**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.

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# REPLY BRIEF OF APPELLANT PUEBLO OF SAN FELIPE

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## STATEMENT OF COMPLIANCE

This Answer Brief complies with the type-volume limitations of Rule 12-213(F) NMRA. Specifically, the Brief was prepared using Times New Roman, a proportionally-spaced type style, and, according to Microsoft Word for Mac 2011, Version 14.3.9 (131030), the body of the Brief, as that term is defined in the Rule, contains 4,331 words.

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## INTRODUCTION

"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." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("*Kiowa*") (emphasis added) (citations omitted). Defendant-Appellant Pueblo of San Felipe (the "Pueblo" or "San Felipe"), a federally recognized Indian tribe, [**RP 1 ¶ 2**], enjoys immunity from suit. The Pueblo has not waived its immunity, nor has Congress abrogated that immunity in the circumstances of this case. That should be the end of the matter.

Like the Court of Appeals, Hamaatsa ignores the fundamental principle that governs this case. In support of the Court of Appeals decision, Hamaatsa trots out and misconstrues a host of federal Indian law cases that have no relevance to this appeal. Arguments concerning the characterization of the proceeding as *in personam* or *in rem*, the type of relief sought, or the availability of an alternative forum do not change the analysis of a motion to dismiss asserting that a court lacks jurisdiction because of tribal sovereign immunity. Ultimately, this appeal involves a tribe's sovereign right not to be hauled into court, not the very different and independent question of whether a tribe has regulatory authority over land it owns in fee.

Nothing in the Answer Brief rebuts the arguments of the Pueblo's Brief in Chief, or justifies the novel conclusion of the Court of Appeals requiring the Pueblo to demonstrate that an aspect of its sovereignty "is adversely affected" in order to invoke its sovereign immunity from suit. *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶ 11, *cert. granted*, 2013-NMCERT-009 (No. 34,287, Sept. 20, 2013). San Felipe respectfully submits that the Court of Appeals decision must be reversed and the suit against the Pueblo dismissed with prejudice.

## ARGUMENT

### I. THE COURT OF APPEALS DECISION IGNORES THE LEGAL STANDARD APPLICABLE TO THE PUEBLO'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

At the center of this dispute is a dirt road that crosses land owned in fee by the Pueblo. **[RP 2 ¶ 4]**. The Pueblo contends that the road does not constitute a legally valid easement and Hamaatsa has no legal right to use this road for access to its property. Hamaatsa sued the Pueblo seeking a declaration of the converse legal conclusion—that the dirt road is a public road pursuant to the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, commonly known as Revised Statute 2477 ("R.S. 2477"). **[BIC 22 n.6]**; **[AB 1-2, 29]**. The Court of Appeals predicated its decision on the finding that the Pueblo, "[by] choosing to make its attack on Hamaatsa's complaint a purely facial one, thereby conced[ed] the truth of the allegations in the complaint, ... [and] admitted the existence of a state public road." *Hamaatsa*,

2013-NMCA-094, ¶ 10. In evaluating the Pueblo's motion to dismiss under Rule 1-012(B)(1) NMRA, the Court of Appeals treated as a judicially cognizable fact the ultimate legal determination Hamaatsa seeks in this action. The Court of Appeals decision misapplies the law relating to a facial attack under Rule 1-012(B)(1) in three discrete ways.

The Court of Appeals' first—and most fundamental—error occurred when it concluded that the Pueblo's invocation of immunity from suit was not appropriate at "this stage of the proceedings." 2013-NMCA-094, ¶¶ 10, 12, 15, and 16. This Court's decisions in *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, and *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207, accord with the Colorado Supreme Court's conclusion that claims of tribal immunity from suit are "generally raised in a rule 12(b)(1) motion, pursuant to either federal or state rules of civil procedure." *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1113 (Colo. 2010) (citing cases). Although it could have raised other legal and factual defenses to Hamaatsa's complaint, the Pueblo asserted its sovereign immunity at "this stage of the proceedings" precisely because "tribal sovereign immunity is an *immunity from suit*." *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007) (emphasis in original) (citations and internal quotations omitted). In addition, San Felipe sought dismissal as early as possible in this proceeding in an effort to minimize the

financial burden Hamaatsa's action continues to impose on the Pueblo. As Judge Wechsler noted in his dissent, "the doctrine of tribal sovereign immunity applies to insulate Indian tribes from being required to defend actions in state court." 2013-NMCA-094, ¶ 24.

