## 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.

# AMICUS BRIEF OF THE NAVAJO NATION, OHKAY OWINGEH, THE PUEBLO OF LAGUNA, THE PUEBLO DE SAN ILDEFONSO, THE PUEBLO OF POJOAQUE, THE PUEBLO OF SANTO DOMINGO, THE PUEBLO OF TESUQUE, THE MESCALERO APACHE TRIBE, THE PICURIS PUEBLO


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## SUMMARY OF PROCEEDINGS

Amici concur with the Summary of Proceedings included in Defendant-Appellant Pueblo of San Felipe's Brief in Chief.

## ARGUMENT

## STATEMENT ON NOTICE

Pursuant to Rule 12-215(B) NMRA, Amici state that their notices of intent to file an amicus brief were filed less than the fourteen days set out in the Rule. Amici were required to receive approval by their respective governments to file this brief, resulting in the late filing. However, Amici gave notice to both parties, believe no party has been prejudiced by the late pre-filing notice, and believe there is a substantive need to apprise the Court as to a larger, more comprehensive and accurate legal framework to the lower court's decision.

## STANDARD OF REVIEW

Whether a tribal nation is immune from suit is a legal question of subject matter jurisdiction, which this Court reviews *de novo*. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207.

## I. FEDERAL LAW RECOGNIZES TRIBAL SOVEREIGN IMMUNITY REGARDLESS OF THE LOCATION OF THE TRIBAL ACTIVITY OR THE TYPE OF LAWSUIT FILED AGAINST THE TRIBAL NATION.

This Court has recognized that tribal sovereign immunity "is a matter of federal law." *Gallegos*, 2002-NMSC-012, ¶ 7. Under federal law, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436

U.S. 49, 58 (1978). Accordingly, as recognized by this Court, tribal sovereign immunity may only be breached by an unequivocal waiver by the tribal nation or by clear act of Congress. *Gallegos*, 2002-NMSC-012, ¶ 7. Neither applies in this case.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the United States Supreme Court recognized immunity as an attribute of a tribal nation's sovereignty that is not dependent on the location of the tribal activity or the type of lawsuit filed against it. *See* 523 U.S. 751, 760 (1998). Immunity applies whether the action arises inside or outside the tribe's federally-defined Indian Country. *Id.* at 760. Further, whether the case is in rem or in personam, or whether a party seeks money damages or declaratory or injunctive relief, is irrelevant. *See, e.g., Id.* (tribe immune from money damages claim); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (tribe immune from injunction action); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (tribe immune from declaratory judgment concerning access to road over tribal lands); *Farmer Oil and Gas Properties, LLC v. Southern Ute Indian Tribe*, 899 F.Supp.2d. 1097, 1103 (D.Colo. 2012) (tribe immune from declaratory judgment concerning contested ownership of gas underneath tribal land); *Oneida Indian Nation of New York v. Madison County*, 401 F.Supp.2d 219, 230 (N.D.N.Y. 2005), *aff'd by* 605 F.3d 149

(2nd Cir. 2010), *vacated and remanded on other grounds by Madison County, New York v. Oneida Indian Nation of New York,* 131 S.Ct. 704 (2011) (per curiam) (tribe immune from in rem foreclosure action by county); *Armijo v. Pueblo of Laguna*, 2011-NMCA-006, ¶24, 149 N.M. 234 (tribe immune from adverse possession action). Regardless of the specific circumstances in a given case, the binding federal law principle remains that a tribal nation cannot be joined as a defendant absent its own consent or the consent of Congress.

Carve-outs for in rem actions created by other state courts, *e.g., Anderson & Middleton Lumber, Co. v. Quinault Indian Nation,* 929 P.2d 862 (Wash. 1996), are not supported by federal law, and this Court should reject them. In particular, the United States Supreme Court has recognized that sovereign immunity bars quiet title actions, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281-82 (1997), and that "we have never applied an in rem exception" to sovereign immunity, "and have suggested that no such exception exists[.]" *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992). For example, courts may not adjudicate a sovereign's interest in property because otherwise its immunity could be easily circumvented by simply first attaching property that belongs to the sovereign and then proceeding in rem. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682, 699 (1982). Moreover, the general policies supporting sovereign immunity

are "particularly applicable to Indian Nations[.]" *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940).

The United States Supreme Court has not overruled *Kiowa*, and it remains controlling federal law. Though individual justices from time to time have expressed their concerns about aspects of the doctrine, *see, e.g.*, *Citizen Band Potawatomi*, 498 U.S. at 514-516 (Stevens, J. concurring), the Supreme Court nonetheless has upheld its broad scope, leaving to the tribal nation and Congress to define the appropriate balance between immunity and redress. *See Kiowa*, 523 U.S. at 758. This Court should not accept Hamaatsa's invitation to disregard the United States Supreme Court's repeated holdings on this matter of uniquely federal law.

