IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF JEMEZ, a federally recognized Indian tribe,	)	
Plaintiff,	)	Case No. 1:12-cv-800 (JB)(JHR)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant,	)	
and	)	
NEW MEXICO GAS COMPANY,	)	
Defendant-in Intervention.	)	

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE

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INTRODUCTION

Extensive fact and expert discovery has disclosed a great deal about the history of what is now the Valles Caldera National Preserve ("Valles Caldera"). As detailed in the United States' Motion for Summary Judgment, extensive evidence indicates that the Pueblo of Jemez ("Jemez," or "Plaintiff") has *never* used the Valles Caldera to the exclusion of other tribes, and that during the years when the Valles Caldera was privately owned (resulting from a Congressional land grant in 1860 – *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1147 (10th Cir. 2015)) the Pueblo's access to and use of the Valles Caldera was strictly limited by the Valles Caldera's owners. ECF No. 232-1 at 16-19. In many cases, the evidence showing these facts consists of sworn admissions by Jemez members (in both deposition and Congressional testimony) and formal court pleadings filed on behalf of Jemez (and other Pueblos). *Id*. In other cases the evidence consists of a century or more of ethnographic, anthropological, and historical work by eminent scholars. *Id*.

By its motion *in Limine* (ECF No. 236) Plaintiff seeks to avoid a vast swath of this evidence by urging this Court, in effect, to flout the mandate of the Court of Appeals. The Appellate Court instructed this Court to determine, based on the evidence, whether Plaintiff's use of the Valles Caldera was exclusive as to other Tribes, and whether Jemez's use of the land was substantially interfered with by the Valles Caldera's private owners; Plaintiff's motion asks the Court bar the very factual development directed by the Tenth Circuit.

The reach of Plaintiff's motion is vast. Plaintiff asks the Court to exclude evidence of use of the Valles Caldera by anyone other than a member of the Pueblo, and to exclude all evidence of interference with Jemez's use and occupancy of the Valles Caldera, because, according to Plaintiff, the evidence is irrelevant and inadmissible. ECF No. 236 at 9-30. Plaintiff

further argues that this Court should exclude any and all evidence as to use of the Valles Caldera after 1848, except for evidence connected to Congressional extinguishment of Plaintiff's aboriginal title to the Valles Caldera. *Id.* at 8, 31-33.

The motion is ill-conceived. First, Plaintiff completely ignores the fact that Plaintiff itself bears the burden to show that Jemez used and occupied the Valles Caldera, that it did so continuously for a long period of time, and that it used the land to the exclusion of other tribes. Excluding evidence of use by other Pueblos makes any defense to Plaintiff's claim of exclusivity impossible. Second, Plaintiff defies logic by arguing that more than 150 years of history are irrelevant to this Court's review of Plaintiff's claim that Jemez continuously and exclusively used the Valles Caldera for over 800 years and that its traditional activities in the Valles Caldera were unimpeded until after the United States' acquired the land in 2000.[1] Here, Plaintiff contradicts itself, by claiming on the one hand that evidence of land use after 1848 is "irrelevant" (ECF No. 236 at 9-10); and on the other, that at trial it will present evidence of its aboriginal title by showing how it has maintained exclusive use and occupation of the Valles Caldera "to the present day." *Id.* at 3.

Plaintiff's motion to exclude evidence deemed relevant by both the Tenth Circuit and Plaintiff itself is improper. Evidence that other Pueblos and also non-tribal people used the Valles Caldera is critical to this case. Similarly, evidence of the Valles Caldera's land use history after 1848 is essential to this Court's review of Plaintiff's continuous use claim. Pursuant to Federal Rules of Evidence 401, 402, and 403, this Court should deny Plaintiff's motion in its entirety.

[1] *See*, *e.g.*, Complaint (ECF No. 1) 84 ("Jemez Pueblo continued to use and occupy the Valles Caldera in the ways detailed in Paragraphs 39 through 64 of this complaint during the 19th century without opposition from the Baca family.")

