IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

YSLETA DEL SUR PUEBLO, a federally recognized Indian tribe, Plaintiffs, v. CITY OF EL PASO, and EL PASO WATER UTILITIES PUBLIC SERVICE BOARD, Defendants.	§ § § § § § § § § § §	Case No. 3:17-CV-00162-DG

PLAINTIFF'S RESPONSE
IN OPPOSITIONTO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff, Ysleta del Sur Pueblo ("Pueblo"), brought this declaratory judgment action seeking judicial confirmation of the Pueblo's title to a portion of the lands encompassed by what is described in official title documents as "the Ysleta Grant." The Defendants ask this Court to dismiss Defendant El Paso Water Utilities Public Service Board from this action arguing that it does not have the capacity to be sued. But the available facts demonstrate that this argument is incorrect. The Defendants also ask the Court to dismiss both Defendants based on the erroneous argument that the complaint fails to allege sufficient facts (all taken as true) to survive a motion to dismiss for failure to state a claim. Under controlling federal precedent, this argument also fails. And finally, Defendants claim that "government immunity" shields them from the Pueblo's claims in this action. But "government immunity" is a state law concept, not to be confused with sovereign immunity under the Eleventh Amendment. Being a City and a water utility owned by the City, these Defendants do not enjoy the protections of the Eleventh

Amendment's grant of sovereign immunity to the states. The notice pleading requirements of the Federal Rules of Civil Procedure, and controlling case law, confirm that Defendants' motion must be denied.

ARGUMENT

I. The El Paso Water Utilities Public Service Board Has the Capacity to Be Named as a Defendant in this Federal Declaratory Judgment Action.

The Defendants cite Fed. R. Civ. P. 17(b)(3) for the proposition that the El Paso Water Utilities and its Public Service Board ("Utility") does not have the capacity to sue or be sued, claiming that state law controls that determination. Defendants argue that because the Utility "serves as an agent of the City," (Mot., ECF No. 13 at 6) and because "El Paso Water Utilities and its Public Service Board are a component unit of the City of El Paso," (*Id.*) the Pueblo may name the City alone as a defendant, and that doing so would be sufficient for the Pueblo to obtain the relief it seeks in this action. *See, e.g., City of El Paso v. Morales*, No. 08-02-00484-CV, 2004 WL 1859912 (Tex. App. Aug. 20, 2004).[1]

Capacity is "a party's personal right to litigate in federal court." 6A Wright, Miller, & Kane, Fed. Prac. & Proc. Juris. § 1542 (3d ed. 2017). Lack of capacity to be sued is not a jurisdictional defect. *Summers v. Interstate Tractor & Equip. Co.*, 466 F.2d 42, 50 (9th Cir. 1972) ("The question of a litigant's capacity or right to sue or to be sued generally does not affect the subject matter jurisdiction of the district court."). Where an entity lacks capacity to sue or be sued: "As a logical corollary, [it] is not an indispensable party." *Colorado Springs Cablevision, Inc. v. Lively*, 579 F. Supp. 252, 254 (D. Colo. 1984).

[1] "In deposition testimony, Catherine Fiore, EPWU contracts manager, explained that EPWU is a department of the City, **but it is operated by an independent board. EPWU is a self-sustaining organization that is not funded by taxes, but rather is supported by water rates**." *Morales*, 2004 WL 1859912 at *1, n.1 (emphasis added).

Under applicable federal law, the Utility does have the capacity to be named as a defendant in this federal declaratory judgment action. Specifically, the Pueblo's claims against the Utility are not based on its capacity under state law to sue or be sued. The Pueblo's claims are instead based on the Utility's capacity to claim title adverse to the Pueblo's Spanish Land Grant title. Because this is a federal law claim, state law does not control the determination of capacity:

> the Court concludes that the Director lacks the capacity under state law to either sue or be sued. The Court is not persuaded, however, that the Director's capacity in this case should be determined by applying Arizona law. The Nation's suit against the Director is not based on his capacity under state law, but instead is based on the doctrine established in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). That case holds, as a matter of federal common law, that any state officer who allegedly violates federal law may be sued for injunctive relief in federal court. *Id.* *Ex Parte Young* thus appears to create an exception to Rule 17(b)'s requirement that a state officer's amenability to suit be determined by state law. At least some courts have so held.

