UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF POJOAQUE, a federally-recognized Indian tribe; JOSEPH M. TALACHY, Governor of the Pueblo of Pojoaque; Plaintiffs, vs. STATE OF NEW MEXICO, SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFERY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, CARL E. LONDENE and JOHN DOES I – V, Defendants.	Case No. 1:15-cv-00625 JB-GBW

PLAINTIFFS PUEBLO OF POJOAQUE AND JOSEPH M. TALACHY'S OPPOSITION TO DEFENDANTS' SUSANA MARTINEZ, JEREMIAH RITCHIE, JEFFREY S. LANDERS, SALVATORE MANIACI, PAULETTE BECKER, ROBERT M. DOUGHTY III, AND CARL E. LONDENE MOTION TO DISMISS COUNT IV ON THE BASIS OF QUALIFIED IMMUNITY

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Plaintiffs, Pueblo of Pojoaque, a federally-recognized Indian tribe and Joseph M. Talachy, Governor of the Pueblo (collectively referred to as "Pueblo" or "Plaintiffs") submit their Opposition to the Defendants' Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty III, and Carl E. Londene (collectively referred to as "Defendant Officials") Motion to Dismiss Count IV on the Basis of Qualified Immunity (Doc. 60) (referred to as the "Motion to Dismiss").

I. INTRODUCTION

Under the defense of qualified immunity, Defendant Officials seek to avoid the possibility of money damages being awarded to the Pueblo as a result of Defendant Officials' wrongful attempts to assert State of New Mexico's (the "State") jurisdiction over gaming activities occurring on the Pueblo's Indian lands in the absence of a tribal-state compact under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"). The Defendants in this action are subject to a Preliminary Injunction presently in effect that enjoins all Defendants from:

> taking any action that threatens, revokes, conditions, modifies, fines, or otherwise punishes or takes enforcement against any licensee in good standing with the New Mexico Gaming Control Board based wholly or in part on grounds that such licensee is conducting business with the Pueblo.

(Docs. 31, p. 23 and 32). Despite this Court's October 7, 2015 Order, Defendant Officials have raised the qualified immunity defense in the context of the Motion to Dismiss, where they must overcome a very difficult burden and demonstrate, despite the allegations in the Complaint, the evidence and pleadings filed in support of the Motion for Preliminary Injunction, and the findings this Court has already made in its October 7, 2015, Memorandum Opinion and Order

(Doc. 31), that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In opposition to the motion, the Pueblo places the pending motion in context. The Defendant Officials do not move to dismiss Counts II and III of the Complaint, which seek prospective equitable relief against them. Presumably that is because of the strong case law in this Circuit (and throughout the United States) that qualified immunity is not an available defense against such claims. Accordingly, this lawsuit continues against the Defendant Officials regardless of whether their pending Motion to Dismiss is granted. Regarding Count IV, the Pueblo establishes a set of facts where, not only does the defense of qualified immunity fail to meet its burden of proof, but where the Pueblo is likely to prevail on the merits, namely a showing that Defendants violated the Pueblo's clear federal rights and that they knew or should have known they were doing so. Indeed, the Court, in its October 7, 2015 Order has already made such findings in favor of the Pueblo. Finally, the Pueblo demonstrates that Defendant Officials' arguments that Governor Martinez and Jeremiah Ritchie should be dismissed from the case are unavailing. For these reasons, set forth more fully below, the Defendant Officials' motion should be denied.

II. STANDARD OF REVIEW

With some exception as discussed in the Argument section below, the Pueblo does not take issue with the standards set forth in the Defendant Officials' brief. Particularly, the Pueblo concurs (Doc. 60 at p. 3) that in evaluating a motion to dismiss, the Court "must accept all the well-pleaded allegations . . . as true and must construe them in the light most favorable to the plaintiff," *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007), and that the

complaint must plead sufficient facts that, when taken as true, provide "plausible grounds" that the case will yield evidence to support Plaintiffs' allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The Tenth Circuit has noted that although summary judgment provides the typical vehicle for asserting a qualified immunity defense, such defense may also be brought in the context of a motion to dismiss. *Petersen v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004). By asserting a qualified immunity defense in the context of a motion to dismiss, however, the defendant is subject to a more challenging standard of review than would otherwise apply in the context of summary judgment. *Id*. In the context of a motion to dismiss, a court should not grant the motion unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim which would entitle the plaintiff to relief. *Id.*; *see also Currier v. Doran*, 242 F.3d 905, 917 (10th Cir. 2001).

