**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**



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

Plaintiff-Appellee,

v.

PUEBLO OF SAN FELIPE, a Federally Recognized Indian Tribe,

Defendant-Appellant.

**Ct. App. No. 31,297**

Thirteenth Judicial District Court
Sandoval County, New Mexico
No. D-1329-CV-2010-03108
The Honorable George P. Eichwald

---

# APPELLANT PUEBLO OF SAN FELIPE'S BRIEF IN CHIEF

---

Samuel D. Gollis
Samuel D. Gollis, Attorney at Law, P.C.
901 Rio Grande Blvd. N.W., Suite F-144
Albuquerque, New Mexico 87104
Telephone: (505) 883-4696
Facsimile: (505) 884-4331
sgollis@hotmail.com

Attorneys for Appellant Pueblo of San Felipe

*ORAL ARGUMENT IS REQUESTED*

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS
**(Continued)**

**Page**



## STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief in Chief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2003, the body of the brief, as defined by Rule 12-213(F)(1), contains 9,200 words.

## TABLE OF AUTHORITIES

**Pages**

**NEW MEXICO CASES**

## TABLE OF AUTHORITIES
**(Continued)**

**Pages**



**OTHER CASES**

## TABLE OF AUTHORITIES
**(Continued)**

**Pages**

## TABLE OF AUTHORITIES
**(Continued)**

**Pages**

## TABLE OF AUTHORITIES
**(Continued)**

**Pages**

## TABLE OF AUTHORITIES
**(Continued)**

**Pages**



**NEW MEXICO STATUTES AND RULES**



**OTHER AUTHORITIES**

## TABLE OF AUTHORITIES
**(Continued)**

**Pages**

## SUMMARY OF THE PROCEEDINGS

### A. Nature of the Case

This case presents an important question concerning the application of an Indian tribe's sovereign immunity to an action in which one neighboring private landowner, Plaintiff-Appellee Hamaatsa, Inc. ("Hamaatsa"), sued another, Defendant-Appellant Pueblo of San Felipe ("Pueblo" or "San Felipe"), for declaratory and injunctive relief in a dispute over Hamaatsa's use of a dirt road crossing the Pueblo's property. The Pueblo currently owns the property, which is located outside of, but adjacent to, the San Felipe Reservation, in fee simple.

### B. Course of Proceedings and Disposition Below

On December 30, 2010, Hamaatsa filed its complaint against the Pueblo, asserting that a dirt road crossing the Pueblo's property is a public road pursuant to the federal statute commonly called R.S. 2477. [**RP 1-7**]. *See* Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy Management Act of 1976, Pub.L. No. 94-579 § 706(a), 90 Stat. 2793 ("R.S. 2477").[1] In its suit, Hamaatsa seeks a declaration that the dirt road "is a public road and therefore that defendant cannot restrict plaintiff's use of

[1] R.S. 2477, in its entirety, provided "[T]he right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

the [road] as a member of the public and the owner of property contiguous to the road. ..." [**RP 5**].

Pursuant to Rule 1-012(B)(1) NMRA, the Pueblo moved to dismiss Hamaatsa's complaint for lack of subject matter jurisdiction based on the Pueblo's sovereign immunity. Following briefing and oral argument, the District Court orally denied the motion. [**Tr. 31**]. As grounds for its decision, the Court simply stated that "this is an *in rem* proceeding not seeking damages." [**Tr. 31**]. Recognizing that its decision "involves a controlling question of law as to which there is a substantial ground for difference of opinion," NMSA 1978, Section 39-3-4(A) (1999), the District Court subsequently entered an order on May 17, 2011, both denying San Felipe's motion and certifying the order for interlocutory appeal in compliance with § 39-3-4(A). [**RP 43**; **Tr. 31**]. The Court also stayed all proceedings in the action pending resolution of the appeal. [**RP 44**].

The Pueblo timely filed, on June 1, 2011, an application for interlocutory appeal with this Court. [**RP 45**]. Hamaatsa, on June 20, 2011, filed a response. [**RP 45**]. This Court granted San Felipe's application on July 5, 2011, assigning the case to the Court's general calendar. [**RP 45**].

## C. Summary of the Facts Relevant to the Issue Presented for Review[2]

In December 2001, the Pueblo acquired from the United States Bureau of Land Management ("BLM") an approximately 9,458-acre parcel of land adjacent to the Pueblo's reservation in Sandoval County. [**RP 2** (¶ 11)]. The property includes, among other lands, Section 3 in Township 13 North, Range 6 East, New Mexico Principal Meridian ("Section 3"). [**RP 2** (¶ 4)]. In the patent conveying the property to the Pueblo, the BLM reserved "an easement and right-of-way over, across, and upon a strip of land 40 feet wide along the existing road crossing lots 1 to 4, inclusive, sec. 3, T. 13 N., R. 6 E. ... " [**RP 2-3** (¶ 12)]. The BLM reserved this easement to provide access to a BLM property known as the Ball Ranch Area of Critical Environmental Concern ("Ball Ranch ACEC"), located to the west of the lands the BLM conveyed to the Pueblo.

In September 2002, BLM and the Pueblo agreed to reroute a portion of the dirt access road to the Ball Ranch ACEC to avoid an area prone to erosion. The BLM, by quitclaim deed, conveyed and relinquished to the Pueblo "all right, title, and interests" to that portion of the easement and right-of-way the BLM had previously reserved "upon a strip of land 40 feet wide along the existing northern road crossing lots 1, 2, and the portion of lot 3 included in the northern route, sec.

---

[2] Because the case is before the Court on the Pueblo's motion to dismiss for lack of subject matter jurisdiction, the Court must "accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130 N.M. 368, 24 P.3d 803.

3, T. 13 N., R. 6 E." [**RP 3** (¶ 14)]. The Pueblo, in turn, deeded a new easement to the BLM, consisting in relevant part of "a strip of land 40 feet wide along the existing road crossing lots 1 and 2, inclusive S½NE¼, sec. 3, T. 13 N., R. 6 E," to establish a new access route to the Ball Ranch ACEC.

In 2007, Hamaatsa purchased the half-section of land in Section 34, Township 14 North, Range 6 East, located directly to the north of Section 3.[3] Since the purchase, Hamaatsa has gained access to its property by crossing the Pueblo's land along a route comprised partly of a portion of the easement and right-of-way the BLM had originally reserved in 2001, and partly of a portion of the easement relinquished by the BLM to the Pueblo in 2002. [**RP 2** (¶ 10)].[4] On

---

[3] Nowhere in Hamaatsa's complaint does Hamaatsa specifically identify its land, its interest in the land, or when it acquired the land. The closest Hamaatsa comes is the allegation that "[p]laintiff and its predecessors in interest have used and continue to use the Northern R.S. 2477 Road to access their property, which is located immediately north of the Northern R.S. 2477 Road ("Plaintiff's Property")." [**RP 2** (¶ 10)]. *See also* [**RP 5** (prayer for relief)] (describing Hamaatsa "as a member of the public and the owner of property contiguous to the road").

