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

YSLETA DEL SUR PUEBLO, a federally recognized Indian tribe,	§	
Plaintiff,	§	
v.	§	Case No. 3:17-CV-00162-DCG
CITY OF EL PASO,	§	
Defendant.	§	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and the requirements set forth in the Court's July 22, 2015, Standing Order Regarding Motions for Summary Judgment, and the Court's Orders in the present case (ECF No. 44 and Text Orders Granting ECF Nos. 54 and 55), Ysleta del Sur Pueblo files one motion for summary judgment that does not exceed 30 pages in length. The Pueblo moves the Court for two rulings: (1) a grant of partial summary judgment in favor of Ysleta del Sur Pueblo confirming that the Pueblo had official legal status as a "Pueblo de Indios;" and (2) a grant of partial summary judgment in favor of Ysleta del Sur Pueblo confirming that the Indian Non-Intercourse Act applies to the Pueblo and any lands the Pueblo proves that it owns at the trial of this action.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The "movant bears the initial responsibility of demonstrating the absence of a genuine issue of material fact with respect to those issues on which the movant bears the burden of proof at trial." *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-19 (5th

Cir. 1995). "For any matter on which the non-movant would bear the burden of proof at trial, however, the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Id.*

I. YSLETA DEL SUR PUEBLO HAD OFFICIAL LEGAL STATUS AS A "PUEBLO DE INDIOS."

A. Summary.

From its establishment in 1682, Ysleta del Sur Pueblo was denominated by Spanish colonial authorities as a "Pueblo de Indios." As applied to characterize a Pueblo Indian village, the term had (and has) specific legal consequences. A "Pueblo de Indios" had the protection of Spanish colonial law and administration that prohibited Spanish settlement on Indian lands, its privatization, and its alienation or conveyance to non-Indians.

B. Proposed Undisputed Facts.

Pursuant to the Court's July 22, 2015, Standing Order Regarding Motions for Summary Judgment, the Pueblo's Proposed Undisputed Facts relevant to the ruling requested by this section are annexed hereto as Appendix A.

C. Argument.

1. Spanish Colonial Law Provided an Official Designation of "Pueblo De Indios."

The Recopilación de Leyes de los Reinos de las Indias, published in 1681, compiled and codified the Spanish laws applicable to Spanish colonies promulgated up to that date. There are nine books or major sections in the Recopilación. Although Book VI is the only one devoted entirely to Indians, each of the nine books has some laws that refer to Indians. Tyler, S. Lyman, *The Indian Cause in the Spanish Laws of the Indies: With an Introduction and the First English Translation of Book VI, Concerning the Indians, from the Recopilación de Leyes de los Reinos*

de las Indias, Madrid, 1681, Salt Lake City: American West Center, University of Utah, 1980, at 1xix.[1]

"Pueblos de Indios" are Indian Pueblos and villages subject to particular provisions of Spanish law. For instance, Book VI, Title 3, Law 1 is titled in Spanish, "De las Reducciones y Pueblos de Indios." This translates as, "Concerning Reducciones and Towns of the Indians." This law provides "that the Indians would be reduced to towns . . .," albeit "with such gentleness and mildness, without causing any inconvenience, that those who could not be settled immediately, might be motivated to voluntarily come forward, having witnessed the good treatment and protection received by those already reduced." *Id*. at 108-09.[2]

The concept of the "Pueblo de Indios" did not appear at any particular hour, day, or year. It was not born as a result of any one piece of royal legislation. Rather, the concept – with its extensive political, economic, and legal implications – developed over the course of the sixteenth century. Most of the political and ideological scaffolding of the concept was in place by the latter part of the 1500s (by 1570 or so), the result of many royal orders, decrees, and cédulas and policy decisions by the Crown. By the time the Recopilación was published in 1681, the term "Pueblo de Indios" was firmly entrenched in the administrative and political lexicon of the Spanish Empire. *See* Appendix A Fact Nos. 3 and 4.