Federal law's respect for tribal sovereign immunity reflects important policy considerations applicable to all sovereign governments. For tribal nations to operate effectively, they must have the ability to define when and where they can be sued. This is no different than federal, state, or foreign sovereign immunity where, through the invocation of immunity or the careful use of waivers, such similarly-situated sovereign governments may predictably manage their land holdings, commercial activities, and provision of governmental services for the benefit of their constituents. Congress has considered the appropriate scope of the federal government's immunity from suit, and has waived immunity in some circumstances but not in others, including for suits involving federal interests in

land. *See, e.g.* Federal Tort Claims Act, 28 U.S.C. §§ 2674, 2860 (waiving immunity of the United States for torts committed by federal employees, but excluding thirteen different types of tortious actions); Quiet Title Act, 28 U.S.C. § 2409a(a) (waiving immunity of the United States for certain quiet title actions, but excluding claims against security interests, water rights, or Indian lands). The New Mexico Legislature has as well, including retaining immunity for public agencies acting outside their territorial boundaries in certain circumstances. *See, e.g.*, New Mexico Joint Powers Agreements Act, NMSA 1978, § 11-1-6 (1961) (preserving the immunity of public agencies when acting outside of their territorial limits pursuant to a Joint Powers Agreement); New Mexico State-Tribal Collaboration Act, NMSA 1978, §§ 11-18-3, 11-18-5 (2009) (mandating that state agencies collaborate with tribes, but providing no right of action against state agency or right of review of agency action); New Mexico Tort Claims Act, NMSA 1978, § 41-4-4 (2013) (waiving immunity of the State for certain torts, but retaining immunity for others); New Mexico Quieting Title Act, NMSA 1978, §§ 42-6-12, 42-6-15 (1947) (waiving immunity of the State for quiet title actions "under the conditions . . . prescribed for the protection of the state of New Mexico," including prohibiting money judgments). Moreover, Congress knows how to address tribal sovereign immunity, but has not done so for the sort of claim raised here. *Cf.* 25 U.S.C. § 81(d)(2) (mandating disclosure or waiver of

immunity for certain contracts); *see generally* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law,* 37 Tulsa L. Rev. 661, 729 n.320, 729-51 (2002).

If any balance is then to be struck between immunity and redress for tribal actions, it is for Congress and the tribes to decide as a matter of sound policy under what circumstances tribes should expect to be haled involuntarily into court. *Kiowa*, 523 U.S. at 759 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests."). Both tribes and Congress have done so in varied situations. *See, e.g.*, 25 U.S.C. § 2710(d)(7)(A)(ii) (congressional waiver of tribal immunity to enjoin gaming on Indian lands in violation of Indian Gaming Regulatory Act); 1 N.N.C. §§ 551, *et seq.* (2005) (waiver of Navajo Nation sovereign immunity for tort, civil rights, and injunction or mandamus claims); *see also* Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience,* 47 Tulsa Law Review 503-509 (2012) (discussing negotiated waivers of immunity by Navajo Nation and state and county governments for funding and other intergovernmental agreements).

## II. THE COURT OF APPEALS' OPINION VIOLATES FEDERAL LAW, AND MUST BE VACATED

Under these principles, the Court of Appeals' opinion in this case is patently inconsistent with federal law, and must be vacated. The exception to tribal sovereign immunity it recognized finds no support in the clear and binding

decisions of the U.S. Supreme Court discussed above.[1] The main flaw in its analysis is that the Court wrongly conflated sovereign jurisdiction with sovereign immunity, applying cases recognizing limitations on tribal regulatory authority over certain lands or parties to define the scope of sovereign immunity. *See Hamaatsa*, 2013-NMCA-094, ¶¶ 13-14. While jurisdictional authority and immunity are both aspects of a tribe's sovereignty, they are neither the same thing nor co-extensive, as the limitations on one do not define the limitations on the other. *See Armijo*, 2011-NMCA-006, ¶¶ 18-20; *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1012 (10th Cir. 2007); *Oneida*, 605 F.3d at 137-38. Therefore the alleged inability to regulate certain activity on a state highway in no way controls whether a tribe is nonetheless immune from a suit in state court. This Court should vacate the Court of Appeals' decision, and affirm tribal sovereign immunity.

[1] As noted by Judge Wechsler in his dissent, *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-094, ¶ 54 [published after Volume 150 of the *New Mexico Reports*], *cert. granted*, 2013-NMCERT-009 (No. 34,287, Sept. 20, 2013), even the very narrow exception in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 101 S.Ct. 931 (1981), should not apply here. *See Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006) (citations omitted) ("[W]e have emphasized the need to construe the *Dry Creek* exception narrowly in order to prevent a conflict with *Santa Clara*. Indeed, we have 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.").

## CONCLUSION

For the reasons stated above, Amici support Defendant-Appellant Pueblo of San Felipe's position that tribal immunity applies, and therefore the Court of Appeals' opinion must be vacated.

Respectfully submitted this 2nd day of December, 2013.


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I hereby certify that on December 2, 2013, I mailed a copy of this Amicus Brief first class U.S. mail to:

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