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 REPLY TO RESPONSE BRIEF OF *AMICUS CURIAE* NEW MEXICO LAND TITLE ASSOCIATION IN SUPPORT OF HAMAATSA, INC.

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INTRODUCTION

Plaintiff-Appellee Hamaatsa, Inc.'s ("Hamaatsa") lawsuit against Defendant-Appellant Pueblo of San Felipe (the "Pueblo" or "San Felipe") is barred by the Pueblo's sovereign immunity. "Without an unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities." *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207 (citing *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 179 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.")). The Pueblo here has not waived its immunity, and Congress has not abrogated it.

Like the Court of Appeals and Hamaatsa, *Amicus* New Mexico Land Title Association ("NMLTA") refuses to acknowledge the fundamental principle that governs this case. NMLTA instead attempts to justify the Court of Appeals decision in two ways. First, NMLTA contends that upholding the Pueblo's sovereign immunity would wreak havoc with the New Mexico land title system, because purchasers would not buy and banks would not lend for land adjacent to tribal land unless redress in state court is available against a tribal landowner in a

case like this one. The monster under the bed is entirely of the Court of Appeals majority's and NMLTA's own making.

Second, NMLTA confuses and conflates the very different concepts of sovereign authority and sovereign immunity. The entire thrust of NMLTA's argument on this point is that the Court should weigh the interests of both the Pueblo and the State of New Mexico in the subject matter of the suit. Doing so, NMLTA concludes that the State of New Mexico has an interest in protecting its roads, and that the State's interest should outweigh the Pueblo's right to assert its sovereign immunity from suit. In NMLTA's view, the State's interest is so strong that NMLTA makes the remarkable suggestion that this Court can adjudicate Hamaatsa's claim "even if San Felipe elects not to participate." [**NMLTA Amicus Br. 17**]. The Pueblo is immune from suit unless it waives that immunity or unless Congress has abrogated that immunity. That immunity is not subject to balancing the Pueblo's interests against those of Hamaatsa or the State.

ARGUMENT

I. UPHOLDING THE PUEBLO'S SOVEREIGN IMMUNITY WILL NOT CREATE CHAOS IN NEW MEXICO'S LAND TITLE SYSTEM

The Court of Appeals majority rationalizes its decision to disregard the Pueblo's sovereign immunity in this case because

> to permit a sovereign immunity bar would mean that, based on nothing more than the bare assertion of sovereignty, a pueblo or tribe could acquire, in fee simple, subject to an existing state public road, one or more lot or acreage virtually anywhere in New Mexico and immediately deny the motoring public and all neighboring property owners access. And it means that no person whose property is, and perhaps has been for generations, contiguous to a public road before a fee simple acquisition of property through which the road runs, could invoke state court jurisdiction to at least obtain a judicial declaration, binding on a pueblo or tribe, that a road is a state public road.

Hamaatsa v. Pueblo of San Felipe, 2013-NMCA-094, ¶ 16, *cert. granted*, 2013-NMCERT-009 (No. 34,287, Sept. 20, 2013). NMLTA posits similarly dire consequences flowing from a decision upholding the Pueblo's assertion of sovereign immunity in this case. From its own perspective as an association representing title companies, NMLTA asserts that "[t]he ability of a pueblo or tribe to prevent access based merely on its fee ownership of private land and status as a federally recognized Indian tribe would be very disruptive to the current system of title and land ownership." [**NMLTA Amicus Br. 3**]. Asserting "broader ramifications," NMLTA conjures a real estate market in which purchasers "would have to be wary of any land adjoining tribal fee land" and in which "[b]anks and other lenders would be reluctant to loan purchase money… ." [***Id.***]

Upholding the Pueblo's sovereign immunity from suit would precipitate none of these hypothetical problems. First, the Pueblo notes that the Court of Appeals majority and NMLTA merely engage in speculation. The doomsday scenario they envision simply does not flow from the instant case, in which Hamaatsa seeks to establish the legal validity of the road under the Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251 ("R.S. 2477"), and Hamaatsa does not allege that the Pueblo has blocked access. As Judge Wechsler correctly noted in his dissent: "This speculation assumes that a property owner has the ability to convey a dedicated public road and extends far beyond the facts of this case." *Hamaatsa*, 2013-NMCA-094, ¶ 30.