Among the protections extended to the lands of "Pueblos de Indios," one that is confirmed in Book IV, Title 12, Law 17 stands out:

> Law 17: Lands that have been held by the Indians or that have false titles shall not be admitted to composicion, and the Fiscales and Protectors shall carry out justice.

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[1] Lyman Tyler identifies several sources of the laws in the Recopilación, including the 1493 Bull Inter Caetera, the Laws of Burgos of 1512-13, the New Laws of 1542-43, and Phillip II's Compilation of 1571. *Id.* at xxxviii-lxvii.

[2] The Spanish used the term "Reducciones" to describe the Indian settlements that were created through the Spanish government's "reduction" (relocation) of Indians.

> In order to better favor and protect the Indians and so that they may not be wronged, We command that there shall be no composiciones of lands that the Spaniards may have acquired from the Indians contrary to Our Royal Decrees and Ordinances, or that they may possess under a faulty title, because in those cases it is Our will that the Fiscales Protectores, or the Fiscales of the Audiencias in case there are no Fiscales Protectores, shall carry out justice and the law which is applicable from Decrees and Ordinances in order to request nullification of such contracts. And We charge the Viceroys, Presidents and Audiencias that they shall give them all assistance in their complete accomplishment.

Tyler, S. Lyman, *Spanish Laws Concerning Discoveries, Pacifications, and Settlements among the Indians: With an Introduction and the First English Translation of the New Ordinances of Philip II, July 1573, and of Book IV of the Recopilación de Leyes de los Reinos de las Indias, Relating to these Subjects*, Salt Lake City: American West Center, University of Utah, 1980, at 165-66.[3]

2. The Legal Consequences of the Designation "Pueblo De Indios" in Spanish Colonial Law.

The implications of the designation "Pueblo de Indios" are critical. Not all Indian settlements or clusters carried that important designation. In the far north of New Spain, Indians who refused to live under Spanish political and religious authority were known variously as "gentiles" or even "bárbaros." Their settlements were referred to typically not as "pueblos," but as "rancherías." And, critically, their communities did not enjoy any of the legal rights that Spain guaranteed to the "Pueblos de Indios."[4]

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[3] Composición was a process for the regularization of land titles resulting in the confirmation of a private title as against the Spanish Crown. The Crown adopted the policy of composición in order to deal with encroachment on Royal lands, which happened with some frequency. Indian lands, of course, were not Royal lands. Royal lands were approximately what in the United States is now called the public domain. Law 17 described above is written to clarify that the practice of composición only applied to the public domain and not to Indian lands.

[4] The full phrase "Pueblo de Indios" is not always used in the Recopilación, which often refers simply to "Pueblos" or to "Indios." All three terms have the same legal significance. *See* Appendix A Fact No. 6 (Recopilación, Book VI, Title 3, Law 1, titled in Spanish, "De las

Being recognized as a "Pueblo de Indios" meant that the inhabitants of an Indian village lived under specific protections afforded by the Spanish crown. For example, Law 1 in Title 1 of Book V, describes the organization of districts, provinces, and local capitals and recognizes a parallel structure for the "pueblos principales de indios" (principal pueblos of Indians). *Recopilación de Leyes de los Reinos de las Indias* Volume 1, Madrid (Spain) Boix Publisher, 1841, page 164. *See also In re Contests of City of Laredo, to Adjudication of Water Rights in Middle Rio Grande Basin & Contributing Texas Tributaries*, 675 S.W.2d 257, 265–66 (Tex. App. 1984), *writ refused NRE* (Nov. 28, 1984) ("the Crown expressed extraordinary concern for the rights and privileges held by the Indians" (citation omitted)). *See also id.* note 4 ("'That the reductions . . . be made in accordance with this law.' The places where the settlements [Pueblos e y reduciones] shall be established should have the commodities of water, lands and woods, entrances and exits, the farmlands, and a commons measuring one league in length, where the Indians may have their game, without getting mixed up with the other Spanish game." (Citation omitted)). The designation meant that the Native people living in that village had a legally recognized land base. *Id.* note 14 ("the founding of any town to be peopled by Spaniards [shall] . . . cause no prejudice to any Indian tribe [pueblo de Indios"); and note 15 ("'Lands to be left in possession of the Indians.' We command that the sale, grant and composition of lands be executed with such attention, that the Indians shall be left in possession of the full amount of lands belonging to them, either singly or in communities, together with their rivers and waters; and the lands which they shall have drained or otherwise improved whereby they may, by their own industry, have rendered them fertile, or reserved in the first place, **and can in no case be**

