IN THE 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-KK

PLAINTIFF'S RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS AND/OR FOR JUDGMENT ON THE PLEADINGS

COMES NOW, Plaintiff Northern New Mexicans Protecting Land, Water and Rights, (hereafter "NNMPLWR"), by and through its counsel of record, Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq. and Dori E. Richards, Esq.) and in Response to Federal Defendants' Motion to Dismiss and/or for Judgment on the Pleadings, states the following:

INTRODUCTION

Defendant asserts that the Quiet Title Act is the "centerpiece" of Plaintiff's complaint. Doc. 22 at 9. Defendant is wrong in its theory, however. The QTA raises just one aspect of Plaintiff's many causes of action against Defendants.

Defendants state that Plaintiff's "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." Doc. 22 at 10. Plaintiff's theory is wrong on many fronts.

Foremost, it is the United States who created an "alleged" title dispute or cloud on title, by issuing a memorandum sanctioned by a federal official stating that Plaintiff's membership was in trespass due to such membership's use of County Roads 84, 84A, 84B, 84C, 84D and Sandy Way. Indeed, while creating this dispute over access to their property and harming each of Plaintiff's members, the United States failed to identify the property that it claims an interest in, only identifying such interest in relation to the named county road rights-of-way. While the named Government officials complain that Plaintiff does not identify with specificity the land to which they "seek to quiet title," Plaintiff is in a catch-twenty two. Without the deciding government official identifying exactly what land or right-of-way (by metes and bound description) it was claiming by its December 6, 2013, decision letter and the nature of its claims, Plaintiff is hard-pressed to identify the government's interest beyond using the same identification the BIA used. Further still, because of the government's ill-thought issuance of memorandum claiming title to roads impacting Plaintiff's membership properties and failing to include any specificity in its claims, title insurers have devalued member property values and refused title insurance. The cloud on Plaintiff membership's title stemming from the lack on ingress/egress has hindered the sales of property. Because of the ill-thought action of government officials, yet again acting to further the interests of one select group of citizens, the

United States has further marginalized the property rights of the Spanish land grant recipients holding property within the San Ildefonso grant.

Here, Plaintiff does not claim title to lands of the United States, Indian lands, nor land or rights-of-way ever vested in the United States. The United States on the other-hand claims an undisclosed interest in long-standing rights-of-way that were never held, managed or possessed by it or in which it had a previous interest.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE NOT BARRED.

A. Plaintiff's claims are not so intertwined as to provide exclusive remedy through the QTA.

Defendants argue that all claims brought by Plaintiff's are barred because under their theory the "QTA provides the exclusive remedy for claims challenging the United States interests in real property." Based on such argument, Defendant asserts and argues for the first time that *it actually has an interest* in property at issue in this lawsuit. To whit, Defendants by their arguments and in conjunction with the decision memorandum issued by Superintendent Frye, assert an interest in County Roads 84, 84a, 84b, 84c and Sandy Way. This is a far cry from statements previously made in this proceeding wherein the government argued it did not have an interest in the County Roads, but rather only voiced the Pueblo's assertions. See transcript of Hearing.

Thus, the Defendants now argue that since the United States has an actual interest in County Roads 84, 84a, 84b, 84c and Sandy Way, and such interest is asserted in the BIA's December 6, 2013, decision letter, Plaintiff is barred from bringing any non-QTA claims as the QTA provides the exclusive avenue to address the United States' interest in the identified country roads. In support of their theory, Defendants cite to *Block v. North Dakota*, 461 U.S.

273 (1983), *United States v. Mozzatt*, 476 U.S. 834 (1986), and *Rosette v. United States*, 141 F.3d 1394 (10th Cir. 1998), arguing that "when a claim depends on quieting title against the United State . . . the QTA provides the exclusive source of the Court's jurisdiction." Doc. 22 at 10, citing *Block v. North Dakota*, 461 U.S. 273, 277-78.

In making such reference the Defendants specifically argue that "all of Plaintiff's claims" are inextricably intertwined and depend on "quieting title against the United States." As such, they theorize that all non-QTA claims and are thus barred. Doc. 22 at 10. Federal Defendants are in error, however, because the causes of action brought by Plaintiff are not inextricably intertwined. Defendants provide no genuine discussion as to how the causes of action brought by Plaintiff are "inextricably intertwined" nor why such causes cannot stand alone. Rather, in conclusion after conclusion, Defendants merely and subjectively assert that all claims rely on quieting title, in a *res ipsa loquitor-esque* argument. Simply put, the Defendants' mere utterance of such statement does not make it so. The Defendants fail to present argument or law to support their theory that in the instant matter all causes are so intertwined with quieting title against the United States and in Plaintiff's name, that no other cause can stand. Defendants cannot meet this standard, because the QTA either does not provide the exclusive remedy in the pending matter or because the issue of title is not "intertwined" as Defendants allege and the independent actions may stand.