III. ARGUMENT

The Pueblo's Complaint alleges five counts. Count I alleges that the State has breached its duty to conduct good faith negotiations pursuant to IGRA. Counts II and III seek prospective equitable relief against the Defendant Officials for the unlawful assertion of state jurisdiction over the Pueblo's gaming activities in the absence of a gaming compact. Count IV seeks money damages against the Defendant Officials for that unlawful assertion of state jurisdiction. Count V is a pendant state law claim for tortious interference. The Defendant Officials seek only to dismiss Count IV on grounds of qualified immunity (Doc. 60 at p.1).

The Pueblo has demonstrated and this Court has ruled that Defendant Officials fail in establishing the two elements for a qualified immunity defense; Defendant Officials violated the Pueblo's clear federal rights and Defendant officials knew or should have known they were

doing so, as more fully set forth in Subsection III(A). The Complaint has alleged, and in the context of the motion for preliminary injunction, the Pueblo has established facts sufficient to keep Defendants Governor Martinez and Jeremiah Ritchie in this case and subject to further discovery regarding the depth and reach of their involvement, as more fully set forth in Subsection III(B). This litigation is going to proceed against Defendant Officials on the merits without regard to the qualified immunity defense, as more fully set forth in Subsection III(C). For these reasons, the Defendant Officials Motion to Dismiss on Grounds of Qualified Immunity should be denied.

A. The Pueblo has Established a Case that Survives the Qualified Immunity Defense and Precludes Dismissal as to Count IV: The Law is Sufficiently Clear Regarding the Limits of State Jurisdiction Over Tribal Gaming.

The Pueblo agrees that the defense of qualified immunity turns on whether Defendant Officials violated the Pueblo's clear federal rights and Defendant Officials knew or should have known they were doing so. The Pueblo further agrees that the success or failure of the defense will likely turn on whether "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right" (Doc. 60 at p. 5). The Pueblo notes, however, that *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990), which is heavily relied upon in the Defendant Officials' brief, has been heavily criticized by subsequent courts for imposing too strict a standard with respect to the defendants' required knowledge of the law. *Estate of Booker v. Gomez*, 745 F.3d 405, 426 (10th Cir. 2104); *Dixon v. Richer*, 922 F.2d 145, 1461 (10th Cir. 1991). Indeed, this Court, in the complicated and fact-specific litigation in *Hunt v. Central Cosol. School District*, 951 F. Supp. 2d 1136, 1233-34 (D.N.M. 2013) denied state officials' motion to dismiss on qualified immunity grounds because the

complaint in that case alleged a plausible cause of action for discrimination. This Court noted that even though there was not a precise appellate court case on point, the law was reasonably established that state school officials could not discriminate absent a compelling state interest. 951 F. Supp. 2d. at 1233-34.

The Pueblo disagrees, however, with Defendant Officials' position that the issue of qualified immunity must be resolved at this early stage in the litigation (Doc. 5). The case law cited for the proposition that the issue should be resolved early in the litigation is grounded on the notion that an immune official should not be forced to endure the burdens of the litigation. *Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987). That justification is inapplicable here, however, because the Defendant Officials will be burdened by this litigation regardless of whether Count IV is dismissed, as discussed in Subsection III (C) below.