Reducciones y Pueblos de Indios" translated into "Concerning Reducciones and Towns of the Indians").

sold or alienated." (Emphasis added; citation omitted)). The designation meant that these Native people had the right to self-governance, and the right to access the King's justice. Brian P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico*, Stanford University Press, 2008, at 211-213 ("By law, Indian voters in any given jurisdiction gathered annually in the cabildo, or town hall, to elect new officers. . . . Ordinary Spaniards were barred by law from taking part in, or even being present at, Indian elections.").

The special status afforded to Indians under Spanish jurisdiction appears many times throughout the *Recopilación*. A few examples from Book IV contained within Volume 2 of the *Recopilación* illustrate that this special status can be divided into two categories: those that pertain specifically to land recognized by the Crown as belonging to Indians or to Pueblos de Indios, and those that seek to protect Indian interests generally, especially their estates, goods, and assets from theft, encroachment, or harm brought to them by their Spanish neighbors.

Regarding Indian lands, the Recopilación authorized Crown authorities to confirm land already held by Indians. Title 12 Law 14.[5] And it authorized Crown authorities to grant Indians additional land from the public domain as their needs might dictate. In granting lands to Spaniards, the Recopilación (Title 12 Law 16; also Title 12 Law 9) provides that Crown authorities are to exercise due diligence for the good of the Indians to avoid taking Indian lands. This approach also is applied to water and lands owned by Indian communities (Title 12 Law 18). Irrigation works and other improvements made on land by Indians could not be conveyed. In the event that lands belonging to Indians had erroneously been granted to Spaniards, Crown representatives had the authority to revoke those grants. Title 12 Law 20. In the event that Spaniards squatted on lands and requested a composición (regularization of their title) Crown

[5] All of the Title and Law numbers in this section below refer to Book 4.

authorities (the Fiscal, a Crown attorney, and the office of the Protector of the Indians are explicitly mentioned) must prohibit that legalization if the land in question belonged to Indians. Title 12 Law 17. Moreover, if Indians and Spaniards occupied land to which title had not been established, Indians were to get priority in the legalization process (composición). Title 12 Law 19.

Appendix A, Fact No. 38 and Exhibit 38 demonstrate that Ysleta del Sur Pueblo continued to be treated as a functioning Indian Pueblo government and corporate body by Mexican authorities during the Mexican period, as distinct from Non-Indians. Exhibit 38 relates proceedings conducted by Mexican Prefect Jose Maria Elias Gonzalez in June 1841 for the purpose of:

> ending the dissensions that arise daily between the **Indians of said Pueblo** [of Senecú] and **that of Ysleta** over lands that each believes belong to them. *[interesado en terminar las disensiones que diariamente se susitan entre los naturales de dicho Pueblo [i.e. Senecú] y el de la Ysleta por terrenos que cada uno cree pertenecerles.]*.

