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. CITY OF EL PASO, Defendant.	§ § § § § § § § § §	Case No. 3:17-CV-00162-DCG

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This action involves one of Ysleta del Sur Pueblo's most deeply-rooted and fiercely protected rights – its land – a resource that sustained the Pueblo for centuries. The Pueblo seeks a declaratory judgment that it is the rightful holder of title to 111.73 acres of land ("111 acres" or "the Property"), comprised of 42.73 acres of undeveloped dirt lots and a 69-acre park. The Pueblo received a Spanish land grant after Tigua Pueblo Indians were relocated through the Spanish colonial policy of congregación.[1] The Pueblo has never conveyed or abandoned its communal, corporate title to the Property, and the governments of Spain, Mexico and the United States have never purported to extinguish the Pueblo's title. The City first claimed an interest in the Property between 1944 and 1970 through "purchases" that did not involve the Pueblo and were not authorized by the United States Congress.

The City's motion for summary judgment (ECF 56) requests rulings on four matters:

1. Section I asserts that the Pueblo's claim fails because it is "undisputed" that there was no "1751 grant to the Pueblo." ECF 56 at 4-7. [2]
2. Section II asserts that this Court lacks subject matter jurisdiction. ECF 56 at 7-20.
3. Section III asserts that the Pueblo's claim is barred by laches. ECF 56 at 20-27.
4. Section IV asserts that this case should be dismissed under Rules 19(b) and 12(b)(7) arguing that the State of Texas is a required party that cannot be joined. ECF 56 at 27-31.

None of the City's four arguments support entry of summary judgment against the Pueblo.[3] All are contrary to established law and in certain instances involve genuine issues of material fact.

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[1] "Tigua" is a reference to the language spoken at Ysleta del Sur Pueblo. "Tigua Indians" are the Pueblo, not "predecessors to" the Pueblo as the City asserts (without citation) at ECF p. 3.
[2] The City's pagination does not align with the page numbers provided by the Court's ECF filing system. Citation to page numbers in this response are to the number provided by the Court.
[3] Where there are no genuine issues of material fact, the Court may enter judgment in favor of the Pueblo on the issues raised by the City. 10A Wright, Miller & Kane Fed. Prac. & Proc. § 2725 (4th ed.); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.71[3] (3d ed. 1999).

ARGUMENT

I. NO PHYSICAL GRANT DOCUMENT IS REQUIRED TO PROVE YSLETA DEL SUR PUEBLO RECEIVED A SPANISH CROWN LAND GRANT.

A. Ysleta del Sur was a "Pueblo de Indios" Under Spanish Colonial Law.

Ysleta del Sur Pueblo's (hereinafter "YDSP" or "the Pueblo") Motion for Summary Judgment (ECF 57) confirms that it was a "Pueblo de Indios" under Spanish law. This protected its land from alienation beginning in 1682 with its congregación, through the end of the Spanish colonial period in 1821, through the Mexican Period and following the U.S. accession in 1848.[4] Dr. Cutter's report and response report contain extensive analysis of Pueblo Indian land rights under Spanish colonial law, policy and administration in colonial New Mexico. As a "Pueblo de Indios," YDSP was afforded all the legal rights and protections, including a land base protected by a standard "four square league grant," that flowed from that official legal designation. The City mischaracterizes Dr. Cutter's reports and testimony at ECF 56 at 4-6. Dr. Cutter's opinion that there was and is a YDSP Spanish land grant most certainly does not rest on the existence of "a grant document" nor on the "intent" of the 1825 survey of the grant. See Appendix A, Pueblo's Response to City's Proposed Fact No. 1.

B. Valid Spanish Four Square League Grant Documents Have Not Been Found for Any of the Twenty Existing Pueblos Except Sandia Pueblo.

A four square league grant protecting the lands of "Pueblos de Indios" was Spanish law and policy in colonial New Mexico (which included present day El Paso). *United States v. Sandoval*, 231 U.S. 28, 38-39 (1913) ("The lands belonging to the several pueblos vary in quantity, but usually embrace amount 17,000 acres, held in communal, fee-simple ownership

[4] The policy of "congregacion" was to bring scattered settlements of Indians together into one or more manageable, accessible villages subject to Spanish oversight and control around a Catholic mission church.

under grants from the King of Spain, made during the Spanish sovereignty"). Yet except for Sandia Pueblo, no valid physical Indian Pueblo four square league grant documents have been found.[5] Several Pueblos testified to the Surveyor General that they once had such documents but that they were lost over the years.[6] Seven "four square league" pueblo grants were confirmed by the Surveyor General and by Congress without grant documents on the basis of Spanish law, Pueblo affidavits and local traditions.[7] Eleven more "four square league" pueblo grants were confirmed on the basis of the "Cruzate" grant documents, which are fraudulent. *Id.* at 205.

