IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellee,

No. 34,287

v.

PUEBLO OF SAN FELIPE, a
Federally Recognized Indian Tribe,

Defendant-Appellant.

APPELLANT PUEBLO OF SAN FELIPE'S BRIEF IN CHIEF

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SUMMARY OF THE PROCEEDINGS

A. Nature of the Case

This case squarely raises the question of the continuing vitality in our State of the tribal sovereign immunity doctrine. The issue arose when one neighboring landowner, Plaintiff-Appellee Hamaatsa, Inc. ("Hamaatsa"), sued another, Defendant-Appellant Pueblo of San Felipe (the "Pueblo" or "San Felipe"), in a dispute over Hamaatsa's right to use a dirt road crossing land owned by the Pueblo. The Pueblo owns the land, which is located immediately adjacent to its 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 *See* Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy Management Act of 1976, Pub.L. No. 94-579 § 706(a), 90 Stat. 2793 ("R.S. 2477").[1] In its suit, Hamaatsa seeks a declaration that the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 from suit. Following briefing and oral argument, the District Court orally denied the motion. [**Tr. 31**]. As grounds for its decision, the Court simply stated: "This is an *in rem* proceeding not seeking damages." [**Id.**] 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 the Court of Appeals, which the Court granted. [**RP 45**]. Following briefing and oral argument, on July 23, 2013, the Court of Appeals issued its decision affirming the District Court on grounds different from those on which the trial court relied. *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶ 10, *cert. granted*, 2013-NMCERT-009 (No. 34,287, Sept. 20, 2013). Judge Wechsler dissented from the Court's decision.

C. Summary of the Facts Relevant to the Issue Presented for Review

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 itself 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, the BLM and the Pueblo agreed to reroute a portion of the access easement 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 interest" 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. 3, T. 13 N., R. 6 E." [**RP 3** (¶ 14)].

At some point after the Pueblo and BLM rerouted the road, Hamaatsa purchased property located directly to the north of Section 3. [**RP 2** (¶ 10)]. Since the purchase, Hamaatsa has gained access to its property by crossing the Pueblo's land along a route that includes the easement relinquished by the BLM to the Pueblo in 2002. [**RP 2** (¶ 10); **RP 3** (¶ 14)]. On 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)]. During the pendency of this case, the Pueblo has permitted Hamaatsa continued access to its property along this disputed route. **[Id.]**

STANDARD OF REVIEW

"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 (citations omitted). Because "the determination of whether jurisdiction exists is a question of law," this Court's review of "an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction" is accordingly *de novo*. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207 (citations omitted).

ARGUMENT

In affirming the District Court's denial of the Pueblo's motion to dismiss, the decision of the Court of Appeals fashions out of whole cloth a novel rule that effectively abnegates decades of settled precedent regarding the tribal immunity doctrine. The Court of Appeals majority offers no legitimate basis in support of the radical sea change its decision represents. Consistent with the controlling precedent of the United States Supreme Court and this Court, and previous decisions of the Court of Appeals, this Court should reverse.

I. HAMAATSA'S CLAIM AGAINST THE PUEBLO IS BARRED BY TRIBAL SOVEREIGN IMMUNITY

A. Historical and Recent Judicial Pronouncements Mandate Recognition of the Pueblo of San Felipe's Sovereign Immunity in This Case.

The doctrine of tribal sovereign immunity has long been recognized "as a legitimate legal doctrine of significant historical pedigree." *Hoffman v. Sandia Resort and Casino*, 2010-NMCA-034, ¶ 6, 148 N.M. 222. The immunity from suit afforded all federally-recognized Indian tribes under federal law is fundamental to the existence of these "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Article I, Section 8, clause 3 of the United States Constitution, which imbues Congress with the power to regulate commerce with the tribes, reflects the fact that from the time of our

nation's founding the federal government has considered Indian tribes to be possessed of an inherent sovereignty not unlike that possessed by the federal government, the states, and foreign nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Indian tribes thus possess "the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted), which always has been and remains "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Against this backdrop, tribal sovereign immunity is "settled law." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). In *Kiowa Tribe*, the United States Supreme Court held that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." 523 U.S. at 754 (citing *Three Affiliated Tribes*, 476 U.S. at 890; *Santa Clara Pueblo*, 436 U.S. at 58; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)).[2] The Court further clarified the doctrine's reach: 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

[2] Courts recognized the tribal sovereign immunity doctrine long before *United States Fidelity & Guaranty*. *See generally* William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1640-54 (2013) (discussing the doctrine's origin and early judicial application).

reservation." *Id.* at 759-60. The law of our State derives from this settled precedent, as this Court stated in *Gallegos*:

> Thus, tribal immunity is a matter of federal law and is not subject to diminution by the states. *See Three Affiliated Tribes*, 476 U.S. at 891. Without an unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172, 97 S.Ct. 2616, 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.").