Sketchfile 35(4) (Appendix A Exhibit 38) at 1. González gathers

> all the vecinos and Indians of said two Pueblos at an intermediate point, and asking them for proof that each might have in support of their rights so that accordingly he might mark a dividing line, they presented the same document – an original by [the Pueblo of] Ysleta and a copy by [the Pueblo of] Senecú – that contains the measurements Juez de Paz D. Félix Casos [sic] in association with Father Fr. Sebastián Alvarez gave to them November 1, 1828 by virtue of superior orders, but with which the Indians of Ysleta claimed they had never been in agreement. . . *[todos los vecinos é Yndigenas de dichos dos Pueblos en un punto intermedio y pidiendoles las Constancias que cada uno tubiere en apoyo de sus derechos para segun ellas marcarles una linea divisoria, presentaran [sic] un mismo documento Original el de la Ysleta y en copia el de Senecú que contienen las medidas que por el Juez de Paz D. Felix Casos [sic] asociado de con el Padre Fray Sebastian Alvarez se les dieron el 1.o de Noviembre de 1828 en virtud de ordenes superiores pero con el cual espusieron los mismos Yndigenas de la Ysleta no se havian conformado nunca . . .]*.

Id. at 1. Measurements are taken, and the two Pueblos come to an agreement. *Id.* at 2-3. At the bottom of page 3 and continuing to page 4, are numerous signatories to the agreement, including

Mexican officials, a few vecinos (non-Indians), and the officers of the Pueblo governments of Ysleta and Senecú.

> For Ysleta: Juan Rey Pais, Governor of Ysleta; Pedro Cuarón, Cacique of Ysleta; Alvino Marquez, War Captain of Ysleta; . . . Martin Pedraza, Second [War] Captain of Ysleta; . . . Feliciano Alejo, Third [War] Captain of Ysleta . . . *[Juan Rey Pais = Gobernador de la Ysleta, Pedro Cuarón = Cacique de la Ysleta, Alvino Marquez = Capitan de la Guerra de la Ysleta, . . . Martin Pedraza = Segundo Capitan de la Ysleta, . . . Feliciano Alejo = Tercer Capitan de la Ysleta"*

Id. at 4. Also, a number of the signatories identify as "Yndigenas" (Indians) of Ysleta.

3. Summary of Restrictions on Alienation of Indian Pueblo Lands in the Spanish, Mexican and American Periods.

The court in *United States. in Behalf of Pueblo of San Ildefonso v. Brewer*, 184 F. Supp. 377, 379-80 (D.N.M. 1960) summarized the restrictions imposed upon Pueblo Indian lands in the Spanish, Mexican and American periods, finding that the restrictions on privatization, alienation and conveyance by Spain continued throughout the Mexican period and into the American period to the present day, and highlighting the long-term legal effects of the designations "Pueblo de Indios," "Pueblo" or "Indios" in the Recopilacion and related Spanish colonial law and administration. For example, the court summarized the "law of the Kingdom of Spain" relative to Indian land grants as follows:

> 1. The Pueblo Indians of New Mexico were considered wards of the Spanish Crown.
>
> 2. The fundamental legal basis for the Pueblo Land Grants lies in the Royal Ordinances.
>
> 3. Only the Viceroy, Governors and Captains-General could make grants to the Indians, and only these officials had the authority to validate sales of land by the Indians.
>
> 4. All non-Indians were expressly forbidden to reside upon the Pueblo lands.
>
> 5. The Spanish Government provided legal advice, protection and defense for the Indians. Provincial officials had the authority to appeal cases directly to the Audiencias in Mexico.

> 6. The Indians had prior water rights to all streams, rivers and other waters which crossed or bordered their lands.
>
> 7. The Pueblo Indians had their land in common, the land being granted to the Indians in the name of the Pueblo.

Id. at 379-80, *citing and quoting* "*Rio Abajo, New Mexico"* by Herbert O. Brayer in the University of New Mexico Bulletin (1939).

