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 IN CHIEF OF PLAINTIFF/APPELLEE HAMAATSA, INC.

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Oral Argument is Requested

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STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style or typeface, Times New Roman, and the body of the brief contains 10,575 words, as indicated by Microsoft Office Word version 2007 (12.0.6668.5000).

TABLE OF AUTHORITIES

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SUMMARY OF THE PROCEEDINGS

A. Nature of the Case, Course of Proceedings, and Disposition Below

Contrary to the assertions of the Pueblo of San Felipe ("San Felipe," the "Pueblo" or "Appellant"), this is not a dispute about a "dirt road" or an "easement" owned by the Pueblo. Instead, it is a dispute about the ability of San Felipe to refuse to allow Plaintiff, its guests, and the public to use a state highway traversing property acquired and held in fee simple by the Pueblo. (RP 1-3). In short, the question before the Court is the following: "Can an Indian tribe invoke sovereign immunity over a cause of action, as to which the court's jurisdiction is *in rem*, concerning a state highway, where the relief sought is solely equitable?" The answer to this question, for the reasons set forth below, is "no."

Hamaatsa concurs in the Pueblos' recitation of the disposition of the case and the current course of proceedings, as stated in the Pueblo's Brief in Chief ("BIC") at 2.

B. Summary of Relevant Facts[1]

Hamaatsa, Inc. ("Hamaatsa"), a New Mexico nonprofit corporation, purchased property in Sandoval County. (RP 1, ¶¶ 1, 4). Hamaatsa's property is

[1] The Court should disregard any "facts" asserted by the Pueblo at BIC, 3-4 which are not supported by record citations. The Pueblo fails to cite to the record in support of its allegations about why the BLM purportedly created or changed the location of an easement. These facts are irrelevant and, in this appeal from a motion to dismiss, are not supported by the record.

accessed via a public road (the "Road") statutorily created pursuant to 43 U.S.C. § 932, Rev. Stat. § 2477 ("R.S. 2477").[2] This public road has existed since at least the early 1900s, when the property was owned by the U.S. Bureau of Land Management (BLM), and long before the Pueblo acquired the relevant parcel. (RP 2, ¶¶ 7-11; RP 3, ¶ 14).

43 U.S.C. § 932, originally passed in 1866, states:

> 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. Although the statute was repealed in 1976, roads in existence prior to 1976, not otherwise abandoned or vacated, remain public R.S. 2477 roads.

Hamaatsa continually used the Road to access its property. (RP 2, ¶ 10). In August 2009, the Pueblo sent Hamaatsa a letter accusing it of trespass based on Hamaatsa's use of the Road, averring that Hamaatsa had no legal right of access to its own property. (RP 3, ¶ 18; BIC 4). Hamaatsa learned that the Pueblo applied to Interior's Bureau of Indian Affairs to have the Road placed into trust for the Pueblo and filed this litigation. (RP 3, ¶ 19). The Road was not taken into trust and continues to be owned by the Pueblo in fee simple. (RP 3, ¶ 19; RP 1, ¶ 2).

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[2] This type of road is variously referred to as a "932 Road" or an "R.S. 2477 Road." The parties in this case have used the latter reference.

APPLICABLE STANDARD OF REVIEW/PRESERVATION

Hamaatsa agrees with the Pueblo's statement regarding the applicable *de novo* standard of review (BIC at 4). Hamaatsa preserved the issues addressed herein in its Complaint (RP 1-7), Response to Motion to Dismiss (RP 26-36); oral argument to the district court (Trans. 19, 21, 23, 31); brief in the Court of Appeals and oral argument; and in its Response to Petition for Writ of Certiorari.

ARGUMENT

I. MANY OF THE ISSUES IN THIS MATTER ARE AWAITING DEICISION BY THE U.S. SUPREME COURT

In 2013, the United States Supreme Court granted certiorari in *Michigan v. Bay Mills Indian Com'ty*, 695 F.3d 406 (6th Cir. 2012), *cert. granted*, 133 S.Ct. 2850, 186 L.Ed.2d 907 (2013). The Court heard oral argument on December 2, 2013. *Hearing List for the U.S. Supreme Court October Term, 2013*, available at: http://www.supremecourt.gov/oral_arguments/hearinglists/hearinglist-december2013.pdf.

The issues before the Court in *Bay Mills* include "whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA [Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*] outside of Indian Lands." *See* Brief for Petitioner, 2013 WL 4761311, §i(2). Michigan argued issues similar to those in this case. *Id.*, 2013 WL 4761311 at ** 32-41. *See also*

Brief of Alabama, *et al.*, as Amici Curiae in Support of Petitioner, 2013 WL 4829343, *5-*11 (U.S.) ("Tribal immunity does not bar lawsuits brought against tribes for declaratory and injunctive relief").

II. APPELLANT OVERSIMPLIFIES THE HISTORY AND APPLICATION OF TRIBAL SOVEREIGN IMMUNITY (Responsive to Appellant's Points I, A, B and D)

A. Indian Sovereign Immunity Is Not More Expansive than the Law of Sovereign Immunity Applicable to States and Foreign Governments

Appellant/Amici[3] assert that the sovereignty – and therefore the commensurate immunity – to be applied to Indian tribes is "not unlike that possessed by the federal government, the states, and foreign nations" (BIC at 6; Amicus Brf. at 5). Indeed, Amici assert:

> Federal law's respect for tribal sovereign immunity reflects important policy considerations *applicable to all sovereign governments*. For tribal nations to operate effectively, they must have the ability to define when and where they can be sued. *This is no different than federal, state, or foreign sovereign immunity* where, through the invocation of immunity or the careful use of waivers, such similarly-situated sovereign governments may predictably manage their land holdings, commercial activities, and provision of governmental services for the benefit of their constituents.

Amicus Brf. at 5 (emphasis added).