[4] At oral argument on the Pueblo's motion to dismiss, counsel for Hamaatsa repeatedly represented that the legal existence of the alleged road is not in dispute. *See* [**Tr. 14**] ("there's ... no conflict that there is a road over this property, ... which is a public road"); [**Tr. 17**] ("there's no question, at least at this stage of the game, that there is an R.S. 2477 road, public road, over this property"); [**Tr. 18**] ("there's a public road in existence"). There is, to the contrary, a vigorous dispute as to the legal status of the dirt road, and that dispute is at the heart of the merits of Hamaatsa's lawsuit. However, even if that "fact" were presumed true for purposes of a motion to dismiss, it is entirely irrelevant to the legal issue presented in the Pueblo's appeal. The issue here is not the legal status of the alleged road, but

several occasions between 2007 and 2009, the Pueblo informed Hamaatsa that it was trespassing on the Pueblo's land because the route Hamaatsa was using did not constitute a legally valid easement. [**RP 3** (¶ 18)].

## STANDARD OF REVIEW

This Court reviews *de novo* "a district court's ruling on a Rule 1-012(B)(1) lack of subject matter jurisdiction issue" like the one here. *Holguin v. Tsay Corporation*, 2009-NMCA-056, ¶ 9, 146 N.M. 346, 210 P.3d 243. *See also Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207, 46 P.3d 668 ("In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews *de novo*"), *cert. dismissed*, 536 U.S. 990, 123 S.Ct. 32 (2002).

---

whether the Pueblo's sovereign immunity prevents the district court from hearing Hamaatsa's complaint against the Pueblo. The whole point of San Felipe's challenge to the subject matter jurisdiction of the District Court—and the reason that this Court permits interlocutory appeals, as it did here, to review immediately pre-trial decisions regarding application of the tribal sovereign immunity doctrine—is to prevent the District Court from entertaining Hamaatsa's claim. Indeed, the "very purpose" of the sovereign immunity doctrine "is to prevent a judicial examination of the merits." *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987).

## ARGUMENT

The District Court's decision that the doctrine of tribal sovereign immunity does not bar Hamaatsa's lawsuit against the Pueblo is premised on two erroneous legal conclusions. Both conclusions are found in a single sentence without benefit of any elaboration or analysis. [**Tr. 31**]. Both conclusions are clearly erroneous. First, the Court ruled that the action "is an *in rem* proceeding" in which the Court need not exercise personal jurisdiction over the Pueblo, thereby making the Pueblo's invocation of its immunity from suit, in the District Court's eyes, irrelevant. Second, in stating that Hamaatsa was "not seeking damages" in its suit, the Court apparently concluded that immunity protects an Indian tribe from suit in state court only when a party seeks monetary redress against the tribe.

The District Court's decision is incorrect on both points. Hamaatsa's lawsuit, an action between private parties seeking declaratory and injunctive relief, falls comfortably within the boundaries of the types of cases to which the tribal immunity doctrine applies. The action constitutes a proceeding *in personam*, not *in rem*, requiring the Court to exercise jurisdiction over the Pueblo itself. Because the Pueblo has not consented to suit, the District Court cannot assert jurisdiction. New Mexico law is clear on this point, but even were it not, the *in personam – in rem* distinction on which the District Court ostensibly based its decision is irrelevant to the application of the tribal immunity doctrine. The other distinction

on which the District Court based its decision—that between monetary and non-monetary relief—is likewise of no moment, for the applicable precedent leaves no doubt that Indian tribes are immune from suit regardless of the type of relief sought.

## POINT I

## THE DISTRICT COURT ORDER CONFLICTS WITH ESTABLISHED FEDERAL AND NEW MEXICO PRECEDENT REGARDING TRIBAL SOVEREIGN IMMUNITY

### A. Historical and Recent Judicial Pronouncements Mandate Recognition of the Pueblo's Sovereign Immunity.

The District Court's denial of the Pueblo's motion to dismiss directly contravenes the controlling precedent of the United States Supreme Court, the New Mexico Supreme Court, and this Court regarding the application of the tribal immunity doctrine.

The doctrine of tribal sovereign immunity has long been recognized "as a legitimate legal doctrine of significant historical pedigree." *Hoffman*, 2010-NMCA-034, ¶ 6, 148 N.M. 222, 232 P.3d 901, *cert. denied*, 2010-NMCERT-3, 148 N.M. 560, 240 P.3d 15, and 131 S.Ct. 227 (2010). Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (citations omitted). *Accord Gallegos*, 2002-NMSC-012, ¶ 7. Like all aspects of tribal sovereignty, a tribe's sovereign immunity "is subject to plenary

federal control and definition" and "is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) (citing *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1677).

Tribal sovereign immunity, in fact, can be limited in only two ways. First, because Article I, Section 8 of the United States Constitution imbues Congress with plenary authority over Indian affairs, Congress can enact legislation authorizing suits against Indian tribes. *Gallegos*, 2002-NMSC-012, ¶ 7 (citing *Three Affiliated Tribes*, 467 U.S. at 890-891, 106 S.Ct. at 2313 and *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1677). Alternatively, a tribe can waive its own immunity by voluntarily, expressly, and unequivocally consenting to suit. *Gallegos*, 2002-NMSC-012, ¶ 7 (citations omitted); *R & R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 10, 139 N.M. 85, 128 P.3d 513, *cert. denied*, 2006-NMCERT-2, 139 N.M. 339, 132 P.3d 596 (2006). "Without an unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities." *Gallegos*, 2002-NMSC-012, ¶ 7 (citing *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 172, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise

jurisdiction over a recognized Indian tribe.")). Congress has not authorized Hamaatsa's suit against the Pueblo, and the Pueblo has not waived its immunity.