ARGUMENT

"When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). Upon remanding this case, the Tenth Circuit identified two questions central to evaluating Plaintiff's aboriginal title claim: (1) whether Plaintiff can establish that it exercised aboriginal occupancy of the Valles Caldera in 1860 and afterword, *Pueblo of Jemez*, 790 F.3d 1143, at 1165 (10th Cir. 2015); and (2) whether Plaintiff's aboriginal title was ever extinguished by treaty, sword, purchase, by the exercise of complete dominion adverse to the right of occupancy, or by other means. *Id.* at 1160 (citing *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941) ("*Santa Fe*")). In putting these questions for resolution on remand, the Court of Appeals gave specific guidance on the substance of the issues to be resolved. Plaintiff's motion is poorly taken because it asks this Court to flout that guidance.

A. The Court of Appeals Instructed this Court to Determine Whether Jemez's Use of the Caldera was Exclusive as to Other Tribes, and Whether it Was Interfered With After Congress Granted the Land to Private Owners in 1860

The Court of Appeals held that the grant of the Valles Caldera to the Baca family, without more, did not extinguish aboriginal Indian title to the land – assuming such title actually existed at the time. *See Pueblo of Jemez*, 790 F.3d at 1155 ("*Worcester* thus clarified the proposition suggested in *Johnson v. M'Intosh* that a grant to third parties by the sovereign of land in possession of the Indians and which they presently occupied did not extinguish their aboriginal title") (citations omitted); *see also id*. at 1158 ("*Buttz* stands for the proposition that although grants by the United States of land in possession of the Indians conveys fee title, the grant does not impair aboriginal title, which the grantee must respect until aboriginal title has

been extinguished by treaty, agreement, or other authorized actions of the Indians or Congress") (citations omitted); *id*. at 1163 ("As we have pointed out, Supreme Court decisions since 1823 make clear that the Baca grant at issue was subject to the Jemez Pueblo's aboriginal title—assuming the Jemez maintained aboriginal possession at the time.").

The assumption made by the Tenth Circuit in the last quotation from *Pueblo of Jemez* is a big one. In the guiding formulation, to establish aboriginal occupation (i.e., aboriginal title) Plaintiff "must show actual, exclusive, and continuous use and occupancy for a long time of the claimed area." *Id*. at 1165, quoting (in part) *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir.2012) (internal quotation marks omitted). The court went on to explain that establishing "exclusive" use, and establishing "actual ... and continuous" use, raise different issues.

To establish *exclusive* use, the court said Plaintiff "must show that it used and occupied the land to the *exclusion of other Indian groups*." *Id*. at 1166, quoting *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975) (emphasis supplied by *Pueblo of Jemez*). And as a subpart to this question, the Tenth Circuit further noted that Plaintiff must show it has "continued for hundreds of years to use the Valles Caldera for traditional purposes, including hunting, grazing of livestock, gathering of medicine and of food for subsistence, and the like." *Id.* at 1166. All such use, of course, must be exclusive.

"Actual and continuous" use, however, raises different issues.

> To show "actual" and "continuous use," on the other hand, the Jemez Pueblo must show, as it alleges in its Complaint, that the Jemez people have continued for hundreds of years to use the Valles Caldera for traditional purposes, including hunting, grazing of livestock, gathering of medicine and of food for subsistence, and the like. As the cases make clear, if there was actually substantial interference by others with these traditional uses before 1946, the Jemez Pueblo will not be able to establish aboriginal title. In that circumstance, moreover, the Pueblo would be barred by the ICCA statute of limitations for failing to bring a claim before the ICC.