In *Block v. North Dakota*, the Supreme Court considered the State of North Dakota's claim to land that the United States viewed as "its own" consisting of the ownership of a disputed riverbed. In *Block*, the Court held that the State could not circumvent the QTA's *statute of limitations* by invoking other causes of action, among them the APA. *See id.* at 277–278, 286, n. 22, 103 S.Ct. 1811. The "crux" of such reasoning was that Congress had enacted the QTA to

give recourse to citizens asserting title to or the right of possession of lands also claimed by the United States, which right was lacking prior to passage of the QTA. *Id.,* at 282.

The decision in *Block* reflected the legislative purpose of Congress in enacting the QTA, to "provide the exclusive means by which adverse claimants could challenge the United States' title to real property" and thus an adverse claimant could not avoid the *jurisdictional requirements* of the QTA by citing other statutes and/or causes of action. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199, 2207, 183 L. Ed. 2d 211 (2012), citing *Id.,* at 286.

In *United States v. Mottaz,* 476 U.S. 834 (1986), the Supreme Court considered whether the QTA, versus the Tucker Act or General Allotment Act, governed the plaintiff's suit involving certain allotments of land held by the United States. In finding that the QTA was the applicable relevant statute, the Court quoted the plaintiff's own description of her suit: "At no time in this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case." *Id.,* at 842, 106 S.Ct. 2224 (quoting Brief for Respondent in *Mottaz,* O.T. 1985, No. 546, p. 3). Such fact, was found to bring the suit within the QTA's scope. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2207 (2012).

Notably, the Defendants here fail to resolve recent Supreme Court guidance regarding the QTA with the older holdings in *Block, Mozzatt* and *Rosette*. *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak ("Patchak"),* and subsequent guidance stemming therefrom, distinguishes the cases cited by Defendants for facts similar to this case. By its holding in *Patchak,* the Supreme Court distinguished the earlier cases cited by Defendants, and reaffirmed that the QTA is the "'exclusive means by which adverse claimants could challenge the United

States' title to real property'" and specifically defined "adverse claimants" as "plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's." *San Francisco Herring Ass'n v. United States Dep't of the Interior*, 2013 WL 6698860, at *6 (N.D. Cal. Dec. 19, 2013), citing *Id.*, 132 S.Ct. at 2207 ("What [the plaintiff] seeks is a declaration that she alone possesses valid title." So once again, we construed the QTA as addressing suits by adverse claimants.)

"The QTA authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a 'right, title, or interest' in real property that conflicts with a 'right, title, or interest' the United States claims." *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak ("Patchak"),* 132 S.Ct. at 2205 (2012) (*quoting* 28 U.S.C. § 2409a(d)). A party bringing a "quiet title action" may only do so if the action complies with the jurisdictional requirements of the QTA.

In *Patchak,* as they do in the pending action, Federal Defendants argued that Plaintiff's suit – brought by a non-profit association - qualified as a "quiet title action" insofar as it required the Court to "adjudicate" the United States' claim of title. Federal Defendants in *Patchak* argued that the Court could not reach a decision regarding title to waters or lands beneath because the non-profit (SFHA) could not fulfill one of the QTA's prerequisites, *i.e.* identifying with particularity the nature of the property interest "which *the plaintiff claims* in the real property." *San Francisco Herring Ass'n v. United States Dep't of the Interior*, 2013 WL 6698860, at *6 (N.D. Cal. Dec. 19, 2013), referencing Defendants' Reply/Opp. 28:28 (quoting U.S.C. § 2409a(d) (emphasis added by Defendants).

In *Patchak,* the Supreme Court adopted a contrary understanding of the QTA than as argued currently by Defendants. There, the Court found that suit was "not a quiet title action,

because although it contests the Secretary [of Interior's] title, it does not claim any competing interest in the [property at issue]." 132 S.Ct. at 2206. Therefore, "the QTA's limitations and requirements did not apply." *Id.* Under *Patchak,* an action does not become a "quiet title action" simply because the United States' ownership of property becomes an issue in the case. Rather, it becomes so when the plaintiff makes a claim of ownership to the property. *Patchak* reaffirmed that the QTA is the "'exclusive means by which adverse claimants could challenge the United States' title to real property'" but specifically defined "adverse claimants" as "plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's." 132 S.Ct. at 2207 (*quoting Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 283 (1983)). *San Francisco Herring Ass'n v. United States Dep't of the Interior*, 2013 WL 6698860, at *6 (N.D. Cal. Dec. 19, 2013) ("What [the plaintiff] seeks is a declaration that she alone possesses valid title." So once again, we construed the QTA as addressing suits by adverse claimants.); *see also Lonatro v. United States*, 714 F.3d 866, 872 (5th Cir. 2013)

As such, the Supreme Court in *Patchak* noted that a QTA action requires that a complaint "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property." 28 U.S.C. § 2409a(d). If, however, a Plaintiff does not assert such right or interest – as Patchak did not – "the statute cannot come into play." In support of its finding the Court held:

> Further, the QTA provides an option for the United States, if it loses the suit, to pay "just compensation," rather than return the property, to the "person determined to be entitled" to it. § 2409a(b). That provision makes perfect sense in a quiet title action: If the plaintiff is found to own the property, the Government can satisfy his claim through an award of money (while still retaining the land for its operations). But the provision makes no sense in a suit like this one, where Patchak does not assert a right to the property. If the United States loses the suit, an award of just compensation to the rightful owner (whoever and wherever he might be) could do nothing to satisfy Patchak's claim.[1]

[1] In reviewing the legislative history of the QTA, the Supreme Court cautioned that:

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. at 2206-07.

The Court in *Patchak* expressly warned that Defendants' construction of the QTA would bar all suits in which the United States' ownership of property becomes a collateral issue in the case. The Court in *Patchack* repeated "adverse claimants," meaning plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2207, 183 L. Ed. 2d 211 (2012), citing *Id.*, at 286. In the instant case, Plaintiff does not cite to other statutes in an effort to avoid the jurisdictional prerequisites such as the applicable statute of limitations of the QTA. Rather, such other causes of action are pled in addition to or in the alternative to a quiet title cause.

II. PLAINTIFF'S QTA CLAIM.

A. The QTA and "Indian Trust or Restricted Indian Lands."

Defendants posit that Plaintiff "alleges the 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." Doc. 22 at 14. This statement evinces a fundamental failure in Defendants' understanding of Plaintiff's claims and fundamental flaw in the arguments it makes in support of its motion for judgment on the pleadings. Plaintiff does not allege a cloud on *its* title to the BIA-identified rights-of-way. Rather, Plaintiff alleges that the arbitrary decision

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> The legislative history, for those who think it useful, further shows that the QTA addresses quiet title actions, as ordinarily conceived. The Senate Report states that the QTA aimed to alleviate the "[g]rave inequity" to private parties "excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs." S.Rep. No. 92–575, at 1. Similarly, the House Report notes that the history of quiet title actions "goes back to the Courts of England," and provided as examples "a plaintiff whose title to land was continually being subjected to litigation in the law courts," and "one who feared that an outstanding deed or other interest might cause a claim to be presented in the future." H.R.Rep. No. 92–1559, p. 6 (1972), 1972 U.S.C.C.A.N. 4547, 4551. From top to bottom, these reports show that Congress thought itself to be authorizing bread-and-butter quiet title actions, in which a plaintiff asserts a right, title, or interest of his own in disputed land.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. at 2207.

reached by the BIA in its December 6, 2013, decision letter has clouded title to Plaintiff's membership's individually held property which is accessed by the long-standing rights-of-way that BIA now alleges are in trespass. Here, Plaintiff seeks to protect the right of access to long-held properties owned by individual members, such property rights confirmed by Treaty and subsequent commission and court decisions. Plaintiff does so acting for the public benefit and to protect the interests of its membership.

Here, Defendants complain that "[t]he only claim of interest by the United Sates that Plaintiff identifies as the basis for its alleged title dispute is BIA's December 6, 2013, letter, which in turn is based only [sic] the United States' interest in protecting the Indian trust lands of the Pueblo of San Ildefonso from Santa Fe County trespass." Doc. 22 at 17. Defendant is correct that Plaintiffs members' troubles stem directly from the December 6, 2013, decision of the BIA determining that roads it identified therein sit in trespass. This lawsuit stems directly from that fateful action of the BIA.

Defendants seek dismissal of Plaintiff's QTA claim alleging that the Indian trust land exception to the QTA acts to limit the waiver of sovereign immunity in the QTA and thus, the action cannot stand. In making this argument, Defendants either assume or assert that the rights-of-way in question are indeed "Indian trust lands."

The QTA provides that:

> 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. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

28 U.S.C.A. § 2409a(a). Plaintiff is cognizant of the Indian trust land exception to the waiver of immunity contained in the QTA. *See generally Match–E–Be–Nash–She–Wish Band of*

Pottawatomi Indians v. Patchak ("Patchak"), 132 S. Ct. 2199 (2012) (*quoting* 28 U.S.C. § 2409a(d)(noting that, pursuant to the QTA provision at 28 U.S.C. § 2409a(a), a quiet title action is barred against the United States if it involves Indian lands).

Here, in seeking dismissal of the QTA based on the alleged Indian trust exception Defendants solely rely on their own statements and assertions, without actually presenting any evidence by which to determine the Indian land exception bars this particular cause of action. Indeed, Defendants do not demonstrate in any way that the roads that BIA identifies and which it asserts are in trespass on the San Ildefonso grant by the December 6, 2013, decision are demonstrably Indian trust lands. Instead, Defendants rest non-specific assertions of some interest and cites to cases that merely stand for the general principal of the existence of a trust responsibility towards Tribes.[2] *See* Doc. 22 at 15-16. Defendants fail to demonstrate any colorable claim that the community rights-of-way used by Plaintiff's members and maintained by the County of Santa Fe enjoy the "status as trust or restricted Indian lands" sufficient to bar the pending action if it were to proceed under the QTA.

