

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

PUEBLO OF ACOMA,

Plaintiff

v.

No. 1:16-cv-01132- JCH-SCY

**DEMESIA PADILLA, Secretary, New Mexico
Taxation and Revenue Department, in her official
capacity, DOLORES VALLEJOS, Cibola County
Treasurer, in her official capacity, GERALDINE
RAEL, Cibola County Assessor, in her official
capacity,**

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR TEMPORATY RESTRAINING ORDER**

Plaintiff, Pueblo of Acoma, submits the following memorandum of points and authorities in support of its Motion for Temporary Restraining Order.

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I. INTRODUCTION

The precipitating event in this action arises from the issuance of a "Notice of Sale of Real Property/Delinquent Property Taxes," dated September 28, 2016, from the New Mexico Taxation and Revenue Department ("Notice"). The Notice informs the Pueblo that the Property, consisting of two commercial tracts of about 8.7 total acres, will be sold at the Cibola County Court House at 9 a.m. on October 18, 2016, unless the allegedly delinquent taxes in the collective amount of \$30,387.99 are paid.

II. FACTUAL BACKGROUND

In 1937, the State of New Mexico District Court entered an order prohibiting Valencia County, NM (predecessor to Cibola County, NM) from taxing lands held in fee by the Pueblo of Acoma.¹ In 2004, Acoma purchased the two commercial tracts that are subject to the Notice. Together, the two commercial tracts comprise approximately 8.7 acres, and are located in Cibola County, New Mexico.

In 2009, Acoma filed a complaint against then-Secretary of the New Mexico Department of Taxation and Revenue, Richard Homans, requesting a refund of property taxes, penalties, and interest paid to Cibola County for tax years 2005, 2006, 2007, and 2008. The 2009 lawsuit partly involved property taxes improperly assessed, taxed, and enforced against the same Property subject to the 2016 Notice. In 2010, after the State's first attempt to sell Acoma Pueblo fee lands for alleged taxes due, the First Judicial District Court approved a Settlement Agreement between Acoma and the Cibola County Assessor and Cibola County Treasurer, agreeing that the Gottlieb Ranch lands, which included the Property, were improperly assessed and taxed, and required the return of about \$54,000 to Acoma in unlawful tax payments.²

¹ See Exhibit 2 to Complaint in this matter filed on October 12, 2016.

² See Exhibit 3 to Complaint in this matter filed on October 12, 2016.

Despite the 2010 Settlement Agreement, Acoma was once again forced to protest the valuation of their lands for assessment of taxes in 2010 and 2011. Acoma requested hearings before the Cibola County Valuation Board pursuant to the State law, but no hearings were granted. In 2014, Acoma again protested the valuation of their lands for assessment of taxes, and again requested a hearing before the Cibola County Valuation Board. The Cibola County Valuation Board granted a hearing, and, in 2015, decided that all Acoma lands and property, including livestock and the Property subject to this case, should be given a \$0.00 value for tax purposes, because the County and State lack authority to value, assess, tax, and enforce the tax on Acoma lands and property.³ Defendants or their predecessors did not appeal the decision of the Cibola County Valuation Board.

Despite the 2015 Decision of the Cibola County Valuation Board, the Cibola County Assessor purported to value Acoma Pueblo fee land and personalty for tax purposes and assess taxes in 2015 and 2016. Once again, Acoma responded with letters in 2015 and 2016 protesting the valuation of Acoma Pueblo fee land and personalty for tax purposes and the assessment of taxes.

III. ARGUMENT

1. **Acoma Has Met the Threshold Requirements for This Court's Consideration of Acoma's Motion for Temporary Restraining Order.**

To obtain a temporary restraining order in federal court on an *ex parte* basis under Fed. R. Civ. P. 65(b), a party must first make the showing required under Rule 65(b)(1)(A) and (B) - that is, it must: (1) show the existence of an "immediate and irreparable injury, loss, or damage that will result to the movant before the adverse party can be heard in opposition," such showing to be made by "specific facts in an affidavit or a verified complaint"; and (2) supply a

³ See Exhibit 4 to Complaint in this matter filed on October 12, 2016.

certification from "the movant's attorney," showing "any efforts made to give notice and the reasons why it should not be required."