Tohono O'odham Nation v. Ducey, 174 F. Supp. 3d 1194, 1200 (D. Ariz. 2016).

Moreover, the Ordinance establishing the Utility grants it the power to "consult with counsel, who may or may not be of counsel to the city" and grants the Utility the power to bring and defend lawsuits. ECF 13 at 36.[2] Records indicate that the Utility claims to hold title to some portion of the land at issue in this action, and to do so in its own name.

The Ordinance also explicitly confers the Utility with extensive independent powers. As Defendants correctly note, "page 13 of the Ordinance states that the 'Public Service Board' was created pursuant to authority contained in Article 1115, Texas Revised Civil Statutes1, **to have complete management and control** of the City's combined water utilities." Mot., ECF No. 13

[2] "[T]he Board will proceed immediately with a suit in assumpsit or similar action . . . " and "nothing in this paragraph shall be construed to require the Board to pay, discharge or make provision for any such lien charge, claim or demand so long as the validity thereof shall be by it in good faith contested." Mot., ECF No. 13 at 36.

at 5, citing Exhibit 1 to the Response, Ordinance creating the Utility ("Ordinance") (Mot., ECF No. 13 at 25 – 55) (emphasis added).[3] This complete power is further detailed on the next page of the Ordinance:

> Subject to the provisions and restrictions contained in this ordinance, the Board shall have complete authority and control of the management and operation of the System and the expenditure and application of its revenues.
> . . .
> The Board may make such regulations and by-laws for the orderly handling of its affairs as it may in its discretion see fit and shall thereafter, subject to the pertinent laws of the State of Texas, operate and manage the system **with the same freedom and in the same manner as are ordinarily enjoyed by the Board of Directors of a private corporation operating properties of a similar nature**.

Mot., ECF No. 13 at 27 (emphasis added). The Ordinance requires the Utility separately to insure its operations for loss. Mot., ECF No. 13 at 27, 33, 34. The Ordinance anticipates that "an order or decree" might be entered either with or without the consent or acquiescence of the City "appointing a receiver or receivers of the system or any part thereof." Mot., ECF No. 13 at 43. The operations over which the Utility has "complete management and control" are substantial.[4] The modern operations of the Utility are unlike those of the Waterworks that nearly a century ago was held to be department of the City of San Antonio in *Sifford v. Waterworks Bd. of Trustees*, 70 S.W.2d 476, 477 (Tex. Civ. App. 1934), *writ refused* ("The property is owned by the city, and the department of water is as much under the control and management of the city, through its trustees, as is the department of taxation, streets, police, and fire"). In contrast, the

[3] Defendants filed their Exhibits as part of their Motion, and not separately as directed by this Court's Administrative Policies and Procedures for Electronic Filing Section 9(d) (**Other documents must be submitted as separate PDF documents; e.g., an Appendix, an Exhibit**, an Affidavit, a Supplement, or a Volume) (emphasis added).

[4] "By the end of 1998, the El Paso Water Utility (EPWU) operated 152 wells, 56 reservoirs, 41 booster pump stations, and two surface water treatment plants. Octavio E. Chavez, *Mining of Internationally Shared Aquifers: The El Paso-Juarez Case*, 40 Nat. Resources J. 237, 243 (2000).

Utility's operations are what they were meant to be under the Ordinance: the same as "a private corporation operating properties of a similar nature." Mot., ECF No. 13 at 27. Under the facts here, it is appropriate to name the Utility, or the individual members of its Public Service Board, as defendants in this action. *Accord Cimerman v. Cook*, 561 Fed.App'x. 447, 450 (6th Cir.2014) ("Because the doctrine of *Ex parte Young* preserves the suit for equitable relief from dismissal on immunity grounds, it was error to dismiss the suit in this case simply for lack of capacity to be sued under state law.").