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[3] *See* Amicus Brief of the Navajo Nation, Ohkay Owingeh, the Pueblo of Laguna, the Pueblo de San Ildefonso, the Pueblo of Pojoaque, the Pueblo of Santo Domingo, the Pueblo of Tesuque, the Mescalero Apache Tribe, the Picuris Pueblo, filed December 2, 2013 (hereinafter referred to as "Amicus Brf."), at page 5.

Decades ago, New Mexico rejected the outdated concept of judicially-created common law sovereign immunity. In *Hicks v. State*, 1975-NMSC-056, 88 N.M. 588, 544 P.2d 1153, this Court noted that "the doctrine of sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary." 1975-NMSC-056, ¶ 6. After discussing why sovereign immunity no longer reflected prevailing mores, the *Hicks* Court overturned the judicially-created doctrine of state sovereign immunity:

> [W]e take this opportunity to rid the State of this legal anachronism. Common law sovereign immunity may no longer be interposed as a defense by the State, or any of its political subdivisions, in tort actions.[4] Sovereign immunity was born out of the judicial branch of government, and it is the same branch which may dispose of the doctrine. It can no longer be justified by existing circumstances and has long been devoid of any valid justification. In so doing, we join the growing number of States which have judicially abolished it.

1975-NMSC-056, ¶ 9. *See also Ayala v. Philadelphia Bd. of Public Educ.*, 453 Pa. 584, 305 A.2d 877 (Penn. 1973) (same). The state became subject to limited immunity only after the State legislature *statutorily* enacted the New Mexico Tort Claims Act.

Similarly, tribal immunity is solely a creature of judicial creation. Like New Mexico, the U.S. Supreme Court has affirmed that doctrines created by the

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[4] Subsequent opinions by this Court found that *Hicks* was not limited to tort actions, but to all actions against the state, including actions for declaratory relief. *See, e.g., State ex rel. Hanosh v. State ex rel. King*, 2009-NMSC-047, ¶¶ 10, 11, 147 N.M. 87, 217 P.3d 100 (citing cases).

judiciary can also be eliminated judicially. *See, e.g., Rogers v. Tennessee*, 532 U.S. 451, 462-463, 121 S. Ct. 1693, 1700, 149 L. Ed. 2d 697 (2001) (judicial abolition by Tennessee state court of the judicially-created "year and a day" rule in the criminal context was proper, noting "the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process of judicial evolution at the time of the framing, and it does not do so today").[5] *See generally* Ruggero J. Aldisert, *The Brennan Legacy: The Art of Judging*, 32 Loy.L.A.L.Rev 673 678 (1999)[6] ("There seem to be few limits to changing judge-made law because, as [Justice Benjamin] Cardozo stated: 'A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience....", *quoting* Benjamin N. Cardozo, *The Growth of the Law* 136-137 (1924)).

This Court should reaffirm that, because tribal sovereign immunity is based upon archaic concepts, there is no continued place for such a judicially-created theory in New Mexico, particularly when applied to off-reservation, non-Trust

[5] *Hicks* included an appendix listing all of the states which had abrogated sovereign immunity, including those states where sovereign immunity was retrenched by a state judiciary.

[6] Available at: http://digitalcommons.lmu.edu/llr/vol32/iss3/4.

property purchased and owned by a tribe in fee simple and located in the larger state community. As will be set forth in more detail *infra*, this is precisely the path the U.S. Supreme Court has worn.

Tribal sovereign immunity, like the immunity of other sovereigns, is outdated and based upon two theories, neither of which allow its perpetuation:

> ....[P]rimarily, because the courts equated tribes with states and foreign nations that enjoyed immunity as part of their inherent sovereignty; and, secondarily, because subjecting the tribes to suit would have threatened the tribal governments' treasuries.

William Wood, *It Wasn't an Accident: The Tribal Sovereignty Immunity Story*, American Univ. L. Rev., Vol. 62:1587 at 1659 (2013). No longer part of "inherent sovereignty," common law immunity continues to exist largely as a creature of statute. *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. The threat to the treasuries of tribal governments is not at issue in this case, which involves a request for solely equitable relief.

To the extent Indian sovereign immunity was developed for the "admittedly, perhaps archaically, paternalistic purpose of protecting a tribe against being tricked" (*Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659 (7th Cir. 1996))[7], the purpose behind the judicially-created doctrine no longer reflects the sophistication of tribes involved in significant off-

[7] *Sokaogon* found that a tribe had waived its immunity in a contract with a non-tribal casino contractor.

reservation commercial enterprises. As a result, to summarize Justice Cardozo, today's mores require the alteration of this judge-made law.

If, as the Supreme Court stated in *Kiowa Tribe of OK v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L. Ed. 2d 981 (1998) ("*Kiowa*") and as asserted by Appellant/Amici, the sovereign immunity applicable to foreign nations is the bellwether against which tribal sovereign immunity should be measured, the contours of that immunity should be employed in this case. Foreign states are "not immune ... in any case ... in which rights in ... immoveable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Nor, prior to passage of the Foreign Sovereign Immunities Act, did foreign states enjoy immunity from suit with regard to commercial undertakings. *See, e.g. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 701-02, 96 S.Ct. 1854, 1865, 48 L. Ed. 2d 301 (186) ("the United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign governments"). *See also Id.*, 425 U.S. at 696 ("If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function. ... When a state enters the market place seeking customers it divests itself of its Quasi sovereignty Pro tanto, and takes on the character of a trader. ... It is thus a familiar

concept that 'there is a constitutional line between the State as government and the State as trader....'" *New York v. U.S.*, 326 U.S. 572, 579 (1946)").

Like other sovereigns, there is no compelling reason why an Indian tribe should be immune from a suit involving real property situated outside of Trust lands. Indeed, if San Felipe's immunity is co-extensive with that of a foreign state, the limits of that immunity should also be synonymous. *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).