Second, the Court of Appeals misapplied the presumption of truthfulness applicable at the motion to dismiss stage. Hamaatsa alleges in its complaint that the road at issue is a "public road." [**RP 3 ¶¶ 15-17**]. The Pueblo acknowledges that the Court must "accept as true all material allegations of the complaint and construe the complaint in favor of" Hamaatsa. *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130 N.M. 368. However, this rule applies to *factual* allegations. The presumption of truthfulness does not require the Court "to accept as true [Hamaatsa's] legal conclusions even if they are cast in the form of factual allegations ... or go to the merits of the suit." *Ashley v. U.S. Dept. of Interior*, 408 F.3d 997, 1000 (8th Cir. 2005) (citations and internal quotations omitted). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Whether the 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 (or must concede pursuant to Rule 1-012(B)(1)); it is the ultimate legal conclusion that Hamaatsa's lawsuit seeks. *See, e.g., Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210,

1219 (10th Cir. 2011) (allegation in complaint that property did not constitute a public nuisance is a conclusion of law not entitled to a presumption of truth). The allegations in Hamaatsa's complaint concerning the existence of a public road are not averments of fact but mere legal conclusions and thus are not entitled to a presumption of truth. The Court of Appeals ruling to the contrary is clear error.

Third, by focusing its analysis on the existence of a state public road, the Court of Appeals failed to address the actual issue before it—the question of subject matter jurisdiction. Subject matter jurisdiction is not dependent on whether Hamaatsa states a claim for relief. Even if the allegations of Hamaatsa's complaint "plausibly give rise to entitlement to relief," *Hamaatsa*, 2013-NMCA-094, ¶ 9 (citation omitted), Hamaatsa cannot establish subject matter jurisdiction in a case like this, where a federally-recognized Indian tribe is the named defendant. The Court of Appeals in effect impermissibly shifted Hamaatsa's burden to establish subject matter jurisdiction to the Pueblo to demonstrate that Hamaatsa's action "adversely affected" its sovereignty in a manner that would permit San Felipe to invoke its sovereign immunity from suit. *Id.* ¶ 13.

The Court of Appeals plainly misapplied the standard applicable to the Pueblo's motion to dismiss. All of Hamaatsa's efforts to justify the Court of Appeals majority's approach similarly misapprehend the governing law.

## II. HAMAATSA'S CONCERNS ABOUT THE TRIBAL IMMUNITY DOCTRINE ARE BETTER ADDRESSED TO CONGRESS

As this Court has previously recognized, "tribal immunity is a matter of federal law and is not subject to diminution by the states." *Gallegos,* 2002-NMSC-012, ¶ 7 (citations omitted). Accordingly, Hamaatsa's plea to this Court to abandon the tribal immunity doctrine is misdirected. [**AB 4-9**]. Nevertheless, Hamaatsa persists in arguing that because the doctrine is archaic, it should be put to rest or limited, much like our State's common law immunity from suit, *see Hicks v. State*, 1975-NMSC-056, 88 N.M. 588, or that of foreign countries, *see* 28 U.S.C. §§ 1602-1611 (2012). If this Court is unwilling to abrogate the doctrine, Hamaatsa proposes that the Court measure the Pueblo's immunity from suit against "the sovereign immunity applicable to foreign nations." [**AB 8**]. Neither argument has merit.

Contemporary criticisms of tribal immunity—Hamaatsa's included—are directed not so much at the doctrine's origins, but at its continuing application. Justice Stevens, dissenting in *Kiowa*, described the doctrine's application as "anomalous" when compared with federal, state, and foreign immunity from suit. 523 U.S. at 765. But there is no anomaly when one considers, first, that tribal sovereign immunity developed no differently than the immunity of other sovereigns, and second, that federal, state, and foreign sovereign immunity have not been abolished, only limited, and that tribal immunity too is not absolute.

William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1596-98 (2013) (footnotes omitted).