If this Court should hold that the Utility does not have the capacity to be sued in this federal declaratory judgment action, then the Court should grant the Plaintiff leave to amend its complaint to name the individual members of the El Paso Water Utilities Public Service Board as parties under *Ex parte Young.*[5] *Blick v. Soundview Home Loan Tr. 2006-WF1*, No. 3:12-CV-00062, 2013 WL 139191, at *3 (W.D. Va. Jan. 10, 2013), *aff'd*, 521 F. App'x 207, 2013 WL 2303491 (4th Cir. 2013)

> While Virginia law applies in determining whether a trust has the capacity to be sued, substitution of a party appears to be a matter of procedure that should be governed by federal law under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Federal Rule of Civil Procedure 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Because Virginia law does not permit a suit against a trust in the absence of specific statutory authorization, I find that the trust is not the proper defendant in this case, but rather the trustee is.

The appropriate remedy is not dismissal of the case, but a modification of the caption. *LaMie v. Smith*, No. 1:12-CV-201, 2012 WL 3010942, at *6 (W.D. Mich. June 12, 2012), *report and recommendation adopted*, No. 1:12-CV-201, 2012 WL 3010940 (W.D. Mich. July 23, 2012) (emphasis in original).

[5] *Cimerman v. Cook*, 561 F. App'x 447, 450 (6th Cir. 2014) ("The fact that the *court* cannot sue or be sued has no bearing on Judge Cook's ability to be sued in his official capacity").

II. Taken as true, the Allegations in the Complaint Establish a Claim that Entitles the Pueblo to Relief.

Defendants argue that: "Plaintiffs [sic] failed to allege 'enough facts to state a claim to relief that is plausible on its face' and 'raise a right to relief above the speculative level.'" Mot., ECF No. 13 at 4.[6] But as Defendants recognize, all Plaintiff had to allege was "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Mot., ECF No. 13 at 3, citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. [5]44, 556 (2007)). In evaluating a motion to dismiss for failure to state a claim, the reviewing court considers "only the contents of the claim and construes all allegations of material fact in the light most favorable to the nonmoving party." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997)) (citing *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996)). Although Defendants argue that certain of Plaintiff's assertions "are false"[7], when ruling on a motion to dismiss, "a judge must accept as true all of the factual allegations" contained in the counterclaim. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Twombly*, 550 U.S. at 555-56).

Defendants also argue that additional facts "may" impact a final decision on the merits:

> Plaintiff herein, being found to be in the Confederacy, was excluded from Lincoln's confirmation of ownership. When Texas was subsequently readmitted to the United States in 1870, its readmission came with some restrictions that **may** have affected the tribe's ownership.

Mot., ECF No. 13 at 7 (emphasis added). But as this Court has noted:

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[6] On one occasion in their memorandum in support the Defendants state "Plaintiff fails to assert a cognizable legal theory." Mot., ECF No. 13 at 7. Contrary to this single assertion, the Pueblo has succeeded in a land title action against the City of El Paso on this exact same legal theory. Order, *Ysleta del Sur Pueblo v. El Paso Elect. Co., et al.*, No. 3:16-cv-00035-KC (U.S.D.C. W.D. Tex., Feb. 24, 2017) (ECF No. 43).

[7] E.g., Mot., ECF No. 13 at 7.

> The Court's task, then, is "to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success."

Canaan v. City of El Paso, 2017 WL 129027, at *2 (W.D. Tex. Jan. 12, 2017). And Defendants additional (and unsupported) factual arguments simply confirm that the Plaintiff's complaint is sufficient, even if resolution of the Plaintiff's claims on the merits may require extrinsic evidence:

> [the] Defendants concede establishing that the SH 45SW Project is solely a state project, meaning it is developed by only state actors using state funds, will depend on extrinsic evidence and thus is not suitable for resolution through a Rule 12(b)(6) motion.