The assertion is belied by findings of the Pueblo Lands Board, ruling that CR 84 and 84B was "excepted from ownership by San Ildefonso Pueblo."

> So far as known, no deed or other documentary evidence of title has been obtained from the Indians, but it appears from evidence submitted that this road or highway has been used by the public for more than fifty years, and the Board has determined

[2] Defendants cite to a 9th Circuit Court of Appeals decision, *State of Alaska v. Babbitt*, 75 F.3d 449 (1996) to argue *if* it 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." At issue in State of Alaska, however, was the property rights of an unpatented allotment, not simply a community right of way running through the allotment. *State of Alaska v. Babbitt*, 75 F.3d 449, 452 (9th Cir. 1995), *as amended* (Jan. 11, 1996), *as amended on denial of reh'g and reh'g en banc* (Mar. 19, 1996)("Here, as in *Albert*, because the allotment remains unpatented, the government has a trust interest in the disputed property; 'the scope of this trust status is the same, whether or not the State controls rights-of-way over the lands.'")

> and hereby (p. 538)/ determines that the Territory and State acquired by such use, an easement in and over said land, subject only to a reversion to the Pueblo whenever said land shall no longer by used by the public or the state as a highway, or shall be abandoned by the State for a new location across said Grant.

History of the Santa Fe County Roads Passing Through Boundaries of Tesuque, Pojoaque, Nambe, San Ildefonso and Santa Clara Pueblos, Stanley M. Hordes, PhD, (hereinafter called Hordes Report), *quoting* NARA-DC, Record Group 75, Records of the Bureau of Indian Affairs, Records of the Board of Indian Commissioners, Reports of Pueblo Lands Board, 1925-1931, PI-163, Entry 1394, Box 6, Pueblo of San Ildefonso, Report No. 1: Pueblo Lands Board, San Ildefonso Pueblo, Report of Title to Land Granted or Confirmed to Pueblo Indians not Extinguished, pp. 537-539. The Pueblo Land Board finding regarding the status of such roads crossing the San Ildefonso Pueblo was signed by the Secretary of the Interior on July 22, 1929.

Plaintiff does not merely assert the existence of a public road and seek to quiet title in its name as to such road. Rather, Plaintiff asserts a right to use long-standing, established community roads, to access member properties, with such access having been confirmed by the Treaty of Guadalupe and subsequent legal decisions. The historic existence of such Spanish land grant access roads as long been noted by Federal officials. Indeed, Ralph Emerson Twitchell, Special Assistant to the United States Attorney General noted the historic and fixed existence of such community highways across Pueblo lands in 1923:

> I have deemed it advisable to call your attention to the fact that the lands of every Indian Pueblo in New Mexico are crossed by highways which have existed since the earliest days of the Spaniards and which are not in the most part State highways and part of the highway system in this section. There is not doubt in my mind that these roads, having ben established by the Spaniards, the public has acquired a right by prescription to the use of the same and that no interference will meet with the approval of the Court . . ..

Hordes Report, *quoting* NARA-RMR, RG, Entry 43, Box 49, General Correspondence File, Folder 1, Letter, R.E. Twitchell, Special Assistant to the Attorney General, to Charles H. Burke,

Commissioner of Indian Affairs, Santa Fe, March 22, 1923. Subsequent review of such property rights sought to enjoin the United States or Pueblo from interfering with the use and enjoyment of property held by Spanish land grant recipients:

> And that every right, title or interest claimed and asserted by said United States of America, the Pueblo of San Ildefonso or the Indians thereof, in or to said tracts or any part thereof is null and void, and that they, their agents, representatives, successors and assigns are permanently enjoined from trespassing upon any of the tracts in this paragraph 2 described, *or interfering with the full possession, use and control thereof* by said defendants respectively.

United States of America v. Filomeno Apodaca, et al., No. 2031 In Equity (D. N.M., December 5, 1930)(emphasis added).

Finally, what is telling in Defendants argument, is their admission that their ***sole interest*** and concern in issuing the December 6, 2013, decision regarding alleged trespass of CR 84, 84A, 84B, 84 C, 84D and Sandy Way is to protect Indian interests, "for which the United States recognizes its trust responsibilities." *Id.* at 18. Plaintiff's do not contest that the United States has a demonstrated trust responsibility to Tribes, including the Pueblos, for a variety of reasons and purposes. However, in this particular instance, the United States has failed to present any evidence that it legitimately acted to protect "Indian trust lands" as it now asserts. Moreover, in arguing that the United States has a *sole interest* in this matter, Defendants inherently acknowledge that they failed to consider the confirmed and protected Treaty rights of its other citizens, historic Spanish settlers and their progeny. While there may certainly be a public interest fulfilling Indian trust responsibilities, the United States must also share the public interest in honoring its existing Treaty obligations and Spanish land grant holders right to use and access such their granted property. If the obligations of the United States confirmed and agreed to by international Treaties are not honored, not only does the United States violate the public trust but also the trust of the international community.