2002-NMSC-012, ¶ 7. Congress has not authorized Hamaatsa's suit against the Pueblo, and the Pueblo has not waived its immunity.

The Supreme Court's ruling in *Kiowa Tribe* represents that Court's most recent reaffirmation of the deep roots of the tribal immunity doctrine. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (describing *Kiowa Tribe* as the case "in which we reaffirmed the doctrine of tribal immunity"). In obeisance to *Kiowa Tribe*, this Court thus stated in *Gallegos* that "whether a tribe's activity was a commercial or a governmental function appears to be a distinction without a difference." *Gallegos*, 2002-NMSC-012, ¶ 27. And the Court of Appeals declared, applying the tribal immunity doctrine a few years ago, 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. In New Mexico, then, "[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 (quoting *Kiowa Tribe*, 523 U.S. at 754).

Armijo is functionally on all fours with the instant case.[3] In *Armijo*, as here, the appeals 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 purchased the land at issue, a ranch located within the Cebolleta Land Grant and outside Laguna's boundaries. *Id.* ¶ 2. The Board of Trustees of the Cebolleta Land Grant brought an action against Laguna, Armijo, and others to quiet title to a 640-acre section of the ranch, and Armijo filed cross-claims against Laguna and others asserting that he had acquired title to the section through adverse possession. *Id.* ¶¶ 3-5. The District Court denied Laguna's motion seeking dismissal of Armijo's cross-claims against it based on its immunity from suit, concluding "that the 'court has subject matter and personal jurisdiction over [the Pueblo] in this matter because this matter arises outside the reservation.' " *Id.* ¶ 7 (alteration in original).

[3] Indicative of its peculiar approach to the issue, the Court of Appeals majority decision ruled on sovereign immunity without mentioning, much less discussing, *Gallegos* or *Armijo*.

The Court of Appeals reversed, rejecting the District Court's conclusion that it had jurisdiction because "this matter arises outside the reservation." *Id.* ¶ 11. Citing *Kiowa Tribe*, the Court stated: "The locus of the Pueblo's activity does not determine the applicability of tribal sovereign immunity." *Id.* ¶ 12. Citing *Antonio*, the court also rejected Armijo's contention that reliance on *Kiowa* was misplaced "because *Kiowa* is a contract case and the discussion therein is limited to contract issues." *Id.* Concluding that "[t]he law regarding sovereign immunity remains as set forth in *Kiowa*," *id.* ¶ 20, the Court of Appeals held that "the district court erred in denying the Pueblo's motion to dismiss" because "[t]he Pueblo is immune from suit and, therefore, the District Court lacks subject matter jurisdiction over this claim." *Id.* ¶ 24 (citing *Gallegos*, 2002-NMSC-012, ¶ 36).

In this case, Hamaatsa alleges that a retired BLM right-of-way on the Pueblo's fee property is a legally valid access route to Hamaatsa's adjacent property under R.S. 2477, and seeks a declaration to that effect. For all practical purposes, the nature of the relief sought here is the analytical equivalent of the cross-claim for quiet title by adverse possession in *Armijo*. The Court of Appeals properly held there that Laguna's sovereign immunity barred Armijo's action. Logic and consistency dictate the same result here.

B. The Court of Appeals Decision Erroneously Imposes upon the Pueblo a Burden Contrary to the Controlling Precedent.

To establish subject matter jurisdiction over a federally recognized Indian tribe in the courts of our State, a plaintiff bears the burden of proving, first, that the state court has the power to hear and determine the particular case, *Marchman v. NCNB Texas Nat'l Bank*, 1995-NMSC-041, ¶ 27, 120 N.M. 74, and, second, that the tribal defendant's sovereign immunity has been abrogated or waived. *Doe*, 2007-NMSC-008, ¶ 27 n.6. Setting aside all of the governing precedent—"no United States Supreme Court case, and no New Mexico case, is clearly determinative or constitutes binding precedent favoring the Pueblo under the particular circumstances here," *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 12—the Court of Appeals majority fashioned its own novel rule to govern tribal claims of immunity from suit:

> If common law sovereign immunity from suit is an attribute of sovereignty, one must wonder why immunity should exist in this case where the Pueblo has shown no other attribute of sovereignty—such as a property, treasury, or governance interest in or sovereign authority over the road—that could bestow immunity from inherent sovereignty. In this case, with no evidence showing that a significant aspect of the Pueblo's inherent sovereignty or sovereign authority is adversely affected, we see no justifiable basis on which the Pueblo can draw immunity from inherent sovereignty.