On October 12, 2016, Acoma filed a verified complaint alleging that if the tax sale is permitted to proceed as scheduled on October 18, 2016, Acoma will suffer an "immediate and irreparable injury, loss, or damage" and that such imminent, irreparable injury will result before the Defendants can be heard in opposition. If the Motion for Temporary Restraining Order is not granted, the Tax Sale will proceed as scheduled, causing Acoma to either 1) pay the unlawful delinquent taxes, or 2) risk foreclosure of the Property in contravention of applicable law. While in normal circumstances, monetary loss may be remedied by an award of compensatory damages, and the risk of such loss is therefore not generally considered irreparable, *Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564, 570 (10th Cir. 1985), the Court considers the consequences of such losses as extremely serious and potentially devastating to a Tribe. The consequences of such losses meet the irreparable harm test. Here, the consequences of such loss includes, but is not limited to, Acoma's loss to its sovereignty and sovereign immunity interests if the temporary restraining order is not granted. *Winnebago Tribe of Nebraska v. Stovall*, 216 F.Supp.2d 1226 (D. Kan 2002) (This is not a matter of how much capital will be lost if the [temporary restraining order] is not imposed, but the issues concern the scope of tribal sovereignty, an issue that cannot be measured in dollars).

As soon as Acoma became aware of the Notice, Acoma contacted Defendants in an effort to persuade them that the enforcement action sought in the Notice was unlawful, and that Defendants should voluntarily cease the Tax Sale. The undersigned attorney certified, in the Verified Complaint, that efforts were made to immediately contact Defendants, which further

support the "imminence" of the alleged injury, and the corresponding need for *ex parte* relief to prevent it.

2. Acoma Meets the Traditional Standards Governing Issuance of A Temporary Restraining Order.

Acoma has the burden of establishing that: (1) it will suffer irreparable injury unless the motion is granted, (2) the threatened injury to Acoma outweighs whatever damage the proposed injunction may cause the Defendants, (3) the order, if issued, would not be adverse to the public interests, and (4) there is a substantial likelihood that Acoma will eventually prevail on the merits. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998).

2.1. Acoma Will Suffer Irreparable Injury If the Tax Sale, Scheduled for October 18, 2016, Is Not Stayed

A plaintiff suffers irreparable injury when the Court would be unable to grant an effective monetary remedy after a full trial because damages would be inadequate or difficult to ascertain. *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1354 (10th Cir. 1989). As noted above in Section 1 of this Argument, monetary damages will not be sufficient to undo the damage which Acoma is currently faced with. This is not a matter of how much capital will be lost if the temporary restraining order is not imposed, but is a matter that concerns the scope of tribal sovereignty and tribal sovereign immunity, both of which cannot be measured in dollars.

2.2. The Harm to Defendants is Negligible Compared to the Harm Caused to Acoma if the Temporary Restraining Order is Not Issued.

In terms of the standard for issuing a temporary restraining order, Acoma is faced with more devastating losses than the Defendants' temporary inability to enforce its tax laws. The

underlying purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing may be held. *Granny Goose Foods v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County, et. al.*, 415 U.S.423, 439 (1974). With the issuance of a temporary restraining order, the Defendants are only required to stay the Tax Sale proceedings until the sovereignty and sovereign immunity issues can be adjudicated.

2.3 The Issuance of a Temporary Restraining Order is Not Against the Public Interest.

The public has a significant interest in assuring the viability of tribal self-government, self-sufficiency, and self-determination. *Sac and Fox Nation of Missouri v. LaFaver*, 905 S.Supp. 904, 907-908 (D. Kan. 1995). If the Defendants are allowed to circumvent the 1937 Decision, the 2010 Settlement, and the 2014 Cibola County Valuation Board decision, the viability of tribal self-government, self-sufficiency, and self-determination are jeopardized and continue to be in jeopardy. Acoma acquired the Property for economic development, in furtherance of its goals of tribal self-government, self-sufficiency, and self-determination, and those goals would be defeated or undermined if the Defendants are not stopped from engaging in conduct contrary to those goals.

2.4 The Issues Presented in the Complaint are So Serious, Substantial, Difficult, and Doubtful as to Make Them Fair Ground for Litigation.

When a Plaintiff has established the first three requirements for issuance of a temporary restraining order, the Plaintiff need only show that the issues presented are so serious, substantial, difficult, and doubtful as to make them fair ground for litigation. *Zsambia ex rel. Zsambia v. Community Bank*, 56 F.Supp.2d 1207, 1210 (D. Kan. 1999) (citing *Resolution Trust Corp v. Cruce*, 972 F.2d 1195, 1199 (10th Cir 1992)). Here, despite several rulings at the State

and County levels holding that Defendants cannot tax Pueblo of Acoma fee lands, Defendants continue to assert jurisdiction over the Pueblo and its property. The only permanent recourse left to the Pueblo of Acoma is full and final determination of this issue. The jurisdiction asserted by Defendants appears to be a violation of federal law, and their refusal to recognize the sovereign immunity of the Pueblo of Acoma and its property presents a serious and substantial issue that the court needs to resolve.

Date: October 13, 2016

Respectfully submitted:

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