B. **Appellant Fails to Acknowledge Supreme Court Case Law Applicable to Non-Trust Property**

Ignoring other applicable cases, the Pueblo jumps straight into the *Kiowa* decision. (BIC at 6-8). However, *Kiowa* did not involve issues surrounding off-reservation fee realty. In short, San Felipe overlooked the Court's more applicable decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149, 153, 93 S.Ct. 1267, 36 L. Ed. 2d 114 (1973) ("*Mescalero*"), among others. *Cf. Rodriguez de Quijas v. Shearson/Am. Exp. Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in another case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls....").

In *Mescalaro*, the Court addressed the ability of the State of New Mexico to assess *and collect* gross receipts taxes owed by the tribe with regard to its operation of a ski area, no part of which "is located within the existing boundaries of the reservation." 411 U.S. at 146. *Mescalero* addressed whether the state could affirmatively "*enforce* its revenue laws against any tribal enterprise, 'whether the enterprise is located on or off tribal land.'" *Id.* at 147-148. The Court found that the state's laws applied to both on and off reservation conduct, "unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Id.* at 148. However, "tribal activities conducted outside the reservation" required no such self-government limitation. *Id.* at 149. Off-reservation activities are thus subject to all "nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* The Court found it "unrealistic to conclude that Congress conceived of off-reservation tribal enterprises 'virtually as an arm of the government,'" and "off-reservation activities are within the reach of state law." *Id.* at 152-153 (citation omitted). The Court accordingly "decline[d] to resurrect the expansive version of the intergovernmental immunity doctrine". *Id.*

Importantly, with regard to the conjunction between sovereign authority and sovereign immunity, the Court held:

> Here, 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[8]. These provisions were designed to encourage tribal enterprises 'to enter the white world on a footing of equal competition.'... In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the state are subject to. We therefore hold that the exemption in § 465 does not encompass or bar *the collection* of New Mexico's non-discriminatory gross receipts tax....

Mescalero at 157-158 (emphasis added). Thus, while the issue of sovereign immunity from suit was not before the Court (the tribe filed the suit), it nonetheless found that New Mexico could assess and *collect* taxes (*Id.* at 158), and *enforce* (*Id.* at 147) the state's tax laws against the tribe.

In a detailed analysis, the dissenting judge in *New York v. Shinnecock Indian Nation*, 686 F.3d 133 (2d Cir. 2012)[9], summarized *Mescalaro* as follows:

> .... Prior to *Kiowa,* tribal sovereign immunity, and the attendant need for congressional or tribal waiver in order to overcome it, depended on...: (1) whether the tribal conduct at issue involved self-governmental or commercial activities; and (2) if the conduct involved commercial activities, whether those activities were occurring on or off the tribe's reservation. .... If the tribe's activities involved either (a) matters of self-government, whether occurring on- or off-reservation or (b) on-reservation commercial conduct, then congressional or tribal waiver of tribal sovereign immunity was necessary to be able to ...pursue an action against the tribe with respect to that activity. ...If, however, the tribe engaged in off-reservation commercial activities, then a state had the authority to enforce its laws against a tribe... unless Congress "expressly forbade it...."

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[8] The Indian Reorganization Act provides, in part, for the right of tribal self-government (§§ 476, 477), to protect tribal land, and to immunize tribal lands from taxation (§ 475). 25 U.S.C. § 461, *et seq*.

[9] The majority did not reach the issue of sovereign immunity, remanding the matter to state court for lack of federal question jurisdiction.

Shinnecock at 147 (citations omitted). The dissent also substantively analyzed *Kiowa* and prior precedent in detail, explaining that there was no basis in fact for distinguishing between tribal sovereign authority and sovereign immunity:

> Simply put, *Kiowa*'s cleaving of tribal sovereign immunity was a departure from previous precedents, which had not split the concept of tribal sovereign immunity into two parts. More specifically, the precedents upon which *Kiowa* purported to rely do not support the notion that tribal immunity from suit is distinct from tribal sovereign authority over its lands and people. Furthermore, this cleaving of tribal sovereign immunity went beyond what was necessary for the Court to reach the holding it did in *Kiowa*. And so, the legacy of *Kiowa* is at once both unnecessary dictum and without sound support in prior precedents....
>
> ....*Kiowa*'s broader sweeping pronouncements beyond those necessary to resolve the issue in dispute in that case—i.e., that a tribe's sovereign immunity from suit is a separate concept from general sovereign immunity over a tribe's lands and issues of self-governance and that the only way to overcome this distinct type of sovereign immunity from suit is to obtain congressional or tribal waiver—were unnecessary to the Court's holding. In a word, they are dicta.

Shinnecock at 147-56 (underlined emphasis added, citations omitted).

After *Mescalero*, in *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of OK ("Potawatomi")*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the Court reiterated that a tribe's sovereign immunity exists only because of the tribe's "sovereign authority" over its "members and territories":

> Indian tribes are "domestic dependent nations" that exercise inherent *sovereign authority* over their members and territories. ... Suits against Indian tribes are *thus* barred by *sovereign immunity* absent a clear waiver tribe or congressional abrogation.

Potawatomi, 498 U.S. at 509 (emphasis added).

Other courts are in accord. For example, in *Hollynn D'Lil v. Cher-AE Heights Indian Com'ty of the Trinidad Rancheria*, No. C 01-1638 THE, 2002 WL 33942761 at *8 (N.D. Cal. March 11, 2002), the court enforced the federal Americans with Disabilities Act against a tribal venture located on fee property, noting "in light of the ambiguous reach of the holding in *Kiowa* and the apparent continued validity of *Mescalero*, this Court determines that *Kiowa* does not extend the doctrine of tribal immunity to all non-contractual off-reservation conduct."

In short, Supreme Court precedent establishes that sovereign immunity depends upon a tribe's sovereign authority.