Id. ¶ 13.

The majority decision below thus requires the Pueblo to demonstrate that an aspect of its sovereignty "is adversely affected" in order to invoke its sovereign immunity from suit. This test is plainly contrary to the doctrinal basis for tribal immunity. An Indian tribe's immunity from suit arises from its inherent status as a sovereign. *See Santa Clara Pueblo*, 436 U.S. at 58; *Three Affiliated Tribes*, 476 U.S. at 890. No court of which the Pueblo is aware has ever even suggested that such immunity depends on whether the tribe alleges that a claim has an adverse effect on a governmental interest, and the Court of Appeals majority cites no authority.[4]

Given the command of the United States Supreme Court and this Court that "the doctrine of tribal immunity is settled law," *Kiowa Tribe*, 523 U.S. at 756, the position of the Court of Appeals majority is inexplicable. The shifting of the burden to the Pueblo to demonstrate an adverse effect of Hamaatsa's action upon the Pueblo's sovereignty upsets the rule of *Kiowa Tribe* and *Gallegos*. As discussed below, it also is merely the first of several liberties the Court of Appeals majority takes with the tribal immunity doctrine in an effort to justify its conclusion.

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[4] The Court of Appeals decision acknowledges, as it must, that the Pueblo possesses "inherent sovereignty," but refuses to accept the notion that San Felipe's sovereign status is the basis upon which the Pueblo may invoke immunity from suit. *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 16 (refusing "to permit a sovereign immunity bar at this facial attack stage of the proceedings ... based on nothing more than the *bare assertion of sovereignty*") (emphasis added).

C. The Court of Appeals Decision Incorrectly Concludes that Tribal Sovereign Immunity is a Matter of State Law.

The Court of Appeals next invokes this Court's decision in *Jicarilla Apache Tribe v. Board of County Commissioners, County of Rio Arriba*, 1994-NMSC-104, 118 N.M. 550 ("*Jicarilla*") in support of the conclusion that "the issue in this case is a matter of state law, over which the District Court has jurisdiction." *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 14. The majority erred. As stated plainly in *Gallegos*, "tribal immunity is a matter of federal law and is not subject to diminution by the states." 2002-NMSC-012, ¶ 7 (citing *Three Affiliated Tribes*, 476 U.S. at 891). Federal law commands that "[w]ithout an unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities." *Id.* (citing *Puyallup Tribe, Inc.*, 433 U.S. at 172).

The Court of Appeals majority appears to believe that the incantation of a "public road" brings Hamaatsa's case within *Jicarilla* regardless of the Pueblo's sovereign immunity and crucial differences in the postures of the two cases. In the majority's view, state court subject matter jurisdiction is a *fait accompli* in any action seeking a declaration of a road's legal existence over land owned in fee simple by an Indian tribe, regardless of whether the tribal litigant consents to suit.

Jicarilla stands for no such proposition. The Jicarilla Apache Tribe's sovereign immunity was not at issue in that case. As correctly noted by Judge

Wechsler in his dissent, 2013-NMCA-094, ¶ 28, the sole issue before this Court was federal preemption and

> whether a federal statute ... deprives a state court of subject-matter jurisdiction to adjudicate a dispute between an Indian tribe and one of the state's counties concerning the existence of a public road across part of a ranch purchased by the tribe in the recent past.

Jicarilla, 1994-NMSC-104, ¶ 2 (footnote omitted). The only conclusion this Court reached was that "federal law did not preempt the District Court's exercise of jurisdiction to resolve the parties' dispute." *Id.*

Most importantly, the Jicarilla Apache Tribe's immunity from suit was not at issue *because the Tribe brought suit*. *Jicarilla*, 1993-NMCA-094, ¶ 24, 116 N.M. 320 ("the Tribe brought suit and stipulated to the District Court's jurisdiction early on in the lawsuit"), *rev'd on other grounds*. Having lost on the merits in the District Court, the Tribe apparently took the unusual step of raising the issue of subject matter jurisdiction for the first time on appeal to avoid the unfavorable judgment against it. 1994-NMSC-104, ¶ 2. By filing suit, the Tribe consented to the jurisdiction of the court and effectively waived its sovereign immunity. *See McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) (initiation of lawsuit by Indian tribe necessarily establishes consent to court's adjudication of merits of that particular controversy). Unlike San Felipe here and the Pueblo of Laguna in *Armijo*, the Jicarilla Apache Tribe was not sued without its consent. The Tribe

itself initiated the litigation, thus unambiguously consenting to litigation in state court.