B. Plaintiff's QTA Claim is Not Barred for Want of Pleading its Interest and the Interests of the United States With "Particularity."

If Plaintiff's QTA cause may stand, it is not further barred for lack of particularity as argued by Defendants. In this action, Plaintiff has described the rights-of-way to which BIA alleges Plaintiff's members use in trespass, in the exact same manner and description used by BIA in its December 6, 2013, decision letter. BIA utterly fails to describe with any specificity whether it claims an interest in all or only portions of the roads it identifies. Plaintiff's action merely reiterates its members right to use the BIA identified trespass roads, based on existing rights of use, not as a property interest in and of itself. Plaintiff is not positioned to describe the roads to which its claims a use right, with further specificity unless BIA further identifies the portions of the roads to which it claims an interest. Here, Plaintiff is simply caught in the government's failure to identify the property it claims, in a chicken and egg argument.

C. Plaintiff's APA Claim is Not Barred by the QTA.

The APA's waiver of sovereign immunity does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," and the Government's argued QTA application and exceptions "satisfies the APA carve-out." *Lonatro v. United States*, 714 F.3d 866, 872 (5th Cir. 2013), *citing Patchak*, 132 S.Ct. 2205. As to *Patchack*, the Supreme Court concluded that because the QTA, and in turn its exception, did not apply Patchak's action "[fell] within the APA's general waiver of sovereign immunity." *Id.*, *citing* Patchak, 132 S.Ct. at 2210. The Court held that the QTA only applies when the plaintiff asserts her own right in the disputed property, "repeat[ing]" that the QTA only applies to suits by "adverse claimants, meaning plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's." *Id. citing Patchak, 132 S.Ct. 2207.*

Where the QTA applies, it is the exclusive means of a sovereign immunity waiver. *Id.* If the QTA applies, then the applicability of the "Indian trust or restricted land" carve-out to its grant of jurisdiction for quiet title actions must necessarily be assessed. *Patchak,* 132 S.Ct. at 2205. If the QTA does not apply, then 28 U.S.C. § 2409a(a) does not preclude a waiver of sovereign immunity.

Even if Defendants were to come forward and present evidence to establish that the roads identified by BIA is "land" that it holds in trust for the benefit of the Pueblo (making such roads "Indian trust lands"), the inquiry does not end there. Such is the case, because Plaintiff does not seek to quiet title to a specifically identified parcel of land in its own name. As such, even if the BIA identified roads were demonstrated to be Indian trust lands, there is a pre-existing prescriptive easement established before reservation boundaries were confirmed, which was re-confirmed by treaty, never extinguished by the sovereign and with no act of abandonment by holder of the vested easement.

In *Pine Bar Ranch LLC v. Interior Bd. of Indian Appeals,* 503 Fed. Appx. 491, 493 (9th Cir. 2012), the Ninth Circuit noted that:

> The Supreme Court has recently clarified that the QTA applies only to actions in which the plaintiff claims a property interest in the land. [*Patchak*].at 2206–08. Here, Pine Bar asserts only a statutory right to use Surrell Creek Road, a right allegedly arising from the CCC Act, not a property right. At most, Pine Bar *asserts a right of access akin to the right of the public*, which Wyoming law does not recognize as a property right. *See Thomas v. Jultak,* 68 Wyo. 198, 231 P.2d 974, 982–83 (1951). The QTA is inapplicable and thus does not bar Pine Bar's claims.

Plaintiff here asserts the same type of right and thus the QTA does not bar its claims.

D. 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 asserting both *Kinscherff* and *Southwest Four Wheel Drive* for the proposition that a person or organization cannot assert an interest in a public right-of-way, Federal Defendants overlook and fail to mention the effect of *Patchak* on both cases. Nonetheless the rubric of *Kinscherff* and *Southwest Four Wheel Drive* are distinguishable from the current case in which Federal Defendants miscomprehend the rights being asserted. To be sure, in this bundle of sticks exists several public easement sticks. For instance, as the Federal Defendants argue there are commonly public easements vested in the state of New Mexico and the County of Santa Fe, however, there are also commonly multiple easements overlain or underlain on the same right-of-way. It is a fundamental principle of property law that there may be many holders of easements (dominant estates) that are real property rights coexisting on the same right-of-ways which also exist overlain the top of the subservient fee property of the United States. Plaintiff is not alleging the rights vested in the state of New Mexico and the County of Santa Fe, but are instead alleging under *Patchak* the adverse claim to use of those public rights and in the alternative asserting the private RS 2477 rights-of-way that existed prior to reservation for public use of the Federal Defendant's property which are held privately by the members of Plaintiff as fee property owners served by a vested easement. These vested easements were previously granted to them as a community land grant which were then recognized and protected from usurpation by the United States in the Treaty of Guadalupe Hidalgo.