Congress is the appropriate body to limit tribal sovereign immunity. In reaffirming the tribal immunity doctrine in *Kiowa*, the Supreme Court recognized that Congress is better positioned than the judiciary "to weigh and accommodate the competing policy concerns and reliance interests" implicated by a decision to abrogate or limit the doctrine. 523 U.S. at 759. The Court accordingly "defer[red] to the role Congress may wish to exercise in this important judgment." *Id.* at 758. Until Congress or the Supreme Court speaks differently, Hamaatsa bears the burden of demonstrating in this case that the Pueblo has waived its immunity or Congress has authorized suit.

## III. EVEN IF HAMAATSA'S ACTION WERE A PROCEEDING *IN REM*, THE PUEBLO'S IMMUNITY FROM SUIT WOULD STILL BAR THE ACTION

In finding Hamaatsa's action an *in rem* proceeding, the District Court concluded that it could exercise subject matter jurisdiction over this case without considering the questions of whether the Pueblo had waived its immunity from suit or Congress had abrogated it. [**Tr. 31**]. Hamaatsa now echoes the District Court's conclusion, arguing that "[w]here an action is *in rem*, sovereign immunity does not apply." [**AB 24**]. However, as the Pueblo explains below, the case on which Hamaatsa relies for this proposition states no such thing. *See Fernandez v.*

*Farmers Ins. Co. of Arizona*, 1993-NMSC-035, ¶ 15, 115 N.M. 622 ("cases are not authority for propositions not considered"). Thus, even were the District Court's invocation of *in rem* jurisdiction correct, under the relevant precedent San Felipe's immunity from suit would still operate to bar Hamaatsa's action, and the Pueblo's motion to dismiss should have been granted.

Hamaatsa relies on *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ("*Yakima*"), to justify the District Court's finding of *in rem* jurisdiction. [**AB 24-28**]. However, the United States Supreme Court did not there hold that it was permitting the tax foreclosure of tribally owned fee land. Rather, the case presented, and the Court decided, only questions of state taxing authority over fee lands the Yakima Indian Nation and individual tribal members had reacquired after prior alienation under the General Allotment Act. The Court never addressed whether the County could enforce that tax against the Nation despite the Nation's sovereign immunity. *Yakima*, 502 U.S. at 253 ("The question presented by these consolidated cases is whether the County of Yakima may impose an ad valorem tax on so-called 'fee-patented' land located within the Yakima Indian Reservation, and an excise tax on sales of such land.").

In other words, the decision dealt solely with the extension of state tax law to lands the Nation claimed were beyond the reach of those laws. As the United States District Court for the Western District of New York recently explained:

> [T]he Court disagrees that the case stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings. *Yakima* involved the State of Washington's ability to tax certain "fee patent" parcels of land, located within the Yakima Reservation, that had become alienable under the General Allotment Act. *Yakima's* use of the terms *in rem* and *in personam* pertained to the difference between the *imposition,* not collection, of taxes on a piece of land, as opposed to an individual. The Supreme Court concluded that Yakima County had the power to impose an ad valorem tax on the land, pursuant to an express grant from Congress, but not the ability to impose an excise tax on sellers of the land. Admittedly, the *Yakima* decision did refer in passing to the "power to assess *and collect* a tax on certain real estate." *Id.*, 112 S.Ct. at 692 (emphasis added). However, that statement appears to be dicta, since the *Yakima* decision *did not involve tribal sovereign immunity from suit.*

*Cayuga Indian Nation of New York v. Seneca County, N.Y.*, 890 F. Supp. 2d 240, 247-48 (W.D.N.Y. 2012) (last emphasis added). *See Kiowa*, 523 U.S. at 755 ("To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. ... There is a difference between the right to demand compliance with state laws and the means available to enforce them.") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) ("*Citizen Band*")). Thus, *Yakima* is one of a class of cases that "explore a tribe's *sovereign authority* over purchased lands and to what extent a state may compel a tribe to accept state laws applicable to those lands." *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶ 18, 149 N.M. 234 (emphasis in

original) (citing *Oneida Indian Nation of New York v. Madison County and Oneida County, N.Y.*, 605 F.3d 149, 156-159 (2d Cir. 2010), *vacated and remanded*, 131 S.Ct. 704 (2011)). The case sheds no light on the application of the tribal sovereign immunity doctrine in the *in rem* context.[1]