More importantly, were a tribe or pueblo to acquire property and block the access of neighboring landowners along a dedicated public road, the affected landowners or state or county officials responsible for the road may be able to bring an *Ex Parte Young*-type suit against the responsible tribal officials to enjoin them from violating the law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-56 (10th Cir. 2011). In the context of state sovereign immunity, the *Ex Parte Young* doctrine provides a remedy for ongoing unlawful conduct by a governmental official where immunity would otherwise prevent enforcement of the law. *See Gill v. Pub.*

Employees Ret. Bd., 2004-NMSC-016, 135 N.M. 472. Thus, under the hypothetical situation the Court of Appeals majority and NMLTA imagine, no affected member of the motoring public or neighboring property owner—Hamaatsa included—would be left without legal recourse.

II. LIKE HAMAATSA AND THE COURT OF APPEALS, NMLTA ERRONEOUSLY EQUATES TRIBAL SOVEREIGN AUTHORITY WITH SOVEREIGN IMMUNITY

NMLTA perpetuates the erroneous analysis urged by Hamaatsa, contending that this case "involves an attempt by the Pueblo to exercise jurisdiction and authority over off-reservation State property and over non-tribal individuals." [**NMLTA Amicus Br. 5**]. San Felipe does not seek to exercise governmental jurisdiction and authority over anyone or anything. The Pueblo seeks only to prevent itself from being hauled into state court when it has not consented to suit and Congress has not abrogated the Pueblo's sovereign immunity. San Felipe will not repeat here the arguments on this issue made in its Brief in Chief and Reply Brief, and respectfully refers the Court to those arguments. [**BIC 14-17; RB 10-12**]. However, NMLTA makes several new statements and arguments that cannot go unrebutted.

First, NMLTA invokes *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) ("*Bracker*"), stating that "[t]he Supreme Court has recognized that

in assessing claims of tribal sovereignty, the 'inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry of the nature of the state, federal and tribal interests as [sic] stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.' " [**NMLTA Amicus Br. 8**]. From this principle, NMTLA asserts that the New Mexico state courts may exercise jurisdiction over the Pueblo.

Bracker is another in the line of cases that addresses federal preemption, not tribal sovereign immunity. *See Blaze Const. Co. v. Taxation & Revenue Dept. of New Mexico*, 1994-NMSC-110, ¶ 1, 118 N.M. 647 (discussing *Bracker* at length in a case "consider[ing] whether federal law preempts imposition of New Mexico gross receipts tax on a contractor's receipts when the contractor enters into an agreement with the Bureau of Indian Affairs ... to construct or provide materials for roads built on several New Mexico Indian reservations"). In a suit against Arizona state officials for tax refunds, the question presented was whether state taxes imposed on non-Indian companies conducting business exclusively on tribal land were preempted by federal law. The Supreme Court held that they were. *Bracker*, 448 U.S. at 152-53. The phrase "sovereign immunity" does not appear in the opinion, as the Tribe's immunity from suit was not at issue.

Nevertheless, NMLTA would apply the *Bracker* preemption balancing test to consider the "interest that New Mexico has in protecting and preserving its public roads," [**NMLTA Amicus Br. 8**], juxtaposing that interest with the Pueblo's ostensible lack of any governmental interest in the road.[1] NMLTA accuses the Pueblo of "completely ignor[ing] any interest that New Mexico has in protecting and preserving its public roads... ." [***Id.***]. NMLTA is correct—the Pueblo does ignore the State's interest in its roads. The Pueblo does so because that interest is entirely irrelevant to the question of whether San Felipe is immune from Hamaatsa's lawsuit. Unlike sovereign authority and preemption, the only focus when determining sovereign immunity is whether the Tribe has waived or Congress has abrogated that immunity. Neither is the case here.