Contrary and distinguishable from *Kinscherff* where the Plaintiff did not assert an easement instead asserted only:

> [t]hat they have a real property interest in the Jemez Dam Road as members of the public entitled to use public roads pursuant to N.M.S.A. s 55-1-1 Et seq. (1953 Comp.), and as an owner of land abutting a public highway, and under 43 U.S.C. s 932. This "interest" in plaintiffs, we must hold, is not an interest in real property contemplated by 28 U.S.C. s 2409a. If it exists, it is vested in the public generally. The legislative history of section 2409a refers to the historical development of

> Quia timet suits in the courts of equity in England, and to quiet title suits as developed in this country. U.S.Code Cong. & Admin.News, 1972, Vol. 3, p. 4547. It thus must be assumed that Congress intended to permit to be brought against the United States the typical quiet title suit, as it has developed in the various states in this country through statutory and case law.
> The plaintiffs, on this point, do not assert that their interest is an easement or any similar right.

Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978).

However, in this case Plaintiff has asserted that by virtue of the Treaty of Guadalupe Hidalgo, and by virtue of the vested private easements for ingress and egress recognized before the United States, had a claim to these lands as well as adopted in accordance with RS 2477, served to vest in them as private property owners of lands adjacent to the Federal Defendant's property across which the right-of-way must pass over to reach their fee properties. These vested easements exist in addition to the public easements vested in the state of New Mexico and Santa Fe County. In short, Plaintiff in its Complaint, is asserting that its members have access to their property through several vested easements and is seeking protect its claims not held by the city, New Mexico, or the County of Santa Fe. This is directly against the asserted adverse claim of the United States seeking to set up a toll for the use of the public easements and the continued use of the Plaintiff's members vested private easements.

The United States government has long argued against the notion that private vested easements across public ground for rights-of-way exist, but good grounds and precedent exist to support just that outcome. Plaintiff will admit to the Court that the only case secured deciding private vested easements existing across federal lands is *United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev.*, 220 F. Supp. 328, (D. Nev. 1963) in which the Court observes "there is a paucity of case authority on the precise question involved." *Id.* at 331. Yet

in spite of the lack of case history, this is still the only case on this subject (no negative treatment since the decision) in which United States Federal Court for the District of Nevada concluded:

> It follows by simple logic that, if the work done on making a roadway to a mining claim could be allowed as annual assessment work to the value of at least one hundred dollars, or a total of five hundred dollars on the mining claim, then the road or right-of-way had some value, and was property.
> But there are other authoritative cases which bear upon the proposition as to whether or not such a right-of-way is property and when it becomes such.
> In *Estes Park Toll-Road Co. v. Edwards,* (1893) 3 Colo.App. 74, 32 P. 549, the appellant was resisting the efforts of the county to collect a tax on the right-of-way of the toll-road it had built for a distance of fourteen miles on public land, and had operated the same since its construction in 1876, contending that thus it could not be taxed for much the same reasons as advanced here by the United States, viz: that the road was across public lands and the only grant of 43 U.S.C. 932 was to the public, and that title to the ground occupied by the roadbed was in the United States, and that hence the roadbed could not be taxed. The court disagreed with the appellant. It pointed out that, 'The language used in regard to the right of way for highways (in 43 U.S.C. 932) is 'Is hereby granted.' The word 'grant,' in such connection, is very significant; in fact, seems to be a key for the solution of the question involved. 'Grant:' * * * 'A generic term, applicable to all transfers of real property' * * *. It is stipulated that in the year 1876 the grant was accepted, the road constructed, and has since been maintained. This grant and the acceptance were all that was necessary to pass the government title to the right of way, and vest it in the grantee permanently, subject to defeasance in case of abandonment. See *Flint & P.M. Railroad Co. v. Gordon*, 41 Mich. 420, 2 N.W.Rep. 648. After entry and appropriation of the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it; and the lands through which it passed were disposed of subject to the right of the road company, such right being reserved in the grant. The road company, as shown, became the owner of the right of way. By the use of its money it improved this right of way, making a highway over which the public could pass by the payment of tolls. Although the public became entitled to use the road, such right was only by compliance with the fixed regulations recognizing the ownership * * * it is clear that the road company could maintain trespass or other actions for any unwarranted interference with its possession and rights. * * * It is also clear that the company had such title as could be sold and transferred, and the successor invested with the right of possession. * * * Tested by these well-settled principles, it will readily be seen that the contention of plaintiff that it had no tangible, taxable property in *335 the road cannot be sustained. It had its granted right of way, together with its road, for the use of which it exacted dues. A toll road is very analogous to a railway to which congress grants the right of way over the public domain. * * * The fact that the county commissioners had supervisory control to regulate tolls can have no

> bearing whatever. * * * The right to so regulate * * * neither divests, defines, nor modifies ownership.'