The United States Supreme Court's ruling in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) represents that Court's most recent reaffirmation of the broad contours of the tribal immunity doctrine. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L.Ed.2d 623 (2001) (describing *Kiowa Tribe* as the case "in which we reaffirmed the doctrine of tribal immunity"). In *Kiowa Tribe*, the Supreme Court held as "a matter of federal law" that Indian 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." 523 U.S. at 759-60. This Court has recognized that "the question of whether a tribe's activity occurred on or off the reservation has been rendered inconsequential under *Kiowa Tribe*." *Antonio v. Inn of the Mountain Gods Resort and Casino*, 2010-NMCA-077, ¶ 10, 148 N.M. 858, 242 P.3d 425, *cert. denied*, 2010-NMCERT-7, 148 N.M. 610, 241 P.3d 611 (2010). Nor do the New Mexico Supreme Court and this Court limit the holding of *Kiowa Tribe* to suits on contract. *Id.* at ¶ 11. As recently as a year ago, this Court emphatically stated that, in New Mexico, "[t]he law regarding sovereign immunity remains as set forth in *Kiowa*—'an Indian Tribe

is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' " *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶ 20, 149 N.M. 234, 247 P.3d 1119 (quoting *Kiowa*, 523 U.S. at 754, 118 S.Ct. at 1702), *cert. denied*, No. 32,687 (Dec. 6, 2010).

The breadth of the doctrine of tribal sovereign immunity cannot be overstated. As noted in *Kiowa,* "the immunity possessed by Indian tribes is not coextensive with that of the States." 523 U.S. at 756, 118 S.Ct. at 1703. The same is true of tribal immunity when measured against the immunity possessed by foreign sovereigns, the application of whose immunity from suit—unlike that of Indian tribes—Congress has chosen expressly to limit. *See id.* at 759, 118 S.Ct. at 1705. Why a tribe's immunity from suit is broader than that possessed by state and foreign sovereigns was explained by the United States Court of Appeals for the Ninth Circuit in *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039, 114 S.Ct. 681, 126 L.Ed.2d 649 (1994), *superseded by statute*. There, a panel of the Ninth Circuit found that the Yakima Indian Nation's sovereign immunity barred an adversary proceeding in bankruptcy against a tribal business. The court stated:

> The actions of the states and the United States in limiting their own immunity, and the action of Congress in limiting the immunity of foreign states underscore the original scope of sovereign immunity. Against this background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, and the repeatedly

> recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

980 F.2d at 594.

### B. This Case is Functionally Equivalent to *Armijo*, Which Mandates Recognition of the Pueblo's Sovereign Immunity.

Against this backdrop, this Court's decision in *Armijo v. Pueblo of Laguna* is functionally on all fours with the instant case. In *Armijo*, like here, this Court was faced with "the issue of tribal sovereign immunity as it relates to non-tribal land purchased by the Pueblo." 2011-NMCA-006, ¶ 1. The Pueblo of Laguna had sought dismissal of Armijo's cross-claims for adverse possession against it based on the Pueblo's immunity from suit. The District Court denied Laguna's motion, concluding "that the 'court has subject matter and personal jurisdiction over [the Pueblo] in this matter because this matter arises outside the reservation.' " *Id.* at ¶ 7 (alteration in original). This Court reversed, concluding that "[t]he law regarding sovereign immunity remains as set forth in *Kiowa*," *Id.* at ¶¶ 20, 24 (citing *Gallegos*, 2002-NMSC-012, ¶ 36).

As was the case in *Armijo*, where the plaintiff's adverse possession claim was in the nature of an action to quiet title, *id.* at ¶¶ 1 and 5, the fact that Hamaatsa's claim here directly implicates San Felipe's title to its land does not affect the

application of tribal sovereign immunity. *See Pueblo of Santo Domingo v. Rael*, 209 F.R.D. 470, 471, 474 (D.N.M. 2002) (Pueblo's sovereign immunity barred counterclaim for slander of title). On the contrary, because, as Hamaatsa itself admits, its action "is seeking particular relief against the Pueblo" [**Tr. 19**], in the absence of a congressional abrogation or tribal waiver of immunity, Hamaatsa's action cannot go forward. The District Court's apparent reliance on the legal fiction that the action is *in rem* does not alter that conclusion.

## POINT II

## THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT HAMAATSA'S ACTION AGAINST THE PUEBLO "IS AN *IN REM* PROCEEDING"

The District Court's decision rendered San Felipe's immunity from suit irrelevant. By characterizing Hamaatsa's action as an *in rem* proceeding, the District Court concluded that it need not exercise *in personam* jurisdiction over the Pueblo to hear and determine the case. [**Tr. 31**]. The Court's conclusion is plainly at odds with the well established law of this State regarding the nature of Hamaatsa's action, the nature and scope of *in rem* jurisdiction, and the application of the tribal immunity doctrine in actions asserting an interest in land owned in fee simple by an Indian tribe.

### A. The District Court Erroneously Concluded That It Need Not Exercise *In Personam* Jurisdiction Over San Felipe.

Regardless of how it is styled, Hamaatsa's complaint presents an action for declaratory and injunctive relief in which San Felipe's title to its land is at issue. Such a case, like the cross-claimant's quiet title action for adverse possession against Laguna in *Armijo*, requires the District Court to exercise *in personam* jurisdiction over the Pueblo.

The complaint seeks, first, a declaration that real property owned by the Pueblo in fee simple is encumbered by a road, and, second, an order prohibiting the Pueblo from restricting Hamaatsa's use of this alleged road. [**RP 5**]. In Hamaatsa's own words:

> It [Hamaatsa] is seeking particular relief against the Pueblo. It is seeking a declaration that [the dirt road] is a public road, and the Pueblo is the only one who [has] threatened to impede access to this public road, which is why the declaration needs to be entered so they don't block that access.

[**Tr. 19**]. Hamaatsa asserts this interest in the Pueblo's property both "as a member of the public and the owner of property contiguous to" the alleged road. [**RP 5**]. Thus, Hamaatsa's claim, like that of the cross-claimant in *Armijo*, seeks as a practical matter to quiet title in a portion of the Pueblo's property and comes within the ambit of our quiet title statute. *See* NMSA 1978, Section 42-6-1 (1951)

("An action to determine and quiet the title of real property may be brought by anyone having or claiming an interest therein. ...").

In this respect, Hamaatsa's action is no different than other actions that have been brought by private landowners in New Mexico alleging under R.S. 2477 the existence of and right to use an alleged road on privately-owned adjacent land. *See, e.g., Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946) (plaintiff "sought to enjoin" defendant "from interfering with plaintiff's use of an alleged public road or highway across the lands of the latter"); *Wilson v. Williams*, 43 N.M. 173, 87 P.2d 683 (1939) (same); *Quintana v. Knowles*, 115 N.M. 360, 851 P.2d 482 (App. 1993) (same).[5] *Compare Luchetti v. Bandler*, 108 N.M. 682, 777 P.2d 1326 (App.) (trespass action to enjoin defendant's use of an alleged R.S. 2477 road crossing plaintiff's property), *cert. denied*, 108 N.M. 681, 777 P.2d 1325 (1989).