The remainder of Defendant Officials' briefing (Doc. 60 at pp. 5-21) is a poorly veiled attempt to re-litigate, in the context of a motion to dismiss Count IV on grounds of qualified immunity, the preliminary injunction motion, which was granted in Plaintiffs' favor after full briefing and a hearing. The Pueblo declines any invitation to re-litigate that issue.[1] The actual issue is whether Count IV survives the Motion to Dismiss on Grounds of Qualified Immunity. The very fact that this Court has entered a Preliminary Injunction in this matter, which was based upon finding a substantial likelihood that the Pueblo would prevail on the merits, defeats the Defendant Officials' pending Motion to Dismiss on Grounds of Qualified Immunity. Even if this Court ultimately rules in favor of Defendant Officials on the merits, which this Court has already determined to be unlikely, this Court's analysis and reasoning in its Memorandum Opinion and

[1] The Pueblo incorporates, as if fully set forth herein, the pleadings (Docs. 23, 24, and 27), supporting declarations (Docs. 29 and 30) and the transcript of the October 2, 2015, hearing

Order (Doc. 31) compels denial of Defendant Officials' Motion to Dismiss.

The Pueblo is not required to defeat the qualified immunity defense on the merits at this juncture in the litigation. The Pueblo merely needs to demonstrate that it has presented a plausible claim that a clearly-established federal right has been violated by the Defendant Officials, and that it would "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" (Doc. 60 at p. 4). Judge Brack found a clearly-established federal right that has been violated:

> Defendants' protestations that the regulation of vendors doing business with the Pueblo does not constitute regulation of the Pueblo's gaming activities are disingenuous and inconsistent with the record. Defendants' actions are based, quite clearly, on Defendants' own determination that the post-June 30, 2015 Class III gaming at the Pueblo is illegal – a determination that the Defendants, just as clearly, are without jurisdiction or authority to make. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) (observing "that the very structure of [IGRA] forbids the assertion of state civil or criminal jurisdiction over Class III gaming except when the tribe and the state have negotiated a compact that permits state intervention"); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004) ("Although the IGRA provides that Class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, it does not follow that the states have any authority to regulate Class III gaming in the absence of a compact. States may not enforce the terms of IGRA—the only enforcement provided for in the IGRA is through the federal government."), vacated and remanded on other grounds, 443 F.3d 1247 (10th Cir. 2006).

(Doc. 31 at p. 20). Judge Brack further concluded that the Defendant Officials "know" that they have stepped over the line in their attempt to assert state jurisdiction over the Pueblo's gaming:

> Defendants are frustrated by and resent the ongoing gambling activity of the Pueblo. Defendants' harassment and threatening conduct directed at the vendors is a thinly disguised attempt to accomplish indirectly that which Defendants **know** they are without authority or jurisdiction to accomplish directly.

(Doc. 31 at p. 20) (emphasis added). Given this Court's October 7, 2015, Opinion establishing that a federal right was violated, and that it was knowingly violated by the Defendant Officials,

the Defendant Officials' Motion to Dismiss falls far short of establishing "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The Defendant Officials are not street-beat law enforcement officers that unwittingly exerted excessive force in an arrest. They are professionals, many of whom are lawyers, and all of whom purport to have expertise in the regulation of gaming and the implementation of IGRA. What Defendant Officials argue in their motion to dismiss stands in sharp contrast to applicable law governing this case, and is arguably a further extension of the "disingenuous" and "thinly disguised" actions for which Defendant Officials were admonished in the October 7, 2015, Opinion of this Court.

B. The Allegations Against Defendants Martinez and Ritchie are Sufficient to Survive the Instant Motion to Dismiss.

Defendant Officials argue that Governor Suzanna Martinez and Jeremiah Ritchie should be dismissed because the majority of the Pueblo's allegations are against the New Mexico Gaming Control Board (the "NMGCB") officials, and because the Governor and Attorney General of Arizona were recently dismissed in a similar action. *Tohono O'odham Nation v. Ducey*, _____ F. Supp. 3d ____, 2015 WL 5475290 (D. Ariz. Sept. 17, 2015). These arguments are unavailing. As set out in the Complaint, the Pueblo's allegations against Governor Martinez and Mr. Ritchie are sufficient, on their own, to survive the Motion to Dismiss. Further, the Pueblo has reason to believe that Defendant Officials are refusing to provide information that is likely to further substantiate the Pueblo's claims against Governor Martinez and Mr. Ritchie. Finally, the facts at issue in *Tohono O'odham* are critically distinguishable.