United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev., 220 F. Supp. 328, 334-35 (D. Nev. 1963). Similarly, as cited to in the foregoing case, in the Solicitor's opinion for Interior (Defendant in this action) found in 1959 in his opinion (attached hereto as exhibit A) that "it has traditionally been customary for mining locators, homestead, and other public land entrymen to build and or use such roads across public lands other than granted rights-of-way as were necessary to provide ingress and egress to and from their entries or claims without charge, the question whether a fee may be charged for such use is not only of broad, general interest but to make such a charge now would change a long practice." 66 I.D. 361 (1959) The present case in which the BIA now asserts an interest in the roads, for which they can provide no evidence in support thereof and have no legitimate claim to, in order to attempt to extort a fee is no different. The state of New Mexico has a public vested easement for the public right-of-way and by proxy Santa Fe County may exert the same public easement. It is not exclusive, in fact as discussed in the Solicitor's opinion of 1959 and in *9,947.71 acres* it may in fact be a private road or "granted rights-of-way":

> … providing for the payment by permittee for the use of a road "constructed" or "acquired" by the United States. There is also authority to charge for tram-road rights-of-way, granted pursuant to 43, CFR, 1954 Rev., 244.52, section 244.21. (Supp.). But both sections 115.171(b) and 244.21 pertain to *granted* rights-of-way. They do not apply to roads constructed by an entryman or locator solely to provide access for his entry or claim. The road was not built by the United States nor can it be deemed to have been acquired by it in the sense contemplated by section 115.17 (b). Even if the word "acquired" as there used is given its broadest possible meaning it is not believed that it would encompass an access road of the kind discussed here. It is true that the title to the land is in the United States but the road is in the nature of a "private road access" across another's land which is primarily used by one or more persons but which may used by anyone. The United States can no doubt use such a road or permit its permittees or licensees to do so, at least to the extent that it does not unduly interfere with its use for the legitimate purpose for which it was built.

Correspondingly, Plaintiff's members that owned real property can trace the history of their lands back to the Treaty of Guadalupe Hidalgo.

Much like *9947.71 acres* in this case "the terms of Section 8 of the Act of July 26, 1866 (14 Stat. 251 et seq., 43 U.S.C. § 932) was a grant in praesenti, which became effective upon the construction of the road in 1921; that, at that time the title of the United States to the right-of-way passed from the United States and vested in the defendants' predecessors and ceased to be a portion of the public domain, without any further action by either or by any public authority; that, any subsequent disposition of the fee title of the land over which it passed was subject to such right-of-way." *United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev.*, 220 F. Supp. 328, 335 (D. Nev. 1963).

The United States cannot invade the public's right to use the road under *Patchak* nor can it invade the rights of Plaintiff's member's vested easements that exist in the same rights-of-way. In either vein whether asserting the public interest under P*atchak* or the private vested easements of its members, Plaintiff has correctly pled that Quiet Title Act to remove the slander of title by the United States.

III. JURISDICTION OVER PLAINTIFF'S TAKINGS CLAIM.

Federal Defendants assert this Plaintiff pled the Tucker act 28 USC 1491, did not specify an amount of damages that indicates the Plaintiffs are seeking damages in excess of $10,000, and assumes that Plaintiff incorrectly invoked Federal District Court jurisdiction when in fact Plaintiff did not intend to invoke the jurisdiction of the Court of Federal Claims. Plaintiff's action does not seek damages in excess of $10,000 in the pending matter; and are in fact seeking declaratory judgment that the private rights of its members have been taken by the United States by virtue of the letter issued by the Bureau of Indian affairs that declared their private rights were

held now by the Federal government in violation of the Fifth Amendment to the United States Constitution. Plaintiff may permissibly pursue this action under the concurrent jurisdiction of the Federal District courts under the little Tucker act 28 USC 1346, "[e]ven though others may have used the road, with or without the right to do so, the defendants' right to its use was nevertheless 'property' taken from them herein for which they are entitled to 'just compensation'." U*nited States v. Welch* (1910) 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787; *Schiefelbein v. United States* (C.C.A. 8th 1942) 124 F.2d 945; *Brooklyn etc. v. City of New York* (C.C.A. 2nd 1944) 139 F.2d 1007, 1011, 152 A.L.R. 296. *United States v. 9,947.71 Acres of Land, More or Less, in Clark Cty., State of Nev*., 220 F. Supp. 328, 337 (D. Nev. 1963).\

