UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NORTHERN NEW MEXICANS PROTECTING LAND WATER AND RIGHTS, Plaintiff, v. UNITED STATES OF AMERICA; SALLY JEWELL, Secretary, U.S. Department of the Interior; KEVIN WASHBURN, Assistant Secretary, Bureau of Indian Affairs; WILLIAM WALKER, Regional Director, Bureau of Indian Affairs, Southwest Office; RAYMOND FRY, Superintendent, Northern Pueblo Agency, Federal Defendants.	)	Case No. 1:15-cv-00559-JB-LF

FEDERAL DEFENDANTS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM IN SUPPORT

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MOTION

Consistent with Federal Rules of Civil Procedure 12(b)(1) and 12(c), Federal Defendants hereby move to dismiss Plaintiff's June 30, 2015 "Complaint," ECF No. 1, in its entirety. The grounds for this Motion are set forth below. Plaintiff, through counsel of record, has been consulted and opposes this Motion.

INTRODUCTION

In this case, Plaintiff challenges a December 6, 2013 letter from the U.S. Department of the Interior, Bureau of Indian Affairs, Northern Pueblos Agency ("BIA") advising the County of Santa Fe that certain county roads are in "trespass by the County on tribal lands of the Pueblo of San Ildefonso." Compl. Ex. 1, ECF No. 1-2 at 1. Plaintiff seeks to quiet title against the United States in rights-of-way on these roads on Pueblo lands, alleging BIA's letter clouds Plaintiff's title and interferes with Plaintiff's members' access to their private property. Plaintiff's Complaint raises claims not only under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, but also alleges that the letter violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the Fifth Amendment Takings Clause of the U.S. Constitution, and the Treaty of Guadalupe Hidalgo, which Plaintiff also characterizes as an equal protection claim.

All of the claims in Plaintiff's Complaint are laden with jurisdictional flaws that cannot be remedied with an amended complaint, and therefore this case must be dismissed. Since Plaintiff's dispute involves a challenge to the United States' interests in real property, Supreme Court precedent dictates that the QTA provides the *exclusive* means by which Plaintiff can challenge BIA's December 6, 2013 letter, and thus Plaintiff's APA, constitutional, and Treaty claims are barred by the QTA's limits on the United States' waiver of sovereign immunity. *See Block v. North Dakota*, 461 U.S. 273, 286 (1983). In turn, Plaintiff's quiet title claim itself is barred because the QTA's waiver of sovereign immunity is limited to title claims that do not

involve "trust or restricted Indian lands," such as the lands of the Pueblo of San Ildefonso. *See* 28 U.S.C. § 2409a(a). These two issues alone render this Court without jurisdiction to hear any of the claims in Plaintiff's Complaint.

Even beyond these dispositive jurisdictional issues, the Court would lack jurisdiction based on other considerations. For instance, Plaintiff has failed to invoke the QTA's waiver of sovereign immunity by failing to plead with "particularity" its interests or the interests of the United States in the disputed properties, 28 U.S.C. § 2409a(d), and the Tenth Circuit has held that members of the public such as Plaintiff and its members are not proper plaintiffs in actions seeking to quiet title to allege public rights-of-way. *See, e.g., Sw. Four Wheel Drive Ass'n. v. Bureau of Land Mgmt.*, 363 F.3d 1069, 1071 (10th Cir. 2004). Plaintiff's takings claim appears to seek just compensation pursuant to the Tucker Act, 28 U.S.C. § 1491, which vests jurisdiction for such claims solely in the U.S. Court of Federal Claims. Plaintiff lacks associational standing because quieting title in the alleged rights-of-way or easements and seeking just compensation for the alleged taking of its members' properties requires the individual members to participate in the lawsuit. Finally, the Treaty of Guadalupe Hidalgo does not provide Plaintiff or its members with a cause of action, and Plaintiff has failed to allege a plausible equal protection claim.

For all of the foregoing reasons, as explained in more detail below, Plaintiff's claims are not properly before this Court. Therefore, Federal Defendants respectfully request that the Court grant this Motion and dismiss Plaintiff's case.

FACTUAL BACKGROUND

There is only one Plaintiff in this case, "Northern New Mexicans Protecting Land Water and Rights." Compl., ECF No. 1 at 1. Plaintiff alleges that it is "a duly registered 501(c)(3) nonprofit corporation whose members are property owners in New Mexico that are served by the

rights of way know [sic] as County Roads 84, 84A, 84B, 84C, 84D, and Sandy Way." *Id.* ¶ 1. The focus of Plaintiff's Complaint appears to be a December 6, 2013 letter from the U.S. Department of the Interior, Bureau of Indian Affairs, Northern Pueblos Agency ("BIA") to the County of Santa Fe in which BIA advises the County that "County Road 84 and side roads 84A, 84B, 84C, 84D and Sandy Way" are in trespass "by the County on tribal lands of the Pueblo of San Ildefonso." Compl. Ex. 1, ECF No. 1-2 at 1. The December 6, 2013 letter requests that Santa Fe County either "enter into good faith negotiations to settle the current trespass and enter into a new easement for rights-of-way" or "show cause why the County's failure to pursue valid easements for the county roads should not be turned over to the U.S. Department of Justice for action against the County." *Id.* at 2.

Plaintiff's Complaint raises four claims: 1) a stand-alone claim under the APA alleging that BIA has acted "[a]rbitrarily and [c]apriciously" in "derogation" of "Plaintiff's statutorily granted public right-of-way easement," Complaint, ECF No. 1 at 5 and ¶¶ 24-37; 2) a quiet title claim asking the Court to "quiet title to Plaintiff's vested rights-of-way property rights for ingress and egress to their [sic] fee title property as against Defendants," *id.* ¶ 44 and ¶¶ 38-46; 3) a constitutional taking claim alleging that Defendants have violated the Fifth Amendment of the U.S. Constitution, *id.* ¶¶ 47-53; and 4) a constitutional equal protection claim arising out of an alleged violation of the Treaty of Guadalupe Hidalgo, *id.* ¶¶ 54-61. For relief, Plaintiff seeks declarations that "the public holds the previously described rights-of-way as a vested property right under the Act of July 26, 1866, 14 Stat. 253" and that Federal Defendants' "interference" with "Plaintiff's vested access rights" is arbitrary and capricious and violates the "5th Amendment and Due Process Clause" and "the rights preserved to Plaintiff's members by the Treaty of Guadalupe Hidalgo." *Id.* at 10-11 ¶¶ 1, 2, 4, 5.

Beyond the attachment of BIA's December 6, 2013 letter to Santa Fe County regarding County Road 84 and its five side roads, Plaintiff's Complaint is devoid of any basic allegations that would provide a basis for Plaintiff's claims and requests for relief. For instance, Plaintiff alleges that BIA's letter -- the only possible "federal agency action" identified in the Complaint -- interferes with *Plaintiff's* access to *Plaintiff's* property, *see id.* ¶ 19 (alleging that BIA's letter "seek[s] to extinguish" the rights-of-way that "provide the sole means of access to *Plaintiff's* fee simple real property") (emphasis added); *see also id.* ¶¶ 20, 22, 32, 42, 44, 48, 49, 52, 53. But Plaintiff's Complaint fails to identify any real property that Plaintiff alleges it actually owns. And, while the Complaint also alleges that BIA's letter interferes with "Plaintiff's members [sic] private real property," *id.* at 2, the Complaint fails to identify a single such member, let alone what real property Plaintiff alleges that any member actually owns. Indeed, while BIA's letter states that the County Roads are in trespass "by the County *on tribal lands of the Pueblo of San Ildefonso*," ECF No. 1-2 at 1 (emphasis added), the Pueblo of San Ildefonso is not a named Defendant and is not even mentioned in the Complaint. The Complaint's single oblique reference to "tribal lands" is the only hint that Plaintiff's property dispute is actually first and foremost with the Pueblo, not the United States. Compl., ECF No. 1 ¶ 19.

STATUTORY BACKGROUND

I. THE QUIET TITLE ACT

The United States is immune from suit except when Congress explicitly waives sovereign immunity. *Block v. North Dakota*, 461 U.S. 273, 280 (1983).

> The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed[.]

Id. at 287. Accordingly, "[a] waiver of the Federal Government's sovereign immunity must be

unequivocally expressed in statutory text," and "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

With the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, Congress provided a limited waiver of sovereign immunity for actions to quiet title against the United States. Under the QTA, "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." *Id.* § 2409a(a). The QTA is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block*, 461 U.S. at 286 (footnote omitted). The QTA requires that a plaintiff's complaint "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d).