C. Historical and Evidentiary Records Confirm the Pueblo's Spanish Grant.

1. The Federal Indian Agent Before El Paso Became Part of Texas.

During the Mexican-American war, the U.S. provisional government of New Mexico in Santa Fe governed what had been the Mexican Territory of New Mexico and that part of the state of Chihuahua that included the El Paso area. Between February of 1848 (Treaty of Guadalupe-Hidalgo) and the Compromise of 1850, all of the Indian Pueblos, including YDSP, were under the military and civil jurisdiction of the provisional government in Santa Fe. James S. Calhoun, who served in the army during the war, served as the federal Indian Agent for the territory of New Mexico. On October 4, 1849, Calhoun wrote to his superior in Washington listing Indian Pueblos, including YDSP: "The Pueblos, or civilized Towns, of Indians of the Territory of New Mexico, are the following. *** Opposite El Paso. Socoro, Isletas 600 [population]." Able, A.H.,

[5] Ebright, Hendricks and Hughes, "Four Square Leagues: Pueblo Indian Land in New Mexico", University of New Mexico Press (2014) ("Ebright et al., "Four Square Leagues") at 11.
[6] J. J. Bowden, "Pueblo of Santa Clara Grant," http://newmexicohistory.org/2015/07/17/pueblo-of-santa-clara-grant/ (accessed August 12, 2019); The Pueblo of Santa Clara Grant, No. K (Mss., Records of the S.G.N.M.).
[7] Ebright et al., "Four Square Leagues" at 11.

The Official Correspondence of James S. Calhoun (Washington GPO 1945) at 39.[8] Calhoun refers to the "Isleta del Sur" and Socorro Pueblos in letters of November 16, 1849 and March 29, 1850 ("It may be well to remember that there are two Indian Pueblos below El Paso, Isletta & Socorro ….") and February 16, 1851 (listing population at the Pueblos). *Id.* at 81, 172 and 294. Calhoun recommended Indian agencies, including a sub-agent at "the military post near El Paso." *Id.* at 57. Calhoun died in June 1852.[9] But action initiated by Calhoun led to U.S. confirmation of Pueblo "four square league" Spanish land grants.

2. Implementation of the 1854 Surveyor General Act Confirms That Physical Grant Documents Are Not Necessary to Confirm Spanish Grants to Pueblos.

The Act of July 22, 1854, 33 Cong. Ch. 103, 10 Stat. 308, directed the Surveyor General:

> [to] make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating … the nature of their titles to the land … [W]hich report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bond fide* grants, ...[10]

Ebright Hendricks and Hughes describe implementation of the Surveyor General Act:

> Several Pueblos – Santa Clara, San Ildefonso, Nambe, Pojoaque, Tesuque, Santa Ana and Isleta – had no grant documents. U.S. officials operated on the assumption that all the pueblos had at one time received written land grants from Spanish and Mexican authorities, a view possibly based on Calhoun's reports. The U.S. authorities also seemed to be aware, as a result in part of Domaciano Vigil's sworn testimony, that "all recognized that the pueblos were entitled to four square leagues, with or without documents."

Elbright et Al., "Four Square Leagues" at 245 (footnote omitted). The Surveyor General's geographical mandate was the New Mexico Territory, which by 1854 no longer included YDSP:

> Calhoun proposed the creation of six districts for the administration of Indians, the last of which would have consisted of Socorro and Ysleta. Had Ysleta remained in

[8] Available at https://archive.org/search.php?query=the%20official%20correspondence%20of%20James%20S.%20Calhouna (accessed August 12, 2019).
[9] Ebright et al., "Four Square Leagues" at 243.
[10] Elbright et al., "Four Square Leagues" at 309.

> New Mexico, it would almost certainly have enjoyed the same right that was eventually adjudicated to most other Pueblo communities by the surveyor general: a grant of four square leagues. In addition Ysleta would have received a patent from the United States for their four square leagues.[11]

3. Persistent Practice and Belief Confirms the YDSP Spanish land grant.

Even in the absence of a document, the City's expert witnesses confirm the existence of the 1751 Spanish grant, and that it was to the Ysleta del Sur Pueblo. Kessell, "Ysleta del Sur under Spain and Mexico: A Commentary;" text at 12 entitled "1751: A different kind of Indian grant." Referring to the YDSP Spanish grant, Kessell states, "[t]he year 1751 has never been in doubt" as the year the grant was made. *Id.* See also Lawrence Kelly report at 4 ("In the literature about Ysleta del Sur Pueblo the year 1751 has gained special significance over time."). Kelly summarizes the history of references to the Ysleta grant at pages 5 and 6 of his report.

4. Ysleta del Sur Pueblo Land Boundary Disputes.

In 1692 Don Diego De Vargas, Governor of colonial New Mexico, adjudicated a boundary dispute between the Pueblos of Ysleta del Sur and Socorro. Kessell and Hendricks, "By Force of Arms," 275 (Univ. of N.M Press 1992). Socorro Pueblo was adjacent and downriver to YDSP. As Governor of New Mexico and representative of the Crown, de Vargas established a boundary between the two Pueblos, demonstrating that both Pueblos held land rights as tribal corporate bodies.

In 1829 there was a boundary conflict between YDSP and Senecu Pueblo. Senecu Pueblo was adjacent to YDSP on the upriver side. The alcaldes of Senecu and Ysleta walked the Pueblos' boundary in the company of members of each community, which resulted in agreement. Ebright and Hendricks, Pueblo Sovereignty at 114-15. Another boundary conflict between the

[11] Ebright and Hendricks, "Pueblo Sovereignty: Indian Land and Water in New Mexico and Texas" at 119 (footnotes omitted).

YDSP and Senecu Pueblos arose in 1841. "Prefect Jose Maria Elias Gonzalez took steps to settle the dispute, gathering the leading Indians from both Pueblos for adjudication." *Id*. at 116.