In New Mexico, courts have recognized that an individual's right of access to property is a property right, and may not be taken or damaged without the payment of compensation. *State ex rel. State Highway Comm. v. Chavez*, 77 N.M., 104, 419 P.2d 759, *aff'd as State ex rel. State Highway Commission v. Chavez*, 80 N.M. 394, 456 P.2d 868 (1969); *State v. Silva*, 71 N.M. 350, 378 P.2d 595 (1962). The individual right of access has been defined as, a right of ingress to and egress from land on an abutting street or highway and therefrom to the system of public roads. *State v. Danfelser*, 72 N.M. 361, 369, 384 P.2d 241, 246 (1963). New Mexico cases dealing with a denial of access demonstrate clearly that a 'taking,' the actual physical severance and appropriation of the party's land, is not required in order that the landowner be entitled to compensation. A landowner is entitled to compensation if there are consequential 'damages' resulting from the denial of access. *Hill v. State Highway Comm'n*, 1973-NMSC-114, 85 N.M. 689, 690, 516 P.2d 199, 200, *citing Board of County Com'rs, Lincoln County v. Harris*, 69 N.M. 315, 366 P.2d 710 (1961). Should Plaintiff in this matter receive declaratory judgment in its

favor individual plaintiffs may proceed to demonstrate their property losses before the Court of Claims.

IV. PLAINTIFF'S STANDING.

With respect to standing Plaintiff is asserting associational standing and satisfies the three prong test of Kan. Health Care Ass'n., Inc. v Kan. Dep't of Soc. & Rehab. Servs., 958 F.2d 1018, 1021 (10th Cir. 1992). Plaintiff satisfies the first prong because it's membership is standing individually to pursue adverse claims under *Padgett* as a member of the public with an adverse claim or in the alternative as holders of vested easements recognized under the Treaty of Guadalupe Hidalgo and RS 2477 granted to them for ingress and egress to their private property existing on the rights-of-way in question (See Ex. B, Declarations). Plaintiff satisfies the second prong because the state's objections of Northern New Mexicans protecting land water and rights is to assist the community with protecting their rights to land and water. (See Ex. C) Finally, Plaintiff satisfies the third prong because Plaintiff is not seeking to recover damages on behalf of individual members and is not seeking to quite title in itself. Rather, Plaintiff is seeking to quite title to common property by protecting against the slanderous adverse claim of the United States and advocating for the community land grant rights protected by the Treaty of Guadalupe Hidalgo. There is no conceivable reason why Plaintiff cannot pursue these claims without the direct participation of the individual members in the lawsuit.

V. PLAINTIFF'S EQUAL PROTECTION ACT CLAIM.

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

Defendants' statement and admission as discussed supra., in which representatives of the United States admit that the its "only" interest in the pending dispute is the "protection of Indian trust lands" regardless of the harm and damage to its historic Spanish citizens, despite promises,

agreements and rights also conferred to such citizens by Treaty – which guaranteed to such citizens their property interests and that they would be treated equally with all other citizens of the United States. Indeed, it is this same Treaty – the Treaty of Guadalupe Hidalgo – that the San Ildefonso Pueblo's property rights were identified for protection as well.

B. Plaintiff Does Not Allege The Facts Necessary to Plead an Equal Protection Claim Under the U.S. Constitution.

The last sentence of the Federal Defendant's argument on Equal Protection is the most poignant. Federal Defendants argue that 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," but that is facially an irrational statement and wholly lacks even basic logic. Absolutely, Plaintiffs have alleged and are in fact, arguing that the BIA lacked any rational relation to a legitimate government purpose. *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). Attempting after more than a hundred years to claim that roads are now in trespass in order to attempt to extort a fee on behalf of a Pueblo is not a legitimate purpose, in fact, that kind of preferential treatment or arbitrary and capricious action is the epitome of a government action completely lacking even a rational basis. BIA has wholly failed to explain a record it relied to reach a decision for such an action much less explained a rational relation or even less how such a blatant attempt to extort money is legitimate when found on roads and grants that over 150 years old. This is precisely the reason Congress in the section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108)acted to prohibit the Department of the Interior and therein BIA from taking such by legislating that: "No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of

this Act." BIA took an action prohibited by law and serving no legitimate government purpose.

CONCLUSION

Plaintiff has pled the causes of action in its complaint in the alternative to ensure that potential causes of action have been properly and sufficiently brought and pled. Plaintiff has a demonstrated interest in ensuring that its membership's access to their confirmed property right is not further impaired by arbitrary government actions, and such action that rises to a taking of such property. Here, as well, the QTA does not apply to bar Plaintiff's claims.

Plaintiff, as presented during recent hearings, as already announced it intent and desire to amend the Complaint to clarify its causes of action and bring additional causes. Defendant has failed to demonstrate that the standards for dismissal or for a decision on the pleadings. Thus, should the Court find insufficiency in the Complaint, plaintiff posits that in lieu of dismissal, amendment is appropriate.

Respectfully submitted this 22nd day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2015, I served foregoing through the CM/ECF System for filing and transmittal, therefore effecting electronic service on Defendants through their counsel of record.

/s/ A. Blair Dunn
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