III. THE COURT OF APPEALS PROPERLY APPLIED THE LAW (Responsive to Appellant's Point I. B and F)

Appellant misconstrues its own burden before the district court, incorrectly citing *Marchman v. NCNB Texas Nat. Bank*, 1995-NMSC-041, 120 N.M. 74, 898 P.2d 709, for the proposition that "a plaintiff bears the burden of proving, first, that the state court has the power to hear and determine the particular case." (BIC at 10). *Marchman* does not assign the burden of proof to the plaintiff, stating instead that "[t]here is a presumption of jurisdiction, in the absence of proof to the contrary, in courts of general jurisdiction." *Id.*, 1995-NMSC-041, ¶ 27.

Further, this Court has already decided that New Mexico courts have the

power to hear and determine issues involving public roads within Indian fee lands. *Jicarilla Apache Tribe v. Board of Cty. Commissioners, Cty. of Rio Arriba*, 1994-NMSC-104, ¶¶ 12-24, 118 N.M. 550, 883 P.2d 136 ("*Jicarilla*"). Thus, the premises upon which Appellant bases its first objections to the Court of Appeals' Opinion are without merit (BIC at 10); the remaining objections fare no better.

Finding no basis upon which to allow the Pueblo to invoke sovereign immunity in a cause of action involving a state highway, the Court of Appeals' Opinion (the "Opinion") affirmed the district court's denial of the Pueblo's motion to dismiss (though on different grounds). In its Opinion, the appellate court determined that the issues before the district court failed to implicate the Pueblo's sovereignty, and therefore, sovereign immunity was inapplicable.

The Opinion correctly concluded that the Pueblo *conceded* that the road at issue is a state highway:

> The Pueblo nowhere argues that any particular allegation in the complaint is unworthy of being accepted as true for the purposes of the motion to dismiss. Accordingly, as this case comes to us, Hamaatsa's action is to declare the road, alleged and conceded for the purposes of this motion to be a state public road, to be a state public road.

Opinion, ¶ 9. While the Pueblo now contends that the facts demonstrating the public nature of the Road are instead legal conclusions, that is both incorrect and not an argument the Pueblo raised below. Throughout this litigation, San Felipe has: (1) affirmed that it must accept as true the public nature of the road, stating in

its brief to the Court of Appeals that the court must "accept as true all material allegations of the complaint" for purposes of a motion to dismiss (Aplt. Brf. in the COA at 2, n.2) and (2) averred that the issue is not nature of the road, but instead, whether the Pueblo is entitled to immunity from suit, regardless of the Complaint allegations.

The Pueblo could have elected not to file a motion to dismiss at this stage of the litigation. It also could have submitted its own affidavits. *See, e.g., Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995) (allowing affidavits in response to a motion to dismiss under Fed. R Civ. P. 12(b)(1)). It did neither. Thus, if the Pueblo disagreed with Hamaatsa's allegations showing that the Road is public, it could have attempted to support its contention, and *then* sought dismissal based upon lack of subject matter jurisdiction.

The Court of Appeals concluded that because San Felipe did not or could not dispute that the road belongs to the state, the adjudication does not implicate any sovereign interest of the Pueblo. Opinion, ¶¶ 9-13. Therefore, where the sovereign has no interest, sovereign immunity cannot lie. (*Id*). As discussed *supra* with regard to *Mescalero*, Indian sovereignty is not unlimited: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. U.S.*, 450

U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1980). *Montana* also stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation[10] *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.*

Id., 450 U.S. at 566 (emphasis added). The Court of Appeals noted,

> The Pueblo offered no evidence of any property or governance interests whatsoever in the road or that the road, concededly a state public road, would threaten or otherwise affect its sovereignty. The Pueblo has not attempted any proof, for example, that even though the road is a state public road, a district court's declaration of that fact would in any way undermine the Pueblo's sovereignty or sovereign authority, infringe on any right of the Pueblo to govern itself or control its internal relations, or otherwise adversely affect its governmental, property, or treasury interests.

Opinion, ¶ 11. Because the state's ownership of the road does not impact the Pueblos' sovereignty, the Court of Appeals correctly found no issue as to which sovereign immunity could be implicated.

Neither *Kiowa* nor *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-12, 132 N.M. 207, 46 P.3d 668, address facts similar to those here. Further, neither *Kiowa* nor *Gallegos* support the Pueblo's attempt to expand either case beyond its holding.

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[10] The state highway at issue is not within the Pueblo's historical boundaries or reservation. RP 15 (the Pueblo states the road is "outside the boundaries of the Pueblo").

On its face, *Kiowa* stands for the proposition that an Indian tribe cannot be sued for *damages* based upon breach of contract. Notably, the contract at issue in *Kiowa* "recites it was signed...on land held in trust for the Tribe." *Kiowa*, 523 U.S. at 753-754. The document also provided that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe." *Id.* at 754. The participants to this transaction were thus on notice that they were doing business with an Indian tribe asserting "sovereign rights." *Kiowa*'s holding is facially limited to the context of contracts: "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 750 (emphasis added). The Court re-emphasized the narrow nature of its holding by later summarizing *Kiowa* as follows: "Tribal immunity, as we ruled in *Kiowa*, extends to suits on off-reservation *commercial contracts*." *C&L Enterprises v. Citizen Band of Potawatomi Indian Tribe of OK*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (emphasis added).

Nor does *Gallegos* assist Appellant because the underlying incident occurred *on the reservation*. 2002-NMSC-12, ¶¶ 3, 8 ("Gallegos was a visitor at the ...Casino *located on the Pueblo of Tesuque Indian reservation*"; "Gallegos was allegedly injured *on Tesuque's reservation*"). This case does *not* involve the Pueblo's immunity from suit with regard to reservation/trust property or *on-*

reservation conduct. Therefore, neither *Kiowa* nor *Gallegos* support reversal of the Opinion.