In 1755 a non-Indian resident of El Paso sought a grant to vacant land (*realenga*) in the vicinity of the Pueblos of Ysleta del Sur and Socorro.[12] The local magistrate took action to defend the interests of the two "Pueblos de Indios." He summoned the "governors, justices, and communities of Natives" of the two Pueblos to inquire whether the proposed grant might be prejudicial to them.[13] He initiated the process of naming a Protector de Indios to aid the Indians.[14] After lengthy proceedings, the boundaries of the new Hispanic grant were negotiated to protect the existing Pueblo grants. See Appendix A, Pueblo's Response to City's Proposed Fact No. 1. (Cutter June 27, 2019, Resp. Report at 3-5). This event shows that Crown officials and local *vecinos* recognized YDSP as a "Pueblo de Indios" holding a Spanish land grant.

5. The Socorro Pueblo 1802 Four Square League Grant Survey.

An 1802 incident further confirms the Spanish land grants to these Indian Pueblos:

> In the fall of 1802, a land dispute arose that involved Socorro Pueblo. In the course of the legal wrangling that took place over the next several years, **the Pueblo league was invoked and Indian leaders were consulted** in an effort to determine the amount of land that belonged to Socorro, even though the formerly Piro community was considered predominantly mestizo by that time.

Ebright and Hendricks, "The Pueblo League and Pueblo Indian Land in New Mexico, 1692-1846," YDSP Archives, Vol 4 at 140. (Emphasis added.) The report goes on to say:

> In El Paso on 18 October 1802 Bernal [lieutenant governor of El Paso] ordered the Ortegas to produce the titles that they claimed Captain Manuel de San Juan had

[12] Juárez Municipal Archive, University of Texas at El Paso, roll 2, book 2, 1750, f. 469-568, "Registration of land by Francisco Joaquín Sánchez de Tagle," April 2-26, 1755.
[13] Registration of land by Francisco Joaquín Sánchez de Tagle," April 2-26, 1755, Juárez Municipal Archive, University of Texas at El Paso, roll 2, book 2, 1750, fr. 538-539.
[14] On the office of Protector de Indios in colonial New Mexico, see Charles R. Cutter, "The Protector de Indios in Colonial New Mexico, 1659-1821" (Albuquerque: University of New Mexico Press, 1986).

> given to their father so that "on examination of them and the property of the Indians of the Pueblo of Socorro, it could be seen whether the aforesaid land belonged to [the Ortegas]."

Id. This shows land ownership by Socorro Pueblo and not individual inhabitants of Socorro. When asked to present their documents of ownership, the "Indians" said they had lost them and had been unable to find them, despite their diligent efforts. *Id.* The proceedings determined that "Ortega had usurped land from Socorro and gone as far as making them pay rent to cultivate their own land, 'indeed the land that has caused the question is within the league that belongs to this pueblo.'" *Id.* This again shows that the dimension of a league was connected to what contemporaries construed as the norm for Pueblo Indian land grants in the El Paso area, and that the Pueblo did not need to produce a grant document to have its Indian land grant honored.

6. The YDSP Spanish Land Grant was surveyed in 1825.

There is a detailed description of the 1825 survey of the YDSP land grant based on an original Spanish document in Ebright and Hendricks, "Pueblo Sovereignty," at 111-14. Ebright and Hendricks summarize the Chihuahua state colonization law of May 26, 1825, which directed town councils or judges to establish monuments and boundaries for ejidos (communal lands) which included the Indian Pueblo land grants south of El Paso. The alcalde of El Paso initiated the survey in November 1825. The result of the survey enclosed more than 17,000 acres, the approximate size of a Pueblo four square league grant. *See* Appendix A, Pueblo's Response to City's Proposed Fact Nos. 4-6 (Ebright and Hendricks, "Pueblo Sovereignty" at 111-14).

7. The Texas Legislature Confirmed the Pueblo's Spanish Land Grant.

The state of Texas acknowledged the YDSP Pueblo land grant on February 1, 1854, when its Legislature approved "An Act for the relief of the inhabitants of the town of Ysleta in the county of El Paso." There was no corporate "town" of Ysleta in 1854 – only the Pueblo

(Spanish for town) of Ysleta. This 1854 act "fully recognized and confirmed" the grant made to the "inhabitants of the town of Ysleta, in the present county of El Paso, *in the year seventeen hundred and fifty-one*, *by the Government of Spain*" (emphasis added).[15] The only Spanish grant to "Ysleta" in this area was the grant to Ysleta del Sur Pueblo as a "Pueblo de Indios." No other "town" in the area called "Ysleta" existed under Spanish rule.

D. The City Concedes There is an Ysleta del Sur Spanish Land Grant.

The City's argument in Section I – that there is no document evidencing a land grant to the Pueblo – is misleading at best because the City, the County, and the State of Texas all have repeatedly recognized that there was an Ysleta del Sur Pueblo Spanish land grant.[16]

E. The Pueblo's Spanish Grant was Communal, Corporate and Inalienable.

Unable to demonstrate that a document is necessary to confirm the Pueblo's Spanish grant, the City is left to argue that Dr. Cutter's testimony casts "doubt" on whether the Spanish grant was for "the mixed Spanish and Indian community present at Ysleta." ECF 56 at 6. That is incorrect, and contradicts the testimony of the City's own experts that the Spanish grant was to Ysleta Pueblo. See argument at 3, *supra*. The 1854 Texas confirmation specifically references this grant, and in doing so did not change, but instead confirmed, the grant recipient.

The first incorporation of the "Town of Ysleta" in October 1859 was pursuant to the Texas general incorporation Act of January 27, 1858, Texas Legislature, Chapter 61:69-74;

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[15] Gammel, Hans, *The Laws of Texas 1822-1897* (Austin: Gammel Book Co., 1898), 4:53.

