IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellee,

vs. **No. 34287**

PUEBLO OF SAN FELIPE, a Federally Recognized Indian Tribe,

Defendant-Appellant.

ANSWER BRIEF OF PLAINTIFF/APPELLEE HAMAATSA, INC. TO AMICUS BRIEF OF THE NAVAJO NATION, OHKAY OWINGEH, THE PUEBLO OF LAGUNA, THE PUEBLO OF SAN ILDEFONSO, THE PUEBLO OF POJOAQUE, THE PUEBLO OF SANTO DOMINGO, THE PUEBLO OF TESUQUE, THE MESCALERO APACHE TRIBE, AND THE PICURIS PUEBLO

THOMAS A. SIMONS, IV
FAITH KALMAN REYES
THE SIMONS FIRM, LLP
Post Office Box 5333
Santa Fe, New Mexico 87502-5333
(505) 988-5600
(505) 982-0185 (facsimile)

SUPREME COURT OF NEW MEXICO
FILED

JAN 21 2014

Attorneys for Plaintiff/Appellee Hamaatsa, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
ARGUMENT 1

TABLE OF AUTHORITIES

New Mexico Cases

Armijo v. Pueblo of Laguna,
2011-NMCA-006, 149 N.M. 234, 247 P.3d 1119 3
Hamaatsa, Inc. v. Pueblo of San Felipe,
2013-NMCA-094, 310 P.2d 631 4

NM Rules and Statutes

NMSA 1978, § 67-2-5 4
NMSA 1978, §§ 67-2-6 to 67-2-7 2
NMSA 1978, § 67-5-4 2

Federal Rules and Statutes

28 U.S.C. § 1605(a)(4) 2

Other Authorities

"AG: Tribal Police Can't Block Roads," Albuquerque Journal,
May 3, 2000 4
"Court: Pueblo Immune from Suits Over Land," Albuquerque Journal,
Feb. 18, 2011 3
"Rancher, Pueblo Vie Over Gate," Albuquerque Journal,
Nov. 14, 2004 4

ARGUMENT[1]

Notably absent from the Amicus Brief submitted by two Indian tribes and seven Indian Pueblos is any assertion (or even suggestion) that finding sovereign immunity inapplicable in this narrow case involving a public road running over fee land would have any actual deleterious effect on Amici. Nor do Amici or San Felipe seriously submit that affirmance of the Court of Appeals' decision will infringe upon their self-governance. Amici do not assert that the Court of Appeals decision may detract from their sovereignty – or indeed may cause any actual harm, however attenuated, beyond having to predict that cutting off access to a public road may result in litigation. *See* Amicus Brief at 5 (noting that for a tribe to operative effectively, sovereign immunity is used, *inter alia*, to "predictably manage their land holdings"). Yet, to allow sovereign immunity to apply under these facts will have significant negative implications for every New Mexico citizen, including members of Indian tribes and Pueblos.

Here, San Felipe threatened to cut off access over a public road to property owned by Hamaatsa, Inc., a 501(c)(3) nonprofit organization founded by a tribal

---

[1] The Amicus Brief recites largely the same arguments as San Felipe's Brief in Chief. Therefore, Hamaatsa refers the Court to its Response Brief in Chief as to the procedural issues (Hamaatsa Response at 1-2), along with Hamaatsa's arguments with regard to Amici's claims that Indian sovereign immunity should be coextensive with immunities held by other sovereigns (Hamaatsa Response at 4-9), the fact that the real property at issue is held in fee by the Pueblo (Hamaatsa Response at 9-13, 24-31), and why the Court of Appeals correctly decided the issues (Hamaatsa Response at 13-24).

member of the Pueblo of Laguna. If this Court adopts the overreaching view of sovereign immunity advocated by Amici and San Felipe, *every* New Mexico citizen – native and non-native alike – could have their property effectively taken if the public access to that property traverses Indian fee land.

San Felipe's sovereignty is not at issue here because the road itself belongs to the state; the road does not cross property held in Trust for the Pueblo; the state highway had long been used by Hamaatsa, its predecessors in interest, and the public from the time it was created by the BLM; and the property was purchased by the Pueblo of San Felipe in fee simple long after the public road was created.