4. Ysleta del Sur Pueblo was a Protected "Pueblo de Indios" Under Spanish and Mexican Law.

Appendix A contains undisputed facts, documents and other undisputed evidence showing conclusively that Ysleta del Sur Pueblo was consistently designated in Spanish colonial documents and administrative actions as a "Pueblo de Indios" protected by Spanish colonial law, policy and administration, including the Recopilación de Leyes de los Reinos de Las Indias. Defendant's expert witness historian, Dr. John Kessell, acknowledged in his deposition that Ysleta del Sur Pueblo was a "Pueblo de Indios" throughout the Spanish colonial period.

Appendix A also lists documents, expert depositions and expert reports showing that the same protections accorded "Pueblos de Indios" (and Ysleta del Sur Pueblo in particular) during the Spanish colonial period continued throughout the Mexican period.

D. Conclusion.

Ysleta del Sur Pueblo was a "Pueblo de Indios" enjoying the full protections against privatization and conveyance of its Spanish grant lands afforded by Spanish colonial law, policy and administration in colonial New Mexico, and those protections continued during the Mexican period.

II. THE INDIAN NON-INTERCOURSE ACT APPLIES TO THE LANDS AT ISSUE.

A. Summary.

The United States Constitution, federal common law, and the federal Non-Intercourse Act all prohibit alienation of Indian lands except by the Congress of the United States.[6] Defendant City of El Paso has raised as an affirmative defense a claim that the Non-Intercourse Act does not apply to the Ysleta del Sur Pueblo.[7] Because that affirmative defense is wrong as a matter of law, this Court should grant partial summary judgment in favor of Ysleta del Sur Pueblo confirming that the Non-Intercourse Act does apply to the Pueblo and any lands the Pueblo proves that it owns at the trial of this action.

B. Proposed Undisputed Facts.

Pursuant to the Court's July 22, 2015, Standing Order Regarding Motions for Summary Judgment, the Pueblo's Proposed Undisputed Facts relevant to the ruling requested by this section are annexed hereto as Appendix B.

C. Argument.

1. The Indian Non-Intercourse Act Applied to the Ysleta del Sur Pueblo Grant Once the Grant Lands Fell Under the Jurisdiction of the United States of America.

(a) Congress Has Exclusive Authority to Regulate the Affairs of Indian Tribes, Including the Conveyance or Extinguishment of Title to Indian Lands.

The United States Constitution provides that Congress, and only Congress, can regulate commerce with Indian tribes. U.S. Const. art. I, § 8, cl. 3 (commonly known as the "Indian Commerce Clause"). The Indian Commerce Clause provides that "Congress shall have the

[6] Federal common law also protects Indians' rights to their land, protection that is not pre-empted by the Nonintercourse Act, "which put in statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678.

[7] Am. Answer, ECF 43, ¶¶ 45, 46.

Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." *Id*. This power was previously articulated in the Articles of Confederation, which has its roots in British Indian policy. "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and duty of exercising a . . . protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913).

Pursuant to its powers to regulate the affairs of Indians, Congress has enacted laws specific to Indians, including laws that regulate trade and intercourse with Indian tribes and that address Congress' exclusive authority to regulate the sale or conveyance of Indian lands. *See* Title 25 of the United States Code, containing statutes specific to Indians, including 25 U.S.C. § 177 specific to Indian lands. These laws, the Constitution and the common law all confirm that any attempt to extinguish, sell, or convey title to Indian lands by a state, county, city, private party, or any entity, without Congressional authorization, is void. The Supreme Court, the Fifth Circuit, and other federal courts have confirmed this prohibition, and in doing so repeatedly held that conveyances of title to Indian lands in violation of these requirements are void. *United States v. Santa Fe Pacific RR Co*., 314 U.S. 339 (1941), *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926); *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1046 (5th Cir. 1996); *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 498-99 (1967); *Alabama-Coushatta Tribe of Tex. v. United States*, No. 3-83, 2000 WL 1013532 at *40 (Fed. Cl. June 19, 2000).