Id. at 1166. This latter inquiry can overlap with the question whether a tribe's aboriginal title has been extinguished, s*ee Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

B. Plaintiff's Motion Wrongly Assumes that Aboriginal Title Has Been Proven and Cannot be Surrendered

In its conclusion, Plaintiff asserts that "[w]hether non-Indians (or Indians) interfered with [Plaintiff's] continuing use and occupancy is not an issue." ECF No. 236 at 33. Plaintiff's argument puts the cart before the horse and completely distorts the aboriginal title analysis. The requirement that use be exclusive and continuous necessarily entails the conclusion that where use ceases to be exclusive it has ceased to be continuous. Plaintiff's logic implies that if a tribe had aboriginal title on the day the United States acquired sovereignty, it retains aboriginal title today even if it physically abandoned the land more than a century ago, an absurd result. *See Williams v. City of Chicago*, 242 U.S. 434, 436 (1917) (finding that the Pottawatomies' title to lands around Lake Michigan had been lost when the tribe ceased to occupy those lands); *Aboriginal rights*, American Indian Law Deskbook § 9:9 (May 2018 Update) ("Even without action by the United States, a tribe has no aboriginal title after it abandons possession of its tribal territory") (citing *Mitchel v. United States*, 34 U.S. 711 (1835)).

Plaintiff's theory – that aboriginal title over the Valles Caldera was frozen as of the date the United States acquired sovereignty, is also flatly rejected in *Sac & Fox Tribe of Indians of Okl. v. United States*, 383 F.2d 991, 998 (Ct. Cl. 1967). *See Id.* ("It is a matter of common knowledge that in the course of years, and especially during the early years of the United States, the use and occupancy of land by Indian tribes changed continuously. New tribes would appear and old ones would disappear or move on to new territories. Sometimes land of one tribe would be exchanged for that of another, or one tribe would acquire the land of another as the result of an Indian war or by right of conquest.")

This result would seem particularly compelling with respect to the Banco Bonito, where Jemez discontinued seasonal occupancy and farming more than three hundred years ago. ECF 233-1 at 24.

We also note that Plaintiff's assertion in their motion's conclusion -- that use of the Valles Caldera *by other Tribes* (after 1848) is irrelevant -- is nowhere argued in the body of the motion.

And indeed there is abundant evidence of use by other tribes. For example, Plaintiff's motion relies on work by Richard Hughes. ECF No. 236 at 23, 28. Mr. Hughes wrote a report on the impacts of proposed geothermal development in the Valles Caldera on religious practices and beliefs of the Pueblos.[2] *See* M20RTH0159200 – M20RTH0159263. The report explains how the Valles Caldera "has been constantly occupied by ancestors of [several] present-day tribes for a thousand years or more," M20RTH0159203, and how multiple Pueblo leaders had concerns about impacts on their religious practices resulting from geothermal development in the Valles Caldera. M20RTH0159202. Mr. Hughes wrote the report while an attorney at the law practice of Luebben, Hughes & Kelly – the same Luebben who now represents Plaintiff and authored the motion at issue.

On the same subject, Lois Weslowski conducted an ethnographic analysis of Jemez Pueblo use of the geothermal project area based on interviews with Jemez elders in 1979. L. Weslowski, *Native Am. Land Use Along Redondo Creek* at 105 (June 9, 1981) (ECF 232-39) Weslowski wrote that Jemez or "Towa oral history describes the boundaries of . . . the aboriginal domain of their ancestors. . . . This domain is traditionally recognized as a joint use

[2] Relevant excerpts of this document are attached to the United States' Opposition to Plaintiff's Motion for Partial Summary Judgment (filed today) as Exhibit 16.

area for the three pueblos of Zia, Santa Ana, and Jemez which have cooperatively utilized the region since prehistoric times." *Id*. at 108, 125. Weslowski mapped the "joint use area" as including most of the Valles Caldera lands, but excluded eastern and northern portions of the Valles Caldera. *Id*. at 108-09.

Both authors stress that multiple Tribes worshipped and used the Valles Caldera for many centuries. That fact, if proven, defeats Plaintiff's claim. And it is a matter of common sense that worship and use by other Tribes in recent times (i.e., since the mid-19th Century) is evidence of similar usage in earlier times, particularly where the usage is religious and therefore the subject of centuries-old traditions and beliefs.