No sovereign, and certainly no private citizen, is entitled to simply and unilaterally prohibit the use of a public road. A foreign sovereign would be subject to a declaratory judgment action. 28 U.S.C. § 1605(a)(4) (no sovereign immunity for foreign state based upon rights in immoveable property). The State of New Mexico and its political subdivisions can vacate or abandon a public road only by complying with the applicable statutory scheme. *See, e.g.*, NMSA 1978, §§ 67-2-6 to 67-2-7, 67-5-4 (governmental action is required to abandon a public road and setting forth process for same). Amici believe that – unlike all other sovereigns – this Court should endorse their attempt to deprive the public of a road by fiat, allowing them to purchase property on the open market subject to a public road, and then by shutting down that road without public recourse.

Indeed, through their submission of an Amicus Brief, each of the nine Amici signal to this Court that they, too, intend to follow San Felipe's example. In so doing, Amici fail to acknowledge, let alone address the significant ramifications that will inure to every New Mexican (native and non-native) who have the misfortune to abut a piece of property purchased in fee by an Indian tribe. Nor will it matter who owned the property first; a Pueblo which bought the neighboring property in fee simple five minutes ago will (under Amici's formulation) enjoy the same immunity from suit as a Pueblo which owns property held in trust. In other words, there will be no protection for even the most diligent or skittish landowner – there is simply no way to predict when a tribe will elect to purchase the place next door.

As Indian tribes purchase fee property all over New Mexico (if not all across the United States), disputes such as this are becoming increasingly commonplace. *See, e.g.*, "Court: Pueblo Immune from Suits Over Land," Albuquerque Journal, Feb. 18, 2011[2] (discussing the Court of Appeals opinion in *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, 149 N.M. 234, 247 P.3d 1119, stating: "An expert on American Indian law said disputes stemming from off-reservation land owned by tribes have become more common nationally, in part because casino revenue has made it possible for tribes to buy land as never before"); "Rancher, Pueblo Vie

---

[2] Available on-line at http://www.abqjournal.com/news/state/18237479259 newsstate02-18-11.htm#ixzz2qxtA50TW

Over Gate," Albuquerque Journal, Nov. 14, 2004[3] ("In dispute now is whether the pueblo's immunity from civil lawsuits can be extended to a legal challenge about land off the reservation.... It is a legal issue that could resonate in New Mexico as tribes here continue to acquire land away from their reservations"). *See also* "AG: Tribal Police Can't Block Roads," Albuquerque Journal, May 3, 2000 ("The Attorney General's Office says tribal police lack authority to bar non-Indians from legally using state roads that cross tribal land...."). Despite the relative frequency with which such fee property is gobbled up by Indian tribes, the United States Supreme Court has *never* addressed whether a tribe can claim immunity from suit when seeking to deprive the public of its right of access to a road through that property. This Court should thus reject Amici's attempt to extrapolate a universal rule from inapplicable cases involving trust land, negotiated agreements between a known tribal actor and a contractual partner, actions where the defendant sovereign actually owns the property at issue[4], and actions to quiet title (which this case is not, *see Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶¶ 37-39, 310 P.2d 631, Wechsler, J., dissenting ("Hamaatsa's complaint is not an action for

---

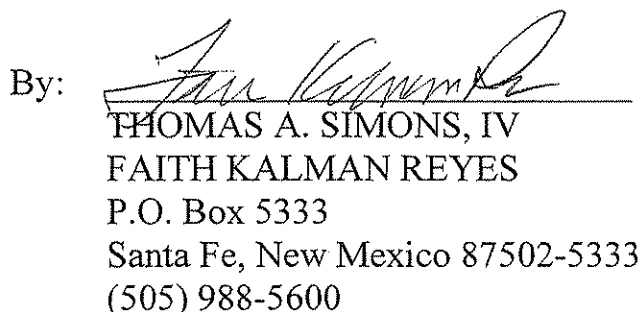
[3] Available on-line at http://abqjournal.com/news/state/258287nm11-14-04.htm

[4] San Felipe does not own the public road. It may own the property across which the road traverses, but the road itself is owned by the state. *See* NMSA 1978, § 67-2-5 "When any state highway in the state of New Mexico, is continuously used by, or open for use to the public, ... for a period of one year ... *such right-of-way shall be and become the property of and fee thereto shall vest in the state of New Mexico* ..., so long as such right-of-way is so used for highway purposes," emphasis added).

quiet title, nor are quiet title actions considered actions in personam under New Mexico law")).