(b) <u>The Historic Foundations of the Indian Commerce Clause.</u>

Influenced by Spanish philosophers and their tenets regarding indigenous land rights in colonial Spain, European nations acknowledged that Indian tribes had a possessory right to their lands. Cohen's Handbook of Federal Indian Law § 1.02[1], at 13 (2012) (hereinafter, Cohen's Handbook). Under the "doctrine of discovery," European nations took the position that they had the sole authority to acquire lands from Indian tribes, a position reflected in early colonial laws. *Id*.

In its American colonies, the British government increasingly controlled Indian land purchases by the colonies and individual colonists to ensure that the European purchaser received title in fee from the government's sovereign patent. Cohen's Handbook § 15.06[1], at 1028. In addition, the British government sought control over land purchased from Indian tribes because the acquisition of Indian lands from Indian tribes by colonies and colonists was often fraudulent and led to conflict and instability on the frontier. Cohen's Handbook § 1.02[1], at 15-16. Indian tribes increasingly resented the colonists intruding on their lands, which encouraged the tribes to align with other European nations, including France. Anticipating the French and Indian War, the British government began to exercise greater control over Indian affairs – which had been traditionally managed by the individual colonies. Cohen's Handbook § 1.02[1], at 16. Beginning in the 1750s, the British government restricted colonies from purchasing and issuing grants to Indian lands. *Id*. The British Proclamation of 1763 reserved the lands west of the Appalachians for Indians and prohibited the colonies and colonists from purchasing lands from Indian tribes without the British government's authorization. Cohen's Handbook § 1.02[1], at 17.

During the Revolutionary War, the Continental Congress acted on behalf of the colonies. One of the Continental Congress' first acts was committed to "preserving and securing the friendship of Indian nations" and establishing departments of Indian affairs. Cohen's Handbook

§ 1.02[2], at 17. The Continental Congress and Indian tribes also began to engage in unwritten, diplomatic ceremonies to "create a discourse of sacred obligation." Cohen's Handbook § 1.02[2], at 18. These engagements later became memorialized by treaties between the Indian tribes and the United States. The various treaties confirm the Continental Congress' intent regarding the Indian tribes, which included: guaranteeing Indian tribes their lands; delivering goods to the Indian tribes; reserving lands for Indian tribes upon which to live and hunt; identifying tribal jurisdiction over non-Indians settling on Indian lands; identifying criminal jurisdiction for crimes committed by and against Indians; and affording Indian tribes protection guaranteed by the Continental Congress. Cohen's Handbook § 1.02[3], at 20-21.

Following adoption of the Declaration of Independence in 1776, the United States approved the Articles of Confederation. U.S. Articles of Confederation (1777). Article IX of the Articles of Confederation specified that Congress had "the sole and exclusive right and power . . . regulating the trade and managing all affairs with Indians not members of any of the states; provided that the legislative right of any state within its own limits be not infringed or violated." U.S. Articles of Confederation art. ix (1777); Cohen's Handbook § 1.02[2], at 19.

Subsequently, upon the adoption of the United States Constitution, Article I, section 8, the Indian Commerce Clause, underscored the powers of the federal government over Indian affairs by reserving to Congress the power to "regulate commerce with foreign nations, among the several states, and with the Indian tribes." *Id.*; *see also* Cohen's Handbook § 15.06[1], at 1030; § 1.02[3], at 22.

2. The Indian Non-Intercourse Act.

One year after adoption of the Constitution, Congress enacted federal law regulating trade and intercourse with the Indian tribes and prohibiting the sale of Indian lands. Indian Trade

and Intercourse Act of July 22, 1790, § 4, 1 Stat. 137 ("Non-Intercourse Act").[8] In line with the principles of aboriginal title as recognized by European sovereigns, the Non-Intercourse Act confirmed congressional control on trade and intercourse with Indian tribes. *See Alabama Coushatta Tribe of Tex.*, 2000 WL 1013532 at *11. For example, under Spanish law, Indian lands could be alienated only under governmental supervision. *United States v. Candelaria*, 271 U.S. at 442 ("Under the Spanish law, Pueblo Indians, although having full title to their lands, . . . could alienate their lands only under governmental supervision."). And, under Mexican law, "the government extended a special guardianship over Indian pueblos, and that a conveyance of pueblo lands, to be effective, must be made under the supervision and with the approval of designated authorities." *Id.* (internal quotations and citations omitted). Thus, "in imposing a restriction on the alienation of these lands" Congress was "continuing a policy which prior governments had deemed essential to the protection of such Indians." *Id.*