The Defendant Officials concede (Doc. 60 at pp. 21-22) that the Complaint alleges Governor Martinez caused the issuance of press releases to the public that were designed to

threaten banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that are now doing business with the Pueblo (Doc. 31 p. 4), and that Mr. Ritchie made, or caused to be made, similar statements. These allegations are further supported by the Declaration of the Pueblo's Governor, Joseph Talachy, submitted in support of the Pueblo's Motion for Preliminary Injunction (Doc. 23-1 generally and at ¶ 7 and exhibits 4 and 5, specifically). As Defendant Officials concede, this Court "must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff" (Doc. 60 at p. 3).

The actions of Governor Martinez and Mr. Ritchie constitute threats to licensees doing business with the Pueblo, and are part of the State's unlawful attempt to assert jurisdiction over the Pueblo's gaming activities. Judge Brack expressly identified the press statements (Doc. 60, p. 4) as part of the actions that caused him to conclude that "Plaintiffs have established that the Individual Defendants are attempting to enforce state gaming regulations on the Pueblo's Indian lands in the absence of a tribal-state compact" (Doc. 31 at p. 15). The fact that NMGCB members have engaged in more frequent and concrete examples of threatening behavior does not excuse Governor Martinez and Mr. Ritchie. The concrete examples of threatening action identified in the Complaint provides reason to believe that discovery will reveal many more examples or evidence of threatening actions and even more direct involvement.

Indeed, the Pueblo has been in pursuit of the correspondence between officials in the Governor's Office and officials with NMGCB under New Mexico's Inspection of Public Records Act, NMSA 1978, §§ 14-2-1 et seq. ("IPRA"), which will likely reveal additional manifestations of misconduct by Governor Martinez and/or Mr. Ritchie, or otherwise provide evidence of a conspiracy between officials in the Governor's Office and in the NMGCB. *See*

December 18, 2015 Declaration of Martina LaForge-Lara and attachments thereto. Although those IPRA requests have been pending since late September 2015, the responses received by the Pueblo thus far have been limited to claims for the need of additional time, and a limited disclosure that does evidence at least two (2) meetings between Mr. Richie and Mr. Landers, and possibly others, specifically to discuss the Pojoaque Pueblo,[2] and most recently, generic statements that many documents will be withheld as privileged. *Id.*

These delays coincide with the motion activity occurring in this case, both in the context of the Pueblo's pending Motion seeking an Order to Show Cause re Contempt (Doc. 53), and the Defendant Officials' pending Motion to Dismiss (Doc. 60). Notably, an attorney/client privilege claim was made when the Pueblo sought correspondence in the form of communications between the Governor's office and the NMGCB, which communications are not attorney communications. Governor Martinez, Mr. Ritchie, and NMGCB Chairman Landers are all attorneys, but the communications being sought were made in their official capacities, and the Pueblo is aware of no circumstances where an attorney-client privilege would attach. In fact, it would likely be a conflict of interest for any of these entities to be acting as the attorney for another in the context of this case. A case cited by the Defendant Officials, *Anderson v. Creighton*, correctly notes that the discovery of facts material to the issue of qualified immunity

[2] The limited IPRA disclosure that was provided reveals at least six emails that reference two meetings in early May, 2015 between Mr. Richie and Mr. Landers, and possibly others, specifically to discuss the Pojoaque Pueblo. They include a May 1, 2015 email (Bates-stamped # 0054), a May 4, 2015, email (Bates-stamped # 055) and four emails dated May 6 and May 7, 2015, (Bates-stamped ## 001-003 and 0057-59, which refer to a "follow-up meeting" to occur on May 8, 2015. The referenced emails are attached to the December 18, 2015, LaForge-Lara Declaration as Exhibit "5". The entire disclosure consisted of only seventy (70) pages in total. Aside from these emails, the remaining pages include the forty-one (41) page Complaint in this matter and multiple copies of letters between the Pueblo, the United States Attorneys' Office, and the National Indian Gaming Commission, which are already part of the record.