To be clear, Plaintiff seeks to exclude the most probative evidence of whether Plaintiff possessed aboriginal title at the time it was allegedly taken. Plaintiff contends its title was taken in 2000. Compl. (ECF No. 1). Plaintiff remarkably seeks to rely on alleged use of the Valles Caldera prior to 1650 and since 2000. While evidence of use prior to 1650 admittedly has some minimal evidentiary value in this case, that value is dwarfed by the value of the evidence Plaintiff seeks to exclude. Evidence that the Valles Caldera were used by many tribes since 1850 and that Plaintiff's use was substantially infringed since 1920 is necessary to determine whether Plaintiff possessed aboriginal title in 2000. Plaintiff cannot exclude the most probative evidence from this Court's consideration.

C. Plaintiff's Motion is Flatly Inconsistent with the Tenth Circuit's Remand Decision

"[O]ccupancy necessary to establish aboriginal possession is a question of fact." *Pueblo of Jemez v. United States*, 790 F.3d at 1163 (quoting *Santa Fe*, 314 U.S. at 345). And yet, Plaintiff seeks to narrow the aperture of this Court's factfinding as to who occupied the Valles Caldera to include only evidence of its own use. While convenient for Plaintiff, doing so runs

counter to the questions at issue on remand. As noted by the Tenth Circuit, "neither party has had the opportunity to offer evidence about whether anyone has actually interfered with [Plaintiff's] traditional occupancy and uses of the land in question here, before or after 1946."[3] *Id.* at 1168. The Tenth Circuit made clear that whether Plaintiff can establish that it exercised its right of aboriginal occupancy to the Valles Caldera "in 1860 and thereafter" was "a fact question to be established on remand." *Pueblo of Jemez v. United States*, 790 F.3d at 1165. Plaintiff now asks this Court to ignore that point, and yet surprisingly, Plaintiff's Complaint is scattered with references to instances occurring after 1848 as relevant to its claims of aboriginal title. For instance, Plaintiff's Complaint alleges that the Valles Caldera lands were not vacant in 1860, when the United States granted the land to Baca (Pls.' Complaint, ECF No. 1 at par. 82), that it continued to use the Valles Caldera for all of its traditional purposes during the 19th century without opposition from the Baca family (ECF No. 1 at par. 87), that it grazed livestock on the Valles Caldera from the Spanish colonial period and continuing through the 20th century (*Id.* at par. 63), and that it had no knowledge of the United States' interest in the Valles Caldera prior to July 2000 (*Id.* at par. 87).

Essential to the inquiry set by the Court of Appeals is whether the Plaintiff suffered substantial interference with its traditional uses of the Valles Caldera. *Id.* at 1166 ("As the cases make clear, if there was actually substantial interference by others with these traditional uses before 1946, the Jemez Pueblo will not be able to establish aboriginal title.") As noted by the Tenth Circuit, "on the present record, we cannot say that either the Baca grant or used of the land by the Baca heirs or their successors establish as a matter of law that the Jemez Pueblo had a pre-

[3] The Indian Claims Commission was established to hear claims against the United States by tribes for, among other things, compensation for lands lost. Claims existing before 1946 and not brought before the Commission were deemed waived.

1946 claim against the government under the [Indian Claims Commission Act]." *Id.* at 1168. Plaintiff's motion cannot be reconciled with the terms of the Tenth Circuit remand.

D. As Dr. Kehoe's Report Documents in Detail, Plaintiff's Use of the Valles Caldera Was Severely Restricted During the Land's 140 Years of Private Ownership

Plaintiff's motion seeks to exclude altogether the expert report by historian Terence Kehoe, who studied, among other things, use of the Valles Caldera lands by other Tribes and interference with Jemez's use of the Valles Caldera during the years when the Baca, Bond, and Dunigan families owned the land. A copy of Dr. Kehoe's report, much of which is confidential under the terms of the Court's Protective Order (ECF No. 116), is filed herewith (under seal) as Exhibit A. We provide here examples of his findings as reflected in source documents that were appended to the United States' motion for summary judgment. These examples show that Jemez's ability to use the Valles Caldera during these years – by the Pueblo's own admission – was severely constrained.