Indeed, NMLTA thinks the State's interest is so strong that

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[1] The Court of Appeals majority's fundamental error was its refusal to accept that San Felipe's sovereign status alone—what the Court of Appeals decision pejoratively refers to as "the bare assertion of sovereignty," *Hamaatsa*, 2013-NMCA-094, ¶ 16—entitles the Pueblo to interpose its immunity from suit in a case like this, where the Pueblo has not waived its sovereign immunity and Congress has not authorized suit. Whether the Pueblo could demonstrate "that a significant aspect of [its] inherent sovereignty or sovereign authority is adversely affected" by Hamaatsa's lawsuit should not be relevant to the question of the Pueblo's amenability to suit in this case. Nevertheless, as mentioned in its Reply Brief, San Felipe notes the strong sovereign interest it has in the land that lies at the center of this dispute. [**RB 17**].

> even if this Court were to find that Hamaatsa's remedies against San Felipe were somehow limited, this does not mean that a favorable district court ruling would be for naught. There is still utility, both public and private, in obtaining a judicial determination concerning the status of S.R. 2477. ... Therefore, *there are no prudential limits on the ability of the court to proceed on the merits, even if San Felipe elects not to participate.*"

[**NMLTA Amicus Br. 17**][2] (emphasis added). The Pueblo responds to this breathtaking argument simply by referring the Court to its decision in *Srader v. Verant*, 1998-NMSC-025, 125 N.M. 521, in which the Court held that the tribes were indispensable parties whose inability to be joined because of sovereign immunity prevented the plaintiffs' claims from being litigated at all. *Id.* ¶¶ 29-34. If the Pueblo "elects not to participate," Hamaatsa's action against it cannot proceed.

Second, NMLTA invokes *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), as presenting "the very same factors that the Court of Appeals considered in declining to dismiss San Felipe's suit based on its claim of tribal sovereign immunity." [**NMLTA Amicus Br. 11**]. In particular, NMLTA

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[2] NMLTA incorrectly refers to the dirt road at the center of the parties' dispute as "S.R. 2477," implying that the road is a named state road. [**NMLTA Amicus Br. 5**]. The road is unnamed. The source of NMLTA's erroneous shorthand reference appears to be the federal statute—Revised Statute 2477, commonly referred to as R.S. 2477—under which Hamaatsa seeks to establish the road's legal existence. [**BIC 1**]; [**AB 2**].

quotes as "essentially the same" the *City of Sherrill* Court's observation that the Oneida Tribe's "unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences... ." 544 U.S. at 219. The Pueblo can only reiterate what NMLTA and Hamaatsa refuse to recognize: San Felipe is not attempting to establish sovereign control over anything; it is asserting its sovereign immunity from suit.

Third, in its Brief in Chief, the Pueblo pointed out that all of the cases cited by the Court of Appeals majority relate to sovereign authority and regulatory jurisdiction, not the tribal immunity doctrine. **[BIC 14]** (citing *Hamaatsa*, 2013-NMCA-094, ¶ 14). Stating the obvious point that in each of the listed cases "there was necessarily an underlying lawsuit" adjudicating the parties' rights, NMLTA argues that "these cases implicitly confirm that tribal sovereign immunity is not a bar to the adjudication of the scope of tribal sovereign authority." [**NMLTA Amicus Br. 16**]. Those cases confirm no such thing. Not one of the cited cases was brought against a federally-recognized Indian Tribe, and therefore none of the cases considered the issue of a tribe's immunity from suit.[3]

[3] The cases are cited by the Court of Appeals at 2013-NMCA-094, ¶ 14, and in not one of them would sovereign immunity have been a bar, implicitly or explicitly. In *Jicarilla Apache Tribe v. Board of County Commissioners, County of Rio Arriba,*

Finally, repeating the doubts expressed by the majority in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), NMLTA argues that "[w]ith these criticisms and caveats from a majority of justices, *Kiowa* should not be read as blanket barrier to state court jurisdiction over tribal activities that impinge on State sovereignty." [**NMLTA Amicus Br. 13-14**]. Criticisms and caveats do not constitute a holding. The holding of the *Kiowa* majority—the binding principle of the case—upheld the Tribe's sovereign immunity. The Court of Appeals majority should have done the same here.