II. REVISED STATUTE 2477

In 1866, Congress provided for public access across unreserved public domain by granting rights-of-way for the construction of highways. Act of July 26, 1866, § 8, ch. 262, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932 ("[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."), *repealed by* Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579 § 706(a), 90 Stat. 2743, 2793. This 1866 Act, commonly referred to as "R.S. 2477," was self-executing in some states. In other words, an R.S. 2477 right-of-way could come into existence without formal action by public authorities whenever the public sufficiently indicated its intent to accept the grant by establishing a public highway across public lands. *See S. Utah Wilderness Alliance v. Bureau of*

Land Mgmt., 425 F.3d 735, 770 (10th Cir. 2005).

On October 21, 1976, Congress enacted FLPMA, which repealed R.S. 2477 but preserved "any valid" right-of-way "existing on the date of approval of this Act." Pub. L. No. 94-579, §§ 701(a), 706(a), 90 Stat. 2743, 2786, 2793 (1976); *see also S. Utah*, 425 F.3d at 741 ("In 1976 . . . Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation."). Accordingly, rights-of-way under R.S. 2477 that were perfected before the statute's repeal in 1976 and which have not lapsed remain valid today. State or local governments may file suits to quiet title against the United States if they can demonstrate that the grant of a right-of-way was accepted prior to the statute's repeal in 1976 or, where applicable, prior to the earlier withdrawal of the public land underlying the alleged right-of-way from the operation of R.S. 2477. However, because the QTA represents the exclusive means by which claimants may challenge the United States' title to real property, R.S. 2477 claims are barred if the claimant cannot satisfy the conditions to the waiver of sovereign immunity under the statute. *See, e.g.*, *Sw. Four Wheel Drive*, 363 F.3d at 1071 (holding that the plaintiff "cannot establish a claim under the Quiet Title Act [to a public right-of-way under R.S. 2477 across federal public lands] and thus it cannot bring suit against the United States").

STANDARD OF REVIEW

As Plaintiff concedes, *see* ECF No. 19 at 8, this is a "hybrid" case, with at least two claims that are cognizable, if at all, pursuant to the judicial review provisions of the APA, 5 U.S.C. §§ 701-706, and two claims that, if justiciable, would be subject to *de novo* review. In *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994), the Tenth Circuit held that "[r]eviews of agency action in the district court must be processed *as appeals*," and that "the

district court should govern itself by referring to the Federal Rules of Appellate Procedure." 42 F.3d at 1580; *see also WildEarth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314, 1323 (D.N.M. 2009) ("Pursuant to [*Olenhouse*], claims under the APA are treated as appeals and governed by reference to the Federal Rules of Appellate Procedure."). Nonetheless, the Tenth Circuit has recognized that the procedural devices for dismissing APA claims consistent with the Federal Rules of Civil Procedure are perfectly appropriate. *See, e.g., Kane Cnty. v. Salazar*, 562 F.3d 1077, 1086 (10th Cir. 2009) ("[N]othing in *Olenhouse* . . . precludes an APA-based complaint from being summarily dismissed pursuant to Federal Rule of Civil Procedure 12(b)."). Thus, both Plaintiff's APA and non-APA claims are appropriately subject to dismissal in this Motion, which is to be reviewed consistent with the principles for deciding motions under Federal Rule of Civil Procedure 12(b).

"A motion to dismiss for lack of subject matter jurisdiction can certainly be raised via a Rule 12(c) motion," and in deciding such a motion, "the court should apply the same standard as that applicable to a motion under Rule 12(b)(1)." *United States v. New Silver Palace Rest., Inc.*, 810 F. Supp. 440, 441 (E.D.N.Y. 1992) (citing 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1367, at 515-16 (1990)). Under the Federal Rules of Civil Procedure, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed for lack of subject matter jurisdiction if the action: "does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, s[ection] 2, [of the Constitution], or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute." *Baker v. Carr*, 369 U.S. 186, 198

(1962). Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." *Celli v. Shoell*, 40 F.3d 324, 327 (9th Cir. 1994) (citations omitted). "Mere conclusory allegations of jurisdiction are not enough; the party pleading jurisdiction 'must allege in his pleading the facts essential to show jurisdiction.'" *Id.* (quoting *Penteco Corp. Ltd. P'ship-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991)).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. In the first form, the movant asserts that the allegations in the complaint on their face fail to establish the court's subject matter jurisdiction. "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted). In the second form, the movant may present evidence challenging the factual allegations in the complaint "upon which subject matter jurisdiction depends." *Id.* at 1003 (citation omitted). "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations . . . [but] reference to evidence outside the pleading does not convert the motion to a Rule 56 motion." *Id.* (citations omitted).

Motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) may also challenge the sufficiency of the claims themselves, and such challenges are "treated in the same manner as a rule 12(b)(6) motion to dismiss." *Swepi, LP v. Mora Cnty., N.M.*, 81 F. Supp. 3d 1075, 1124 (D.N.M. 2015). Federal Rule of Civil Procedure 12(b)(6) allows parties to move to dismiss claims for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This rule authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S.

69, 73 (1984), and *Conley v. Gibson*, 355 U.S. 41 (1957)). "[A] plaintiff's obligation to provide the grounds of h[er] entitlement to relief requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). Complaints that are nothing more than "a formulaic recitation of the elements of a cause of action will not do." To pass muster, a plaintiff must therefore include "[f]actual allegations [specific] enough to raise a right to relief above the speculative level. These factual allegations must be sufficient to "nudge[] [her] claims across the line from conceivable to plausible." *Id.* at 570.

ARGUMENT

I. PLAINTIFF'S NON-QTA CLAIMS ARE BARRED BECAUSE THE QTA PROVIDES THE EXCLUSIVE REMEDY FOR CLAIMS CHALLENGING THE UNITED STATES' INTERESTS IN REAL PROPERTY

The centerpiece of Plaintiff's Complaint is its QTA claim, under which Plaintiff alleges that "[t]he Court should quiet title to Plaintiff's vested rights-of-way property rights for ingress and egress to their [sic] fee title property as against Defendants." Compl., ECF No. 1 ¶ 44. In addition to this express QTA claim seeking to quiet title to its alleged R.S. 2477 right-of-way, however, Plaintiff raises three additional claims, as well as additional requests for relief, that turn on resolution of the title dispute. For instance, the "First Cause of Action" -- Plaintiff's stand-alone APA claim -- alleges that BIA's December 6, 2013 letter is "arbitrary and capricious" because it failed "to recognize and grant Plaintiff's members access to its private property by way of Plaintiff's vested easement [in violation of R.S. 2477]." Compl., ECF No. 1 ¶¶ 32-33. This stand-alone APA claim depends, of course, on Plaintiff quieting title to its alleged R.S. 2477 right-of-way. Similarly, Plaintiff's "Third Cause of Action" and "Fourth Cause of Action" also turn on whether BIA's December 6, 2013 letter deprived Plaintiff (or its members) of its (or their) alleged right to use the County Roads to access (unidentified)

properties "in violation [of the Takings Clause of the] of the Fifth Amendment to the United States Constitution," Compl., ECF No. 1 ¶ 52, and "in violation [of the equal protection clause] of the United States Constitution and [the] Treaty [of Guadalupe Hidalgo]," *id.* ¶ 61.

These claims are so intertwined with Plaintiff's QTA claim that they cannot be decided in the absence of a resolution of the alleged title dispute. Under well-settled case law, the QTA establishes the exclusive remedy for claims challenging the United States' interests in real property. Thus, Plaintiff's non-QTA claims are barred and must be dismissed, along with Plaintiff's claims for relief falling outside the remedies afforded by the QTA.

The Supreme Court and the Tenth Circuit have expressly held that when a claim depends on quieting title against the United States, as all of Plaintiff's claims require here, the QTA provides the exclusive source of the Court's jurisdiction. In *Block v. North Dakota*, 461 U.S. 273 (1983), North Dakota sought to resolve a "dispute as to ownership of [a] riverbed" by bringing suit "against several federal officials." *Id.* at 277-78. "As the jurisdictional basis for its suit, North Dakota invoked 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201-2202 (declaratory judgment and further relief) and 5 U.S.C. §§ 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.)." *Id.* at 278.[1] North Dakota's original complaint did not mention the QTA, but the district court later required an amended complaint that set forth a QTA claim. *Id.*

The Supreme Court rejected North Dakota's reliance on statutory provisions beyond the

[1] In addition to the QTA, Plaintiff's Complaint here relies on many of these same provisions for alleging this Court's jurisdiction over Plaintiff's various claims and requests for relief that the Supreme Court reject in *Block*. *See* Compl., ECF No. 1 ¶ 6 ("This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty), the Quiet Title Act, 28 U.S.C. § 2409a, the Declaratory Judgment Act, 28 U.S.C. § 2201, and 28 U.S.C. § 2202 (injunctive relief)."); ¶ 8 ("This Court also has jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701.").