A. The Court Cited to Jicarilla to Establish Issues of Subject Matter Jurisdiction, Not Sovereign Immunity (Responsive to Appellant's Point I, C)

The Court of Appeals concluded that no aspect of the Pueblo's sovereignty is implicated in a case involving what the Pueblo admits is a state road. Opinion, ¶¶ 9-11. Finding no sovereign immunity, the Court of Appeals next considered whether the district court had subject matter jurisdiction over the dispute. Relying on *Jicarilla* to address issues of subject matter jurisdiction – not sovereign immunity -- the court concluded that New Mexico state courts have jurisdiction to declare the existence of a public road running across fee simple land owned by an Indian tribe. (Opinion, ¶ 14). The Court of Appeals correctly found that New Mexico state courts have jurisdiction over the dispute.[11]

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[11] Contrary to the Pueblo's argument (BIC at 12-14), the court did not confuse subject matter jurisdiction in the New Mexico courts with sovereign immunity. Read in context, its statement that, "[i]n our view, the issue in this case is a matter of state law, over which the district court has jurisdiction," means the issue was properly raised in a New Mexico court, not that state law governs the inquiry into sovereign immunity from suit. (Opinion, ¶14). However, this Court has recognized that sovereign immunity and subject matter jurisdiction are two sides of the same coin: "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-008, ¶ 27, n.6, 141 N.M. 269, 154 P.3d 644.

The appellate court then cited some of the numerous U.S. Supreme Court cases reiterating that state courts, not tribal courts or other judicial bodies, have jurisdiction over state roadways that cross tribal lands; tribal courts cannot normally exercise jurisdiction over non-Indians; and an Indian tribe lacks authority to regulate the use of fee land. (Opinion, ¶ 14). Thus, the Opinion further illustrates that jurisdiction in this matter is proper in state, not federal, court.

The Opinion then outlined *why* the Pueblo lacks sovereignty over the state road, and therefore why the Pueblo lacks the ability to impede use of the roadway with impunity and without any legal recourse for the travelling public. As the court noted, if the Pueblo blocked the state highway, only a state court would have jurisdiction over the matter. To deprive the public of the ability to challenge an Indian tribe which unilaterally cuts off access to a public highway is the equivalent of allowing the Pueblo to take public property without any means of legal challenge. (Opinion, ¶15).

The Opinion discussed the status of the law of sovereign immunity and the trend toward its abrogation. It compared the facts of the present case with applicable Supreme Court precedent, correctly noting that the Pueblo voluntarily purchased land in fee simple and neither Hamaatsa nor the public entered into any negotiations or transactions with the Pueblo over the property. The Court of Appeals then appropriately concluded: "When a tribe acquires property in fee

simple that envelops a state public road and subsequently denies access to existing property owners or other individuals, those excluded are innocent civilians who had no choice and cannot be held to have known or anticipated a legal risk of access denial and dispositive facial assertion of sovereign immunity by an Indian tribe." (Opinion, ¶ 20).

B. Courts Properly Examine the Impact of their Decisions on Litigants (Responsive to Appellant's Points I. A and E)

Appellant is critical of the Court of Appeals for resorting to "Considerations of Equity and Fairness" (BIC at 17). Legally, "'equity' is a synonym of right and justice" and "fairness" is synonymous with "justness and right dealing." *Ortiz v. Lane*, 1979-NMCA-009, ¶ 14, 92 N.M. 513, 590 P.2d 1168. "Equity and fairness" are not strangers to courts in fashioning relief.

In *Jicarilla*, one of the factors addressed by this Court in finding that the dispute raised by the Tribe could be brought in state court was the equity of its decision:

> If ...our state courts do not have jurisdiction over this dispute and the dispute is not cognizable in federal court, neither the Tribe nor the County has a judicial forum in which to settle their respective property rights. This anomalous result, precluding a Native American tribe from bringing a trespass action such as this one, provides further support for our conclusion that the district court below had subject-matter jurisdiction to adjudicate the Tribe's and the County's claims.

Jicarilla, 118 N.M. at 558.

Similar equitable and practical considerations informed the Tenth Circuit's decision in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). *Dry Creek Lodge* involved a lawsuit by a non-Indian who owned fee land located within the boundary of an Indian reservation. The plaintiff informed the tribe that he planned 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. When he sued, the tribe asserted sovereign immunity. *Id.*, 684-685. The Tenth Circuit allowed the case to proceed, finding: "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.

So too does the U.S. Supreme Court consider these types of equitable practicalities in its opinions. For example, 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*"), the Court repeatedly addressed practicability, "pragmatic concerns," and the disruption that would be caused if it found that a tribe's open market repurchase of lands held by the tribe two hundred years ago revived tribal sovereignty over those properties. *Sherrill*, 544 U.S. at 214-219.

Even in *Gallegos*, the Court discussed the equities and interests of both parties, weighing the public's interest versus that of the pueblo. *See* BIC at 18, *quoting Gallegos*. Therefore, the Opinion appropriately addressed these issues. While the Opinion noted the equities of the situation, contrary to Appellant's averment, it did not "justify" its holding based upon those equities (BIC at 17-18). The court simply and correctly noted that in *Jicarilla*, this Court found it important to ensure that both tribal and non-tribal entities had an available forum in which to resolve a dispute concerning a public road. (Opinion, ¶ 15).

Appellant too acknowledges the importance of ensuring that Hamaatsa has some remedy, noting that it could seek redress from the prior lot owner or its title insurer. (BIC at 20). This is a circular argument, because even were Hamaatsa to obtain that relief (and if such relief were complete), either the prior owner or the title insurer would take Hamaatsa's place as the plaintiff in this litigation. Further, as this is a public road, not just Hamaatsa but the entire public would lose access. Thus, even were Hamaatsa able to obtain alternative access to its property (and no such alternative access exists or has been offered), the Pueblo will still deprive the public of use of a state highway. In other words, none of the Pueblo's proposed "remedies" are remedies at all because the state road would be unusable by the public at the Pueblo's whim.

