

**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.

NO.: 1:15-cv-00625 JOB-GBW

**RESPONSE TO STATE DEFENDANTS' MOTION
TO DISMISS COUNT V OF PLAINTIFFS COMPLAINT**

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 response to the Defendants’ State of New Mexico (the “State”), Susana Martinez, Jeremiah Ritchie, Jeffrey S. Landers, Salvatore Maniaci, Paulette Becker, Robert M. Doughty III, and Carl E. Londene (collectively referred to as “Defendants”) Motion to Dismiss Count V of Plaintiffs’ Complaint.

COMMENT ON CONTEXT AND PROCEDURAL POSTURE

The Defendants have filed six motions, all of which are set to be heard on March 2, 2015:

- Doc. 64 Defendants’ Motion to Stay or Suspend the Court’s October 7, 2015 Preliminary Injunction.
- Doc. 65 Defendants’ Motion to Reconsider and Either Vacate or Modify the Court’s October 7, 2015 Preliminary Injunction and for Other Relief Pursuant to Fed.R.Civ.P. 62.1.
- Doc. 69 Motion to Modify October 7, 2015 Preliminary Injunction and to Dismiss Defendant State of New Mexico based on the State’s Eleventh Amendment Sovereign Immunity.
- Doc. 71 Motion to Dismiss Counts III and IV of Plaintiffs’ Complaint.
- Doc. 72 Motion to Dismiss Count II of Plaintiffs’ Complaint.
- Doc. 73 Motion to Dismiss Count V of Plaintiffs’ Complaint.

Because there is a significant amount of overlap on the facts and the analysis, rather than repeat arguments (other than this summary), the Pueblo incorporates all responses into all other responses as if fully set forth therein, and attempts to focus each response on the issues unique to that motion. In a nutshell, the Pueblo vigorously opposes the Motions to Dismiss Counts II and III of Plaintiffs’ Complaint and the three motions to vacate or modify the Preliminary Injunction.

The Pueblo does agree, subject to its approval of specific language, to the dismissal of Counts I and V by reason of the State's assertion of Eleventh Amendment immunity. The Motion to Dismiss Count IV is moot.

The Pueblo anticipates that it will file within the next few days a Motion to Stay all proceedings before the District Court pending resolution of the appeals before the Tenth Circuit, including the Defendants' appeal from this Court's October 7, 2015 Order. The decisions of the Tenth Circuit in the pending appeals will likely provide substantial clarity and binding guidance regarding the issues pending in this matter.

ARGUMENT

Defendants' Motion to Dismiss Count V of Plaintiffs' Complaint affirmatively asserts the State's Eleventh Amendment immunity from suit. The assertion of immunity demonstrates the State's unwillingness to allow the matter to proceed on the merits. Accordingly, the Pueblo concurs with the Defendants that under these circumstances, this Court lacks jurisdiction to hear Count V.

The Pueblo encourages the Court to dismiss Count V without prejudice, however, as the Defendants have the capacity to waive, or choose to not assert, Eleventh Amendment immunity, in which event the claim may proceed on the merits.

CONCLUSION

For the reasons set forth herein, and set forth in the Pueblo's responses to pending motions, as fully incorporated herein, and barring any change in the State's position regarding its decision to withhold consent to the Court's jurisdiction to deliberate Count V, the Pueblo has no objection to the dismissal of Count V.

RESPECTFULLY SUBMITTED on January 25, 2016,

BY:
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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on January 25, 2016, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

/s/Scott Crowell

Scott Crowell, AZ Bar No. 009654**