Fath v. Texas Dep't of Transportation, No. 1:16-CV-234-LY, 2016 WL 7442868, at *6 (W.D. Tex. Sept. 6, 2016)

On this motion to dismiss under Rule 12(b)(6) the Court must accept the following facts in the complaint as true and construe them in the light most favorable to the Pueblo:

1. Ysleta del Sur Pueblo was established by Tiwa (or Tigua) speaking Pueblo Indians who were relocated by the Spanish from the Pueblo of Isleta, New Mexico, to their current locations between 1680 and 1682.
2. In 1751, Spain granted the land of the Ysleta del Sur Pueblo to the Pueblo's members as communal property.
3. In 1825, the Mexican State of Chihuahua confirmed the Pueblo grant.
4. In 1825, the Mexican alcalde of El Paso conducted the first survey of the Pueblo grant and confirmed the total area to be 17,588 acres.
5. In 1845, Texas was admitted into the United States.

6. In 1848, the Mexican-American War ended with the Treaty of Guadalupe Hidalgo. Treaty of Peace, Friendship, Limits and Settlement, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.
7. The Treaty of Guadalupe Hidalgo transferred territory previously held by Mexico to the United States, including the lands comprising the Pueblo grant.
8. The Treaty also created the international boundary between the United States and Mexico in the middle of the principal stream of the Rio Grande.
9. Article VIII of the Treaty of Guadalupe Hidalgo guaranteed to citizens of Mexico within the affected areas, which at the time included the Ysleta del Sur Pueblo Indians, protection of their land titles upon the transfer of sovereign authority from Mexico to the United States.
10. After the Rio Grande flooded in 1849, Mexico expropriated Ysleta del Sur Pueblo lands located south of the Rio Grande's new course for the Senecú Pueblo. The Ysleta del Sur Pueblo sought to confirm its rights to its lands that remained north of the Rio Grande.
11. In 1853, as a result of this dispute, the El Paso district surveyor resurveyed the portion of the Pueblo grant remaining north of the Rio Grande.
12. The 1853 survey confirmed that "one league and 21 labors" (8,148.34) acres of grant area remained north of the international boundary.
13. In 1854, the State of Texas confirmed its recognition of the Pueblo grant. An Act of the relief of the Inhabitants of the town of Ysleta in the county of El Paso, Texas Legislature, Feb. 1, 1854, chapter XXXVII: 53.

14. In the decades after Texas joined the United States, the Texas state legislature passed successive incorporation acts which purported to transfer title to the Pueblo's lands.
15. In 1968, the United States confirmed its recognition of Ysleta del Sur Pueblo as an Indian Tribe. An Act relating to the Tiwa Indians of Texas, Pub. L. No. 90-287, 82 Stat. 93 (Apr. 12, 1968).
16. The 1968 "Tiwa Indian Act" transferred the federal government's trust responsibilities to the State of Texas. An Act relating to the Tiwa Indians of Texas, Pub. L. No. 90-287, 82 Stat. 93 (Apr. 12, 1968).
17. In 1987, Congress restored the trust relationship between the Pueblo and the United States. Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (Aug. 18, 1987).
18. The Pueblo grant has not been vacated or abandoned by the members of the Ysleta del Sur Pueblo.
19. Members of the Pueblo continue to reside on or near these 1751 Spanish grant lands and the Pueblo has remained a visible presence in the community.
20. The Pueblo is and since 1751 has been the owner of the Property.
21. The Property is located within the boundaries of the 1751 Spanish Land Grant.
22. The Property has been used by the Pueblo since before the 1751 Spanish land grant and continues to be used by the Pueblo.
23. The Pueblo has never conveyed to any entity title ownership in the Property.

ECF No. 1 (Compl. at pp. 3-5).