## IV. HAMAATSA ERRONEOUSLY RELIES ON CASES CONCERNING SOVEREIGN AUTHORITY OVER FEE LANDS IN AN EFFORT TO JUSTIFY THE COURT OF APPEALS DECISION

Hamaatsa posits that the Pueblo "jumps straight into the *Kiowa* decision" at the expense of "other applicable cases" that actually "involve issues surrounding off-reservation fee realty." **[AB 9]**. The Pueblo does just that, for the simple reason that *Kiowa*, not the other cases cited by Hamaatsa, is the governing authority.

Hamaatsa asserts that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("*Mescalero*"), is the "applicable decision" relevant to the issue of whether San Felipe's sovereign immunity bars this action. *Id.* *Mescalero* is an early

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[1] Hamaatsa cites four additional cases—*Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996); *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Tp.*, 2002 ND 83, 643 N.W.2d 685; *Smale v. Noretep*, 208 P.3d 1180 (Wash. Ct. App. 2009); and *Miccosukee Tribe of Indians of Florida v. Dept. of Environmental Protection*, 78 So.3d 31 (Fla. Dist. Ct. App. 2011)—in support of its argument that tribal immunity is no bar to an *in rem* action. As correctly noted by Judge Wechsler in his dissent, each of these cases relies on *Yakima* and, because that case "does not involve tribal sovereign immunity," it "does not compel the result[s] reached." *Hamaatsa*, 2013-NMCA-094, ¶ 49 (citing *Oneida Indian Nation*, 605 F.3d at 156-57 and *Armijo*, 2011-NMCA-006, ¶ 18).

exemplar from the line of cases construing the regulatory reach of state law to lands owned by an Indian tribe in fee. *See* 411 U.S. at 147 ("We granted the Tribe's petition for a writ of certiorari ... to consider its claim that the income and property of the ski resort are not properly subject to state taxation."). The case thus concerns issues relating to the doctrine of "tribal sovereign authority," not tribal sovereign immunity.[2]

The sovereign authority and sovereign immunity doctrines are distinct, with different historical origins and purposes, and the former does not bear upon application of the latter. **[BIC 15]**. Nevertheless, Hamaatsa claims that "Supreme Court precedent establishes that sovereign immunity depends upon a tribe's sovereign authority." **[AB 13, 15]**. Review of the precedent upon which Hamaatsa relies debunks this claim. First, Hamaatsa seizes upon the statement in *Mescalero* that "we will not imply an expansive immunity from ordinary income taxes that businesses throughout the state are subject to." 411 U.S. at 157-58. Of course, this reference to "immunity" is to immunity from state taxation, as the text states. The text clearly does not refer to immunity from suit. As Hamaatsa itself

[2] The same is true of *Montana v. United States*, 450 U.S. 544 (1981), to which Hamaatsa looks in its defense of the Court of Appeals decision. **[AB 15-16]**. As this Court explained in *Garcia v. Gutierrez*, 2009-NMSC-044, 147 N.M. 105, *Montana* "held that the Crow Tribe lacked authority to regulate the hunting and fishing of non-Indians on non-Indian fee land located within tribal boundaries." 2009-NMSC-044, ¶ 27 (citing *Montana*, 450 U.S. at 566-67). Thus, "*Montana* and the cases that follow it also do not involve issues of tribal sovereign immunity." *Hamaatsa*, 2013-NMCA-094, ¶ 29 (citing cases).

acknowledges, "the issue of sovereign immunity from suit was not before the Court." [**AB 11**].