may be necessary before a court's consideration of a qualified immunity defense may be resolved. 483 U.S. at 646, n.6. At a bare minimum, if the communications and other documentation sought by the Pueblo are to be withheld by the State under IPRA, the Defendant Officials should be required to prepare and submit a privilege log that identifies with specificity the documents being withheld and the basis for the assertion of privilege. The Pueblo is entitled to know who attended the above-referenced meetings, and whether other meetings occurred to ascertain whether any attorney client privilege attaches. This Court should review those documents *in camera* to determine if the alleged privilege may properly be attached.

Finally, the facts at issue in *Tohono O'odham Nation* regarding the Governor and the Attorney General of Arizona are critically distinguishable from the facts at issue in this case. In *Tohono O'odham*, the Arizona Governor and Attorney General wrote to the Director of the Arizona Department of Gaming regarding what enforcement action the Department might take to threaten vendors doing business with the Nation. *Id at *5*. Here, Governor Martinez and Mr. Ritchie are alleged to have taken action to cause *public* threats attributed to the Governor's Office and intended to assert jurisdiction over the Pueblo's gaming activities, broadly threatening banks, credit card vendors, gaming machine vendors, advertisers, bondholders, and others that are now doing business with the Pueblo. The actions of the NMGCB officials are simply one small part of the Governor's larger scheme to assert jurisdiction over the Pueblo's gaming activities. This distinction also weighs on the relevance of the documents being withheld under IPRA. If indeed, Governor Martinez and Mr. Ritchie conspired with members of the NMGCB to assert jurisdiction over the Pueblo's gaming activities, they cannot escape liability by asserting qualified immunity or attorney-client privilege.

C. Qualified Immunity is Not Available as a Defense Against Claims Seeking Prospective Equitable Relief.

The Court should also take into account the context surrounding the Defendants' motion to dismiss Count IV. Counts II and III will still proceed against Defendant Officials, subjecting them to the same burdens of litigation, including discovery as to whether Defendant Officials knew or should have known they were doing so despite the Court's ruling on its Motion to Dismiss at this early stage of the litigation. Qualified immunity is not available as a defense against claims seeking prospective equitable relief. *Guttman v. Khalsa*, 669 F.3d 1101, 1130 (10th Cir. 2012) is instructive. The Tenth Circuit reversed the District Court's dismissal of claims for prospective equitable relief under *Ex parte Young*, 209 U.S. 123 (1908), while it affirmed dismissal of all other claims based on sovereign immunity and qualified immunity. The court sets forth the interplay between *Ex parte Young* and immunity defenses as follows:

> In *Ex parte Young*, 209 U.S. 123, 28 S. Ct 441 (1908), the Supreme Court carved out an exception to Eleventh Amendment immunity for suits against state officials seeking to enjoin alleged ongoing violations of federal law. *Crowe & Dunlevy v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) "By proceeding on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state itself, the *Ex parte Young* doctrine enables federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Id.* (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105, 104 S. Ct. 900 (1984))." To determine whether the *Ex parte Young* doctrine applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc., v. Public Service Commission of Md.*, 535 U.S. 635, 645, 22 S. Ct. 1753 (2002). . . . **In summary, neither a state official's absolute immunity nor a state's sovereign immunity bars a plaintiff from bringing an *Ex parte Young* claim** for a violation of Title II of the ADA.

669 F.3d at 1126-1127 (emphasis added). *See also Ross v. Addison*, 2015 WL 237190 at *2 (W.D. Okla. 2015); *Marietta Materials, Inc. v. Kansas Dept. of Transp.*, 953 F. Supp. 2d 1176,

1186-1187 (D. Kan. 2013); *Hicks v. Anderson*, 2012 WL 1415338 at *10 (D. Colo. 2012).