- Plaintiff's testimony before the Indian Claims Commission in 1956 admitted that the Valles Caldera lands were jointly used by Zia and Santa Clara, among other tribes. ECF No. 233-1 at 2-3
- The 18 Pueblos who sued the Energy Department over the proposed geothermal project characterized the land use as "a limited number of Indians using, for secretly conducted religious activities, certain circumscribed areas within the several thousand acres owned by the [Dunigans]." Pl.s' Resp. to Intervention Mot. of Dunigan Enters., *Jemez v. Sec'y of Energy*, 81-cv-113 at 4 (D.D.C. Nov. 18, 1981) (ECF No. 232-37).
- The 18 Tribes, including Jemez, admitted that they "do not contest the ownership of – nor do they seek any interest in – movants' land." *Id*. at 2.

- Jemez historian Joe Sando testified that Jemez "felt the loss of . . . part of the [Valles Caldera] in the first hald [sic] of the Eighteen Hundreds to the" Baca heirs. Aug. 16, 1979 at 52; *Id*. at 53-54 ("We used the area as our own until 1904. . . . Jemez names carved on the Aspen trees [are] dated 1927, which was the last time [Jemez] had use of the area.") (ECF No. 170-11).
- Mr. Sando testified that "[w]hen the various Jemez religious societies go to the shrine [on Redondo] they have to get permission from [the owner, who lives] in Texas." *Id*. at 54.
- Frank Bond erected fences around the Baca Location No. 1 in 1917. Letter from F. Bond to E. Wetmore, Redondo Dev. Co. (Aug. 11, 1917) (Ex. 39); Inventory, Quemondo Sheep Co. (Nov. 30, 1917) (ECF No. 232-41).
- The Valles Caldera's owners prohibited Jemez from grazing its animals in the Valles Caldera between the 1920s and 2000. Weslowski, Land Use at 115 (Ex. 38); Ferguson Dep. at 110-111 (ECF No. 232-7).
- Plaintiff acknowledged that prior to 1971 it "came to lose proprietary interest in their ancient shrine" on Redondo Peak and "realize[d] that [the Baca Land and Cattle Company] exercise[d] control of the place under the system of laws now in effect." Letter from D. Gardner, to Baca Land and Cattle Co. (Nov. 23, 1971) (ECF No. 232-42).
- According to a report prepared by Dr. Ellis in 1981, it was "utterly impossible [for Jemez] to obtain permits to get in [to the Valles Caldera] since 1976. The religious societies do not feel that they dare sneak in." Ellis, Religious Freedom at 58 (ECF No. 232-14).
- The Bonds put "restrictions on Jemez hunting." Ferguson Dep. at 104-105 (ECF No. 7).

- The Dunigan family, who operated a hunting business within the Valles Caldera, placed "greater restrictions on Jemez hunting." *Id.*; Gov. Gachupin Dep. at 43; 112 (ECF No. 43).
- Plaintiff could not collect timber in the Valles Caldera during the time the Dunigan family owned the land. *Id*. at 112.

It was to permit review of this kind of evidence for which the Court of Appeals remanded the case.

E. Plaintiff's Analysis of the Relevant Caselaw is Deeply Flawed

Plaintiff's heavy reliance on *Santa Fe* is misplaced. In *Santa Fe*, as relevant here, Congress had created a reservation for the Walapai Tribe. The question was whether doing so was intended to extinguish the Tribe's aboriginal title to its ancestral lands elsewhere. 314 U.S. at 353-54. Several unusual factors led to a decision that there was no such intent: the Act creating the reservation said nothing on the subject; the Walapai never agreed to accept the reservation (and in fact promptly decamped the reservation after being forcibly removed there); and it was subsequently "decided to allow [the Tribe] to remain in their old range during good behavior." *Id*. at 354 (citation and internal quotation marks omitted). The forcible removal of the Tribe to a reservation was, moreover, carried out by the military without "any mandate of Congress," which the Court characterized as "a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited." *Id*. at 355. Here, by contrast, Jemez's inability to use the Valles Caldera while it was privately owned was the direct and natural result of Congress's granting the land to the Baca heirs. And, further, the actual interference by the Dunigan and Bond families – which has no parallel in the relevant portion of the *Santa Fe* decision -- is largely conceded by Jemez witnesses, and is dispositive under the Tenth Circuit's

directive in this case that "actual[] substantial interference by others with [Pueblo] traditional uses" will defeat a claim to aboriginal title. *Pueblo of Jemez v. U.S.*, 790 F.3d at 1166.

