



New Mexico Court of Appeals Split Opinion Rules Tribal Sovereign Immunity Does Not Apply in Action to Declare Road Status on Tribal Fee Land

In a 2-1 opinion, the New Mexico Court of Appeals in *Hamaatsa, Inc. v. Pueblo of San Felipe*, 2013-NMCA-___, No. 31,297 (July 23, 2013), took a very narrow view of tribal sovereign immunity and concluded equitable considerations of a non-tribal entity's ability to seek redress in state court for a dispute with the Pueblo of San Felipe ("Pueblo") outweighed the Pueblo's sovereign interest in freedom from being subjected to the judicial process.

Case Background: Hamaatsa owns property in northern New Mexico that it accesses by a road that was a BLM road since at least 1906, and has been a public road since at least 1935. In 2001, the Bureau of Land Management ("BLM") conveyed property over which the road runs to the Pueblo in fee simple. While the BLM initially reserved an easement for use of the road for public purposes, in 2002 the BLM quitclaimed its interests in the road to the Pueblo. The Pueblo subsequently threatened to restrict Hamaatsa's use of the road. In response, Hamaatsa filed a lawsuit seeking a declaration that the road in question was a state public road and that the Pueblo cannot restrict Hamaatsa's use of the road. The Pueblo moved to dismiss for lack of subject matter jurisdiction based on the Pueblo's sovereign immunity from suit. Since this litigation has commenced, the Pueblo has withdrawn its application to take the property into trust.¹

The Majority Opinion: Sovereign Immunity Does Not Apply: The Court of Appeals construed the Pueblo's challenge to the court's jurisdiction by a motion to dismiss as the Pueblo's concession, for purposes of the motion, that Hamaatsa's allegations regarding the history and status of the road were true. The Court used the procedural posture of the case to avoid determining whether the case required the court to exercise *in personam* jurisdiction over the Pueblo, or *in rem* jurisdiction over the road crossing land owned by the Pueblo in fee. Because the Court equated the Pueblo's challenge to subject matter jurisdiction with the Pueblo's agreement that the road was a state road, the Court found "no basis for a sovereign immunity defense at this stage of the proceeding."²

Taking a narrow view of tribal sovereign immunity, the Court of Appeals faulted the Pueblo for not providing "evidence of any property or governance interests whatsoever in the road or that the road, concededly a state public road, would threaten or otherwise affect its sovereignty."³ The Court relied on Supreme Court cases involving tribal authority over non-members—which hold a tribe does not have regulatory or adjudicatory jurisdiction over, *inter alia*, state roads within the outer boundaries of a reservation—to equate the Pueblo's assertion of sovereign immunity with the Pueblo's attempt "to assert control over a state public road, yet to deprive Hamaatsa, or any other member of the public, any

¹ *Hamaatsa, Inc. v. Southwest Regional Director, Board of Indian Affairs*, 55 IBIA 132 (June 22, 2012).

² *Hamaatsa*, 2013-NMCA-___, ¶ 10.

³ *Id.* ¶ 11.



opportunity for legal recourse.”⁴ The Court found that the assertion of sovereign immunity in a motion to dismiss improper because it would prevent any person from invoking state court jurisdiction in a dispute with a tribe.⁵ The Court also relied on minority opinions of the United States Supreme Court that questioned the utility of sovereign immunity, apparently in an attempt to encourage the acceptance of a limited view of immunity.

The Dissent: *Tribal Sovereign Immunity Applies and Was Not Waived*: In his dissent, Judge Wechsler asserts that the majority improperly diminished tribal sovereign immunity in violation of the rule that tribal sovereign immunity can only be waived by a tribe or abrogated by Congress: there is no role for the State.⁶ He faulted the majority for relying on cases involving tribal authority over tribal land, *not* tribal immunity from suit in state court.⁷ He further objected to the consideration of equitable factors in a “pure jurisdictional question.”⁸ Finally, Judge Wechsler found the majority’s consideration of the timing of the motion to be irrelevant.⁹

Judge Wechsler then considered the merits of the motion to dismiss, and concluded that he would have reversed the district court’s denial of the motion. Construing Hamaatsa’s action as an *in rem* proceeding as to the road status,¹⁰ Judge Wechsler concluded that tribal sovereign immunity applied. “[A]n action essentially to declare a tribally owned property a public highway is in effect an action against the tribe.”¹¹ Judge Wechsler also rejected Hamaatsa’s argument that tribal sovereign immunity only applied to actions for monetary relief, rejecting the Fifth Circuit’s contrary rule.¹²

The Pueblo has 30 days from the entry of the order to file a writ of certiorari with the New Mexico Supreme Court. As of this writing, the Pueblo does not appear to have filed a writ of certiorari.

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⁴ *Id.* ¶¶ 14-15.

⁵ *Id.* ¶ 16.

⁶ *Id.* ¶¶ 26-27.

⁷ *Id.* ¶ 29.

⁸ *Id.* ¶ 30.

⁹ *Id.* ¶ 31.

¹⁰ *Id.* ¶ 35.

¹¹ *Id.* ¶ 44.

¹² *Id.* ¶ 52 (citing *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999)).