None of the case law relied upon by the Defendant Officials is in the context of the Pueblo's claims for prospective equitable relief under *Ex parte Young*. The Defendant Officials initially cite to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), for the proposition that the defense of qualified immunity may apply to claims against state officials acting in their official capacities, but that case was limited to claims for money damages. *Id.* at 802 ("[t]he issue in this case is the scope of the immunity available to the senior aides and advisers of the President of the United States in a *suit for damages* based upon their official acts.") (emphasis added). *Harlow's* progeny expressly acknowledges that qualified immunity does not apply to claims for prospective equitable relief. *See, e.g.*, *Prisco v. D.O.J.*, 851 F.2d 93 (3d Cir. 1988), *overruled on other grounds*; *Acierno v. Cloutier*, 851 F.2d 93 (3d Cir. 1994) ("that policy rationale is not applicable to a suit for injunctive relief. An official acting in violation of the law may in some instances be appropriately shielded from the threat of money damages recovery, but the policy reasons for such a shield do not confer discretion to continue acting illegally"); *Guadarrama v. H.U.D.*, 74 F. Supp. 2d 127, 141 n.13 (D.P.R. 1999) (claims for damages dismissed, applying *Harlow*, but claims for equitable injunctive remedies not dismissed, applying *Ex parte Young*); *Stewart v. Hunt*, 598 F. Supp. 1342 (E.D. N.C. 1984) (a state official sued individually may raise a qualified immunity defense if his conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known" (applying *Harlow*), however, qualified immunity only protects the individual from civil damages, it does not protect him from suits for injunctive relief (applying *Ex parte Young*)"); *O'Brien v. University of Houston*, 2010 WL 890979, *2 (S.D. Texas 2010) ("State actors acting within their discretionary

authority are partially immune from prosecution for the violation of an individual's Constitutional rights (citing *Harlow*). Individuals can sue them in federal court to enjoin further misconduct (citing *Ex parte Young*)").

Defendant Officials proceed in their pleading to cite case law from this Circuit, all involving arrests or searches, addressing whether arresting officers knew that the actions they were taking were excessive under applicable law (Doc. 60 at pp. 3-5). None of the cases cited were brought in the context of defeating a claim for prospective equitable relief. *See Albright v. Rodriguez*, 51 F.3d 1531 (10th Cir. 1995) (claim for damages stemming from wrongful warrantless arrest); *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990) (action for injuries sustained in wrongful arrest); *Farmer v. Perrill*, 288 F.3d 1254 (10th Cir. 2002) (allegedly unlawful strip search in prison)[3]; *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (excessive force against suspect fleeing arrest); *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (alleged violation of Fourth Amendment by police bringing media to serve and execute search warrant of home); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (excessive force in arrest). These cases have no relevance to Plaintiffs Counts II and III, seeking prospective equitable relief.

As discussed above, the applicability of qualified immunity involves an analysis of whether Defendant Officials violated the Pueblo's clear federal rights and whether Defendant officials knew or should have known they were doing so. The Pueblo's prosecution and the Court's deliberation of Counts II and III will necessarily involve the development of both matters that are also the elements of a qualified immunity defense. Accordingly, the Court should decline

[3] Notably, in *Perrill*, the Tenth Circuit upheld the District Court's denial of a motion to dismiss on grounds of qualified immunity. 288 F.3d at 1261.

the invitation by Defendant Officials to definitively rule on this issue in the context of a motion to dismiss. *See Petersen* 371 F.3d at 1201; *Hunt v. Central Cosol. School District*.

IV. CONCLUSION

For all the reasons set forth above, the Defendant Officials motion to dismiss Count IV on grounds of qualified immunity should be denied. The Court need not go far in reaching this conclusion. Given that the October 7, 2015, Memorandum Opinion and Order has found a substantial likelihood that the Pueblo will prevail on the merits, that all Defendants are attempting to violate clear federal rights of the Pueblo, and that the Defendant Officials knowingly violated the Pueblo's federal rights, Defendant Officials cannot possibly establish "beyond doubt" that the Pueblo "can prove no set of facts in support of its claim" which would entitle it to relief.

RESPECTFULLY SUBMITTED on December 18, 2015,

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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on December 18, 2015, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

/s/ *Scott Crowell*
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