.

a. Sovereign immunity Does Not Apply to a Dispute About Non-Trust Fee Land

An Indian tribe, like any other entity, has the ability to acquire real property on the open market. But, unlike other entities, it also has the ability to ask Interior

to transform such property from fee into property held in trust. Placing tribal property in trust is beneficial in several ways:

> Placing land into trust is typically essential for tribes to maximize economic development on the land – the trust status means the land is free from property taxes, state and local regulation, and often state and local taxation for any business operating on the property.

Aspatore, Emerging Issues in Tribal-State Relations, "Managing Tribal-State Relations in a Changing Economy," 8 (2010). The opposite is presumably also true – when property is not held in trust, it is not free from state regulation, including laws affecting public roadways and enforcement of those laws.

In Carcieri v. Salazar, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009) ("*Carcieri*")[10], the Supreme Court noted under 25 U.S.C. § 465, Interior "may accept land into trust only for 'the purpose of providing land for Indians.'" Id., 555 U.S. at 388. Thus, a tribe which owned property in fee could "free itself from compliance with local regulations," (specifically, regulations governing housing construction), by having property taken into trust. Id. at 385.

Under New Mexico state law, it is clear that only after a property is taken into trust do the state courts lose subject matter jurisdiction. Jicarilla Apache Tribe, *supra*, 118 N.M. 550, 883 P.2d 136 (1994). Indeed, the Pueblo does not

[10] In that case, the Court found that the Indian Reorganization Act's (IRA) definition of "Indian tribe," 25 U.S.C. § 479, did not apply to tribes other than those recognized as of the date on which the IRA was passed in 1934. If the Pueblo was not recognized until after 1934, it is questionable post-*Carcieri* whether it can claim sovereign immunity from suit at all.

dispute that, if sovereign immunity is inapplicable, the state court has subject matter jurisdiction over this matter. In response to the Pueblo's repeated assertion that the finding of subject matter jurisdiction over the tribe in Jicarilla is irrelevant to the issue of sovereign immunity, the New Mexico Supreme Court has stated:

> We do not believe that sovereign immunity and subject matter jurisdiction are as distinct as the Pueblos argue. A waiver of immunity in state court inherently involves a state court's subject matter jurisdiction, and immunity waiver claims are often phrased as subject matter jurisdiction claims.

Doe v. Santa Clara Pueblo, 2007-NMSC-8 ¶ 27, n.6, 141 N.M. 269, 154 P.3d 644. Therefore, if subject matter jurisdiction exists in the state courts, as it does here under Jicarilla for this fee-owned property, the tribe cannot claim sovereign immunity from suit as to that property.

b. Fee Property is Subject to Local Authority, Including Enforcement

Carcieri suggests that fee property is subject to local regulations. Such a conclusion is consistent with other cases from the U.S. Supreme Court which specifically address whether fee property held by Indian tribes is subject to state and local taxation. See, e.g., *Sherrill*, 544 U.S. at 213 ("OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that have been subject to state and location taxation for generations"). While those cases discuss "ancestral lands located outside of current tribal boundaries that were

purchased on the open market by tribes (purchased lands)[11]" the analysis does not change if the property was never previously held by the tribe which purchased it in fee.

The statutory scheme and case law with regard to the immunities of property held in trust are also instructive on the opposite point – the lack of immunities of property that is not held in trust. At the outset, the *Sherrill* Court stated that the "Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Sherrill*, 544 U.S. at 202-203. That statement should also preclude the ability of the tribe to assert sovereign immunity with regard to litigation over open-market purchases of non-trust property.

This position is further bolstered by *Sherrill*'s citation to the fee-to-trust process at 25 U.S.C. § 465, by which the Secretary of the Interior can "acquire land in trust for Indians" and by so doing, preclude that land from local regulatory control. *Sherrill* at 220-221. As *Sherrill* notes, Interior cannot simply accept land into trust without first determining the impact of its decision on the locality, including possible "jurisdictional problems." Id. at 221, citing 25 C.F.R. § 151.10(f) (2004). Thus, non-trust property should not be given the protections from local authority, law, and the enforcement of such laws that are enjoyed by

[11] Armijo, *2011-NMCA-6,* ¶¶ 17, 18.

Indian tribes once property is taken into trust. To find otherwise would render superfluous the entire fee-to-trust purpose and detailed processes (set forth, *inter alia*, in 25 C.F.R. part 151).