In both *Lovelace* and *Wilson*, the plaintiffs sought declarations that the alleged roads existed and orders prohibiting the defendants specifically from

[5] The appellate courts of other western states confronted with disputes over the existence and use of alleged R.S. 2477 roads located on private land uniformly describe the suits as actions *in personam* to quiet title. *See Clark v. Erekson*, 9 Utah 2d 212, 213, 341 P.2d 424, 425 (1959); *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1018 (Alaska 1996); *Farrell v. Board of Com'rs, Lemhi County*, 138 Idaho 378, 381, 64 P.3d 304, 307 (2002); *Western Aggregates, Inc. v. County of Yuba*, 101 Cal.App.4th 278, 305-306, 130 Cal.Rptr.2d 436, 456 (Cal.App. 3 Dist. 2002); *Camp Bird Colorado, Inc. v. Board of County Com'rs of County of Ouray*, 215 P.3d 1277, 1280 (Colo. App. 2009).

"interfering with" or "obstructing" plaintiffs' use of the roads. 50 N.M at 52, 168 P.2d at 865; 43 N.M. 173, 87 P.2d at 684. Neither case contains even the remotest suggestion that the exercise of jurisdiction by the Supreme Court and the courts below was or could have been premised upon anything other than *in personam* jurisdiction.[6] In ordering the defendants not to interfere or obstruct, the district courts in each case had to exercise *in personam* jurisdiction over the defendants because

> " '[i]n a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam*.' " ... This is so whether the injunction is preliminary or final; in both contexts, the order is directed at someone, and governs that party's conduct.

---

[6] The same is true for the class of cases, the most notable of which is *Algermissen v. Sutin*, 2003-NMSC-001, 133 N.M. 50, 61 P.3d 176 (filed 2002), in which litigants around the State have sought to establish an interest in a public road or path by proving the existence of a public prescriptive easement. The establishment of a "highway" under R.S. 2477 created a right-of-way, which is a species of easement. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988) (citation omitted), *overruled on other grounds by Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir.) (*en banc*), *cert. denied*, 506 U.S. 817, 113 S.Ct. 59, 121 L.Ed.2d 27 (1992). Thus, while the manner of their creation is different, the nature of the easements in public rights-of-way created under R.S. 2477 and by the exercise of prescriptive rights are not. The plaintiffs in *Algermissen*, like Hamaatsa, filed suit specifically against the individuals on whose land the alleged public pathway was located because those defendants, as the owners of the land at issue, could, and in fact did, block the plaintiffs' access. 2003-NMSC-001, ¶¶ 2, 3, and 6. As in the R.S. 2477 cases, neither *Algermissen* nor the other public prescriptive easement cases contain any suggestion whatsoever that the courts were exercising *in rem* jurisdiction over the alleged road or path rather than *in personam* jurisdiction over the parties.

*Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 1757, 173 L.Ed.2d 550 (2009) (quoting Black's Law Dictionary 800 (8th ed. 2004) (in turn quoting 1 H. Joyce, A Treatise on the Law Relating to Injunctions § 1, pp. 2-3 (1909)).

In other words, the district courts in *Lovelace* and *Wilson* could not have employed their "full coercive powers" to enjoin the defendants' future actions with regard to the plaintiffs' use of the roads in question had the courts merely exercised *in rem* jurisdiction over the real property on which the alleged roads were located. By seeking an order declaring that the Pueblo specifically cannot restrict its use of the alleged road, Hamaatsa is directly seeking to enjoin San Felipe from doing so.[7] Injunctive relief does not operate *in rem*, as Hamaatsa would have it, but *in personam*.

The District Court's decision here thus runs afoul of the longstanding legal principle in our State that actions to quiet title—that is to say, actions affecting the title to real property—are actions *in personam*. *State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County*, 44 N.M. 16, 96 P.2d 710, 714-15 (1939). In *Truitt*, the Supreme Court rejected the notion underlying the District Court order here that, if a district court "has jurisdiction of the res, ... it is immaterial that it has

[7] By accident or design, Hamaatsa's complaint does not expressly *in haec verba* seek to "enjoin" the Pueblo from interfering with Hamaatsa's right to use the alleged road. [**RP 5**]. Granting Hamaatsa's prayer for relief, however, would have the direct effect of an injunction, because Hamaatsa "is seeking particular relief against the Pueblo." [**Tr. 19**].

not jurisdiction of the person. ..." 44 N.M. at 711-712. To the contrary, the Supreme Court in *Truitt* concluded that

> actions affecting title to property within the jurisdiction of the court, but which is not seized or otherwise brought under the direct control of the court for disposition ... are usually held to be in personam. Such are actions ... to quiet title to property.

*Id.* at 714-15.

Hamaatsa claimed below, and no doubt will argue to this Court, that because R.S. 2477 operates to create, in the parlance of the statute, a "highway," Hamaatsa's action is not akin to one to quiet title, because members of the public do not have a sufficient interest in public roads for the purpose of maintaining such an action. [**Tr. 18-20**]. Both the law and facts of record refute Hamaatsa's position. First, as a legal matter, Hamaatsa premised its argument on this point not on New Mexico law, but rather on inapposite federal law—specifically, the decision of the United States Court of Appeals for the Tenth Circuit in *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978), and its progeny. *See, e.g., Southwest Four Wheel Drive Ass'n v. Bureau of Land Management*, 363 F.3d 1069, 1071 (10th Cir. 2004). The Tenth Circuit in *Kinscherff* and *Southwest Four Wheel Drive Ass'n* were construing the limits of the federal Quiet Title Act, 28 U.S.C. § 2409a (1986), not our quiet title statute and state court actions alleging the existence under R.S. 2477 or easement by prescription of a public way across

privately owned land. Second, no doubt knowing this to be the case, Hamaatsa hedged its bets in pleading its claim: Hamaatsa asserts that it is entitled to use the dirt road—and to bar the Pueblo from restricting that use—both "as a member of the public and the owner of property contiguous to the road. ..." [**RP 5**].[8]

Neither our Supreme Court nor this Court has ever concluded that a party claiming a right to use a road allegedly created pursuant to R.S. 2477 or by public prescriptive easement cannot state an interest in the alleged road sufficient to allow the party to establish and enforce its right. Indeed, the Supreme Court's decisions in *Lovelace v. Hightower* and *Wilson v. Williams* seem long ago to have settled the issue to the contrary. Hamaatsa brings the same claim, and seeks the same relief, as the plaintiffs in those cases. Nothing in Hamaatsa's case, with the exception of the fact that the defendant is a federally recognized Indian tribe, commends this case for different treatment.