Contrary to Appellant's statements, the Court of Appeals did not rely solely upon either the dissent in *Kiowa* or the concurrence in *Potawatomi*. Instead, the court carefully examined the language of both the Supreme Court's majority opinions and Justice Stevens' separate writings, concluding: "The majority's concerns and Justice Stevens' dissent in *Kiowa Tribe*, read fully, should stimulate analysts to reasonably view the case now before this Court as one beyond the periphery of immunity, requiring affirmance of the district court's denial of the Pueblo's motion to dismiss." (Opinion, ¶ 19). The court then distinguished the facts that: (1) in this case, there was no contractual, commercial, or other type of relationship between the Pueblo and the plaintiff; and (2) Hamaatsa could not have divined the Pueblo's intention to treat the plaintiff's use of a public highway as a trespass, and therefore, the plaintiff was an innocent party, unlike the commercial contractor in *Kiowa*. Indeed, in *Kiowa*, the contractor, unlike Hamaatsa, could have negotiated a waiver with the tribe or elected not to pursue the contract, and presumably included the risk as part of its costs of doing business. None of those options was available to Hamaatsa.

Appellant repeatedly cites to the Court of Appeals decision in *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, 149 N.M. 234, 247 P.3d 1119, as if it binds this Court. *See, e.g.*, BIC at 8, 18-19, 32-33. However, like the Court of Appeals decision in this matter, *Armijo* simply reflects the opinion of a single panel of the

Court of Appeals -- it is in no way binding upon this Court. Nor is it preclusive.[12] *Armijo* did not address any of the arguments relied upon in the *Hamaatsa* opinion, nor did it cover the issues of sovereign immunity in *in rem* versus *in personam* actions, the U.S. Supreme Court's decision in *Mesacalero*, the distinction between seeking damages versus equitable relief, or related concepts.

IV. THE IN REM NATURE OF THIS SUIT BARS ITS DISMISSAL BASED ON SOVEREIGN IMMUNITY (Responsive to Appellant's Point II)

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, because sovereign immunity is not implicated 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 decision relevant to this analysis -- ignored by Appellant -- 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 *Yakima*, the County initiated litigation to foreclose upon non-reservation fee property held by the Tribe after it failed to pay both *ad valorem* and excise taxes on these parcels.

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[12] Nor did the panel correctly decide *Armijo*; the *in rem* nature of the adverse possession action should have precluded the tribe from invoking sovereign immunity. *See Smale v. Noretep*, 150 Wash. App. 476, 484, 208 P.3d 1180 (Wash. Ct. App. 2009) (finding – as to a claim for adverse possession – that "exercising jurisdiction over *in rem* proceedings does not implicate sovereign immunity").

Simultaneously, the Tribe sued the County in federal court for declaratory and injunctive relief, contending the County lacked jurisdiction to levy these taxes. *Id.*, 502 U.S. at 256. The 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, 269. In so concluding, the Court expressly pointed out that the County's jurisdiction over the fee land with regard to the *ad valorem* 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 brought the federal action); however, as in *Mescalero*, the Supreme Court nonetheless implicitly found that the County could *enforce* the *ad valorem* tax by *foreclosing* on the property (based upon the existence of *in rem* jurisdiction). *Yakima* 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).

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 is not implicated. 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 subject matter jurisdiction over it. The court rejected

this argument, applied *Yakima*, and concluded the state court had *in rem* jurisdiction to quiet title and partition fee property held by the 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.... The Quinault Nation would lose no property or interest for which it holds legal title.
>
> Under the Supreme Court's holding in ... *Yakima*, it is reasonable to conclude that the ... 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*.

Id. at 872-874. *Anderson* 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: "the decision in ... *Yakima*, which based state jurisdiction to tax and foreclose on reservation fee land exclusively *in rem*, contradicts that contention." *Anderson* at 875-876.

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. The court stated 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 affirmatively, finding sovereign immunity could not be invoked to deprive the district court of *in rem*

jurisdiction to determine "rights in a ... specific property, against all the world, equally binding on everyone." *Id.*, 2002-ND-83, ¶¶ 8, 9. It found:

> 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.

These cases are not outliers. Courts in other jurisdictions similarly have concluded that sovereign immunity is not implicated when a court exercises *in rem* jurisdiction involving a tribe's fee property. *See Miccosukee Tribe of Indians of Fla. v. Dep't of Envtl. Prot.*, 78 So.3d 31(Fla. Dist. Ct. App. 2011) ("The eminent domain action here is not an action against the Tribe itself, but instead is an action against land held in fee by the Tribe. [Plaintiff] does not need personal jurisdiction over the Tribe – it needs only *in rem* jurisdiction over the land. And the land in question is not tribal reservation land ... and it is not held in trust.... Therefore, on these facts, the Tribe's sovereign immunity is not implicated and does not bar this eminent domain action"); *Smale*, 150 Wash. App. at 484 (sovereign immunity was not implicated with regard to an *in rem* action for adverse possession). *See generally Lyon v. State*, 76 Idaho 374, 283 P.2d 1105, 1106 (1955) ("A suit to quiet title to land allegedly owned by appellants and to which the...State of Idaho allegedly asserts a claim, is not a claim against...the State, to which it can

interpose sovereign immunity as a defense....The appellants ... are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own. Hence the contention that such proceeding deprives the State...of sovereign rights of immunity, is without merit").

The Pueblo's reliance on *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (BIC 24-25), 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*, 1990-NMSC-031, ¶ 25, 109 N.M. 683, 789 P.2d 1250 (lack of personal jurisdiction "must be asserted at the outset of an action; otherwise these defenses are waived"). The Pueblo has not contended that the district court lacked personal jurisdiction over it.

Second, the property at issue here is *real* property located in New Mexico. 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.