Second, Hamaatsa looks to the dissenting opinion in *New York v. Shinnecock Indian Nation*, 686 F.3d 133 (2d Cir. 2012) for support. While the dissenting judge engages in an explication of *Mescalero* and critique of *Kiowa*, the opinion should be given no weight because, as Hamaatsa again acknowledges, "[t]he majority did not reach the issue of sovereign immunity." [**AB 11 n.9**]. Indeed, *Kiowa*, decided twenty-five years later, expressly disclaimed the reading of *Mescalero* Hamaatsa seeks to advance. *See Kiowa*, 523 U.S. at 755 (citing *Mescalero*, 411 U.S. at 148-49 and *Citizen Band*, 498 U.S. at 514).[3]

## V. THE DEFENSE OF SOVEREIGN IMMUNITY BARS HAMAATSA'S ACTION FOR DECLARATORY RELIEF

Although practically the entire weight of pertinent precedent is to the contrary, *see* [**BIC 31-32**]; *Hamaatsa*, 2013-NMCA-094, ¶ 51, Hamaatsa asserts that a tribe is not entitled to assert its sovereign immunity from suit if the only relief sought is declaratory rather than monetary. [**AB 31-36**]. The Pueblo acknowledges, as it must, that two of the cases Hamaatsa cites for this proposition

[3] Hamaatsa also cites the Indian Reorganization Act, 25 U.S.C. § 465 (2012), the federal "fee to trust" regulations, 25 C.F.R. §§ 151.1 – 151.15 (2013), and the New Mexico Enabling Act, 36 Stat. 557, § 2, to support its position. [**AB 37-38**]. Each of these authorities deals with the sovereign authority issue only, and thus none of them buttresses Hamaatsa's stance in the way Hamaatsa hopes.

do, indeed, state that as the rule.[4] However, those cases, emanating from a single federal circuit, represent a minority view and are contrary to *Kiowa* and the Court of Appeal's decisions in *Armijo* and *Antonio v. Inn of the Mountain Gods Resort and Casino*, 2010-NMCA-077, 148 N.M. 858.

In *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), TTEA brought claims for damages and equitable relief against both the Pueblo and its tribal court judges. 181 F.3d at 679-80. The United States Court of Appeals for the Fifth Circuit concluded that the Pueblo's immunity shielded it "from an award of damages only." *Id.* at 680. Concluding that *Kiowa* "was an action for damages, not a suit for declaratory or injunctive relief," the court found that "tribal immunity did not support [the district court's] order dismissing the actions seeking declaratory and injunctive relief." *Id.* at 680-81. The court is not particularly clear about whether its decision applies to the Pueblo itself or the individual tribal officials. The Fifth Circuit followed *TTEA* two years later in *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001).

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[4] The other cases to which Hamaatsa looks in support of this argument—*City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), *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)—deal not with the application of tribal sovereign immunity but the inapposite issue of tribal sovereign authority over fee lands. *Armijo*, 2011-NMCA-006, ¶¶ 16-20; [**BIC 16-17**].

The decisions in *TTEA* and *Comstock Oil & Gas* set the Fifth Circuit apart in its view of the tribal immunity doctrine. No other federal circuit follows the decisions, and neither this Court nor our Court of Appeals has ever adopted the principle of their holdings. The Texas Court of Appeals, in a lawsuit "to determine right to possession of certain real property," found *TTEA* and *Comstock Oil & Gas Inc.* unpersuasive and instead relied upon *Kiowa* to hold the Alabama-Coushatta Tribes immune from suit. *Conley v. Comstock Oil & Gas, LP*, 356 S.W.3d 755, 759-60 (Tex. App. 2011).

## VI. NONE OF HAMAATSA'S OTHER ARGUMENTS SUPPORTS A FINDING OF STATE COURT JURISDICTION OVER THE PUEBLO

Much of Hamaatsa's Answer Brief addresses court decisions and principles of federal Indian law that have no bearing on the issues presented in this case. While none of these "[t]endentious, junk-drawer arguments" requires extended discussion, neither can they be left hanging without comment.[5]

### A. *Dry Creek Lodge* Is Not Relevant To This Case.

Hamaatsa attempts to equate this case with *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). **[AB 21]**. The limited exception to the tribal immunity doctrine established in *Dry Creek Lodge*