These restrictions were necessary to prevent the "unfair, improvident, or improper disposition" of Indian lands and to protect a tribe's "interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state" as non-Indians overwhelmingly began to settle in the west displacing and taking Indian lands. *Tonkawa Tribe of Okla.*, 75 F.3d at 1045 (internal citations omitted); *see also Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 538 (N.D.N.Y. 1977) (Non-Intercourse Act protects land purchased and reserved for tribe in treaty with New York prior to passage of United States Constitution and confirmed in subsequent treaties with the tribe by Congress) *aff'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226 (1985). Each section of the Indian Non-Intercourse Act

[8] The Act was subsequently modified and amended by Congress on multiple occasions between 1790 and 1834. Additional restraints on the alienation of tribal land were added by Congress in 1871, and again in 2000. Cohen's Handbook § 15.06[1], at 1029, 1031.

"fulfilled an obligation previously assumed by the United States in treaties with various tribes" and provided a "practical and contemporaneous construction" to the Indian Commerce Clause. Cohen's Handbook § 1.02[2], at 35.

(a) Transfers of Indian lands without Congressional Authorization and in Violation of the Indian Non-Intercourse Act are Void.

By its own terms, the Non-Intercourse Act renders void any transfer or conveyance of protected Indian lands that is not authorized by Congress. 25 U.S.C. § 177.[9] Specifically, the Act prohibits the alienation or acquisition of Indian lands without Congressional authorization, as follows:

> *No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity*, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177 (emphasis added).

Under the Non-Intercourse Act, where Indian lands are conveyed or obtained by any person without Congressional authorization, the conflicting non-Indian title is void and invalid. *Id.*; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974) ("The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790 . . . which provided that no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . This has remained the policy of the United States to this day.")

[9] Act of June 30, 1834, § 12, 4 Stat. 729 (codified at 25 U.S.C. § 177).

(internal citations and quotations omitted). Title obtained, conveyed and purchased from the Pueblo Indians is obtained in violation of the Non-Intercourse Act and is void. *United States v. Sandoval*, 231 U.S. at 48-49. The Supreme Court in *Sandoval* confirmed that the Non-Intercourse Act's restraints on alienation of Indian lands applied to the Pueblo Indians. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 243 (1985).

(b) The United States Supreme Court Has Repeatedly Confirmed the Nationwide Scope of the Indian Non-Intercourse Act.

The United States Supreme Court has upheld Congress' exclusive authority to transfer or extinguish aboriginal title under the federal common law, United States Constitution and the Non-Intercourse Act. As the Supreme Court confirmed in *Oneida Indian Nation v. County of Oneida*:

> In *Johnson v. M'Intosh*, . . . the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775; those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government. . . . federal law, treaties, and statutes protected Indian occupancy and . . . its termination was exclusively the province of federal law.

414 U.S. 661, 669-70 (1974) (citing *Johnson v. M'Intosh*, 21 U.S. 543 (1823)). *See also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 347 (1941) ("Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme."). This has been held to be true even where lands were held by Indians in communal fee simple ownership. *United States v. Sandoval*, 231 U.S. at 48. This has also been held to be true "even if the ultimate legal fee holder is a state." *Alabama Coushatta Tribe of Tex.*, 2000 WL 1013532 at *41 (citing to Chief Justice Marshall's opinions in *Johnson v. M'Intosh* and *Worcester v. State of Georgia*, 31 U.S. 515 (6th Pet.) (1832)); *see also, Lipan Apache Tribe*, 180 Ct. Cl. at 498 (the *Worcester* decision, "plainly confirm[s] the exclusive power of the United States to extinguish Indian title even if the ultimate legal fee holder is a

state" and "the State of Texas is not excepted from the rule applicable to all other States.").