Had it remained faithful to governing precedent, the Court of Appeals should have found this difference in the parties' positions in the respective cases dispositive of the Pueblo's motion to dismiss. The Jicarilla Apache Tribe, by filing suit, voluntarily consented to the jurisdiction of the state court; the Pueblo, being the defendant in this action, has not consented to suit. It is as simple as that.

D. The Court of Appeals Decision Erroneously Relies upon Cases Concerning Sovereign Authority and Regulatory Jurisdiction.

To support its erroneous conclusion that the District Court has subject matter jurisdiction over this action as "a matter of state law" pursuant to *Jicarilla*, the Court of Appeals majority "note[s] that the United States Supreme Court supports the view that an Indian tribe cannot exercise jurisdiction over conduct on a public roadway." *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 14 (citations omitted). This approach confuses "sovereign immunity" with "sovereign authority." *Oneida Indian Nation of New York v. Madison County and Oneida County, N.Y.*, 605 F.3d 149, 156 (2d Cir. 2010) ("*Oneida II*"), *vacated and remanded*, 131 S.Ct. 704 (2011). As Judge Wechsler observed in dissent, the cases on which the majority relies "do not involve issues of tribal sovereign immunity," but rather the issue of an Indian tribe's regulatory and adjudicatory jurisdiction over lands the tribe owns

in fee. 2013-NMCA-094 ¶ 29. The cases thus provide no basis whatsoever for the conclusion reached by the Court of Appeals.

"Tribal sovereign authority and tribal sovereign immunity are two distinct doctrines with different historical origins and purposes." *Id.* ¶ 43 (citing *Oneida II*, 605 F.3d at 157-58). An Indian tribe's sovereign authority is necessarily land-based; it concerns the extent to which a tribe may exercise jurisdictional authority over lands the tribe owns to the exclusion of state jurisdiction. *Oneida II*, 605 F.3d at 157. "[A] tribe's immunity from suit," on the other hand, "is independent of its lands." *Id.* at 157-58 (citing *Kiowa Tribe*, 523 U.S. at 754) ("[O]ur cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred."). The Supreme Court in *Kiowa Tribe* explained the distinction between the two doctrines this way:

> We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. There is a difference between the right to demand compliance with state laws and the means available to enforce them.

523 U.S. at 755 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("*Citizen Band Potawatomi*")).

Although this Court has not had occasion to parse the distinction between sovereign immunity from suit and sovereign governmental authority over land, the Court of Appeals in *Armijo* squarely faced the issue. Armijo argued that *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and its progeny, *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), *vacated and remanded*, 686 F.3d 133 (2d Cir. 2012), and *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), "evidence a jurisprudential shift concerning the law of tribal sovereign immunity" and barred Laguna "from asserting tribal sovereign immunity here because Armijo's cross-claim arises from the Pueblo's acquisition of non-tribal land." *Armijo*, 2011-NMCA-006, ¶ 16. Rejecting the argument, our Court of Appeals stated:

> *Sherrill* and *Hobart* do not explore the boundaries of a tribe's *sovereign immunity* from suit. Rather, they 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. *See Oneida Indian Nation of N.Y.*, 605 F.3d at 156-59 (clarifying that *Sherrill* concerns tribal sovereign authority over reservation lands, not tribal sovereign immunity from suit.) ... Here, the Pueblo is asserting its sovereign immunity, not its sovereign authority over Section 16. Armijo confuses the two doctrines.

Id. ¶ 18 (emphasis in original). The Court of Appeals majority's reliance on the "sovereign authority" line of cases thus provides no support for its conclusion that the Pueblo's immunity from suit does not bar Hamaatsa's action.[5]

E. The Court of Appeals Decision Erroneously Relies upon Considerations of Equity and Fairness.

The Court of Appeals majority impermissibly injects into its analysis a consideration of "the practical effects of the application of sovereign immunity." 2013-NMCA-094, ¶ 15. Indeed, the majority opinion justifies its holding on the

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[5] Although this Court has not directly addressed the issue of the tribal sovereign immunity doctrine's geographic scope, at least one of the Court's previous tribal immunity decisions acknowledges the doctrine's extraterritorial reach. In *Srader v. Verant* , 1998-NMSC-025, 125 N.M. 521, this Court affirmed the dismissal of certain claims brought by non-Indian individuals who suffered gambling losses in Indian casinos. The plaintiffs argued that the tribes' immunity from suit "is not dispositive of this issue, particularly since this suit involves off-reservation activities by non-Indians." 1998-NMSC-025, ¶ 27. Holding that the tribes were indispensable parties to the claims and the tribes' sovereign immunity from suit barred their joinder, this Court concluded:

> New Mexico citizens filed the current claims in the state court. No waiver exists that permits suit against the tribes in state court, and no Congressional authorization has been given. Therefore, the doctrine of sovereign immunity precludes joinder of the tribes.