At a later time, by contrast, the Walapai asked for and were given a reservation; white settlers had moved into the Walapai ancestral lands, grazing cattle and appropriating Walapai waters. Under these circumstances, the Court held, aboriginal title to the non-reservation land had been surrendered. *Id*. at 356-58. *This* aspect of *Santa Fe* is indeed relevant, and is fatal to Plaintiff's motion. Because it is perfectly possible for Jemez to "relinquish[ ] tribal rights in lands," *id*. at 358, or for other tribes to transform exclusively-held land into jointly-held land, evidence that other tribes routinely used the Valles Caldera after 1848 could well establish that whatever aboriginal interests Jemez may have once had in the Caldera have been lost.

Plaintiff also tries to sweep under the rug an important line of caselaw – cited with approval by the Court of Appeals – that federal conveyance of land to private parties, and encroachment on traditional Tribal use, can evidence extinguishment of aboriginal title. *Pueblo of Jemez v. U.S.*, 790 F.3d at 1166-67, citing *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975), *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (Ct.Cl.1959); *Pueblo of Nambe v. United States*, 16 Ind. Cl. Comm. 393 (1965); *Pueblo of Taos v. United States*, 15 Ind. Cl. Comm. 666 (1965). Plaintiff argues that *other* ICC cases were wrongly decided. ECF No. 236 at 15 ("Due to unique and peculiar circumstances, the ICC and the Court of Claims made findings of Indian title 'takings' and 'extinguishment' that are absolutely incompatible with the fundamental nature of Indian title.")

To this end, Plaintiff spends several pages trying to debunk the holdings in *Western Shoshone Identifiable Group v. United States*, 11 Ind. Cl. Comm. 387 (1962), *Pueblo de Zia, et al. v. United States*, 19 Ind. Cl. Comm. 56 (1968); *aff'd in part, rev'd in part on other issues*,

United States v. Pueblo De Zia, 474 F.2d 639 (Ct. Cl. 1973), *Gila-River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm. 301 (1970), *aff'd* 204 Ct. Cl. 137 (1974), and *Pueblo of San Ildefonso, et al. v. United States*, 30 Ind. Cl. Comm. 234 (1973), *aff'd*, 513 F.2d 1383 (Ct. Cl. 1975). ECF No. 236 at 18-27. The first three are *not* among the cases relied upon by the Court of Appeals. *Pueblo of Jemez v. U.S.*, 790 F.3d at 1166-67 (citing *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975), *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (Ct.Cl.1959); *Pueblo of Nambe v. United States*, 16 Ind. Cl. Comm. 393 (1965); *Pueblo of Taos v. United States*, 15 Ind. Cl. Comm. 666 (1965)). The one case that Plaintiff attacks that *is* among those cited by the Court of Appeals, the *San Ildefonso* decision, is a precedent that the Court of Appeals examined at considerable length. *Id*. Plaintiff is asking the Court to disregard the judicial authorities the Court of Appeals identified as controlling.

Plaintiff also goes so far as to suggest that the ICC and Court of Claims are beneath the dignity of an Article III court.[4] But the Court of Appeals in this case has referred the parties and this Court to this very line of cases that Plaintiff asks the Court to disregard. Plaintiff's assertion that "the extinguishment analysis performed by the ICC and Court of Claims is irrelevant to the extinguishment analysis that must be performed by this Article III Court" (ECF No. 236 at 16) is

[4] In an extraordinary footnote, plaintiff asserts that the ICC "lacked jurisdiction to adjudicate the status of title or the ownership of land." ECF No. 236 at 15 fn. 16. But the same footnote later recites that Section 2 of the Indian Claims Commission Act (79 Cong. Ch. 959, 60 Stat. 1049, 1050 (August 13, 1946)) gave the ICC jurisdiction to "hear and determine …. claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant" – which of necessity included the power to determine "the status of title or the ownership of land" – and that Section 2 only excluded the power "to extinguish Indian title on its own authority." 25 U.S.C. § 70a.

therefore nothing short of an invitation to this Court blatantly to disregard the mandate of the Court of Appeals.