Nor is Appellant's citation to *State v. Nuñez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (BIC at 25-26) more useful. While *Nuñez* may have been critical of the idea that – in the criminal context – *in rem* jurisdiction "allows the court to

divest any wrongdoer anywhere of any interest they may possess in ... unlawful property," (*id.*, 2000-NMSC-013, ¶ 79), the Court did not eliminate *in rem* jurisdiction in any context. Further, in this case, the *Nuñez* concerns are inapplicable. Contrary to the Pueblo's averment, Hamaatsa does not believe that San Felipe actually owns the property under the road. To the contrary, under state law, 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"). Because the Pueblo – which does not own the road – not the State, has threatened to cut off the use of the public road, this case is well within the species of suits subject to *in rem* jurisdiction. Thus, Hamaatsa's suit is properly *in rem* because it concerns the nature of the property itself, and not the ownership of that property.[13]

San Felipe next argues, citing cases that do not support the proposition (BIC at 27-28), that *in rem* jurisdiction does not create subject matter jurisdiction. This convoluted argument ignores the holding in *Jicarilla*, which found the New Mexico courts have subject matter jurisdiction over claims involving fee property

[13] Without record support, the Pueblo states that the road is simply Hamaatsa's "preferred" route. (BIC at 26-27). This allegation is simply untrue. It is the only route to reach Hamaatsa's property.

claimed by Indian tribes.[14]

The Pueblo's reliance on the *Oneida New York* ("OIN") case at its various levels of appeal (BIC 29-30) also is misplaced. There, the district court found that the action before the federal court was not *in rem*. *Oneida Indian Nation v. Madison County*, 401 F. Supp. 2d 219, 226-229 (N.D.N.Y 2005) (because the state court had jurisdiction of an *in rem* foreclosure proceeding, the federal court proceeding can only be *in personam* because only one court can take jurisdiction over the *res*, and further noting in the federal court case, 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"). By contrast, the district court has jurisdiction over the *res*, and Hamaatsa does not seek to "take" anything from the Pueblo; it simply seeks a declaration that property acquired by the Pueblo has had a public road running over it since the early 1900s (the road itself is owned by the State).

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 Supreme Court granted *certiorari*, 131 S.Ct. 459, 178 L. Ed. 2d 286 (2010).

[14] The argument at BIC 28-29 relates to issues of sovereignty comparable to states and foreign sovereigns. This issues was briefed *supra* at point II. A.

OIN then decided not to continue its sovereign immunity fight, issuing 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). Thus, the OIN cases are irrelevant to Hamaatsa's arguments with regard to *in rem* jurisdiction in the present matter.[15]

V. SOVEREIGN IMMUNITY DOES NOT BAR AN ACTION FOR DECLARATORY OR INJUNCTIVE RELIEF (Responsive to Appellant's Point III)

A. *Kiowa* Does Not Compel A Finding Of Sovereign Immunity In A Matter Seeking Only Equitable Relief

Kiowa concluded only that the tribe was immune from an action for contract damages, while also noting there "are reasons to doubt the wisdom of perpetuating the doctrine [of sovereign immunity]", because 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.

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[15] In dissent, Judge Wechsler agreed with the conclusion of the OIN district court, stating that Hamaatsa seeks to "declare a tribally owned property a public highway." 2013-NMCA-094, ¶44. The actual property under the road is not owned by the Pueblo, but is owned by the state, and therefore, Hamaatsa is not seeking to acquire property. *See infra* Section IV, A. Further, even were the property under the road owned by the Pueblo, the road easement was owned by the state prior to the date on which the Pueblo acquired the property, so Hamaatsa's suit seeks to enforce the status quo.

Undoubtedly, 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 (without contravention by the majority) that the Court has not decided whether a state court has jurisdiction to enjoin a tribe's off-reservation actions. *Id.* at 763. Nor did *Kiowa* discuss whether sovereign immunity could be invoked in disputes involving "*purely* off-reservation conduct." *Id.* at 764 (Stevens, J. dissenting, emphasis added). Thus, while *Kiowa* signaled its belief that tribal sovereign immunity should be restricted, it continued to apply sovereign immunity in an actions for money damages for breach of contract, regardless of where the wrong occurred. However, *Kiowa*'s narrow breadth does not encompass the facts of this case. Instead, this Court must turn to other Supreme Court pronouncements and federal case law to address whether sovereign immunity applies where the sole relief sought is equitable (in addition to the cases cited *supra*).

B. The *Sherrill* Case

In *Sherrill* (decided after *Kiowa*), the Court noted that a tribe could not claim immunity as a defense to an equitable action to evict the tribe from fee land. *Sherrill* involved two separate lawsuits: the Oneida Indian Nation filed a federal action challenging the City's ability to tax the OIN's fee land; and the City filed its

own action in state court against OIN, 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 Court's decision addressed whether OIN was immune from taxation, it also addressed the unavailability of sovereign immunity from suit in the state court eviction action. In his dissent, Justice Stevens noted that, based upon the majority's decision, OIN would be able to assert immunity as a defense to the state court eviction action. In response, Justice Ginsberg (writing for the majority) 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 related to non-trust, fee property, sovereign immunity is unavailable as a defense:

> ... 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 before *Sherrill*, one federal appellate found that Indian tribes are not immune from suits for equitable relief. In *T.T.E.A. v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), the court recognized that claims for injunctive relief against a 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. ... There is no reason that the federal common law doctrine of tribal sovereign immunity, ...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. at 680-681.

The Fifth Circuit reiterated this holding in a later case: "In the case *sub judice*, the oil companies sought declaratory relief against the Tribe. *TTEA* 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* ...was addressing sovereign immunity of federally-recognized Indian tribes from damages actions, not for injunctive relief").

In *Oneida Tribe of Indians of WI v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), 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:

> ... [I]t hardly makes sense to permit taxation while at the same time prohibiting the only means of collecting such taxes.... 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....

Hobart at 921. *See also Dry Creek Lodge*, 623 F.2d at 685.