[16] *E.g.*, February 1, 1854 Act (recognizing "the grant made to the "inhabitants of the town of Ysleta, in the present county of El Paso, in the year seventeen hundred and fifty-one, by the Government of Spain"); Historic Preservation Urban Design Division Department of Planning, Research & Development City of El Paso, Texas, *Design Criteria: Ysleta Historic District*, February 26, 1991, at 4 ("The second significant event of the times came about in 1751 when the Spanish Crown granted 'a league of land' to the Pueblo of San Antonio de Ysleta – a grant of approximately thirty-six square miles surrounding the mission church and encompassing territory on both sides of the Rio grande.").

Hendricks Report at 17-18. Prior to 1859, there was no corporate entity, or claim of corporate entity, that could have held title to the Ysleta grant other than YDSP. Hence the Texas Legislature's Act of February 1, 1854 could not, and did not purport to alter ownership of the Pueblo grant, but instead it did just what it said: "fully recognized and confirmed" "the grant made" "in the year seventeen hundred and fifty-one, by the Government of Spain."

II. THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. Legal Standard.

Section II of the City's motion challenges this Court's subject matter jurisdiction, pled in the complaint at ECF 1, Compl. ¶ 6. The City brought this challenge in a Rule 56 summary judgment motion, so the City bears the burden of proving that there is no genuine dispute as to any material fact concerning jurisdiction. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("a party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact"). If "there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." *Id.*, 477 U.S. at 331, n.2 (citation omitted). The City failed to meet its burden.

B. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1362.

The Court has subject matter jurisdiction under 28 U.S.C. § 1331 (Federal question):

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

And the Court has subject matter jurisdiction under Title 28 U.S.C. § 1362 (Indian tribes):

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The United States Supreme Court has confirmed that "tribes suing under this section [1362] were to be accorded treatment similar to that of the United States had it sued on their behalf." *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 474 (1976). The Ninth Circuit Court of Appeals has explained:

> Cases involving Indian tribes as plaintiffs present special considerations. The moral and legal obligations of the United States toward Indian tribes place the tribes in a special posture when seeking relief in federal courts. This special posture has been codified in 28 U.S.C. § 1362 . . . . The primary purpose of § 1362 was to remove the jurisdictional amount in controversy barrier for Indian tribes, and to give tribes the right to sue on their own behalf in any controversy "involving tribal property or matters of tribal sovereignty where the United States declines to do so on a tribe's behalf as trustee."

Housing Auth. of Seattle v. Washington, 629 F.2d 1307, 1312 (9th Cir. 1980).

C. The Pueblo's request for declaratory judgment "arises under the Constitution, laws, or treaties of the United States."

1. The Complaint Is Rooted in Federal Law.

As bases for this Court's jurisdiction, the Complaint provides that the Pueblo:

> seeks a declaratory judgment confirming its title to real property deriving from a Spanish grant to Plaintiff recognized by federal law, and the laws of Spain and Mexico, and preserved by the United States in the Treaty of Guadalupe Hidalgo.

ECF 1, Compl. ¶ 6. Federal common law recognizes property rights conferred by prior sovereigns. *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 558 (5th Cir. 1946). In *United States v. O'Donnell*, 303 U.S. 501, 511 (1938) the Supreme Court confirmed:

> The obligation imposed by the principles of international law to respect property rights within annexed territory is substantially that recognized by the treaty, and comprehends not only formal grants 'but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession.'

Id. at 510 n.2 (citations omitted). For Indian title, federal common law also recognizes property rights based on possession. *Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226,

226 (1985) ("It has been implicitly assumed that Indians have a federal common-law right to sue to enforce their aboriginal land rights, and their right of occupancy need not be based on a treaty, statute, or other Government action."). Because the Pueblo's claim arises under federal law, including federal common law, the United States' Constitution, and the Treaty of Guadalupe Hidalgo, the Court has jurisdiction under 28 U.S.C. §§ 1331 and 1362.

2. The Treaty of Guadalupe Hidalgo is not the only basis for jurisdiction.

The City's contention that the Treaty is "the only federal law alleged to invoke this Court's jurisdiction" is incorrect. ECF 56 at 2, 7, 19-20.[17] As detailed above, the Pueblo's claim arises under numerous provisions of federal law. Of the four cases cited by the City on the issue of jurisdiction, three are irrelevant[18] and one supports the Pueblo's position.[19]

After incorrectly characterizing the jurisdictional bases for the Pueblo's claim as "only" the Treaty, the City next attempts to discount the Treaty by arguing substantive issues that go the

[17] Also incorrect is the City's contention at ECF 56 at 8, n.7 that: "The Complaint does not allege any claim under the federal Non-Intercourse Act, 25 U.S.C. § 177, or that its alleged 'grant' is subject to any federal restrictions against alienation." The Non-Intercourse Act is not a grant of title, and instead was raised by the City as an affirmative defense. ECF 43, Def.'s Am. Answer ¶¶ 45, 46. A complaint is not required to anticipate and address affirmative defenses nor would doing so be appropriate. *E.g.*, *Moore v. McCalla Raymer, LLC*, 916 F. Supp. 2d 1332, 1342 (N.D. Ga. January 2, 2013) ("The complaint contains whole paragraphs of legal argument, quotations, and citations which have no place in a complaint.").