Based upon the foregoing, and upon the arguments set forth in more detail in its Response Brief in Chief, Hamaatsa respectfully requests that the Court affirm the district court's and Court of Appeals' decisions denying San Felipe's motion to dismiss.

THE SIMONS FIRM, LLP

By: 

THOMAS A. SIMONS, IV
FAITH KALMAN REYES
P.O. Box 5333
Santa Fe, New Mexico 87502-5333
(505) 988-5600

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, on January 21, 2014 to:

Samuel Gollis
Gwenellen Janov
Janov Law Office, P.C.
901 Rio Grande Blvd.
Albuquerque, NM 87104-2055
Phone: (505) 842-8309
Email: gjanov@janovlaw.com

And by electronic mail to:

Richard L. Alvidrez
PO Box 25687
Albuquerque, NM 87125
Attorney for Amicus New Mexico Land Title Association
Email: RAlvidrez@mstLAW.com

Samuel Gollis
Gwenellen Janov
901 Rio Grande Blvd.
Albuquerque, NM 87104-2055
Attorneys for Appellant
Email: gjanov@janovlaw.com, sgollis@hotmail.com

Paul Spruhan
Assistant Attorney General
Navajo Nation Department of Justice
PO Box 2010
Window Rock, AZ 86515-2010
Email: pspruhan@rindoi.org,
Attorney for Amicus Navajo Nation

Tammi M. Lambert
Pueblo of Laguna
PO Box 194
Laguna, NM 87026-0194
Email: TLambert@lagunapueblo-nsn.gov
Attorney for Amicus Pueblo of Laguna

Lee Bergen
Bergen Law Offices, LLC
4110 Wolcott Avenue, NE, Suite A
Albuquerque, NM 87109
Email:
lbergen@nativeamericanlawyers.com
Attorney for Amicus Ohkay Owingeh

Carolyn J. Abeita
VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
1201 Lomas Blvd., NW, Suite C
Albuquerque, NM 87102
Email: cabeita@nmlawgroup.com
Attorney for Amicus Pueblo de San Ildefonso

Steffani A. Cochran, Chief General Counsel Pueblo of Pojoaque
Legal Department
58 Cities of Gold Road, Suite 5
Santa Fe, NM 87506
Email: scochran@puebloofpojoaque.org
Attorney for Amicus Pueblo of Pojoaque

Richard W. Hughes, Esq.
Rothstein, Donatelli, Hughes, Dahlstrom, Schoenburg & Bienvenu, LLP
PO Box 8180
Santa Fe, NM 87504-8180
Email: rwhughes@rothsteinlaw.com
Attorney for Amicus Picuris Pueblo

Teresa Leger de Fernandez
Cynthia Kiersnowski
Leger Law & Strategy, LLC
414 Old Taos Highway
Santa Fe, NM 87501
Phone: (505) 982-3622
Email: cindy@legerlawandstrategy.com
Attorneys for Amicus Pueblo of Santo Domingo

Maxine R. Velasquez,
General Counsel
Pueblo of Tesuque Legal Department
Route 42, Box 360-T
Santa Fe, NM 87506
Email:
mvelasquez@pueblooftesuque.org
Attorney for Amicus Pueblo of Tesuque

John D. Wheeler
Nelva L. Cervantes
Arslan Umarov
John D. Wheeler & Associates, P.C.
PO Box 1810
Alamogordo, NM 88310
Email: jdw@jdw-law.com
Attorneys for Amicus Mescalero Apache Tribe

Faith Kalman Reyes