QTA as the basis for its claims, stating that regardless of how North Dakota crafted its pleading, its claims still sounded in quiet title and had to satisfy the requirements of the QTA: "We hold that Congress intended the QTA to provide the *exclusive means* by which adverse claimants could challenge the United States' title to real property." *Id.* at 286 (emphasis added); *see also id.* at 286 n.22 (stating that the QTA "expressly 'forbids the relief'" sought pursuant to the APA). As the Supreme Court noted, "[i]f North Dakota's position were correct, all of the carefully-crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." *Id.* at 284-85. Thus, the Supreme Court concluded, "North Dakota's action may proceed, if at all, only under the QTA." *Id.* at 292-93.

Similarly, in *United States v. Mottaz*, 476 U.S. 834 (1986), a plaintiff sought to avoid the requirements and limitations of the QTA by pleading her attempt to establish her interests in Indian allotments pursuant to various federal statutes (including 28 U.S.C. §§ 1331, 1346, 1353, and 2415) and the Fifth Amendment Due Process and Takings Clauses. *Id.* at 838. As in *Block*, the Supreme Court noted that the plaintiff "seeks to avoid the carefully crafted limitations of the Quiet Title Act by characterizing her suit as a claim for an allotment under the General Allotment Act of 1887." *Id.* at 844. Reiterating that the QTA provides the exclusive means for bringing cases that depend on the resolution of a dispute with the United States over a property interest, the Supreme Court stressed that allowing such claims to proceed without strict application of the requirements of the QTA "could also seriously disrupt ongoing federal programs," posing "precisely the threat to ongoing federal activities on the property that the Quiet Title Act was intended to avoid." *Id.* at 847. "In light of Congress' purposes in enacting the Quiet Title Act, we cannot conclude that Congress intended to permit persons in respondent's position to avoid that Act's strictures." *Id.* at 847-48. Accordingly, the Supreme Court held that

the plaintiff's General Allotment Act claim was barred. *Id.* at 836.

In *Rosette v. United States*, 141 F.3d 1394 (10th Cir. 1998), an owner to a surface estate questioned the United States' authority to regulate the geothermal resources under the estate and styled its complaint as one for "quiet title, ejectment, declaratory judgment and permanent injunction." *Id.* at 1395-96. The Tenth Circuit applied the Supreme Court's holding in *Block*, stating that "[i]nsofar as [the plaintiff's] current claims are all linked to the question of title, the Quiet Title Act provides the exclusive remedy." *Id.* at 1397. "Allowing [the plaintiff] to maintain a declaratory judgment action under these circumstances would undermine the policies set forth in *Block*." *Id.*

As in *Block*, *Mottaz*, and *Rosette*, all of Plaintiff's claims are linked to the question of whether Plaintiff holds title to rights-of-way across San Ildefonso Pueblo lands. The QTA provides Plaintiff with the exclusive remedy for its claims in this matter. As discussed below, Plaintiff has not met the requirements of the QTA for bringing its claim to quiet title to rights-of-way pursuant to R.S. 2477 or under any other theory, and Plaintiff cannot evade those requirements through derivative claims seeking to have this Court determine whether the BIA's December 6, 2013 letter: 1) is "arbitrary and capricious" under the APA because it failed to recognize Plaintiff's or its members' alleged rights-of-way under R.S. 2477 ("First Cause of Action"); 2) deprived Plaintiff (or its members) of their alleged rights to use these alleged R.S. 2477 rights-of-way to access (unidentified) properties in violation of the Fifth Amendment ("Third Cause of Action"); or 3) deprived Plaintiff (or its members) of their alleged rights to use these alleged R.S. 2477 rights-of-way in violation of the equal protection clause and the Treaty of Guadalupe Hidalgo ("Fourth Cause of Action"). Plaintiff's requests for relief based on these claims, as well as on the Declaratory Judgment Act or the Mandamus Act, are also barred in

accordance with *Block*. *See* Compl., ECF No. 1 at 10-11 ¶¶ 1, 2 (Declaratory Judgment Act portion), 3, 4, and 5.

To pursue its dispute with the United States over the R.S. 2477 rights-of-way or easements under any theory, Plaintiff must proceed, if at all, pursuant to the requirements and limitations on the United States' waiver of sovereign immunity in the QTA. All of Plaintiff's other claims and requests for relief -- as set forth above -- are barred and must be dismissed. *See, e.g.*, *Catron Cnty. v. United States*, 934 F. Supp. 2d 1298, 1308-09 (D.N.M. 2013) (holding that Catron County's claims for a declaratory judgment and a writ of mandamus were both linked to the question of title over an alleged R.S. 2477 right-of-way and were therefore barred because "the Quiet Title Act provides the exclusive remedy") (quoting *Rosette*, 141 F.3d at 1397);[2] *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1177-79 (E.D. Cal. 2007) (dismissing for lack of subject matter jurisdiction declaratory judgment and mandamus claims in an R.S. 2477 case, because such claims "can only be brought pursuant to the Quiet Title Act's narrow waiver of sovereign immunity").

II. PLAINTIFF'S QTA CLAIM DOES NOT SATISFY THE QTA'S WAIVER OF SOVEREIGN IMMUNITY

Plaintiff's "Second Cause of Action" seeks to "quiet title to Plaintiff's vested rights-of-way property rights for ingress and egress to their [sic] fee title property as against Defendants." Compl., ECF No. 1 ¶ 44.[3] Plaintiff alleges that the rights-of-way to which it seeks to quiet title

[2] The Tenth Circuit in *Kane County v. United States*, 772 F.3d 1205 (10th Cir. 2014), declined to follow a different part of the *Catron County* decision in which the *Catron County* court found that the absence of the alleged R.S. 2477 right-of-way in a published proposed wilderness area map triggered the QTA statute of limitations period. *See id.* at 1218-19.

[3] Although Plaintiff seeks to quiet title "as against Defendants," the QTA allows only the United States to be named as a defendant. *See* 28 U.S.C. § 2409a(a) ("The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights."). The four Department of the Interior officers named as Defendants in Plaintiff's

are on roads "commonly known as County Roads 84, 84A, 84B, 84C, [and] 84D, and Sandy Way road," and that these rights-of-way "were conferred pursuant to [R.S. 2477]" or that "Plaintiff has prescriptively acquired a corresponding non-possessory interest in land as an implied easement for ingress and egress to fee title property pursuant to *Superior Oil Co. v. United States*, 353 F.2d 34 (9th Cir. [1965])." *Id.* ¶¶ 40-42.

Pursuant to *Block*, "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286. Thus, Plaintiff's claim to quiet title is cognizable, if at all, only pursuant to the limited waiver of sovereign immunity in the QTA. Because Plaintiff has not and cannot satisfy all of the requirements and limitations of that waiver of sovereign immunity, Plaintiff's quiet title claim must be dismissed.

A. The QTA Expressly Precludes Quiet Title Claims Involving Trust Or Restricted Indian Lands

Plaintiff alleges that BIA's December 6, 2013 letter to Santa Fe County clouds Plaintiff's title in its alleged rights-of-way over County Roads 84, 84A, 84B, 84C, and 84D, and Sandy Way. That letter, however, expressly states that "[t]he County is in direct violation of the federal requirements governing the use of *Indian trust lands*," because "[n]o easement or Rights-of-way exist for County Road 84 and the side roads on *tribal trust land of the Pueblo of San Ildefonso*, [and] thus, the County is in trespass." Compl., Exh. 1, ECF No. 1-2 at 2 (emphasis added); *see also id.* at 1 (stating that because the County Roads are in trespass on the Pueblo, the County is "in violation of the federal requirements in the use of Indian trust land); *id.* at 3-5 (Geological Survey map and Google earth images showing the location of the roads on the "San Ildefonso

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Complaint, of course, do not claim any interest in the subject lands and alleged rights-of-way. In any event, the Supreme Court's first holding in *Block* was that quiet title actions against officers of the federal government (i.e., "officer's suits") were barred by the QTA's exclusive remedy against the United States. 461 U.S. at 285-86.

Indian Reservation").[4] While failing to even mention the Pueblo of San Ildefonso anywhere in its Complaint, Plaintiff does concede that its alleged rights-of-way are on Indian lands in a single oblique statement, alleging that BIA "has acted arbitrarily and capriciously, seeking to extinguish these public property rights/easements *that cross tribal land*." Compl., ECF No. 1 ¶ 19 (emphasis added). Because the sole interest claimed by the United States is in Indian trust or restricted lands on the Pueblo of San Ildefonso, Plaintiff's quiet title act claim is barred by the QTA.