Similarly, the Enabling Act of New Mexico, 36 Stat. 557, § 2, requires only that the state keep its regulatory hands (in the form of taxation) off of lands "owned...by Indian tribes, the right or title which shall have been acquired through or from the United States." Id. The Enabling Act expressly provides that lands held by Indian tribes or individual members in fee are subject to taxation. Id. This provision therefore differentiates between Indian trust and fee lands with regard to taxation, and therefore presumably enforcement of local tax policy. If a tribe is not immune from an action to collect state/local taxes as to its fee property, it should not be immune from other causes of action related to that property. While the cases on taxation and regulation of property held by tribes in fee do not resolve the issue of sovereign immunity from suit, they are informative with regard to the analysis of New Mexico's authority over a tribe's fee property. And, as addressed *infra*, Congress did not intend that a state could have authority over an area without also giving the state the ability to enforce that authority in equity.

c. *Kiowa* Does Not Alter the Result

This argument is not negated by the holding in *Kiowa* that off reservation "conduct" does not abrogate sovereign immunity. The issue here is not the tribe's

"conduct," such as entering into a contract or committing a tort, but the tribe's ability to control access to a public road over non-trust property, where the character of the road was established prior to the tribe taking possession. Cf. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149, 153, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) ("*Mescalero*") ("off-reservation activities are within the reach of state law"). In this case, unlike *Kiowa*, there is a non-discriminatory law to be applied to the conduct of the tribe beyond reservation boundaries – R.S. 2477.

To allow an Indian tribe to avoid the enforcement of state and federal law to non-trust fee property, in an equitable action that would not impact the tribe's treasury, would defeat the purpose of the laws allowing tribes to acquire such property. The "ultimate purpose" of allowing such fee purchases was to give tribes and their members "the more independent and responsible status of citizens and property owners." *Mescalero* at 154, citation omitted. Thus, to hold tribes and their members "immune [from state law] would be inconsistent with one of the very purposes" of allowing such fee purchases. Id. at 154-155, citation omitted. Further, here as in *Mescalero*, "the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §§ 476 and 477 of the [Indian Reorganization] Act. These provisions were designed to encourage tribal enterprises 'to enter the white world on a footing of equal competition.'" Id. at 157, citations omitted, emphasis added.

See also *Kiowa* at 758 (in "sovereign immunity extends beyond what is needed for tribal self-governance. This is evident when tribes take part in the Nation's commerce"). Therefore, no purpose is served in allowing sovereign immunity to extend to equitable actions related to a tribe's fee property.

Various federal statutes control public roads on Indian lands. See, e.g., 25 U.S.C. § 341; 25 U.S.C. § 311; 25 U.S.C. § 323. These statutes thus recognize that Congress retained the authority to create and regulate public highways over Indian land, including highways under R.S. 2477.[12]

Further, there is no conceivable policy reason for Indian tribes which own unalloted land to be subject to state and local laws and their enforcement, but to exclude Indian tribal land that is held in fee. Both types of property are not held in trust, and are freely alienable. 25 U.S.C. § 349 ("At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside...").

To allow an Indian tribe to claim sovereign immunity from suit with regard to fee property over which a public road traverses would defeat the congressional scheme of regulation and Congress' pronouncement in R.S. 2477 would be

[12] Thus, in 25 U.S.C. § 341, Congress also waived the right of a tribe to claim immunity with regard to any road to which that statute applies.

unenforceable. This conclusion is bolstered by the Supreme Court's reminder that "general Acts of Congress apply to Indians as well as all other in the absence of a clear expression to the contrary." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct. 343, 4 L. Ed. 2d 584 (1960) ("*Tuscarora*"). R.S. 2477 is precisely one of the "general Acts of Congress" that applies universally to the federal government, states, and Indian tribes. To allow a law to apply universally, but without any enforcement mechanism, would be incongruous. Thus, in *Tuscarora*,[13] the Court found that the federal government had the same power to take fee land belonging to an Indian tribe as it had to take property belonging to a state or a private owner. Id. at 121-122.[14]

d. The Pueblo's Position Would Deprive Hamaatsa of A Judicial Forum

The United States Court of Appeals for the Tenth Circuit has determined

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[13]In *Tuscarora*, the litigation was initiated by the Indian tribe.

[14]While certain cases have found that statutes seeking to abrogate Indian immunities should be specific, that rationale does not apply here: "The Tenth Circuit....examined *Tuscarora*, noting that it dealt solely with issues of land ownership, not with questions pertaining to the tribe's sovereign authority to govern the land. The Tenth Circuit concluded that proprietary interests and sovereign interests are separate; Tuscarora governed only those situations where the tribe was exercising mere proprietary or property rights....In situations where the tribe acts in its capacity as a sovereign, a well-established canon of Indian law dictates that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," Chickasaw Nation v. NLRB, CV 11-506-W, 2011 U.S. Dist. LEXIS 105675, 12-13 (W.D. Okla. July 11, 2011) (citing NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (emphasis added).

that, with regard to an equitable action involving an Indian tribe, it unlikely that Congress intended to create rights but no remedies against a tribe. Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), involved a lawsuit by a non-Indian who owned fee land located within the boundary of an Indian reservation. The plaintiff informed the tribe of a project he planned to undertake to build a guest lodge on his 160-acre property and obtained a license to do so. The day after the plaintiff completed the lodge, the tribe closed the road to it. The plaintiff had no access to tribal court, and in response to an action brought in the federal court, the tribe asserted sovereign immunity. Id., 684-685.