Id. ¶ 29. Finding the tribes immune from suit, this Court refused to permit the litigation to continue in the tribes' absence notwithstanding the off-reservation locus of activity. *Id.* ¶ 34 ("Plaintiffs' emphasis that non-Indians performed the acts in question while within New Mexico's jurisdictional boundaries does not change the Rule 1-019 considerations. The remedies requested pose substantial risks for the Indian tribes' interests, and Plaintiffs fail to credibly suggest methods for addressing those concerns if this litigation were permitted to continue.").

ground that "[t]he legal and practical effect of permitting the Pueblo to assert sovereign immunity" would "deprive Hamaatsa, or any other member of the public, any opportunity for legal recourse." *Id.* Both this Court and the Court of Appeals have soundly rejected that argument. *See id.* ¶ 30.

This Court has recognized that the "sovereign interests" represented by the tribal immunity doctrine are of greater importance than a plaintiff's pursuit of a state court remedy:

> "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*, 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)).

Gallegos, 2002-NMSC-012, ¶ 51 (alterations in original).

The *Armijo* court also put to rest the notion that equitable considerations have any place in an analysis of the tribal immunity doctrine. In reversing the District Court, which premised its decision denying the Pueblo of Laguna's motion to dismiss on notions of "basic fairness," the Court of Appeals recognized that " 'sovereign immunity is not a discretionary doctrine that may be applied as a

remedy depending on the equities of a given situation. ... Rather[,] it presents a pure jurisdictional question.' " *Armijo*, 2011-NMCA-006, ¶ 13 (quoting and citing *Ameriloan v. Superior Court*, 86 Cal. Rptr. 3d 572, 582 (Ct. App. 2008), *as modified* and citing *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998)). Because the immunity issue implicates a court's subject matter jurisdiction, "[a] court has no authority to assert its equitable powers over a matter involving a tribe where tribal sovereign immunity precludes the court from asserting jurisdiction in the first place." *Id.* ¶ 15.

As a matter of law and policy, then, neither "the practical effects of the application of sovereign immunity" nor equitable considerations should have played any part in the Court of Appeals' analysis of the issue. "[T]he Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Ute Distribution Corp*, 149 F.3d at 1267 (citing *Kiowa Tribe*, 523 U.S. at 758-60; *Citizen Band Potawatomi*, 498 U.S. at 509-11; and *Santa Clara Pueblo*, 436 U.S. at 58, 64). By injecting equitable considerations into its analysis, the Court of Appeals majority directly contravened the controlling precedent. Under *Kiowa Tribe* and *Gallegos*, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 754; *Gallegos*, 2002-NMSC-012, ¶ 7.

The Court of Appeals majority also erred as a matter of fact. Proper application of the Pueblo's immunity from suit would foreclose Hamaatsa's ability to sue San Felipe, which may be Hamaatsa's preferred remedy, but dismissal would not "deprive Hamaatsa ... *any* opportunity for legal recourse." 2013-NMCA-094, ¶ 15 (emphasis added). 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 pursue a remedy with the BLM, which owns property adjacent to Hamaatsa's. *See supra* p. 3. While the Pueblo cannot be sued by virtue of its sovereign status, this fact does not leave Hamaatsa deprived of any remedy. *See Citizen Band Potawatomi*, 498 U.S. at 514 ("There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.")).

Finally, in making its equitable argument, the majority embraced Justice Stevens' criticism of the tribal sovereign immunity doctrine in his concurring and dissenting opinions in *Citizen Band Potawatomi* and *Kiowa Tribe*, respectively. That criticism was not part of the actual judgment of the Supreme Court. It does not represent the law as currently pronounced by the United States Supreme Court. And it does not and cannot form the basis for the Court of Appeals majority's rejection of the doctrine in a case where prevailing law—reaffirmed most recently

in *Kiowa Tribe*—mandates that the doctrine be applied. The Court of Appeals majority may share Justice Stevens' distaste for modern application of the doctrine, but as recognized by the majority of the Supreme Court in *Kiowa Tribe*, it is for Congress, not the courts, to limit the doctrine's scope. 523 U.S. at 760.