The QTA expressly states that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). The Supreme Court explained in *Block* that this Indian lands limitation on the United States' waiver of sovereign immunity in the QTA was one of "the carefully-crafted provisions of the QTA [that Congress] deemed necessary for the protection of the national public interest," along with the 12-year statute of limitations and the United States' option of paying damages *in lieu* of being divested of the property, if it should lose a quiet title claim. 461 U.S. at 284-85. Thus, when Congress was considering the bill that became the QTA, "[t]he Executive Branch opposed the original [simple] version of [the bill] and proposed, in its stead, a more-elaborate bill . . . providing several 'appropriate safeguards for the protection of the public interest.'" *Id.* at 282-83 (quoting Hearing before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs on S. 216, S. 579, and S. 721, 92nd Cong., 1st Sess., p. 21 (1971) (S. Kashiwa, Assistant Attorney General)).

One of these safeguards for protecting the interests of the United States was the Indian

[4] In reviewing a motion to dismiss or for judgment on the pleadings, "[a] court may consider documents to which the complaint refers if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Pena v. Greffet*, No. CIV 12-0710 JB/KBM, 2015 WL 3860084, at *10 (D.N.M. June 17, 2015) (citing *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941-42 (10th Cir.2002)).

lands exception:

> This Executive proposal, made by the Justice Department, limited the waiver of sovereign immunity in several important respects. First, it excluded Indian lands from the scope of the waiver. The Executive branch felt that a waiver of immunity in this area would not be consistent with "specific commitments" it had made to the Indians through treaties and other agreements.

Block, 461 U.S. at 283. Like the 12-year statute of limitations provision, which the Supreme Court in *Block* found could serve to bar North Dakota's claim, *id.* at 287-93,[5] the Supreme Court emphasized the implications of the Indian lands exception: "If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory." *Id.* at 285. Thus, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the government's immunity." *Mottaz*, 476 U.S. at 843; *see also Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987) ("The ordinary reason[s] for enforcing sovereign immunity . . . are reinforced when Indian lands are in question.").

The Supreme Court recently reiterated that "[t]he QTA's authorization of suit 'does not apply to trust or restricted Indian lands.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012) (quoting 28 U.S.C. § 2409a(a)). "In the QTA, Congress made a judgment about how far to allow quiet title suits -- to a point, but no further. (The 'no further' includes . . . the 'Indian lands' exception . . .)." *Id.* at 2209. "As long as the United States has a 'colorable claim' to a property interest based on that property's status as trust or restricted Indian lands, the QTA renders the government immune from suit." *State of Alaska v. Babbitt*, 75 F.3d

[5] Following *Block*, Congress amended the QTA to include more lenient statute-of-limitations provisions for States seeking to quiet title against the United States. *See* 28 U.S.C. §§ 2409a(g)-(m).

449, 451-52 (9th Cir. 1996).

The only claim of interest by the United States that Plaintiff identifies as the basis for its alleged title dispute is BIA's December 6, 2013 letter, which in turn is based only the United States' interest in protecting the Indian trust lands of the Pueblo of San Ildefonso from Santa Fe County's trespass. *See* ECF No. 1-2 at 2-5. The Supreme Court has recognized that the Pueblos in New Mexico, while owning their lands in fee simple, are "subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs." *United States v. Sandoval*, 231 U.S. 28, 48 (1913). "The Indians of the pueblo[s of New Mexico] are wards of the United States, and hold their lands subject to the restriction that the same cannot be alienated in any wise without its consent." *United States v. Candelaria*, 271 U.S. 432, 443 (1926); *see also United States v. Thompson*, 708 F. Supp. 1206, 1209 (D.N.M. 1989) *aff'd*, 941 F.2d 1074 (10th Cir. 1991) (stating that "[i]t was not until 1926 that the Supreme Court expressly held that the Nonintercourse Act applied to the Pueblo Indians") (citing *Candelaria*, 271 U.S. at 441-42). "The Indian Nonintercourse Act, 25 U.S.C. § 177, . . . acknowledges and guarantees the Indian tribes' right of possession [of Indian lands], . . . and imposes on the federal government a fiduciary duty to protect the lands covered by the Act," . . . and Congress extended the Nonintercourse Act to the Pueblos in 1851." *U.S. for & on Behalf of Santa Ana Indian Pueblo v. Univ. of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984) (citations omitted); *see also id.* ("Section 17 of the Pueblo Lands Act reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act.") (citing Ch. 331, § 1, 43 Stat. 636, 641-42).

In accordance with this law, the Pueblo of San Ildefonso (along with the other Pueblos in New Mexico) is a tribal entity for which the United States recognizes its trust responsibility. 46 Fed. Reg. 35360, 35362 (July 8, 1981). Because Plaintiff's QTA claim can plausibly be read only to seek to quiet title against the United States' interest in "trust or restricted Indian lands," *see* 28 U.S.C. § 2409a(a), Plaintiff's quiet title claim is barred on its face by the QTA's Indian lands exception to the United States' waiver of sovereign immunity, just as North Dakota's quiet title act claim in *Block* was subject to the statute-of-limitations exception.[6] Therefore, Plaintiff's quiet title claim must be dismissed for lack of jurisdiction.

B. Plaintiff's QTA Claim Is Barred Because Plaintiff's Complaint Fails To Plead With "Particularity" Its Interests And The Interests Of The United States

To satisfy the QTA's waiver of sovereign immunity, the QTA requires putative plaintiffs to plead their quiet title claims against the United States with greater specificity than do the Federal Rules of Civil Procedure. A complaint seeking to quiet title against the United States must clearly identify the plaintiff's property claims, as well as the United States' adverse claims in that same property. Specifically, the QTA provides:

> The complaint shall set forth *with particularity* the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

[6] Plaintiff's quiet title claim also implicates the QTA's 12-year statute of limitations, 28 U.S.C. § 2409a(g), since the dispute between the Pueblo of San Ildefonso and the County of Santa Fe over whether the county roads are in trespass is not new, but has been a widely-reported public dispute for decades, dating back to at least the 1960s. *See, e.g.*, Exhibit B hereto (newspaper reports from 1965 and 1999, indicating the Pueblo was advising the County that the county roads were in trespass); Exhibit C hereto (August 3, 1999 letter from the Pueblo to the County, advising the County that the Pueblo "has been working with Santa Fe County concerning trespass inside Pueblo Grant boundaries by County Roads" and that the Pueblo had "provided the County with copies of legal documents showing that Santa Fe County has no legal title for county roads inside the Pueblo of San Ildefonso grant boundaries").

28 U.S.C. § 2409a(d) (emphasis added). Because it is a waiver of sovereign immunity, the QTA must be strictly construed in favor of the United States. *See Mottaz*, 476 U.S. at 841. The specific pleading requirements of the QTA are therefore subject to the rule that "when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block*, 461 U.S. at 287.

Because they are a prerequisite to the United States' waiver of sovereign immunity, meeting the pleading requirements of 28 U.S.C. § 2409a(d) is necessary for establishing this Court's jurisdiction. *See, e.g.*, *Catron Cnty.*, 934 F. Supp. 2d at 1307 ("As a condition on the United States' waiver of sovereign immunity, a failure to satisfy these pleading requirements is a jurisdictional bar to a plaintiff's quiet title claim.") (citing *Mottaz*, 476 U.S. at 843); *Washington Cnty. v. United States*, 903 F. Supp. 40, 42 (D. Utah 1995) (holding that, by failing to plead its R.S. 2477 quiet title claims with particularity, the plaintiff county "has failed to comply with the conditions and requirements of 28 U.S.C. § 2409a by which the United States consents to suit in quiet title actions"). As a result, a complaint that is based upon conclusory allegations, rather than specific averments regarding the basis of a claim to quiet title, fails to establish a waiver of sovereign immunity and the court is without jurisdiction to hear the claim. If a federal court finds that it lacks subject matter jurisdiction, then it must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3).