Thus, Congress' exclusive authority over Indian affairs and Indian lands includes its exclusive authority to protect Indian lands under grants given by Spain and recognized by Spain's sovereign successors, Mexico and the United States. Any attempt to transfer title to the Pueblo's lands without Congressional approval is in violation of federal law and void.

3. The Indian Non-Intercourse Act Applies to the State of Texas and Indian Lands Located Within Texas.

The Fifth Circuit Court of Appeals has confirmed that the Non-Intercourse Act's prohibition is effective against states, like Texas, and private parties who attempt to convey or otherwise obtain Indian lands in violation of the terms of the Non-Intercourse Act. *Tonkawa Tribe of Okla.*, 75 F.3d at 1046. "In this regard the Act reaches not only conveyances by a tribe, but also any action by a state which purports to divest a tribe of an interest in land." *Id.*

The Fifth Circuit's application of the Non-Intercourse Act to Texas is consistent with holdings from the federal Court of Claims in *Lipan Apache Tribe*, 180 Ct. Cl. 487 and *Alabama-Coushatta Tribe of Tex.*, 2000 WL 1013532. These federal courts have confirmed that the Non-Intercourse Act applies to all Indian lands, including Indian lands in Texas. In *Alabama-Coushatta Tribe of Tex.*, the United States argued that "Congress did not extend the [Indian Trade and Intercourse] Act to the State of Texas and the Indians within the State's borders when Texas was annexed by the United States." *Id.* at 47. Rejecting that argument, the court held:

> because Texas attained statehood on equal footing with the original States in all respects . . . the United States Constitution, treaties, and federal statutes became applicable to the State of Texas and the Indians within Texas' borders on December 29, 1845. . . . Therefore, we hold that the terms of the Indian Trade and Intercourse Act of 1834 extended to the State of Texas on December 29, 1845.

Id. Upon statehood, the State of Texas "became annexed to the United States on 'equal footing' with the other States of the Union and thus, Texas' fee interest in its public lands did not confer

power on Texas to manage Indian matters within its borders." *Id.* (quoting *Lipan Apache Tribe*, 180 Ct. Cl. at 498-99). "The State's retention of its public domain no more meant that it kept its pre-admission power over Indians than the like retention by the original States of their lands precluded the Federal Government's authority." *Alabama-Coushatta Tribe of Tex.*, 2000 WL 1013532 at *41 citing *Lipan Apache Tribe*, 180 Ct. Cl. at 498-99.

Alabama-Coushatta is consistent with the court's prior holding in *Lipan*. In *Lipan*, the court held that the Republic of Texas never extinguished title to the Indian lands at issue given the Republic's policies "encouraging peaceful relations with the Indians and of discouraging mutual encroachments," and that upon attainment of statehood, control over Indians and their affairs passed to the federal government. *Lipan Apache Tribe*, 180 Ct. Cl. at 487, 495.

D. Conclusion.

The Indian Non-Intercourse Act applies to Ysleta del Sur Pueblo and any lands the Pueblo proves that it owns at the trial of this action. As mandated by the Non-Intercourse Act, no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto "shall be of any validity in law or equity." 25 U.S.C. § 177. Only the United States Congress could or can extinguish, convey or acquire any interest in Ysleta del Sur Pueblo's Spanish grant lands, which it has never done. The City's affirmative defense to the contrary is without merit. Am. Answer at ¶¶ 45, 46.

WHEREFORE, Ysleta del Sur Pueblo requests that the Court grant this motion and enter rulings for partial summary judgment on the matters of law set forth above.

Dated: July 29, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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