[18] *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 843 F.3d 325 (8th Cir. 2016) (no federal court jurisdiction in "simple breach of contract claim" between two private companies); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988) (no federal court jurisdiction in employee claim of wrongful discharge against employer); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986) (no federal court jurisdiction in construction company's breach of contract claim against tribal housing authority).

[19] In *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661 (1974), two Indian nations sued two New York counties seeking to recover the fair rental values of certain lands unlawfully ceded to the state in 1795. The Supreme Court held that the district court's dismissal for lack of jurisdiction was in error. The tribes' right to possession was plainly enough alleged to be based on federal law. The court reasoned that Indian title is a matter of federal law and can be extinguished only with federal consent. *Id.* at 670.

merits of this case, under the guise of jurisdiction. The City's Rule 56 motion on jurisdiction is not the appropriate mechanism to address substantive issues of law and disputed facts concerning the Treaty. "Jurisdictional finding of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits' of an action." *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d 138, 139 (9th Cir.1983).

3. The Treaty applies to the Pueblo's Spanish land grant.

The City's cursory allegation that the 1848 Treaty of Guadalupe Hidalgo "does not apply to the State of Texas" is wrong. ECF 56 at 7-8. The City ignores relevant historical facts and fails to disclose Texas Supreme Court cases holding that the Treaty does apply. Although the Republic of Texas claimed jurisdiction to the Rio Grande, this jurisdiction was not recognized by Mexico, and until 1848 the Mexican state of Chihuahua exercised jurisdiction over the Pueblo's land grant. See ECF 57-7, Pueblo's Fact No. 4. *Accord Clark v. Hiles*, 2 S.W. 356 (Tex. 1886); *State v. Gallardo*, 135 S.W. 664 (Tex. Civ. App. 1911); *State v. Gallardo*, 166 S.W. 369 (Tex. 1914); *State v. Sais*, 47 Tex. 307, 1877 WL 8607 (Tex. 1877); *Haynes v. State*, 100 S.W. 912 (Tex. 1907). *Cf. McKinney v. Saviego*, 59 U.S. 235 (1855) (Treaty does not refer to lands within the "acknowledged" limits of the Republic of Texas).[20] *See also*, *Lipan Apache Tribe v. United States*, 180 Ct. Cl.487 (1967) (the state of Texas did not extinguish title to Indian lands). Texas' highest court left no doubt that the Treaty applies:

[20] The *McKinney* case (cited by the City) concerned a land grant located east of the Nueces River. The *Elisha Basse v. City of Brownsville*, 154 U.S. 610 (1875) case (cited by the City) did not analyze the issue and instead simply relied on *McKinney* in a one paragraph ruling. In the third case cited by the City, *Amaya v. Stanolind Oil & Gas Co.*, 62 F.Supp. 181, 191 (S.D. Tex. 1945), the district court held the Treaty did not apply to a land grant located west of the Nueces River, but the Fifth Circuit declined to adopt the district court's approach and instead assumed that the Treaty did apply. 158 F.2d 554 (5th Cir. 1946).

> we do not deem it necessary to reopen the question urged by the able counsel for the state as to whether property rights within the territory, over which the sovereignty of Texas was extended, were within the protection of the treaty of Guadalupe Hidalgo. That, **in relation to such rights, that treaty has the force of law in Texas has been repeatedly affirmed by this court**.

Gallardo, 166 S.W. at 373 (citations omitted; emphasis added).

4. Congressional Confirmation of a Spanish Land Grant is not Required.

The City next contends that the Treaty did not "automatically confirm land grant titles" and therefore "Congress needed to act for any land grant to be recognized under federal law." ECF 56 at 9-16. That is not correct. *United States v. Joseph*, 94 U.S. 614, 618 (1876) ("The pueblo Indians . . . hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution,—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadaloupe (sic) Hidalgo"). The relevant provisions of the Treaty are ARTICLE VIII ("Mexicans now established in territories previously belonging to Mexico . . . shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, **retaining the property which they possess in the said territories**") and ARTICLE IX ("Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic . . . **shall be maintained and protected in the free enjoyment of their liberty and property**").[21]

The Treaty does not require congressional confirmation of property title held by Mexicans (both those who became United States citizens and those who did not). *Accord Amaya*, 158 F.2d at 556 ("A treaty lawfully entered into stands on the same footing of supremacy

[21] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922 (emphasis added).

as does the Constitution and Laws of the United States. It is generally self-operating in that it requires no legislation by either Congress or the state.").

That the Treaty of Guadalupe Hidalgo did not require congressional affirmation of Pueblo land grants is confirmed by the Gadsden Treaty, which adopted the provisions of the Treaty of Guadalupe Hidalgo, but contained an additional provision that no grants of land within the ceded territory made after a certain date would be recognized or any grants "made previously (would) be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." Art. VI, 10 Stat. 1035. This provision alone, and not any requirement of congressional confirmation, was held to bar recognition of fee ownership of a Pueblo Indian land grant in *Pueblo of Santa Rosa v. Fall*, 12 F.2d 332, 335. The Supreme Court reversed this opinion on the merits, and dismissed without prejudice for failure of legal counsel to confirm his authority to represent the Indian Pueblo. 273 U.S. 315. 320 (1927).