In *Catron County*, the Court held that "Catron County falls short of satisfying the pleading requirements of the QTA" in an action to quiet title to an alleged R.S. 2477 right-of-way against the United States, because "Catron County's allegations as to the nature of its claimed right-of-way are undisputedly imprecise." 934 F. Supp. 2d at 1308. The *Catron County*

Court also based its holding on the fact that "the Complaint is devoid of any allegations identifying which entity held title to the alleged right-of-way pursuant to R.S. 2477 prior to 1899, when the land was transferred to the federal government, or how title was subsequently transferred from that entity to Catron County, after the County came into existence and before the initiation of this action." *Id.* The Court rejected the County's argument that the County should be excused from the pleading requirements of the QTA because the United States purportedly knew what right-of-way was the subject of the County's quiet title action: "A plaintiff is not relieved of its obligation to plead its interests in property with precision, simply because the other parties may know the details of the property at issue." *Id.*; *see also Hazel Green Ranch, LLC v. U.S. Dep't of Interior*, No. 07-cv-414, 2010 WL 1342914, *6 (E.D. Cal. Apr. 5, 2010) ("It is of no moment that Plaintiffs claim to have met with Federal Defendants to discuss the roads. The complaint must stand on its own."), *aff'd*, 490 F.App'x 880 (9th Cir. 2012).

In *Washington County*, the Court dismissed several claims to alleged R.S. 2477 rights-of-way, in part, on the grounds that the complaint did not allege with particularity the interests claimed or the circumstances under which the interests were acquired. In that matter, the plaintiff county alleged that it was "'the owner of the highway rights-of-way shown' on the map attached to its complaint and that it 'acquired its rights-of-way through public use, by County construction and maintenance of the rights-of-way or both.'" 903 F. Supp. at 42. The *Washington County* Court agreed with the United States that the county's conclusory allegations did not identify "with particularity" any interest in real property, nor did they describe "the circumstances under which" any property interest was acquired. *Id.* Accordingly, the Court held that the county's failure to comply with the conditions and requirements of 28 U.S.C. § 2409a(d)

was an alternative basis for dismissing the county's quiet title claim. *Id.*

Likewise, in *Hazel Green Ranch*, the Court examined in detail a county's allegations seeking to quiet title in two alleged R.S. 2477 rights-of-way. 2010 WL 1342914 at *5-8. The *Hazel Green Ranch* Court found that the allegations in the county's complaint were inconsistent and vague with regard to the stretches of roads in which the county sought to quiet title--both in terms of length and in the endpoints for the claimed rights-of-way. *Id.* at *5-6. The Court, finding the county's complaint "on its face, confusing and contradictory," dismissed the quiet title claims "on the ground that the County has not provided a clear and consistent description of the claimed property interest(s)." *Id.* at *6.

The *Hazel Green Ranch* Court also dismissed the claims for the failure of the county to "specifically and unambiguously describe the nature of its assertion of ownership over the roads. *Id.* at *8. In examining the county's allegations in this regard, the Court found that allegations that the roads appeared on maps was inadequate because "authorizing, mapping or designating the roads does not, in and of itself, establish County ownership." *Id.* at *7. The complaint's apparent allegations that the roads were at one time State-owned, added to the confusion, because the complaint "does not specify whether [the county] claims that it has been the owner of the roads since that date [when the roads first came into existence] or how it acquired any claimed interest from the State of California." *Id.* The Court therefore found that the county's complaint had not alleged with adequate particularity how the county acquired its alleged interests in the R.S. 2477 rights-of-way, as required by 28 U.S.C. § 2409a(d).

Plaintiff's Complaint suffers from even greater deficiencies than the fatal defects that contributed to dismissal of the R.S. 2477 quiet title claims in *Catron County*, *Washington County*, and *Hazel Green Ranch*. Plaintiff's Complaint identifies its alleged rights-of-way only

as being on roads "commonly known as County Roads 84, 84A, 84B, 84C, [and] 84D, and Sandy Way road," Compl., ECF No. 1 ¶ 40, but wholly fails to allege with particularity the actual location of the alleged rights-of-way, their length, their course, or their widths. *See* Compl., ECF No. ¶ 20. Plaintiff alleges that the rights-of-way "provides [sic] direct access to the fee simple property of Plaintiff from State Highway 502, formerly State Route 4," *id.* ¶ 20, but there is no description whatsoever of the location of Plaintiff's alleged "fee simple property" this is purportedly served by these rights-of-way. Moreover, there is no explanation was to why Plaintiff *needs* access across *six* county roads for ingress and egress to this property, which would be but one of the elements that Plaintiff would be required to meet to establish it "has prescriptively acquired a corresponding non-possessory interest in land as an implied easement for ingress and egress to fee title property" as Plaintiff alleges in the alternative. *See* Compl., ECF No. 1 ¶ 42.

Indeed, to the extent that Plaintiff intends to allege that each of its members has "prescriptively acquired . . . an implied easement for ingress and egress to fee title property," *id.*, the Complaint would need to identify with particularity, *inter alia*, each member's fee title property; how, when, and from whom it was acquired; and the precise route that each member needs to access each property. An implied easement by necessity is created when: "(1) the title to two parcels of land was held by a single owner; (2) the unity of title was severed by a conveyance of one of the parcels; and (3) at the time of severance, the easement was necessary for the owner of the severed parcel to use his property." *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1266 (9th Cir. 2006). Plaintiff's Complaint contains none of this information, let alone how an implied easement by necessity could be created over the sovereign lands of the Pueblo of San Ildefonso. Plaintiff's claim for implied easements of necessity falls far short of

the requirements of 28 U.S.C. § 2409a(d).[7]

Plaintiff's Complaint even lacks basic information as to how it acquired a cognizable interest in the alleged R.S. 2477 rights-of-way. Plaintiff offers only the conclusory allegations that "[t]he rights-of-way easements were created and exist per [R.S. 2477]" and that "[t]he public County Roads in question were established prior to 1900 across lands that, at the time, were within the territory of the United States and otherwise unreserved." Compl., ECF No. 1 ¶¶ 14, 16. But parroting the language of R.S. 2477, and vaguely alleging that the County Roads were established sometime prior to 1900, falls far short of alleging with particularity "the circumstances under which [each alleged right-of-way] was acquired." *See* 28 U.S.C. § 2409a(d).[8] Plaintiff's Complaint is even internally contradictory as to who holds the alleged rights-of-way, alleging at one point that the "same roads have since [prior to 1900] been regarded as public rights-of-way owned by the State of Mexico [sic]," Compl., ECF No. 1 ¶ 17; at another point that the alleged rights-of-way are "already possessed by the County," *id.* ¶ 23; at another point alleging the rights-of-way are "Plaintiff's vested easement," *id.* ¶ 32; at another point alleging that "Plaintiff's *members* have a vested right of ingress and egress to their private property over the rights-of-way for which the County of Santa Fe holds title," *id.* at ¶ 39 (emphasis added); and finally alleging that "the public holds the previously described rights-of-

[7] The magnitude of Plaintiff's pleading deficiency in this regard is evident from Plaintiff's (untimely) November 4, 2015 "Initial Disclosures," in which Plaintiff provides a list of some 338 members, asserting that "[e]ach of these members have [sic] knowledge regarding their property ownership, deed information, ingress and egress to their property, current and historic uses of roads 84, 84A, 84B, 84C, 84D and Sandy Way." Exhibit A hereto at 1. To raise a claim under the QTA to quiet title against the United States for implied easement, Plaintiff was -- at a minimum -- required to plead the particulars of this information as to each member. 28 U.S.C. § 2409a(d).

[8] These vague and conclusory allegations are even insufficient under the more lenient pleading requirements of the Federal Rules of Civil Procedure. *See, e.g.*, *Pena*, 2015 WL 3860084, at *9 ("[A] plaintiff's obligation to set forth the grounds of his or her entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

way as a vested property right under [R.S. 2477]," *id.* at 11 ¶ 2. While it is conceivable for more than one party to hold a right-of-way or easement interest over the same route, Plaintiff's recitation of who holds the alleged rights-of-way is confused, with no particular allegations as to how each of those parties acquired their interests, thereby failing to meet the requirements of 28 U.S.C. § 2409a(d).

Nor does Plaintiff's Complaint make any effort to identify "the right, title, or interest claimed by the United States." *See* 28 U.S.C. § 2409a(d). While proffering some largely inaccurate allegations about BIA's December 6, 2013 letter, and attaching the letter as an exhibit to the Complaint, Plaintiff fails to set forth any allegations in the Complaint identifying that the interest claimed by United States is actually that the County Roads are in trespass (by the County) on Indian trust lands owned by the Pueblo of San Ildefonso. *See* ECF No. 1-2 at 1-5. Plaintiff has thus failed to meet this requirement of 28 U.S.C. § 2409a(d) as well.