These facts are more than sufficient to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The facts alleged in the

complaint "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Taken as true for purposes of this motion, the facts stated in the complaint confirm that the Pueblo's complaint is legally sufficient for relief to be granted on the claims stated therein. *Cooper v. Pate*, 378 U.S. 546 (1964). Indeed, this Court has relied on many of these facts when ruling in favor of the Pueblo in earlier litigation involving these and other parties. *Ysleta del Sur Pueblo v. El Paso Elect. Co.*, No. 3:16-cv-00035-KC (U.S.D.C. W.D. Tex., Feb. 24, 2017) (ECF No. 43).

III. Government Immunity is Inapplicable in this Federal Action, and Cities and Their Agencies Do Not Have Eleventh Amendment Sovereign Immunity.

Defendants argue that this federal Court should dismiss the complaint because of "Governmental Immunity." Mot., ECF No. 13 at 8. Governmental Immunity is extended by the State of Texas to cities and counties as a defense to state law claims – it is not a protection available to these two Defendants in this federal law action in federal court. *Dorris v. City of McKinney, Texas*, 214 F. Supp. 3d 552 (E.D. Tex. 2016) (governmental immunity barred state law claims, but not federal law claims). As the Texas Supreme Court has clarified:

> Courts often use the terms sovereign immunity and governmental immunity interchangeably. However, they involve two distinct concepts. . . . [s]overeign immunity refers to the State's immunity from suit and liability. In addition to protecting the State from liability, it also protects the various divisions of state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects political subdivisions of the State, including counties, cities, and school districts.

citing Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694 (Tex. 2003), *judgment withdrawn and reissued* (May 13, 2003) (some internal quotes and citations omitted). Because governmental immunity is a state law defense to state law claims, Defendants' citation to

multiple state law cases discussing governmental immunity are irrelevant in this federal action. And Defendants do not cite a single federal court opinion in support of their argument.

Late in their argument on governmental immunity Defendants include a one sentence claim that the City of El Paso "is both immune from suit and liability under the doctrine of sovereign immunity and governmental immunity." Again they cite no federal court opinion to support this one sentence argument.[8]

In our federal system, States are granted sovereign immunity in the Eleventh Amendment to the United States Constitution. This federal protection, however, does not extend to smaller units of government, such as cities and counties. *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local government. . . . only the States are the beneficiaries of the Eleventh Amendment"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("cities and counties do not enjoy Eleventh Amendment immunity").

These defendants do not, and cannot, claim they are acting as "arms of the state" in holding vacant land for purposes of resale and for use as a park. They therefore do not enjoy state sovereign immunity protections that would allow them to avoid defending their claimed land title in this action. *de la O v. Hous. Auth. of City of El Paso, Tex.*, 417 F.3d 495, 499 (5th Cir. 2005) ("HACEP, the sole defendant, is an entity comprised wholly of members appointed by the mayor of El Paso. As an arm of local government, not an instrument of the state, it is not entitled to sovereign immunity under the Eleventh Amendment").

[8] The Defendants do not claim or argue that the Utility is entitled to sovereign immunity, as it is not.

Nor would they qualify as "arms of the state" even if they had so claimed. In the Fifth Circuit, "[w]hen confronted with a governmental entity asserting Eleventh Amendment immunity as an arm of the state, [the court applies] the test established in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986)." *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318 (2001). As explained in *Williams*:

> A proper inquiry under *Clark* considers six factors; (1) whether the state statues and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property. Although none of the six factors is dispositive, some are more important than others; the second – the source of funds – is the most important, while the fifth and sixth---whether the agency has authority to enter into litigation and hold property – are less so. Rather than forming a precise test, [the *Clark*] factors help us balance the equities and determine as a general matter whether the suit is in reality a suit against the state itself.

Id. at 319 (internal citations and quotation marks omitted).