F. The Court of Appeals Decision Misapplies Rule 1-012(B)(1) to the Pueblo's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

All of the infirmities described above ultimately manifest themselves in the Court of Appeals majority's application of Rule 1-012(B)(1) to affirm the District Court's denial of the Pueblo's motion to dismiss. The Court repeatedly characterized the Pueblo as having "conceded" the existence of the road that is the subject of the litigation, concluding that as a result the Pueblo could not assert its sovereign immunity "at this stage of the proceedings." The Court of Appeals majority stated:

> By choosing to make its attack on Hamaatsa's complaint a purely facial one, thereby conceding the truth of the allegations in the complaint, the Pueblo admitted the existence of a state public road. As we indicate in the body of this Opinion, there is no basis for a sovereign immunity defense at this stage of the proceeding where it is presumed that the road in question is a state public road.

2013-NMCA-094, ¶ 10. The majority's application of the Rule is erroneous in two key respects. First, the majority opinion bases its denial of the Pueblo's motion on the presumption that the road in question is a "public road" as a matter of law. In

conceding the truth of the factual allegations in Hamaatsa's complaint for purposes of its motion to dismiss, the Pueblo did not concede the road's *legal* existence. To be clear, whether the alleged road is a "public road" within the meaning of R.S. 2477 is not a factual allegation the truth of which the Pueblo has conceded; rather, it is the ultimate legal conclusion—the declaratory relief—that Hamaatsa seeks in its lawsuit. [**RP 5** (Prayer for Relief) ("plaintiff requests that the Court declare [the dirt road] is a public road")]. Thus, the main premise underlying the Court of Appeals decision—that tribal sovereign immunity is inapplicable where a plaintiff's claims concern a concededly "state public road"—is fallacious.[6]

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[6] 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 whether the Pueblo's sovereign immunity prevents the District Court from hearing Hamaatsa's complaint against the Pueblo. The whole point of a tribe's challenge on sovereign immunity grounds to the subject matter jurisdiction of a trial court—and the reason that the Rules of Appellate Procedure permit interlocutory appeals to review immediately pre-trial decisions regarding application of the tribal sovereign immunity doctrine—is to determine whether immunity bars the action. 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).

Second, Hamaatsa simply did not and cannot demonstrate the existence of subject matter jurisdiction without alleging that the Pueblo's sovereign immunity has been abrogated or waived. *This* is the nature of the Pueblo's facial challenge, which the allegations of the complaint plainly cannot overcome.[7] This is also the fundamental point of disagreement raised by Judge Wechsler in dissent. 2013-NMCA-094, ¶ 24 ("Regardless of the stage of a proceeding, the doctrine of tribal sovereign immunity applies to insulate Indian tribes from being required to defend actions in state court."). Accordingly, the majority's repeated insistence that "there is no basis for a sovereign immunity defense at this stage of the proceeding," *id.* ¶ 10; *see also id.* ¶¶ 12, 15, and 16, is erroneous because it ignores the very purpose of sovereign immunity. "This stage of the proceedings" is exactly the time to rule on the Pueblo's claim of immunity from suit. "As with absolute, qualified, and Eleventh Amendment immunity, tribal sovereign immunity is an *immunity from suit* rather than a mere defense to liability; and ... it is effectively lost if a case is erroneously permitted to go to trial." *Burlington Northern & Santa Fe Ry. Co. v.*

[7] Hamaatsa does not allege congressional authorization or tribal waiver, but instead relies on this Court's decision in *Jicarilla* as the basis for the District Court's subject matter jurisdiction. **[RP 1** (¶ 3)]. In light of these two facts, the majority opinion expressly acknowledges that, if it applied the proper test, it would have no choice but to find the Pueblo's sovereign immunity a bar to the action. *See* 2013-NMCA-094, ¶ 17 n.4 ("there exists no unequivocal expression in the present case manifesting an intent to relinquish tribal immunity") (internal quotations and citations omitted).

Vaughn, 509 F.3d 1085, 1090 (9th Cir. 2007) (emphasis in original) (citations and internal quotations omitted).

II. THE PUEBLO OF SAN FELIPE IS IMMUNE FROM SUIT WHETHER HAMAATSA'S LAWSUIT IS CONSTRUED AS AN ACTION *IN PERSONAM* OR *IN REM*

By characterizing Hamaatsa's action as an *in rem* proceeding, the District Court engaged in an end run around tribal sovereign immunity, effectively concluding that it need not exercise jurisdiction over the Pueblo to hear and determine this case. [**Tr. 31**]. The Court of Appeals decided the issue on different grounds and did not reach this issue. *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 10. The Pueblo brings the issue to this Court's attention because, as Judge Wechsler acknowledged in dissent, the issue "was properly before the district court and necessitated a decision." *Id.* ¶ 32. The answer to the question is that immunity bars Hamaatsa's claims, be they characterized as *in personam* or *in rem*, because Hamaatsa is attempting to bring those claims against the Pueblo.[8]

The United States Supreme Court, in *Shaffer v. Heitner*, 433 U.S. 186 (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

[8] Like the District Court, Judge Wechsler concluded that Hamaatsa's action sounds *in rem*. Unlike the two courts below, however, Judge Wechsler would hold that "the doctrine of sovereign tribal immunity applies to an in rem proceeding involving tribally owned property. Regardless of whether the complaint is characterized as in rem, an action essentially to declare a tribally owned property a highway is in effect an action against the tribe." *Id.* ¶ 44.