Plaintiff has failed to plead its quiet title claim with the particularity required to invoke the QTA's waiver of sovereign immunity, both with respect to the nature of Plaintiff's claims in the alleged rights-of-way and the circumstances under which Plaintiff, or any other party, acquired those rights of way. Plaintiff's vague and conclusory Complaint deprives the United States--and the Court--of their right to know the precise contours of Plaintiff's claim, and therefore this Court is without jurisdiction to hear it. *See Sw. Four Wheel Drive*, 363 F.3d at 1071 (holding that the plaintiff's inability to meet the requirements of 28 U.S.C. § 2409a(d) meant that "the federal courts lack jurisdiction over its suit"). Plaintiff's quiet title claim should be dismissed.

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C. Neither Plaintiff Nor Its Members Can Establish This Court's Jurisdiction To Pursue A Quiet Title Claim To Alleged R.S. 2477 Rights-Of-Way Against The United States

In addition to the QTA's bar on quiet title actions involving interests in Indian lands and Plaintiff's failure to plead its claims with particularity, Plaintiff's claim to R.S. 2477 rights-of-way under the QTA is barred for another reason: The Tenth Circuit has at least twice held that the only proper plaintiff in actions to quiet title to alleged public roads such as R.S. 2477 rights-of-way is the State or county in which the rights-of-way are located.

In *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978), the plaintiffs were private property owners that sought to use a road that the United States had built on its land to reach the Jemez Dam in New Mexico. *Id.* at 160. The plaintiffs, who alleged that the road was the only access to their property that they sought to develop, brought an action under the QTA, alleging that "they have a real property interest in the Jemez Dam Road as members of the public entitled to use public roads" pursuant to New Mexico law. *Id.* Citing the QTA's pleading with "particularity" requirement (then 28 U.S.C. § 2409a(c)), the Tenth Circuit in *Kinscherff* determined that the plaintiffs' "interest" in the public road "is not an interest in real property contemplated by [the QTA]," because if such an interest exists, "it is vested in the public generally." *Id.*

> Members of the public as such do not have a "title" in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road. * * * [New Mexico law] provides that rights of way vest in the State of New Mexico after a state highway has been open to the public for one year.

Id. at 160-61. The *Kinscherff* Court thus held that "the 'interest' plaintiff seek to assert as part of the public is not of such a nature to enable them to bring a suit to quiet title." *Id.* at 161.

In *Southwest Four Wheel Drive Ass'n v. Bureau of Land Management*, 271 F. Supp. 2d

1308 (D.N.M. 2003), the lead plaintiff was, as here, a New Mexico non-profit organization that brought a quiet title claim in alleged R.S. 2477 rights-of-way against the United States on behalf of its members. *Id.* at 1309-10. The plaintiffs alleged that "R.S. 2477 offered to the public a grant of public lands as public roads or highways, upon acceptance by the public in New Mexico by use of such lands as roads prior to October 21, 1976." *Id.* at 1313. The district court (Judge Hansen) dismissed the plaintiffs' R.S. 2477 claims pursuant to the QTA's statute of limitations. *Id.* at 1314.[9] The plaintiffs appealed.

On appeal, the Tenth Circuit affirmed, but on different grounds. In *Southwest Four Wheel Drive Ass'n v. Bureau of Land Management*, 363 F.3d 1069 (10th Cir. 2004), the Tenth Circuit again relied on the QTA's "particularity" requirement, finding that because the plaintiffs' claim to quiet title in R.S. 2477 rights-of-way was "indistinguishable from the one denied in *Kinscherff*, that case disposes of [the plaintiffs'] appeal." *Id.* at 1071. "We held in [*Kinscherff*] that '[m]embers of the public . . . do not have a "title" in public roads,' and therefore cannot meet the requirements of section 2409a(d)." *Id.* (quoting *Kinscherff*, 586 F.2d at 160). Thus, since the plaintiffs were not the proper party to bring an action to quiet title to alleged R.S. 2477 rights-of-way, they "cannot establish a claim under the [QTA]," and thus "cannot bring suit against the United States." *Id.* "Because the [QTA] is the exclusive means for challenging the United States' title to real property [pursuant to *Block*], if [the plaintiffs] cannot state a claim within the terms of the [QTA's] provisions, the federal courts lack jurisdiction over [the] suit." *Id.* (citing *Block*, 461 U.S. at 286).

As in *Kinscherff* and *Southwest Four Wheel Drive*, this Court lacks jurisdiction over Plaintiff's claim to quiet title to the alleged R.S. 2477 rights-of-way because neither it nor its

[9] Judge Hansen had previously dismissed the plaintiffs' claims under the APA and for declaratory and injunctive relief because the QTA provided the plaintiffs' "exclusive remedy." *Id.* at 1311.

members can be said to have "title" in those public rights-of-way, even if they exist. In its request for relief for its QTA claim, Plaintiff seeks a judgment "that the public holds the previously described rights-of-way as a vested property right under [R.S. 2477]." Compl., ECF No. 1 at 11 ¶ 2. Indeed, Plaintiff's allegations throughout its Complaint that either it or its members hold "vested public rights-of way" pursuant to R.S. 2477, *see, e.g.*, Compl., ECF No. 1 ¶ 49, are simply contrary to the holdings in *Kinscherff* and *Southwest Four Wheel Drive*.

In sum, this Court is without jurisdiction to hear Plaintiff's QTA claim, for each and all of the reasons addressed above. Therefore, this claim must be dismissed.

III. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S TAKINGS CLAIM

Plaintiff's "Third Cause of Action" is styled as a "Taking of Property without Compensation" claim. Compl., ECF No. 1 at 8. In this takings claim, Plaintiff alleges that:

> If Defendants' [sic] are authorized under the law to issue the December 6, 2013, Memorandum and deprive Plaintiff's members of access to [the] members' real property and cloud title to the extent of diminution of value, such action constitutes a taking of Plaintiff's property for which compensation is due within the meaning of the Fifth Amendment to the United States Constitution.

Id. ¶ 48. This allegation on its face makes little sense because if BIA's December 6, 2013 letter is "authorized under the law" -- i.e., correct in stating that Santa Fe County's "county roads" are in trespass on Indian trusts lands of the Pueblo of San Ildefonso -- then Plaintiff's members have no right to use them as "county roads" as a matter of law, not because of BIA's December 6, 2013 letter. Under these circumstances, there can be no plausible claim of a taking, because BIA has not taken private property for public use, but has only stated its opinion as to the legal status of the county roads. *See* ECF No. 1-2. And, of course, the December 6, 2013 letter states nothing with regard to Plaintiff's members' individual access rights, if any.

More importantly for purposes of the present Motion, the Court lacks jurisdiction to

adjudicate this claim. First, because this claim as framed in the Complaint turns on Plaintiff, or Plaintiff's members, quieting title to alleged rights-of-way to determine whether BIA's December 6, 2013 letter is correct in stating that the county roads are in trespass on lands held in trust by the United States for the Pueblo, the QTA provides the exclusive means for adjudicating the United States' claim of interest, pursuant to *Block*. *See* 461 U.S. at 286. Plaintiff's "Requested Relief" for this takings claim does not expressly seek damages, but only requests a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* Compl., ECF No. 1 at 11 ¶ 4. Again, as the Tenth Circuit stated in *Rosette*, "[a]llowing [the plaintiff] to maintain a declaratory judgment action under these circumstances [a non-QTA claim linked to the question of title] would undermine the policies set forth in *Block*." 141 F.3d at 1397. Thus, as pled in the Complaint, Plaintiff's takings claim is barred and must be dismissed.[10]

Second, although Plaintiff's takings claim does not expressly seek damages, the introductory paragraph of Plaintiff's Complaint does allege that Plaintiff "petition[s] this Honorable Court . . . for just compensation resulting from the taking of property within the

[10] Plaintiff's "Third Cause of Action" and accompanying request for relief also contain oblique references to a "due process" violation. *See* Compl., ECF No. 1 ¶ 50 and at 11 ¶ 4. Any due process claim must be dismissed because the Complaint fails to allege how BIA's December 6, 2013 letter violates due process or what process was due, and conclusory allegations do not establish a cause of action. *See, e.g.*, *See, e.g.*, *Pena*, 2015 WL 3860084, at *9 ("[A] plaintiff's obligation to set forth the grounds of his or her entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Also, a due process claim is not available as a substitute for a taking claims. *See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Protection*, 560 US. 702, 721 (2010) (four-Justice opinion) ("The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done."). Finally, a due process challenge seeking to set aside an agency action constitutes a claim under the APA. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1232-33 (D.N.M. 2014) (noting that federal courts review constitutional due process claims against federal agencies "under the framework set forth in the APA") (quoting *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1085 (10th Cir. 2006)). Thus, even if Plaintiff had adequately raised a due process claim, that claim would be barred under *Block* as an APA claim implicating a quiet title issue.