The District Court cannot assert subject matter jurisdiction over Hamaatsa's lawsuit if the Court cannot assert *in personam* jurisdiction over the Pueblo. San

[8] If this Court were to affirm the District Court's decision and the case were to proceed, Hamaatsa would still face two significant legal obstacles—whether Hamaatsa has standing to raise an R.S. 2477 claim, *see Kinscherff*, 586 F.2d at 160, and whether Sandoval County is an indispensable party to the action, *see Percha Creek Mining, LLC v. Fust*, 2008-NMCA-100, ¶¶ 6 and 17, 144 N.M. 569, 189 P.3d 702 (county was indispensable party in action by one private landowner against another seeking declaration of public road or public right-of-way by prescription)—before the merits of the action are ever reached.

Felipe not being amenable to suit, the District Court improperly denied the motion to dismiss.

## B. *In Rem* Jurisdiction Is A Legal Fiction Not Applicable To This Case, But Even Were Hamaatsa's Action A Proceeding *In Rem*, The Pueblo's Sovereign Immunity Bars the Action.

### *1. The in rem doctrine is not applicable to the circumstances presented by this case.*

The United States Supreme Court, in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), held that a Delaware state court's exercise of *in rem* jurisdiction over defendants based solely on the presence of their personal property within the state violated the Due Process Clause of the United States Constitution. In reaching this conclusion, the Court observed that the jurisdictional distinction between property and the owner of that property is a legal fiction no longer worthy of recognition. The Court stated:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

433 U.S. at 212, 97 S.Ct. at 2584. Given that the Court described the *in rem* fiction in an earlier case "as archaic, an animistic survival from remote times, irrational and atavistic," *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 23,

80 S.Ct. 1470, 1473, 4 L.Ed.2d 1540 (1960) (internal quotations and footnote omitted), the Court's holding in *Shaffer* is hardly surprising:

> The case for applying to jurisdiction in rem the same test of "fair play and substantial justice" as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on recognition that "(t)he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws s 56, Introductory Note (1971) (hereafter Restatement). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing."

433 U.S. at 207, 97 S.Ct. at 2581 (footnotes omitted).

Our Supreme Court has expressed a similar opinion of *in rem* jurisdiction. *See State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264. In *Nunez*, which concerned the double jeopardy implications of civil forfeiture under the Controlled Substances Act, Justice Franchini, writing for the Court, examined the *in rem* doctrine to determine whether its application in the civil forfeiture context was punitive or remedial. 2000-NMSC-013, ¶¶ 83-84. Concluding that its application was the former, Justice Franchini acknowledged that the "criticisms" expressed by the U.S. Supreme Court of the *in rem* fiction "are still valid and distinctive aspects of New Mexico law." 2000-NMSC-013, ¶ 82. Justice Franchini stated:

> Our Court has previously criticized the in rem doctrine as being "rooted in the hoary annals of admiralty law" when courts often could not obtain in personam jurisdiction over those who committed maritime offenses, but could obtain in rem jurisdiction over the wrongdoers' ocean vessels. ... Thus, in maritime law, an action was brought against a ship as if it were the wrongdoer. This aspect of in rem doctrine is known as the guilty property fiction. This fiction treats inanimate objects as if they were sentient beings.
>
> ...
>
> The problems that gave rise to the guilty property fiction still exist: courts must still deal with property that has no owner and defendants who do not reside within the jurisdiction or who are unidentified. The purpose of in rem jurisdiction, even in its most archaic form, was to extend the jurisdiction of the courts. It still serves the same purpose.

2000-NMSC-013, ¶¶ 80, 84 (citing *Matter of Forfeiture of Two Thousand Seven Hundred Thirty Dollars and No Cents ($2,730.00) in Cash*, 111 N.M. 746, 748, 809 P.2d 1274, 1276 (1991) and Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich.L.Rev. 1910, 1916-19 (1998)).

This case does not present a situation where the owner is absent, where there is no owner, or where the extent of ownership is unknown. To the contrary, Hamaatsa specifically filed suit against the Pueblo because Hamaatsa knows that the Pueblo owns the land on which the alleged road is located and over which Hamaatsa prefers to travel to reach its neighboring property. San Felipe, as owner of the land, is also the specific entity that can effectively block Hamaatsa's use of the alleged road and, consequently, is the specific entity against whom Hamaatsa

seeks a judicial order barring such action. Moreover, San Felipe is neither absent from the state nor has the Pueblo in any way ignored the action Hamaatsa has filed.

Rather, the Pueblo has invoked its sovereign immunity, arguing, on the basis of that venerable doctrine, that it simply is not amenable to the District Court's jurisdiction. Under the circumstances presented here, the only plausible explanation for the District Court's decision to invoke the *in rem* doctrine was to circumvent the application of the tribal immunity doctrine. That being the case, the question that the District Court's decision raises is whether the District Court properly could invoke its *in rem* jurisdiction at the expense of the tribal immunity doctrine to extend the Court's jurisdiction over the Pueblo.

The answer, for two very obvious reasons, is no. First, "sovereign immunity's extra-territorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity," *In re Greene*, 980 F.2d at 594, strongly militate against what amounts to the creation of an *in rem* exception to the application of the Pueblo's sovereign immunity. *Compare United States v. Nordic Village, Inc.*, 503 U.S. 30, 38, 112 S.Ct. 1011, 1017, 117 L.Ed.2d 181 (1992) (rejecting the suggestion that there is any "*in rem* exception to the sovereign-immunity bar" in the context of a state's Eleventh Amendment sovereign immunity); *In re ABEPP Acquisition Corp.*, 215 B.R. 513, 516-517 (B.A.P. 6th Cir. 1997) (applying *Nordic Village* and *Seminole Tribe of Florida v.*

*Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114, 1124, 134 L.Ed.2d 252 (1996) to reject the argument that the "bankruptcy court could burrow past" the State of Georgia's Eleventh Amendment immunity "by exercising *in rem* jurisdiction"). *See Kiowa Tribe*, 523 U.S. at 756, 118 S.Ct. at 1703 ("the immunity possessed by Indian tribes is not coextensive with that of the States," but rather is broader). Indeed, the District Court's decision amounts to the impermissible judicial abrogation of the Pueblo's immunity from suit.