Indeed, the Court of Appeals rested its decision in this case on the fact that "[a]t this point in the current proceedings, neither party has had the opportunity to offer evidence about whether [the Bacas or their successors] ha[ve] actually interfered with the Jemez Pueblo's traditional occupancy and uses of the land in question here, before or after 1946." *Pueblo of Jemez v. U.S.*, 790 F.3d at 1168. Plaintiff's motion asks this Court to ignore the Court of Appeals express instructions that evidence of interference (*vel non*) be explored.

The *San Ildefonso* decision will illustrate the point. There the court found:

> In the instant case, the United States allowed and sanctioned—over a period of several decades beginning around 1870—the intrusion of white settlers and miners onto appellees' aboriginal lands. The encroachment was gradual; the native Americans were displaced over a period of many years. In circumstances such as those presented here, it is entirely consistent with reality for the Commission to find that aboriginal lands were 'taken' on the dates of the various entries under the public land laws.

United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391 (Ct. Cl. 1975). Consistent with this reasoning, the Court of Appeals specifically instructed that if the Baca grant (and subsequent transfers) resulted in actual interference with Jemez's use of the Valles Caldera, the Pueblo's aboriginal title claim fails.

> As the cases make clear, if there was actually substantial interference by others with these traditional uses before 1946, the Jemez Pueblo will not be able to establish aboriginal title. In that circumstance, moreover, the Pueblo would be barred by the ICCA statute of limitations for failing to bring a claim before the ICC. The Court of Claims' decision in *Pueblo of San Ildefonso*, 513 F.2d at 1393, is illustrative . . .

Pueblo of Jemez v. U.S., 790 F.3d at 1168. Plaintiff is asking the Court to exclude the very evidence that the Tenth Circuit found to be essential for decision.

Plaintiff's suggestion that the quoted language is *dicta*, ECF No. 236 at 31 fn. 21, is incorrect. It is law of the case. A lower court is "bound to carry the mandate of the upper court into execution and [cannot] consider the questions which the mandate laid at rest." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, (1939); *accord Ins. Grp. Comm. v. Denver & Rio Grande W. R.R. Co.*, 329 U.S. 607, 612, 67 S.Ct. 583, 91 L.Ed. 547 (1947) ("When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court"). The obligation to obey the Court of Appeals' mandate applies to all legal rules and principles identified by the appellate body. Bryan A. Garner et al., *The Law of Judicial Precedent* § 55 at 459 (2016) ("When a case has been heard and determined by an appellate court, the legal rules and principles laid down as applicable to it bind the trial court in all further proceedings in the same lawsuit. They cannot be reviewed, ignored, or departed from").[5]

[5] While some circuits have held that a district court lacks *jurisdiction* to deviate from a Court of Appeals mandate (*see United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007) (collecting caselaw)) the Tenth Circuit has held otherwise. *United States v. Gama-Bastidas*, 222 F.3d 779, 784 (10th Cir.2000). But the mandate remains fully binding. *Estate of Cummings by & through Montoya v. Cmty. Health Sys., Inc.*, 881 F.3d 793, 801 (10th Cir. 2018).

CONCLUSION

Plaintiff's desperate effort to bar evidence from the period between 1860 and 2000 only serves to highlight that this evidence – including Plaintiff's and Plaintiff's expert's repeated admissions that Plaintiff was not the Valles Caldera's exclusive user – is fatal to Plaintiff's claim. This Court should therefore deny Plaintiff's motion *in limine* and grant the United States' motion for summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all counsel of record.

/s/ *Peter Kryn Dykema*
Peter Kryn Dykema