meaning of the just compensation clause [Takings Clause] of the Fifth Amendment to the United States Constitution." Compl., ECF No. 1 at 1. The Fifth Amendment Takings Clause does not prohibit the government from taking private property for public use; rather it conditions the "exercise of that power" on "secur[ing] *compensation*" for an "otherwise proper interference" that amounts to a taking. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314-15 (1987). And, although Plaintiff does not specify the amount of "just compensation" it or its members are entitled to for the alleged takings, the Complaint does cite the Tucker Act, 28 U.S.C. § 1491, as a basis for this Court's jurisdiction. *See id.* ¶ 9 ("This Court has jurisdiction of this case under 28 U.S.C. § 1491 (the Tucker Act) . . . ."). The Tucker Act, 28 U.S.C. § 1491, however, does not give jurisdiction to federal district courts, but only to the Court of Federal Claims. *See* 28 U.S.C. § 1491 ("The United States Court of Federal Claims shall have jurisdiction . . . ."). [11]

"The Tucker Act 'vests exclusive jurisdiction with the Court of Federal Claims for claims against the United States founded upon the Constitution, Acts of Congress, executive regulations, or contracts and seeking amounts greater than $10,000.'" *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009) (quoting *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir. 1997)). The $10,000 claim threshold is based on "The Little Tucker Act," 28 U.S.C. § 1346, which "grants concurrent jurisdiction [with the Court of Federal Claims] to the United States District Court in cases where the amount in controversy is less than $10,000." *Cortez v. E.E.O.C.*, 585 F. Supp. 2d 1273, 1292 (D.N.M. 2007) (Browning, J.) (citing 28 U.S.C.§ 1346(a)(2)). Plaintiff, however, claims jurisdiction only under the Tucker Act, 28 U.S.C. § 1491, and neither cites nor invokes the Little Tucker Act, 28

[11] The QTA states that it does not "apply or affect actions which may be or could have been brought under section[] . . . 1491 . . .of this title." 28 U.S.C. § 2409a(a).

U.S.C. § 1346, indicating that Plaintiff is seeking in excess of $10,000 in just compensation.

Moreover, Plaintiff alleges that Federal Defendants' actions have "*deprived* Plaintiff's members of the value of their property interests," and that "Plaintiff is deprived of *any* financial interest associated with member property interests." Compl., ECF No. 1 at 2 and ¶ 49 (emphases added). The Court may presume that Plaintiff's members' properties may be valued at more than $10,000, therefore vesting exclusive jurisdiction for Plaintiff's takings claim in the Court of Federal Claims. Indeed, "a plaintiff attempting to invoke the subject matter of the federal district courts bears the burden to establish his claim does not exceed the $10,000.00 jurisdictional limit established by [the Little Tucker Act]." *Cortez*, 585 F. Supp. 2d at 1292. Because Plaintiff has not met this burden, this Court is without jurisdiction to hear Plaintiff's takings claim, and that claim must be dismissed. *See id.* (holding that because "Cortez has made no effort to show he is bringing a claim under the Little Tucker Act," his claim for an unconstitutional taking of private property "is dismissed").

IV. PLAINTIFF LACKS STANDING

Whether a party has standing under Article III of the U.S. Constitution is a "threshold jurisdictional question" that a court must decide before it may consider the merits. *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 102 (1998). A party's standing to sue "constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Id.* at 103-04. In order to demonstrate standing under Article III, a party must establish, at an "irreducible constitutional minimum" three requirements:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to

> be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

As an association, Plaintiff must either satisfy this standing test with respect to its own harm, or satisfy the Supreme Court's three-part test governing associational standing. *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1021 (10th Cir. 1992). The Complaint does not allege that Plaintiff itself suffered harm, but only alleges harm to Plaintiff's members. *See, e.g.*, Compl., ECF No. 1 ¶¶ 34-36.[12] To have standing to sue on behalf of its members, Plaintiff must show that "(i) [its] members have standing in their own right; (ii) the interests at stake are relevant to the organization's purpose; and (iii) neither the claim

[12] In the context of Fifth Amendment takings claims, the question of standing frequently turns on the first requirement of the *Lujan* standing test. "In order to establish the first requirement for standing for a takings claim--an injury to a legally protected property interest--plaintiff must point to 'a property interest for purposes of the Fifth Amendment.'" *Normandy Apartments, Ltd. v. United States*, 116 Fed. Cl. 431, 438 (2014) (quoting *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004)). Fifth Amendment takings jurisprudence on this requirement is clear. "It is well established that 'only persons with a valid property interest at the time of the taking are entitled to compensation.'" *CRV Enters. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). Thus, "[i]f plaintiff does not own the requisite property interest it claims was taken, it does not have standing, and therefore the court would lack jurisdiction." *Normandy Apartments*, 116 Fed. Cl. at 438. Here, some of the allegations in Plaintiff's Complaint appear to suggest that Plaintiff owns property served by the alleged rights-of-way. *See e.g.*, Compl., ECF No. 1 ¶ 19 (alleging that the rights-of-way "provide the sole means of access to Plaintiff's fee simple real property"). These allegations, however, appear to be a result of sloppy drafting, as Plaintiff alleges it is "a duly registered 501(c)(3) nonprofit corporation *whose members* are property owners in New Mexico that are served by the rights of way," *id.* ¶ 1 (emphasis added), and nowhere does the Complaint identify, even remotely, any particular property owned by Plaintiff itself. Because the Complaint fails to identify any property actually owned by Plaintiff, Plaintiff does not have standing in its own right to bring the claims in the Complaint. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, No. CIV 12-0069 JB/KBM, 2015 WL 6389741, at *18 (D.N.M. Sept. 30, 2015) ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record.") (quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)).

asserted, nor the relief requested, requires the individual members to participate in the lawsuit." *Jarita Mesa*, 2015 WL 6389741, at *37 (citing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000), and *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Plaintiff's Complaint contains little to no factual support for each of these prongs, failing, for instance, to include any allegations identifying even a single member or a single property owned by a member. *Cf. Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 199-200 (D.C. Cir. 2011) (stating that it is "not enough to aver that unidentified members have been injured;" association must specifically identify at least one member and explain his or her alleged harm). With respect to the first and second prongs, Federal Defendants assume for purposes of this Motion that Plaintiff could cure the defects in the current Complaint by amending to include the necessary information. With respect to the third prong, however, Plaintiff cannot show associational standing on at least two of its claims for relief, Plaintiff's "Second Cause of Action" (Quiet Title) and "Third Cause of Action" (Takings without Just Compensation).

The Tenth Circuit has recognized that an association normally lacks standing to pursue damages claims on behalf of its members. *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1098 n.5 (10th Cir. 2001). For this reason, as many courts have recognized, an association lacks standing to bring a takings claim for "just compensation." *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 849-50 (9th Cir. 2001) ("Because the appropriate relief--determining what, if any, just compensation is due to the owner of the property taken--necessarily requires the participation of the individual members, Washington Legal Foundation does not have representational standing to pursue a Fifth Amendment taking claim."), *aff'd on other grounds*, 538 U.S. 216 (2003); *accord Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993); *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning*

Agency, 365 F. Supp. 2d 1146, 1165 (D. Nev. 2005) (holding that "the Committee does not have associational standing to assert an as-applied takings claim on behalf of its members under the *ad hoc*, fact-based *Penn Central[Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978)] test," because "this type of taking claim must be raised by an individual homeowner under the facts of this case").

Plaintiff's remaining claims do not appear to seek damages for individual members. "This does not mean, however, that an association automatically satisfies the third prong of the *Hunt* test simply by requesting equitable relief rather than damages." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). "Although *Hunt*'s third prong represents a prudential rather than a constitutional requirement for standing, we see no reason to relax it where, in order for the organizations to succeed in the lawsuit, there must be participation by the members themselves." *Id.* (citation omitted). In *Kansas Health Care*, for example, the Tenth Circuit found that a request for injunctive relief could not pass the third prong of the *Hunt* test because the claims asserted would have required the participation of individual members. 958 F.2d at 1021-22.

So too here. Each member of the association supposedly having a right to access the disputed roads must demonstrate their individual right to a particular right-of-way or easement, which will be unique to each Plaintiff's property. The "pleading with particularity" requirement of the QTA, 28 U.S.C. § 2409a(d), requires specific "allegations identifying which entity held title to the alleged right-of-way . . ., when the land was transferred to the federal government, or how title was subsequently transferred from that entity to [plaintiff]." *Catron Cnty.*, 934 F. Supp. 2d at 1307-08. Litigating each of Plaintiff's members' claims to a right-of-way would require highly individualized allegations as well as proof on behalf of each claimant. Plaintiff

tacitly recognizes this by listing 338 of its members as witnesses in its initial disclosures, stating that "[e]ach of these members have [sic] knowledge regarding their property ownership, deed information, ingress and egress to their property, current and historic uses of roads 84, 84A, 84B, 84C, 84D and Sandy Way." Exhibit A at 1.