Second, to the extent the District Court may have believed it had no choice but to invoke its *in rem* jurisdiction because San Felipe's sovereign immunity otherwise would operate to place the Pueblo effectively beyond the Court's jurisdictional reach (*i.e.*, "absent" from the jurisdiction), the public policy purposes of the tribal immunity doctrine do not permit such a circumvention. As our Supreme Court expressed in *Gallegos*:

> "As a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiff[']s interest in having an available forum for suit." *Srader*[ *v. Verant*], 1998-NMSC-025, ¶ 33, 125 N.M. 521, 964 P.2d 82. Indeed, " '[t]his is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.' " *Enter. Mgmt. Consultants*[, *Inc. v. United States ex rel. Hodel*], 883 F.2d [890,] 894 [(10th Cir. 1989)] (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986)).

2002-NMSC-012, ¶ 51 (first and third alterations in original; remaining alterations added).

In sum, the inevitable result of the District Court's decision was to avoid the proper application of the immunity doctrine to bar Hamaatsa's action against the Pueblo. The legal fiction of *in rem* jurisdiction was never intended, in a case like this one, to render the tribal immunity doctrine nugatory. The District Court's decision to the contrary is plainly incorrect and should be reversed.

*2. Even if Hamaatsa's action were a proceeding in rem, the Pueblo's immunity from suit would still bar the action.*

Even were the District Court's invocation of *in rem* jurisdiction correct, under the relevant precedent San Felipe's immunity from suit would still operate to bar Hamaatsa's action, and the decision to deny the Pueblo's motion to dismiss would still be incorrect.

In *Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219 (N.D.N.Y. 2005), *aff'd sub nom. Oneida Indian Nation of New York v. Madison County and Oneida County*, 605 F.3d 149 (2nd Cir. 2010), *vacated and remanded on other grounds sub nom. Madison County, New York v. Oneida Indian Nation of New York*, ___ U.S. ___, 131 S.Ct. 704, 178 L.Ed.2d 587 (2011), *on remand*, ___ F.3d ___, 2011 WL 4978126 (2nd Cir. Oct. 20, 2011), the federal district court, relying expressly on *Kiowa Tribe* and *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905,

112 L.Ed.2d 1112 (1991), held that the Oneida Indian Nation's immunity from suit barred a state foreclosure action—a quintessentially *in rem* proceeding—against off-reservation real property owned by the Nation in fee. The court concluded:

> It is of no moment that the state foreclosure suit at issue here is *in rem*. What is relevant is that the County is attempting to bring suit against the Nation. The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property.

401 F. Supp. 2d at 229 (citations omitted). On appeal, the United States Court of Appeals for the Second Circuit, as the relevant precedent compelled it to do, affirmed:

> We are left then with the rule stated in *Kiowa*: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754, 118 S.Ct. 1700. We therefore agree with the district court that the remedy of foreclosure is not available to the Counties unless and until Congress authorizes such suits or the OIN consents to such suits. Because neither of these events has occurred, the foreclosure actions are barred by the OIN's immunity from suit.

605 F.3d at 159.

As this Court and our Supreme Court have stressed repeatedly, *Kiowa Tribe* governs the application of the tribal immunity doctrine in cases before the courts of our State. *Gallegos*, 2002-NMSC-012; *Armijo*, 2011-NMCA-006. This Court consistently has mandated the application of *Kiowa Tribe* across the board—in any

type of action filed against a federally recognized Indian tribe regardless of the nature of the case or where the tribe's activity occurred. *Armijo*, 2011-NMCA-006, ¶ 12; *Antonio*, 2010-NMCA-077, ¶¶ 10-11. Thus, even were the District Court's characterization of Hamaatsa's action as *in rem* correct, the tribal immunity doctrine would operate to divest the Court of subject matter jurisdiction over the case anyway.

The District Court could not evade this result based on the three cases relied on below by Hamaatsa. [**RP 28-29**]. Each of those cases—*County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Tp.*, 643 N.W.2d 685, 2002 ND 83 (N.D. 2002); and *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 929 P.2d 379 (1996) (*en banc*)—is distinguishable from the present case.

In *County of Yakima*, the Supreme Court did not hold that it was permitting the tax foreclosure of tribally owned fee land despite the Yakima Indian Nation's sovereign immunity. Rather, the case presented, and the Court decided, only questions of state taxing authority over fee lands the Nation and individual tribal members had reacquired after prior alienation under the General Allotment Act; the Court never addressed whether the County could enforce that tax against the Nation despite the Nation's sovereign immunity. *County of Yakima*, 502 U.S. at

253; 112 S.Ct. at 685 ("The question presented by these consolidated cases is whether the County of Yakima may impose an ad valorem tax on so-called "fee-patented" land located within the Yakima Indian Reservation, and an excise tax on sales of such land."); *id.* at 270, 112 S.Ct. at 694 ("We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act..."). In other words, the decision dealt solely with the extension of state tax law to lands the Nation claimed were beyond the reach of those laws.[9] As the Supreme Court has famously held:

> [t]o say substantive state laws apply to off-reservation conduct ... is not to say that a tribe no longer enjoys immunity from suit. ... There is a difference between the right to demand compliance with state laws and the means available to enforce them.

*Kiowa Tribe*, 523 U.S. at 755, 118 S.Ct. at 1703 (citing *Citizen Band Potawatomi*, 498 U.S. at 514, 111 S.Ct. at 912). Thus, *County of Yakima* is part of the class of cases that "explore a tribe's *sovereign authority* over purchased lands and to what extent a state may compel a tribe to accept state laws applicable to those lands." *Armijo*, 2011-NMCA-006, ¶ 18 (citing *Oneida Indian Nation of New York*, 605

[9] It was no accident that the issue of sovereign immunity was not before the Supreme Court: the case was prompted by foreclosure proceedings against thirty-one individual tribal members (who could not claim sovereign immunity from suit), and the Yakima Indian Nation presented only arguments that applied equally to its own property and that of its members. *See* U.S. Amicus Br., *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, No. 97-174, 1998 WL 25517, at 11 n.2; Tr. Oral Arg., *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, Nos. 90-408, 90-577, 1991 WL 636279, at *27.

F.3d at 156-159) (emphasis in original). The case sheds no light on the application of the tribal immunity doctrine in the *in rem* context.