III. OTHER CASES CITED BY NMLTA HIGHLIGHT THE DEARTH OF AUTHORITY TO SUPPORT HAMAATSA'S ARGUMENT

NMLTA cites cases from this Court and the United States Supreme Court for various propositions that are irrelevant to this appeal. For example, it cites

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1994-NMSC-104, 118 N.M. 550, the Tribe was the plaintiff. In *Montana v. United States*, 450 U.S. 544 (1981), the suit was brought by the United States on its own and the Crow Tribe's behalf to quiet title to a riverbed. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the declaratory judgment suit was brought against an individual tribal member. In *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), suit was brought against individual members of the Navajo Tax Commission. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), suit was brought against individuals and the Tribal Court judge, challenging tribal court jurisdiction. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the state sued individual tribal officials to enjoin the exclusion of non-Indians from certain fishing rights. And in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Tribe was the plaintiff, filing suit to challenge certain development within the exterior boundaries of the Yakima reservation.

Sr*ader v. Verant* for the proposition that "the State retains the authority to enforce New Mexico's laws outside of Indian reservations." [**NMLTA Amicus Br. 12**] (citing *Srader*, 1998-NMSC-025, ¶ 16). The Pueblo does not dispute the State of New Mexico's right to enforce its laws beyond reservation boundaries. But San Felipe disputes the State's—and a private party's—ability to enforce those laws by suing an Indian tribe in state court without consent. Indeed, while "firmly assert[ing] the State officials' authority to enforce New Mexico's laws outside of the reservations," Sr*ader*, 1998-NMSC-025, ¶ 16 (citing NMSA 1978, § 29-1-1 (1921)), this Court in *Srader* also concluded that the tribes themselves were indispensable parties whose sovereign immunity prevented their joinder to the suit. *Id.* ¶ 29. Thus, the State could indeed enforce its laws beyond reservation boundaries, but not at the expense of tribal sovereign immunity. *Srader* supports the Pueblo's, not NMLTA's and Hamaatsa's, arguments here.

Similarly, NMLTA pointlessly cites *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) for the proposition that "a State may validly assert authority over the activities of nonmembers on a reservation, and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." [**NMLTA Amicus Br. 13**]. It is unclear what relevance this principle has to this appeal. If NMLTA is arguing that this Court

may exercise jurisdiction over this dispute despite the Pueblo's sovereign immunity, *Mescalero* offers no support. This appeal does not involve a state's attempt to regulate on-reservation activities. It involves a private party's attempt to sue the Pueblo, which possesses sovereign immunity from suit.

Finally, NMLTA cites *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011), and *United States v. Wheeler*, 435 U.S. 313 (1978), for the principle that "Congress retains the plenary right to divest tribes of any or all attributes of sovereignty." [**NMLTA Amicus Br. 9**]. Again, it is unclear how this black letter proposition of federal Indian law helps NMLTA and Hamaatsa. The only relevance the principle has here is to underscore the fact that Congress could have abrogated the Pueblo's sovereign immunity and made the Pueblo amenable to Hamaatsa's lawsuit. Congress has not done so, and neither NMLTA nor Hamaatsa can point to any such congressional authorization.

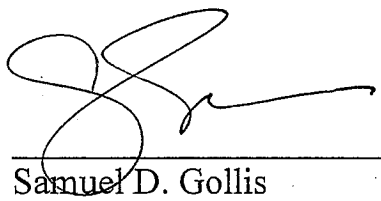
In sum, NMLTA's plucking of seemingly helpful language from irrelevant cases unrelated to sovereign immunity does not support Hamaatsa's argument or justify the Court of Appeals decision. To the contrary, it merely highlights the fact that the Court of Appeals decision and Hamaatsa's arguments are legally unsupportable.

CONCLUSION

Appellant Pueblo of San Felipe respectfully submits that the decision of the Court of Appeals should be reversed and the case remanded to the District Court with direction to grant the Pueblo's motion to dismiss on the grounds of sovereign immunity.

Dated: February 13, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Appellant Pueblo of San Felipe's Reply to Response Brief of *Amicus Curiae* New Mexico Land Title Association in Support of Hamaatsa, Inc. by mailing the same via United States first class mail, postage prepaid, on this 13th day of February, 2014, to the following counsel of record:

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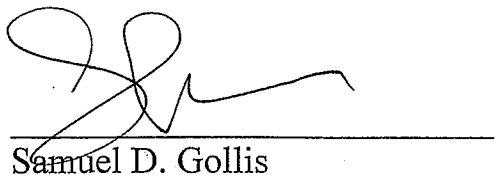

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