The Tenth Circuit determined that "there has to be a forum where the dispute can be settled," concluding: "There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly fashion. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy." Id. at 685. The court noted that tribe's decision to exercise "self-help" by closing the road, rather than by seeking a remedy via judicial recourse, was not a "suitable device to determine constitutional rights." Id.

Here, as in Dry Creek Lodge, absent jurisdiction over the Indian tribe, no court would be able to address this matter. Hamaatsa is creature of New Mexico law, not an Indian corporation (RP 1). It did not enter into a voluntary transaction

with the Pueblo, and whether the Pueblo purchased fee property over which a public road already traversed does not affect the tribe's political integrity, economic security, health, or welfare. Therefore, tribal courts do not have jurisdiction to consider this matter. Strate v. A-1 Contractors, 520 U.S. 438, 446, 453, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) ("*Strate*") ("...Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare" and tribal court authority "generally 'does not extend to the activities of nonmembers of the tribe'"). If the Pueblo can assert immunity in every forum, Hamaatsa is without a remedy.

Dry Creek Lodge's holding is consistent with another federal district court's analysis. In Oneida Tribe of Indians of Wisconsin v. Village of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008),[15] the court concluded that it would be nonsensical for Congress to subject Indian tribes to local regulation, and yet allow sovereign immunity to preclude regulatory enforcement:

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[15] The Armijo court rejected Hobart's application, stating that it did not address sovereign immunity. While the majority of the case dealt with the authority of a local government to condemn the property of an Indian tribe, the court also addressed the issue of sovereign immunity in the context of determining whether the locality had the ability to enforce the condemnation proceeding against the tribe. It is this part of the opinion that is cited herein.

> ... [I]t hardly makes sense to permit taxation while at the same time prohibiting the only means of collecting such taxes....Given the immunity from suit that Indian tribes enjoy, *see* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991), no other means of recovery for unpaid property taxes exists. Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such property is meaningless, and the Court's analysis in *Yakima*... and *Sherrill* amounts to nothing more than an elaborate academic parlor game. Since it hardly seems likely that the Court was simply playing a game in those cases, I conclude, contrary to the district court in the *Oneida Indian Nation* cases on remand from *Sherrill,* that implicit in the Court's holding that Indian fee lands are subject to *ad valorem* property taxes is the further holding that such lands can be forcibly sold for nonpayment of such taxes. And, of course, if Indian lands are not exempt from forced alienation for nonpayment of state or local property taxes, it also follows that they are not exempt from the Village's power to condemn such land for a public highway....

Hobart at 921.

It would similarly be nonsensical to allow an Indian tribe to purchase property in fee wherever it likes, and then essentially give that tribe control over the public roads by allowing the tribe to exercise its sovereign immunity from suit. Under this formulation, a tribe could purchase a lot in a subdivision, put up a gate to which only it has the key, and then claim it is immune from the suit filed by its neighbors to open the public road. As only trust property is subject to such immunity, tribes should not be permitted to assert immunity from suit as to fee property, while still being permitted by Congress to purchase fee land and then have it placed into trust.

e. Tribal Sovereign Immunity Should Not Apply More Expansively to Tribes than to Other Sovereigns

Nor should tribal sovereign immunity be subject to significantly different parameters than the sovereign immunity held by state governments, the federal government, and foreign sovereigns. *Kiowa* stated that "the immunity possessed by Indian tribes is not coextensive with that of the states." *Kiowa* at 756. However, *Kiowa* did not assert that tribal immunity was more expansive than state sovereign immunity. Indeed, in its statements about how sovereign immunity can harm a tribe and those with whom it does business (*Kiowa* at 758), the *Kiowa* suggests that tribal sovereign immunity should be curbed. Nor did the *Kiowa* majority discuss how tribal sovereign immunity compares to the immunity of foreign states. However, the *Kiowa* dissent stated that, as state, federal, and foreign sovereignty have all been increasingly restricted, the same should be true for Indian tribes. *Kiowa* at 765-766 (Stevens, J., dissenting). Indeed, there is no basis for allowing Indian tribes to enjoy immunity for litigation over commercial activities, particularly those involving equitable relief on non-trust land acquired in fee. Such immunities should be restricted with regard to tribes as they have been with regard to other sovereigns. See, e.g., John W. Borchert, Comment, *Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification?* 13 Emory Int'l L. Rev. 247 (Spring 1999). The same policy rationales that curb sovereign immunity for the commercial activities and land

purchases outside of the sovereign's jurisdiction should similarly bar immunity for Indian tribes.

III. CONCLUSION

As set forth herein, there are numerous bases for why sovereign immunity does not apply to the allegations of Hamaatsa's Complaint. Therefore, the district court's decision denying the Pueblo's motion to dismiss should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent via first class U.S. mail, postage prepaid, to Samuel D. Gollis, 901 Rio Grande Boulevard, NW, Suite F-144, Albuquerque, New Mexico 87104 on January 3, 2012.

_____
Faith Kalman Reyes