*Cass County Joint Water Resource Dist.*, an eminent domain proceeding, is similarly inapposite. The North Dakota Supreme Court stressed that the Turtle Mountain Band of Chippewa Indians had acquired its interest in the land from its long-time owner, an opponent of the dam project for which the land was to be condemned, on the eve of the long-planned action. 643 N.W.2d at 687-688, 2002 ND 83, ¶¶ 2-5. Although the case decided the issue of whether the Band's sovereign immunity could bar the action against the Band, the Band was not even a necessary party to the proceeding. This being a condemnation action, the regulatory authority of North Dakota—acting through the Joint Water Resource District, a political subdivision of the state—over fee land located within the District, was really what was at stake. *Id.* at 694-695, 2002 ND 83, ¶¶ 20-25. There was in actuality no defense available to the Band, immunity from suit or not; the best it could do was argue about just compensation.

Finally, *Anderson & Middleton Lumber Co.* concerned an action to partition and quiet title to fee land located within the Quinault Indian Reservation. The fee land was owned by ten individuals, none of whom could claim sovereign immunity from suit. After the action was filed, those individuals conveyed their interest in the property to the Quinault Nation. 130 Wash.2d at 865, 929 P.2d at 381. The

Nation then raised its immunity from suit to challenge the court's jurisdiction. *Id.* Relying exclusively on *County of Yakima* and ignoring the "difference between the right to demand compliance with state laws and the means available to enforce them," as well as the tribal immunity doctrine's extra-territorial component, the Washington Supreme Court did not expressly hold that the Nation had waived its immunity from suit or that Congress had abrogated it. *Id.* at 869-873. Instead, the Court found "it is reasonable to conclude" that the trial court "had proper *in rem* jurisdiction" because, in Washington, "an action for partition of real property is a proceeding *in rem*" and "[t]he right of partition by a tenant-in-common of real property is absolute. ..." *Id.* at 873. Thus, like the Turtle Mountain Band in *Cass County Joint Water Resource Dist.*, the Quinault Nation was not a necessary party under Washington law.

Whatever distant bearing these three cases may have on the issue before this Court, they cannot legitimately support a finding of waiver or abrogation of the Pueblo's immunity from suit, even if this Court were to agree with the District Court's characterization of Hamaatsa's action as an *in rem* proceeding. *County of Yakima* does not deal with the issue of tribal sovereign immunity. *Anderson & Middleton Lumber Co.* incorrectly relied on *County of Yakima* essentially to find jurisdiction in a partition action without reaching the immunity issue. And *Cass County Joint Water Resource Dist.* is a case *sui generis*, concerned with state

regulatory authority to condemn fee land, not an action between private parties over an interest in such land. Viewed in isolation, these cases lend Hamaatsa no support. Viewed in the context of this State's established decisional law, the cases are irrelevant.

## POINT III

## THE DISTRICT COURT RELIED ON THE ERRONEOUS PREMISE THAT A TRIBE IS PRECLUDED FROM ASSERTING ITS SOVEREIGN IMMUNITY IN AN ACTION SEEKING NON-MONETARY RELIEF

In denying San Felipe's motion to dismiss, the District Court also appeared to reject the tribal immunity doctrine on the ground that Hamaatsa is "not seeking damages," only declaratory and injunctive relief. [**Tr. 31**]. This basis for the District Court's decision is in direct conflict with this Court's decision in *Armijo*. That case, as discussed above, concerned an action to quiet title in which cross-claimant Armijo asserted title through adverse possession to a section of land owned in fee by the Pueblo of Laguna. *Armijo*, 2011-NMCA-006, ¶¶ 1, 5. Armijo sought no damages or other monetary relief. Like Hamaatsa here, he sought declaratory relief to quiet title to Laguna's land.[10] In light of this Court's holding

[10] Armijo claimed that he possessed full title to Laguna's land. Hamaatsa, on the other hand, seeks to establish an interest, in the nature of a public easement or right-of-way, in the road that it alleges crosses San Felipe's land. For purposes of the discussion whether the nature of the relief Hamaatsa seeks affects the application of tribal sovereign immunity, this difference does not matter.

that Laguna's immunity from suit barred Armijo's claims, the nature of the relief sought by Armijo establishes *a fortiori* that an Indian tribe may invoke its sovereign immunity in New Mexico notwithstanding the fact that a litigant seeks non-monetary relief. This conclusion is consistent with recent cases from other jurisdictions in which courts have found that tribal sovereign immunity barred actions seeking non-monetary relief against tribes or their businesses.[11]

Most recently, the North Carolina Court of Appeals, in *State ex rel. Cooper v. Seneca-Cayuga Tobacco Co.*, 197 N.C.App. 176, 676 S.E.2d 579 (2009), barred the state's enforcement action against a tribally-owned cigarette manufacturing enterprise under the North Carolina Tobacco Reserve Fund and Escrow Compliance Act. The tribal enterprise sold cigarettes throughout the state, but at some point ceased complying with the Act's requirements. 197 N.C.App. at 179-180, 676 S.E.2d at 582.

---

[11] As discussed in Point II.A, *supra*, Hamaatsa is sure to argue that its action against the Pueblo does not seek to quiet title and does not seek injunctive relief, but merely seeks a declaratory judgment. [**Tr. 19**]. That is a distinction without a difference for purposes of applying the tribal immunity doctrine because, as Hamaatsa readily conceded below, however you characterize Hamaatsa's suit, "[i]t is seeking particular relief against the Pueblo." [**Tr. 19**]. *Compare Seminole Tribe of Florida*, 517 U.S. at 58, 116 S.Ct. at 1124, in which the Supreme Court held, in the slightly more restrictive context of a state's Eleventh Amendment sovereign immunity, that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." (citing *Cory v. White,* 457 U.S. 85, 90, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982)). The determinative factor is the identity of the party defendant, not the nature of the relief sought.

The State sought declaratory and injunctive relief, an order prohibiting the company from selling cigarettes in the state, and civil penalties. The enterprise moved to dismiss for lack of subject matter jurisdiction, invoking its immunity from suit. *Id.* at 180, 676 S.E.2d at 582-583. Finding that the tribal enterprise never unequivocally waived its immunity, the court of appeals, relying on *Kiowa Tribe*, but without any substantial analysis, affirmed the trial court's dismissal of the action. *Id.* at 181-83, 676 S.E.2d at 583-584. *See also Ameriloan v. Superior Court*, 169 Cal.App.4th 81, 86 Cal.Rptr.3d 572, 582 (Cal.App. 2 Dist. 2008), *as modified* (Jan. 14, 2009) (sovereign immunity bars civil enforcement proceeding brought by California Department of Corporations under state Deferred Deposit Transaction Law against payday loan companies wholly owned by two federally recognized Indian tribes).