The Treaty of Guadalupe-Hidalgo only required that private property existing under the laws of Mexico be respected. To meet its obligation to protect those interests, Congress could, if it chose to do so, adopt legislation to determine what property Mexicans owned pursuant to Mexican law in the ceded territory as of the date of the cession. An "Act to Settle Private Land Claims in California," 31 Cong. Ch. 41, 9 Stat. 631 (March 3, 1851), was Congress' first effort to make such determinations. Congress' second effort was "An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska . . .", 33 Cong. Ch. 103, 10 Stat. 308 (July 22, 1854). The jurisdiction of the Surveyor General of New Mexico was the Territory of New Mexico, which in 1854 did not include the El Paso area.[22] In 1891 Congress created the

[22] None of the cases cited by the City hold that congressional action is necessary to validate Pueblo Indian land grants. Two instead address a holding in *United States v. Joseph*, 94 U.S. at 618, that because they are not nomadic, Pueblo Indians were not "classed with the Indian tribes

Court of Private Land Claims, 51 Cong. Ch. 539, 26 Stat. 854 (March 3, 1891). The Court of Private Land Claims Act also did not apply to the Ysleta del Sur Pueblo in Texas. Congress did not adopt any similar statute applicable to Spanish grant lands in Texas. Moreover, confirmation of land grants pursuant to the Surveyor General Act and the Court of Private Land Claims Act are nothing more than a quitclaim from the United States.[23]

Congress could have, but was never required to, confirm Spanish land grants in the El Paso area.[24] *Astiazaran v. Santa Rita Land & Min. Co*., 148 U.S. 80, 81-82 (1893) ("congress might either itself discharge that duty, or delegate it to the judicial department"). There is no statute of limitations applicable to the Ysleta del Sur Pueblo grant because, as a matter of federal law, it is protected by the Indian Non-Intercourse Act, 25 U.S.C. §177. And the United States has never asserted any federal property claims to the lands at issue in this litigation.

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for whom the intercourse acts were made." This holding was corrected in *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (language quoted by City addressed whether Pueblo Indians are recognized by Congress as "Indians" subject to laws prohibiting the introduction of liquor into Indian country, not need for Pueblo grant confirmation); and *United States v. Candelaria*, 271 U.S. 432 (1926) (addressing federal regulatory control over Indian lands, not whether congressional action is needed to confirm a Pueblo land grant).

[23] *E.g.*, Section 15 of the March 3, 1891 Act provides "And be it further enacted, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." 9 Stat. 631, 634.

[24] The cases cited by the City as support for its contention that "rights under the Treaty are judicially unenforceable in the absence of congressional confirmation" (ECF 56 at 9-11) do not support that proposition: *Grisar v. McDowell*, 73 U.S. 363, 379 (1867) (confirming Congress "may," but is not required, to "adopt such modes of procedure as it may deem expedient"); *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644 (1877) (addressing only the exclusive process established by the 1854 act for New Mexico); *United States v. Santa Fe*, 165 U.S. 675, 714 (1897) (recognizing Congress can, but is not required to, confirm Spanish grants, and rejecting "inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of congress").

5. The 1968 and 1987 Acts have no bearing on the Pueblo's claim.[25]

The purpose of the 1968 Act was to address the provision of services to the Pueblo and has no bearing on this case. The City's contention that the definition of Reservation in the 1987 Act does not include the Pueblo's Spanish land grant is incorrect. ECF 56 at 19. The Pueblo's grant lands fall under Section 105 of the 1987 Act.

The City failed to meet its Rule 56 burden of proving that there is no genuine dispute as to any material fact concerning jurisdiction.

III. THE PUEBLO'S CLAIM FOR DECLARATORY JUDGMENT IS NOT BARRED BY LACHES.

A. Laches Cannot be Applied to Bar the Pueblo's Right to Bring a Declaratory Judgment Action as to the 111 Acres at Issue.

1. Supreme Court Precedent Confirms that Laches Cannot Bar the Pueblo's Declaratory Judgment Action Addressing the Pueblo's Title to the 111 Acres.

In *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the Supreme Court held that "the equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." *Id.*, at 138.

Confirming this Supreme Court precedent, the Court in *County of Oneida., N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985), addressed "the question whether three Tribes of the Oneida Indians may bring a suit for damages for the occupation and use of tribal land allegedly conveyed unlawfully in 1795." *Id*. at 229. The district court initially dismissed the

[25] "An Act Relating to the Tiwa Indians of Texas," Act of April 12, 1968, Public Law 90-287 ("1968 Act"); and Public Law 100-89, 101 Stat. 666, codified at 25 U.S.C. §§ 1300g et seq. ("1987 Act").

action, and the Second Circuit affirmed. The Supreme Court reversed the Second Circuit, unanimously holding "that, at least for jurisdictional purposes, the Oneidas stated a claim for possession under federal law. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974) (*Oneida I*). On remand, the district court found the counties liable to the Oneidas for wrongful possession of their lands, and awarded damages. The Court of Appeals affirmed with respect to liability and indemnification. 719 F.2d 525 (1983). It remanded for further proceedings on damages. *Id.*, at 542. The Supreme Court "granted certiorari to determine whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago" and held "that the Court of Appeals correctly so ruled." *Oneida II*, 470 U.S. at 229-30 (1985) (*Oneida II*). Addressing laches, the Supreme Court stated:

> [A]pplication of the equitable defense of laches in an action at law would be novel indeed. Moreover, the logic of the Court's holding in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), seems applicable here . . . . Additionally, this Court has indicated that extinguishment of Indian title requires a sovereign act. See, *e.g.*, *Oneida I*, 414 U.S. 661, 670, (1974); *United States v. Candelaria*, 271 U.S. 432, 439 (1926), quoting *United States v. Sandoval*, 231 U.S. 28, 45–47 (1913). In these circumstances, it is questionable whether laches properly could be applied. Furthermore, the statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law. See 25 U.S.C. § 177. This fact not only distinguishes the cases relied upon by the dissent, but also suggests that, as with the borrowing of state statutes of limitations, the application of laches would appear to be inconsistent with established federal policy.