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. In light of this observation, the Court's holding in *Shaffer* was 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 § 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 (footnotes omitted).

This Court has expressed a similar opinion of *in rem* jurisdiction. *See State v. Nunez*, 2000-NMSC-013, 129 N.M. 63. In *Nunez*, which concerned the double jeopardy implications of civil forfeiture under the Controlled Substances Act, 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 punitive, this Court 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. The Court 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 (citations omitted).

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.

Rather, the Pueblo here has invoked its sovereign immunity from suit, arguing, on the basis of that venerable doctrine, that the District Court cannot exercise subject matter jurisdiction over Hamaatsa's action because Congress has not authorized the suit and the Pueblo has not waived its immunity. Under these circumstances, 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. *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 40.

The answer, for three obvious reasons, is no. First, regardless of whether Hamaatsa's claim challenging the Pueblo's title is characterized as *in personam*, *in rem*, or *quasi in rem*, those labels only concern a court's personal jurisdiction over a party and the applicable service requirements. *State ex rel. Hill v. District Court of the Eighth Dist.*, 1968-NMSC-058, ¶¶ 2-5, 79 N.M. 33; *cf.* Rule 1-004(K)(3)-(4) NMRA (addressing service in cases involving real property). That the Pueblo's

land might be within the *in rem* reach of the District Court alone cannot establish subject matter jurisdiction of a case in which the Pueblo is a named defendant. *See Doe*, 2007-NMSC-008, ¶ 27 n.6 (citing cases); *Armijo*, 2011-NMCA-006, ¶ 15 ("tribal sovereign immunity precludes the court asserting jurisdiction *over the case*") (emphasis added); *Ameriloan*, 86 Cal. Rptr. 3d at 582 ("A tribe may waive its tribal sovereign immunity, thus conferring subject matter jurisdiction on the state court.") (citations omitted).

Second, "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 590, 594 (9th Cir. 1992), strongly militate against what amounts to the creation of an *in rem* exception to the Pueblo's immunity from suit. Indeed, in the context of state sovereign immunity under the Eleventh Amendment, no *in rem* exception exists. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) (stating that "we have never applied an *in rem* exception to the sovereign-immunity bar" and suggesting "that no such exception exists"); *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 (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"). The attributes of state sovereign immunity are relevant here because

"Indian tribes are sovereigns," *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 780 (1991), whose immunity "is not coextensive with that of the States," but rather is broader. *Kiowa Tribe*, 523 U.S. at 756. *See Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

Third, 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. *See supra* Section I.E.

As this Court and our Court of Appeals have declared, *Kiowa Tribe* governs the application of the tribal immunity doctrine in cases before the courts of our State. *Gallegos*, 2002-NMSC-012, ¶¶ 7, 27; *Armijo*, 2011-NMCA-006, ¶ 20. Thus, even were the District Court's characterization of Hamaatsa's action as *in rem* correct, the tribal immunity doctrine nevertheless would operate to divest the Court of subject matter jurisdiction over the case. In *Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219 (N.D.N.Y. 2005) ("*Oneida I*"),

aff'd, 605 F.3d 149 (2nd Cir. 2010), the federal district court, relying expressly on *Kiowa Tribe* and *Citizen Band Potawatomi*, 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 affirmed, as the relevant precedent compelled:

> 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 [Oneida Indian Nation] consents to such suits. Because neither of these events has occurred, the foreclosure actions are barred by the [Oneida Indian Nations'] immunity from suit.

Oneida II, 605 F.3d at 159. *See also Cayuga Indian Nation of New York v. Seneca County, N.Y.*, 890 F. Supp. 2d 240 (W.D.N.Y. 2012) (following *Oneida II*).

The District Court's decision to treat Hamaatsa's action against the Pueblo as one *in rem* allowed the Court to avoid the proper application of the tribal immunity doctrine to bar the action.[9] The settled law of tribal sovereign immunity cannot countenance the application of the legal fiction of *in rem* jurisdiction to render the tribal immunity doctrine inoperative, in a case like this one, where Congress has not authorized suit and the Pueblo has not waived its immunity.