Post-*Sherrill*, *Kiowa* presents no bar to a claim for equitable relief against a tribe, particularly where the equitable relief sought relates to land held in fee. 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 invoke sovereign immunity. 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.

VI. VARIOUS STATUTES DEMONSTRATE THAT CONGRESS DID NOT INTEND TO ALLOW A TRIBE TO INVOKE SOVEREIGN IMMUNITY WITH REGARD TO EQUITABLE ACTIONS INVOLVING FEE PROPERTY (Responsive to Appellant's Points I, II and III)

This is not the type of suit in which sovereign immunity is implicated. Therefore, any discussion of whether immunity has been waived or abrogated misses the point. Were a Pueblo able to invoke sovereign immunity with regard to equitable actions about real property owned only in fee, it would render irrelevant various statutes regarding Indian trust land and other federal laws. A review of those laws and statutes demonstrates that Congress did not intend to allow a tribe

to invoke sovereign immunity in a situation such as this, involving a public road situated within freely alienable fee property.

A. Sovereign Immunity Cannot Be Invoked In a Dispute Involving Fee Land

An Indian tribe, like other entities, has the ability to acquire real property in fee simple on the open market. But, unlike other entities, it also has the ability to ask the Secretary of the Interior to transform fee property into property held in trust, with all of the commensurate trust benefits:

> 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 – unless property is held in trust, it is not free from state regulation, including laws affecting public roadways and enforcement of those laws.

This position is 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, fee property is not protected from local authority, law, or the enforcement of such laws that are enjoyed by Indian tribes once property is taken into trust. To find otherwise would render superfluous the entire fee-to-trust purpose and detailed processes. *See* 25 C.F.R. part 151. *See also Carcieri v. Salazar*, 555 U.S. 379, 385, 129 S.Ct. 1058, 172 L. Ed. 2d 791 (2009) (under 25 U.S.C. § 465, a tribe which owned property in fee could "free itself from compliance with local regulations," by having property taken into trust).

This position is also supported by the Enabling Act of New Mexico, 36 Stat. 557, § 2. The only tribal property mentioned in the Enabling Act as having a distinction from other (non-state or non-federal) property are those lands "owned...by Indian tribes, the right or title which shall have been acquired through or from the United States." *Id.* Trust lands alone are immune from taxation. However, lands held by Indian tribes *outside* of a reservation *are* subject to taxation. *Id.* ("nothing herein ... shall preclude the State from taxing, as other lands and other property are taxed, any lands and any other property outside of an Indian reservation owned or held by any Indian....."). This provision therefore establishes that tribal fee lands are to be treated exactly as other non-state or federal property.

As Indian fee lands are taxable, they are also subject to actions for tax enforcement. *See, e.g., Mescalero*. If sovereign immunity is not implicated in an

action to collect taxes as to tribal fee property, a tribe should not be able to invoke immunity in other equitable causes of action related to that property.

B. *Kiowa* Does Not Alter the Result

This argument is not negated by the holding in *Kiowa* that off reservation "conduct" is subject to 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 fee property, where the character of the road was established prior to the tribe taking possession. *Kiowa* does not address whether a tribe can invoke sovereign immunity with regard to an equitable claim involving fee land in any event.

The invocation of sovereign immunity would impermissibly allow an Indian tribe to avoid the enforcement of state law to fee property in an equitable action that would not impact the tribe's treasury and 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. So, 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. *See also Kiowa* at 758. Therefore, no purpose is served

in allowing sovereign immunity to extend to equitable actions related to a tribe's fee property.

To allow an Indian tribe to invoke sovereign immunity from suit in this case would defeat the congressional scheme of regulation and Congress' pronouncement in R.S. 2477 would be unenforceable. This conclusion is bolstered by the 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 such as R.S. 2477 to apply universally, but without any enforcement mechanism, would be incongruous. Thus, in *Tuscarora*,[16] 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.[17] *See also Agua Caliente Band of Cahuilla Indians v. Superior*

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

[17]While certain cases have found that statutes seeking to abrogate Indian immunities should be specific, that rationale does not apply here because the Pueblo is not acting in its capacity as a sovereign. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) ("*Tuscarora* ... does not apply where an Indian tribe has exercised its authority as a sovereign—here, by enacting a labor regulation—*rather than in a proprietary capacity such as that of ... landowner*")

Court, 148 P.3d 1126, 52 Cal.Rptr.3d 659 (2006) (sovereign immunity does not bar enforcement of Political Reform Act against an Indian tribe, noting that "our abrogation of the sovereign immunity doctrine under these facts is narrow and carefully circumscribed...."); *Hollynn D'Lil* (enforcing the federal Americans with Disabilities Act to a tribal venture located on fee property).

R.S. 2477 created a public road that is now subject to closure at the whim of the Pueblo, denying Hamaatsa access to its property. To avoid this result, Hamaatsa properly asked the district court to disallow any such action by judicially establishing the fact of the long-standing public nature of the road. This is an action *in rem* that takes nothing from the Pueblo, and which does not implicate sovereign immunity.

CONCLUSION

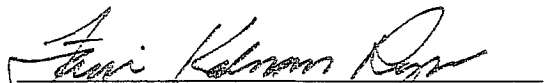
As set forth herein, there are numerous bases for why sovereign immunity does not bar Hamaatsa's Complaint. Therefore, this Court should affirm the district court's decision denying the Pueblo's motion to dismiss.

(emphasis added). Therefore, where the tribe is not acting as a sovereign, but as a private landowner, the tribe does not have the benefit of a liberal construction.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be helpful to a resolution of the issues herein because of the significant implications of this decision to land owners in New Mexico, including Appellee, and due to the general importance of the matters briefed.

THE SIMONS FIRM, LLP

By: 

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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 and Gwenellen P. Janov, 901 Rio Grande Boulevard, NW, Suite F-144, Albuquerque, New Mexico 87104 on January 13, 2014.

Faith Kalman Reyes