[5] *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 416 (6th Cir. 2012), *cert. granted*, 133 S.Ct. 2850 (2013). The Sixth Circuit went on to suggest that such arguments "are best left out of a brief. They waste opposing counsel's time and ours." *Id.*

applies only to suits against Indian tribes brought under the Indian Civil Rights Act, 25 U.S.C. § 1302 (2012). *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006). The exception is so limited, in fact, that, in *Walton*, the United States Court of Appeals for the Tenth Circuit "stated that the rule has minimal precedential value and in the twenty-six years since *Dry Creek*, with the exception of *Dry Creek* itself, we have never found the rule to apply." *Id.* (internal quotations and citations omitted). Nor has the rule been applied since *Walton* was decided. The reason for this, as the United States Court of Appeals for the Eleventh Circuit recently observed, is that "the Tenth Circuit's framework is unnecessary when tribal immunity is at issue. The law is crystal clear that tribal immunity applies unless there has been congressional abrogation or waiver by the tribe." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1209 (11th Cir. 2012) (citing *Kiowa*, 523 U.S. at 754).

### B. *Tuscarora* And Its Progeny Are Not Relevant To This Case.

Citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), Hamaatsa asserts that the Pueblo cannot invoke its sovereign immunity in this case because R.S. 2477 is a statute of general applicability. [**AB 40**]. The Supreme Court in *Tuscarora* stated: "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116. However, "the fact that a statute

applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it." *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (citing *Florida Paraplegic Assn., Inc. v. Miccosukee Tribe*, 166 F.3d 1126, 1129-33 (11th Cir. 1999) and *Kiowa*, 523 U.S. at 754-56). This is true because "[t]he issue of whether a statute of general applicability should apply to a tribe or tribal entity is distinct from the issue in this case, i.e., whether a tribal entity enjoys sovereign immunity from suit." *Bales v. Chickasaw Nation Industries*, 606 F. Supp. 2d 1299, 1302 (D.N.M. 2009). *See id.* at 1307 ("the applicability of a statute to a tribe is a separate issue from the issue of tribal sovereign immunity"). Hamaatsa has not met its burden to demonstrate that in enacting R.S. 2477 Congress intended to and did in fact unequivocally abrogate tribal sovereign immunity.

### C. The Record on Appeal.

Because this case presents the interlocutory appeal of a pre-answer facial challenge to the District Court's subject matter jurisdiction, the record is naturally sparse. Hamaatsa takes issue with what it describes as the Pueblo's inclusion in its Brief in Chief of extra-record facts. [**AB 1 and n.1, 29 and n.13**]. San Felipe stands by its summary of the facts.

With that acknowledgement in mind, the Pueblo wishes to clarify two additional points regarding the record. First, Hamaatsa ventures far beyond the

record on appeal (and the truth) in characterizing San Felipe's reason for acquiring the fee land at issue in this case. Hamaatsa implies that the Pueblo acquired the land, like the Apaches whose off-reservation ski area was the subject of *Mescalero*, "for the purpose of carrying on a business enterprise... ," [**AB 10**] (quoting *Mescalero*, 411 U.S. at 157), and "to maximize economic development on the land. ..." [**AB 37**] (citation omitted). Both statements are untrue, and there is no evidence to support them. The Pueblo acquired the land, which is of great cultural significance to the San Felipe people, in its capacity as a sovereign tribal government, for non-development, preservation purposes. The Pueblo acknowledges that there is no record support for this rebuttal, but neither is there record support for Hamaatsa's gratuitous attempt to paint the Pueblo as a tribe exploiting its sovereign immunity for commercial purposes.

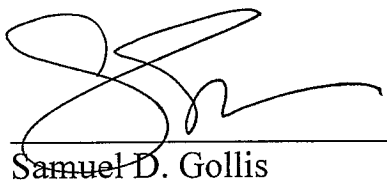
Second, there is not a scintilla of evidence in the record to support Hamaatsa's claim that the disputed road "is the only route to reach Hamaatsa's property." [**AB 29 and n.13**]. Hamaatsa's complaint makes no such allegation. [**RP 1-7**]. Thus, Hamaatsa's companion claim—that Hamaatsa would be denied access to its property were the Pueblo found immune from suit—is unsupported in the record before the Court.

## CONCLUSION

The Pueblo respectfully requests that this Court 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.

Dated: February 5, 2014

Respectfully submitted,



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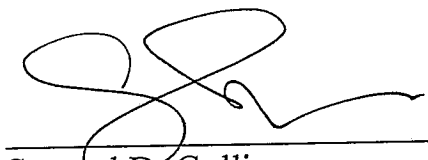

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