III. THE PUEBLO OF SAN FELIPE IS IMMUNE FROM SUIT REGARDLESS OF THE NATURE OF THE RELIEF SOUGHT

In denying the Pueblo's motion to dismiss, the District Court also rejected the tribal immunity doctrine on the ground that Hamaatsa is "not seeking damages," only declaratory and injunctive relief. [**Tr. 31**]. As with the *in rem* issue discussed in Section II, *supra*, the Court of Appeals majority did not analyze this conclusion of the District Court. *Hamaatsa, Inc.*, 2013-NMCA-094, ¶ 10. Nevertheless, the Pueblo brings the issue to this Court's attention because it was a basis for the District Court's decision and was fully analyzed by Judge Wechsler in his dissent. *Id.* ¶¶ 50-53.

First, the District Court's ruling is in direct conflict with the settled practice of the United States Supreme Court and this Court in applying the tribal immunity doctrine. The Supreme Court has repeatedly found the doctrine to shield Indian

[9] No doubt whatsoever exists that Hamaatsa specifically intended to bring suit against the Pueblo. As counsel for Hamaatsa stated to the District Court: "It [Hamaatsa's action] is seeking particular relief against the Pueblo." [**Tr. 19**].

tribes from suit in actions for declaratory and injunctive relief pursued by either states or private parties to the same extent as in actions for money damages. *Citizen Band Potawatomi*, 498 U.S. at 507-08 (tribal immunity barred Oklahoma's counterclaim seeking in part "to enjoin the Potawatomis from selling cigarettes in the future without collecting and remitting state taxes on those sales"); *Puyallup Tribe, Inc.*, 433 U.S. at 168 (tribal immunity barred Washington's action seeking "a declaration that the defendants were bound to obey the State's conservation laws and an injunction against netting the runs of anadromous fish"); *Santa Clara Pueblo*, 436 U.S. at 59 (tribal immunity barred action of private party under the Indian Civil Rights Act seeking declaratory and injunctive relief); *see also Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (concluding, in an action concerning the use of a road crossing the Pala Band's reservation, that the Band's "immunity extends to suits for declaratory and injunctive relief.").

Second, although this Court has not had occasion to address directly whether the nature of the relief sought affects application of the tribal immunity doctrine,[10] the Court of Appeals squarely did in *Armijo*. That case, as discussed in Section I.A, *supra*, concerned an action to quiet title in which cross-claimant Armijo

[10] When this Court, in *Srader*, held that certain Indian tribes were indispensable parties and the tribes' sovereign immunity from suit barred their joinder, claims for declaratory and injunctive relief constituted a part of plaintiffs' causes of action. 1998-NMSC-025, ¶¶ 1, 3.

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, only declaratory relief to quiet title to Laguna's land. The Court of Appeals, consistent with the settled precedent, held that Laguna's immunity from suit barred Armijo's claims.

CONCLUSION

As the Court of Appeals observed in *Armijo*, the Supreme Court's decision in *Kiowa Tribe* "continues 'a longstanding tradition of federal common law in which tribal immunity has been recognized as a fundamental and inherent attribute of tribal sovereignty.' " *Armijo*, 2011-NMCA-006, ¶ 23 (quoting Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 665 (2002) ("Seielstad")). "The doctrine of tribal sovereign immunity from suit is firmly rooted in historical and contemporary decisions of the Supreme Court. It has remained intact even while the Supreme Court has limited other aspects of tribal sovereignty.' " *Id.* (quoting Seielstad at 667). The Court of Appeals majority's decision to the contrary simply cannot stand in the face of the doctrine's enduring vitality.

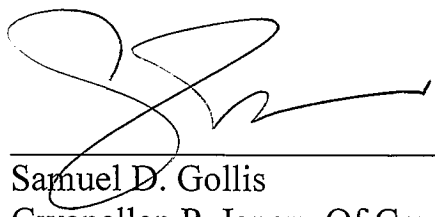
Appellant Pueblo of San Felipe respectfully requests that the Supreme Court hold that the Pueblo is immune from suit in the instant case because the United State Congress has not expressly authorized Hamaatsa's action and the Pueblo has not expressly and unequivocally waived its immunity from suit. This Court accordingly should reverse the decision of the Court of Appeals and remand the case to the District Court with instructions to 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: November 25, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rules 12-213(F)(5) and 12-307 NMRA, I hereby certify that I served Appellant Pueblo of San Felipe's Brief in Chief by mailing true and correct copies of the same via United States first class mail, postage prepaid, on this 25th day of November, 2013, to each of the following counsel of record:

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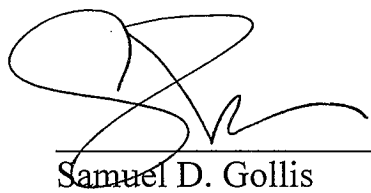

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