The City of El Paso is by definition a *local* government body, not a state agency with statewide jurisdiction. The City collects its own taxes, separate from the State. The Utility uses fees paid for water and sewer to support its operations. The City and Utility exercise complete local autonomy, and are concerned exclusively with local, as opposed to statewide, problems.[9] Both the City and the Utility have authority to sue and be sued in their own name, and both have

[9] The City of El Paso is a home rule municipality. El Paso, Texas, Code of Ordinances, Charter, Article I, Section 1.1. Under Texas law, as a home rule municipality, the City of El Paso is authorized (but not required) to organize a water utility system. TEX. LOCAL GOV'T CODE ANN. § 552.02 (West 1999). El Paso is also authorized to designate whether its water utility will have jural authority. *Darby v. Pasadena Police Dep't*, 939 F.2d 311, ("A Texas city is allowed to designate whether one of its own subdivisions can be sued as an independent entity."). The Charter of the City of El Paso reserves all the general powers of a city. *See* El Paso Charter, Section 1.1(reserving to the City of El Paso "all powers of local self-government which are or come to be conferred upon constitutional home rule cities in the State of Texas, and will exercise these powers as a municipal corporation, subject to the Constitution and laws of the state of Texas").

the right to hold and use property. If the City's claimed title to the land at issue is determined to be invalid, the consequences of such a ruling would impact only the City, and not the State. Neither the City nor the Utility are arms of the State for purposes of Eleventh Amendment sovereign Immunity.

Even under Texas State law the holding of property for resale or a park is a proprietary function that does not qualify the City for sovereign immunity:

> [S]overeign immunity does not imbue a city with derivative immunity when it performs proprietary functions. This is true whether a city commits a tort or breaches a contract, so long as in each situation the city acts of its own volition for its own benefit and not as a branch of the state. We therefore hold that the common-law distinction between governmental and proprietary acts—known as the proprietary-governmental dichotomy—applies in the contract-claims context just as it does in the tort-claims context.

Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427, 439 (Tex. 2016), *reh'g denied* (June 3, 2016).

This exact issue, with these exact Defendants as parties, was decided against the City by the Texas State Court in *City of El Paso v. Morales,* No. 08-02-00484-CV, 2004 WL 1859912, at *5 (Tex. App. Aug. 20, 2004). In ruling against the City of El Paso's claim to sovereign immunity, the *Morales* Court stated:

> Sovereign immunity protects the State of Texas, its agencies, and its officials from being sued absent legislative consent. . . . A municipality, such as the City of El Paso, is immune from liability for its governmental functions unless that immunity is specifically waived. *City of El Paso v. Hernandez*, 16 S.W.3d 409, 414 (Tex.App.-El Paso 2000, pet. denied). A Texas municipal government is only immune for its governmental functions; it has no immunity for any proprietary functions. *Williams v. City of Midland*, 932 S.W.2d 679, 682 (Tex.App.-El Paso 1996, no writ). When a municipality commits a tort while engaged in proprietary functions, it is liable to the same extent as a private entity or individual. *Texas River Barges v. City of San Antonio,* 21 S.W.3d 347, 356 (Tex.App.-San Antonio 2000, pet. denied). Under Section 101.0215 of the Texas Tort Claims Act, certain municipal functions are defined as governmental and others as proprietary. *See* Tex.Civ.Prac. & Rem.Code Ann. § 101.0215 (Vernon Supp.2004). The Texas legislature has defined governmental functions as "those functions that are enjoined

> on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public...." Tex.Civ.Prac. & Rem.Code Ann. § 101.0215(a). Proprietary functions are "those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality...." Tex.Civ.Prac. & Rem.Code Ann. § 101.0215(b); *see also City of Gladewater v. Pike*, 727 S.W.2d 514, 519 (Tex.1987)(proprietary function is one performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the city, rather than for use by the general public).

Because neither of the Defendants is entitled to Eleventh Amendment immunity, they are subject to suit in federal court, and their motion to dismiss should be denied.

CONCLUSION

Defendants' Motion to Dismiss for Failure to State a Claim under F.R. Civ. P. 12(b)(6) should be denied.

December 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 19, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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