Oneida II, 470 U.S. at 245 n.16.

Twenty years later, the Oneida were again before the Supreme Court, this time seeking equitable remedies. *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). Distinguishing between the right to bring a title claim confirmed in *Oneida I* and *II*, and the equitable injunctive relief sought in the subsequent case before it, the Supreme Court confirmed that tribes have the right to obtain a determination of title, but held equitable defenses such as laches may prevent a tribe from obtaining a subsequent equitable remedy. In doing so, the

Sherrill Court made clear that any equitable bar to recovery was limited to remedies, and limited to facts similar to those before it. The facts before this Court are not similar to, and do not reach the threshold adopted in, *Sherrill* for application of laches. *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016) (Gorsuch, J.) (distinguishing facts from those in *Sherrill*, stating: "Because the Tribe waited so long to assert claims against it, [the town] submits, the town has long since and fairly come to expect that it contains no tribal lands qualifying as Indian country. We don't see how.").

The City cites lower court cases decided after *Sherrill*, almost all from the Second Circuit, that the City argues support applying laches to this declaratory judgment action. ECF 56 pp 25-26. The City's single citation to a Circuit Court opinion outside the Second Circuit is *United States v. Washington*, 864 F.3d 1017, 1030 (9th Cir. 2017) with the parenthetical "laches applied to a delay of 30 years." ECF 56 at 26. But this citation is to a dissent to denial of *en banc* review, which dissent correctly notes that the panel rejected laches. The actual Ninth Circuit opinion refused to apply *Sherrill*. *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2018) ("The case before us is radically different from *Sherrill*"). In *New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, No. 09-683 (KSG), 2010 WL 2674565 (D.N.J. June 30, 2010) the plaintiff was a "tribal family" and not an Indian tribe formally recognized by the federal government. *Id*. at *1. They sought "possessory redress for an alleged contractual violation." And although the opinion discusses *Sherrill*, the court's disposition of all counts did not apply laches to bar the plaintiffs' claims. *Id*. at *21.[26] The City's citation to *Gonzales v.*

[26] *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 617 F.3d 114, 127-28 (2d Cir. 2010) involved "possessory claims" where, after the dispossession from their land "most of the Oneidas have moved elsewhere," holding that laches barred "claims to possession" of the lands, does not involve any treaty issues, confirms that passage of time alone is insufficient for the application of laches, and that other facts must be demonstrated before laches can be invoked, including

Yturria Land & Livestock Co., 72 F. Supp. 280, 283 (S.D. Tex. 1947) is to a portion of the decision addressing fraud, not laches. And that case applied state law to non-Indian lands.

Sherrill involved equitable remedies, not treaty interpretation, and is inapplicable to this case involving treaty rights secured to YDSP by the Treaty of Guadalupe-Hidalgo. The power to abrogate treaty rights rests only with Congress. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Sisseton & Wahpeton Bands of Sioux Indians v. United States*, 277 U.S. 424, 436 (1928) (abrogating treaties and statutes are "political, not judicial, powers").

2. The City Confuses and Conflates "Claims" and "Remedies."

A declaratory action claim is much different from remedies returning possession to land. "The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." D. Dobbs, Law of Remedies § 1.2, p. 3 (1973). The City asks the Court to collapse these two concepts into a single question, arguing that not only must the underlying right be before the Court, but also all possible and hypothetical remedies that might be sought in some future litigation. *City of Sherrill*, 544 U.S. at 210 (recognizing with approval that the district court "emphasized the 'sharp distinction between the *existence* of a federal common law right to Indian homelands,' a right this Court recognized in *Oneida II*, 'and how to *vindicate* that right'" (emphasis in original) (citation omitted)).

Although laches could in theory impact hypothetical remedies in cases not yet filed, laches cannot be relied upon to deny the Ysleta del Sur Pueblo its right to obtain a declaratory

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"intervening economic and regulatory development of the subject lands," and whether such economic and regulatory development had in fact "given rise to justifiable societal expectations that would be disrupted by that remedy." Cf. *Felix v. Patrick*, 145 U.S. 317, 334 (1892) (involving land "intersected by streets, subdivided into blocks and lots, and largely occupied by persons who . . . have erected buildings of a permanent character).

judgment confirming its title to the 111 acres of essentially vacant land that is at issue here. *Oneida II*, 470 U.S. at 244 note 16. The undisputed facts confirm that Ysleta del Sur Pueblo has never left these lands as did the tribes denied relief in the Second Circuit cases. Instead, the Pueblo has remained on these lands, and has acted diligently to protect its claim to its Spanish Grant lands. The record confirms that the Pueblo has for decades been making its claim known to all, well before the point in time that the City took political control over the area in 1955, and clearly by 1970 when the City last acquired a tract of the land at issue in this case.[27]

3. The Equitable Remedy of Laches Cannot be Applied in This Action at Law.

The City also failed to show that under federal law, laches is an available defense to bar this specific case given the congressionally established statute of limitations for cases in the Indian Claims Limitation Act. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014) (rejecting the application of laches to bar a claim filed within the limitations period of the federal Copyright Act, holding that "in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief"). The position of the Second Circuit in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273 "that equitable doctrines . . . can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations," conflicts with controlling United States Supreme Court precedent. That Second Circuit case is not binding in the Fifth Circuit, and cannot be applied here as it conflicts with controlling Supreme Court precedent. *Hart v. Massanari*, 266 F.3d 1155, 1171-73 (9th Cir. 2001) ("A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior

[27] The City did not acquire political control of these 111 acres until 1955, when it annexed the Town of Ysleta against the wishes of the people living in that town.

courts may voice their criticisms, but follow it they must. . . . [A]n opinion of our court is binding within our circuit, not elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do.").