Moreover, if Plaintiff were to prevail on its quiet title claim, title would be quieted in the party with the right of ingress and egress. In this case, the only parties with those potential rights would be Plaintiff's members, not Plaintiff itself on behalf of its members. Finally, even if the quiet title claim was adverse to the United States, the QTA provides that "the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, *upon payment to the person determined to be entitled thereto* of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control." 28 U.S.C. § 2409a(b) (emphasis added).

Thus, as is the case with Plaintiff's Fifth Amendment "Just Compensation" claim, Plaintiff's quiet title claim against the United States involves the personal rights and interests of each of Plaintiff's members, necessitating the participation of each member in the lawsuit. Therefore, Plaintiff lacks associational standing and its claims should be dismissed on this alternative basis as well.

V. PLAINTIFF'S EQUAL PROTECTION ACT CLAIM IS NOT JUSTICIABLE

Plaintiff's "Fourth Cause of Action--Violation of Equal Protection under the Law," appears to be based on two different sources: (1) an equal protection guarantee allegedly found in articles VIII and IX of the Treaty of Guadalupe Hidalgo of 1848; and (2) the Equal Protection Clause of the U.S. Constitution. Compl., ECF No. 1 ¶¶ 56, 57, 60. As the Complaint does not contain factual support for a cause of action under either theory, the claim should be dismissed.

A. The Treaty Of Guadalupe Hidalgo Does Not Afford Plaintiff A Private Cause Of Action

As a general rule, international treaties do not create rights that are privately enforceable in the federal courts. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) ("Only if the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, will they have the force and effect of a legislative enactment.") (alterations omitted); *accord United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980).

The rights recognized in the Treaty of Guadalupe Hidalgo are not self-executing, and the Treaty does not create a private cause of action. *see Barker v. Harvey*, 181 U.S. 481, 485-87 (1901) (holding that the provision that the United States would "respect the rights of private property in the ceded territory . . . belonged to the political department of the government" and required action by Congress to secure); *O'Donnell v. United States*, 91 F.2d 14, 39 (9th Cir. 1936) ("the provisions of the Treaty of Guadalupe Hidalgo, providing for the recognition of Mexican titles and interests, are not self-executing"), *rev'd on other grounds*, 303 U.S. 501 (1938);[13] *Chadwick v. Campbell*, 115 F.2d 401, 404 (10th Cir. 1940) ("the duty of providing the mode of securing [private property rights] and of fulfilling the obligations imposed upon the United States in protecting them under its treaty obligations belonged to Congress"); *cf. Vigil v. Hughes*, 509 F.App'x 796, 798 (10th Cir. 2013) (there is "no need to construe the Treaty of Guadalupe Hidalgo" in a quiet-title suit even if the property rights at issue first originated from

[13] In reversing, the Supreme Court nonetheless implicitly agreed with the Ninth Circuit's view of the Treaty of Guadalupe Hidalgo. *See O'Donnell*, 303 U.S. at 511 ("The obligations were political in character, to be discharged in such manner and upon such terms as the United States might deem expedient in conformity to its treaty obligations.").

the Treaty).

The text of the Treaty itself confirms this result. *Cf. Medellin*, 552 U.S. at 506 ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."). Contrary to the allegations in Plaintiff's Complaint, articles VIII and IX of the Treaty do not contain an explicit, self-executing guarantee of "equal protection under the laws." Compl., ECF No. 1 ¶ 57. Article VIII deals only with pre-existing property rights. Treaty of Guadalupe Hidalgo, 9 Stat. 922, art. VIII, ¶ 3. "[T]he treaty of Guadalupe Hidalgo protected all existing property rights, but neither created nor defined the rights." *L.A. Farming & Milling Co. v. City of L.A.*, 217 U.S. 217, 231 (1910).

Article IX, for its part, provides that Mexican citizens, if they choose, may elect to become United States citizens and thereby obtain all the rights of United States citizens. Treaty of Guadalupe Hidalgo, art. IX. In other words, the Treaty did not afford Mexican citizens *more* rights than United States citizens. "It merely guarantees to such Mexican owners equality in respect of such property with citizens of the United States owning similar property." *Chadwick*, 115 F.2d at 405. Thus, even if these provisions could vest plaintiff with an individual right of action, it would be no greater than or different from those under the U.S. Constitution. As this Court explained in *Swepi*, "to whatever extent the Treaty of Guadalupe Hidalgo provides" rights, "those rights cannot trump the Constitution." 81 F. Supp. 3d at 1172-73. Therefore, Plaintiff cannot establish a justiciable claim under the Treaty.

B. Plaintiff Does Not Allege The Facts Necessary To Plead An Equal Protection Claim Under The U.S. Constitution

"The Equal Protection Clause of the Fourteenth Amendment guarantees that 'no states shall . . . deny to any person within the jurisdiction to the equal protection of the laws.'" *Griego v. City of Albuquerque*, No. 13-cv-0929 JB/KBM, 2015 WL 1906087, at *25 (D.N.M. Apr. 11,

2015) (quoting U.S. Const. amend. XIV, § 1).[14] "'The Clause creates no substantive rights. Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.'" *Id.* (quoting *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) (unpublished)). "We subject governmental classifications to strict scrutiny under the Equal Protection Clause only if they target a suspect class or involve a fundamental right." *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). Otherwise, the action "need only be rationally related to a legitimate government purpose." *Id.*

In this case, Plaintiff has not pled any facts supporting an application of heightened scrutiny. Plaintiff alleges that it is an organization "whose members are individual private property owners with property rights conferred pursuant to the Treaty of Guadalupe Hidalgo." Compl., ECF No. 1 ¶ 12. The right to own property is not a fundamental right. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1580 (10th Cir. 1995) (rejecting the argument that "protection of private property is a fundamental right" on the grounds that "[e]conomic regulations--i.e., those burdening one's property rights--have traditionally been afforded only rational relation scrutiny under the Equal Protection Clause"); *Hager v. City of West Peoria*, 84 F.3d 865, 872 (7th Cir. 1996) ("Access to real property does not rise to the level of a fundamental right such that its denial merits heightened scrutiny."); *211 Eighth, LLC v. Town of Carbondale*, 922 F. Supp. 2d 1174, 1180-81 (D. Colo. 2013) (collecting cases).

Nor are property owners a suspect class. Suspect classes possess a "characteristic beyond [the plaintiff's] control," for example, "disabilities," "a history of unequal treatment," or "political powerlessness." *Save Palisade Fruitlands*, 279 F.3d at 1210. No facts in the

[14] Because this case involves actions by the federal government rather than a state, the Fifth Amendment governs here and not the Fourteenth. The difference is not material. "Although there is no Equal Protection Clause in the Fifth Amendment, the equal protection standards of the Fourteenth Amendment are incorporated into the Fifth Amendment's promise of due process." *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998).

Complaint support such a claim by Plaintiff or its members; in fact, such a claim would be entirely implausible. The Supreme Court has held that inequalities of wealth do not create a suspect class. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Owners of real property thus would not receive heightened protection on that basis. *E.g.*, *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111, 1119 (10th Cir. 1991) (property developers are not a suspect class); *Jones v. Wildgen*, 320 F. Supp. 2d 1116, 1130-31 (D. Kan.), *reconsideration denied in relevant part*, 349 F. Supp. 2d 1358, 1364-65 (D. Kan. 2004).

Plaintiff's claim is thus subject to rational basis review. But the Complaint does not pass muster under this standard. In equal protection cases where "the plaintiff challenges a government action that discriminates based on membership in a non-protected class," the Tenth Circuit has required plaintiffs to include in their pleadings "an allegation that a similarly situated person was treated differently." *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011). No such allegation is included in the Complaint. Moreover, "[u]nder a rational basis review, the party challenging a classification under the Equal Protection Clause normally has the burden 'to negative any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Swepi, LP*, 81 F. Supp. 3d at 1181. Because the Complaint does not, and cannot, allege that BIA lacked any rational basis to believe Santa Fe County was in trespass and to send a letter accordingly, it should be dismissed.

CONCLUSION

This Court lacks jurisdiction over each and every claim in Plaintiff's Complaint, and those jurisdictional defects cannot be cured with an amendment. Therefore, Federal Defendants respectfully request that the Court dismiss this case with prejudice.

Dated: November 10, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Fling on all counsel of record.

s/ Andrew A. Smith
Andrew A. Smith
U.S. DEPARTMENT OF JUSTICE