In *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009), a panel of the United States Court of Appeals for the Eleventh Circuit held the Poarch Band immune from suit in an action for declaratory and injunctive relief under the anti-curtailment provision of the Consolidated Farm and Rural Development Act of 1961. The Act "protects water authorities funded with federal loans from encroachment on their territories." 563 F.3d at 1206. When the Band began developing its own private water system to serve its non-contiguous tribal lands, an endeavor that required the Band to

construct system infrastructure on non-tribal land within Freemanville's service area, Freemanville sued, seeking to bar the Band "from building a water facility within Freemanville's service area during the term of its federal loan." *Id.* at 1206-1207.

The Poarch Band moved to dismiss, asserting that the court lacked subject matter jurisdiction due to the Band's sovereign immunity. *Id.* at 1207. The court agreed and dismissed the action. *Id.* at 1210. In reaching its holding, the court found that neither Congress, in the Act, nor the Poarch Band had waived the Band's sovereign immunity from suit. *Id.* at 1207-1210. Citing *Kiowa Tribe*, 523 U.S. at 760, 118 S.Ct. at 1705, and *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1127 (11th Cir. 1999), the court concluded: "Tribal sovereign immunity, where it applies, bars actions against tribes regardless of the type of relief sought." 563 F.3d at 1208. Ignoring this principle, the District Court erred when it found the Pueblo's immunity inapplicable here.

## POINT IV

## TO THE EXTENT THE DISTRICT COURT BASED ITS DECISION DENYING THE PUEBLO'S MOTION TO DISMISS ON THE EQUITIES OF THE CASE, THE DISTRICT COURT'S DECISION IS INCORRECT

The District Court's ruling on the Pueblo's motion to dismiss is contained in a single sentence uttered at the conclusion of the hearing. [**Tr. 31**]. The Court asked no questions of either counsel that might suggest its view on or concerns

about the issue presented. Given the dearth of analytical signposts, San Felipe cannot ignore the possibility that at some level the District Court perceived a "fairness" issue in concluding that the Pueblo's immunity from suit did not apply in this case. Notwithstanding the repeated reaffirmation of tribal sovereign immunity by the U. S. Supreme Court and appellate courts of our State, the doctrine often is criticized by litigants as "an anachronistic legal theory" that should be ignored or abandoned. *Hoffman*, 2010-NMCA-034, ¶ 4. *See Armijo*, 2011-NMCA-006, ¶ 23 ("objecti[ng] to the very concept of tribal sovereign immunity").

In *Armijo*, the district court actually did affirmatively reject the doctrine, premising its decision to deny Laguna's motion to dismiss on notions of "basic fairness." 2011-NMCA-006, ¶ 13. In reversing, this Court made plain that " 'sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation.' ..." *Id.* (quoting *Ameriloan v. Superior Court*, 86 Cal.Rptr.3d at 582 and citing *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998)). Indeed, this is true because a court cannot "assert its equitable powers over a matter involving a tribe where tribal sovereign immunity precludes the court from asserting jurisdiction over the case" in the first place. *Id.*

While sympathetic to the frustration of a non-tribal litigant who, in the face of the tribal immunity doctrine, lacks a remedy in state court, the New Mexico Supreme Court has recognized that, on balance, the "sovereign interests" represented by the immunity doctrine are of greater importance than a plaintiff's pursuit of a state court remedy. *Gallegos*, 2002-NMSC-012, ¶ 51. The Supreme Court stated: "As a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiff[']s interest in having an available forum for suit. ... Equity and good conscience do not suggest a different result." *Srader*, 1998-NMSC-025, ¶ 33 (citing *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 797 (D.D.C. 1990) and *Enter. Mgmt. Consultants*, 883 F.2d at 894) (alteration added). Inherent in the tribal immunity doctrine is " 'the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.' " *Id.* (quoting *Enter. Mgmt. Consultants*, 883 F.2d at 894) (in turn quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986)).

As was the case in *Srader*, *Gallegos*, and *Armijo*, San Felipe's immunity from suit may deprive Hamaatsa of its preferred remedy, but it does not leave Hamaatsa bereft of any remedy.[12] *See Armijo*, 2011-NMCA-006, ¶ 15 (citing

[12] Most obviously, Hamaatsa could seek redress against the party from whom it purchased its property, or against the title insurance company from whom it obtained a policy of title insurance. Alternatively, Hamaatsa could accept BLM's

*Citizen Band Potawatomi*, 498 U.S. at 514, 111 S.Ct. at 912). In any event, under the precedent of this Court and our Supreme Court, Hamaatsa's wishes and notions of "fairness" are not factors that the District Court properly could have considered in reaching its decision to deny the Pueblo's motion to dismiss. Thus, to whatever extent the District Court let equitable considerations influence its decision, the Court erred.

## CONCLUSION

Appellant Pueblo of San Felipe respectfully requests that the Court of Appeals reverse the decision of the District Court denying San Felipe's motion to dismiss for lack of subject matter jurisdiction and dismiss with prejudice Hamaatsa's complaint.

## STATEMENT REGARDING ORAL ARGUMENT

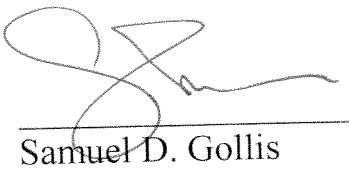
The Pueblo requests oral argument. The Pueblo believes that oral argument may assist the Court in evaluating the arguments of the parties, analyzing the authorities, and reaching a decision on the issue presented by this appeal.

Dated: October 31, 2011

---

offer to use an alternative access route along roads the legal existence of which is not in doubt.

Respectfully submitted,



Samuel D. Gollis
Samuel D. Gollis, Attorney at Law, P.C.
901 Rio Grande Blvd. N.W, Suite F-144
Albuquerque, New Mexico 87104
Telephone: (505) 883-4696
Facsimile: (505) 884-4331
sgollis@hotmail.com

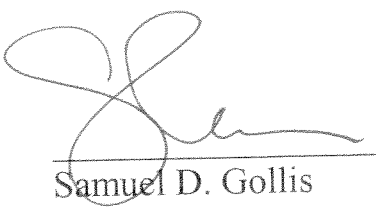
Attorneys for Defendant-Appellant Pueblo of San Felipe

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Appellant Pueblo of San Felipe's Brief in Chief by mailing the same via United States first class mail, postage prepaid, and by e-mailing the same, on this 31st day of October, 2011, to the following counsel of record:

Faith Kalman Reyes, Esq.
The Simons Firm, LLP
P. O. Box 5333
Santa Fe, NM 87503-5333
FReyes@simonsfirm.com

Attorneys for Appellee Hamaatsa, Inc.



Samuel D. Gollis