The applicable statute of limitations here is the limitations period in 28 U.S.C. § 2415. . Because the Pueblo's claims are not barred by that federal statute of limitations, its clam for declaratory relief may not be barred by laches.

Finally, ignoring Supreme Court precedent, the City says that the Texas statute of limitations somehow bars the Pueblo's claim. ECF 56 at 25 n.23. The City is wrong:

> The legislative history of the successive amendments to [28 U.S.C.] § 2415 is replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians, and that the Department of the Interior had not acted with appropriate dispatch in meeting the deadlines provided by § 2415. By providing a 1-year limitations period for claims that the Secretary decides not to pursue, Congress intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf. Thus, we think **the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations**.

Oneida II, 470 U.S. at 244 (emphasis added).

B. Undisputed Facts Confirm the Pueblo Has Diligently Sought to Protect its Spanish Grant Lands.

The Ysleta del Sur Pueblo has occupied these lands since 1680 – for 349 years. Title insurance issued to people buying land in the grant area includes an exception for claims of the Ysleta del Sur Pueblo. And the Pueblo has actively pursued its claim to the 1751 grant lands. The Pueblo's statement of facts confirms its diligent efforts throughout the years to protect its Spanish grant lands. See Appendix A, Section 2: Pueblo's Additional Material Fact Nos. 57-78. The City's allegation that the Ysleta del Sur Pueblo "slept on its rights" is unsupported by the facts, and at a bare minimum presents a genuine issue of material fact making summary

judgment inappropriate.[28] And in any event, the City has provided no facts to show that YDSP, struggling as it was to retain what little it had, had "knowledge and ample opportunity to assert" its rights in the 111 acres at issue in this action. *Bluejacket*, 259 U.S. at 138.[29]

C. None of the City's Laches Cases Involved Facts Similar to Those in This Action.

1. *Sherril* and Cases Relying on That Opinion All Involved Tribes Returning to Ancestral Homelands After Centuries of Absence.

The City's cases applying all involve factual situations where the tribe's dispossession occurred in the very early days of the Republic and the tribe and its members had since been absent from the geographic area in which the claimed land was located. *E.g., City of Sherrill*, 544 U.S. at 202 ("at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere"). Those cases are inapplicable where, as here, land was taken later and tribal members continued to reside on the claimed land.[30] The *Sherrill* Court itself made this distinction. *Id.* at 210 n. 3 (distinguishing *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), where the dispossession occurred in 1885 and "involved land the Oneidas never left"); and at 216 n. 10 (distinguishing cases which "concerned land the Indians had continuously occupied").

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[28] Texas law precludes laches in land title actions. *Rogers v. Ricane Enterprises, Inc.*, 772 S.W.2d 76, 80 (Tex. 1989) ("Laches is not a defense in a trespass to try title suit where the plaintiff's right is based on legal title" (citations omitted)). "A trespass to try title action is the method for determining title to . . . real property." Tex. Prop. Code Ann. § 22.001(a).

[29] *See, e.g.*, Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 Conn. L. Rev. 605, 615-27 (2006) (obstacles to tribal land rights actions).

[30] *See also Cayuga Indian Nation*, 413 F.3d 266, 277, *cert. denied*, 547 U.S. 1128 (2006) (noting that one of the factors justifying the application of laches to a possessory land claim is that "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere" (interior quotation marks omitted)); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d, 126-127 (noting that after the dispossession "most of the Oneidas have moved elsewhere"); *Stockbridge-Munsee Community v. New York*, 756 F.3d 163, 165 (2d Cir. 2014) (noting that "the Stockbridge have not resided on the lands at issue since the nineteenth century and its primary reservation lands are located elsewhere").

The lasting presence of an Indian tribe and its members precludes the formation of "justified societal expectations," the disruption of which is key to the applicability of the time-based defense of laches. *See Canadian St. Regis Band of Mohawk Indians v. New York*, Nos. 5:82-CV-0783, 5:82-CV 1114, 5:89-CV-0829 LEK/TWD, 2013 WL 3992830 at *18-20 (N.D.N.Y. July 23, 2013) (distinguishing *Sherrill* and *Cayuga*, and declining to apply time-based defenses where tribe never left because the continued presence of the tribe makes it "much less likely that the settled expectations of any non-Indian individuals, entities, or interests would be severely upset or harmed"); *cf. Stockbridge-Munsee Cmty. v. State of New York*, 756 F.3d 163, 165 (2d Cir. 2014) (applying *Sherrill* where "the Stockbridge have not resided on the lands at issue since the nineteenth century and its primary reservation lands are located elsewhere").

2. Ysleta Del Sur Pueblo has Occupied its Spanish Grant Lands for over Three Centuries.

As noted earlier, the Pueblo's gradual possessory loss of portions of its 1751 grant lands occurred much later (from 1859 to the 1960's), and the Pueblo and its members never vacated or abandoned the Pueblo's Spanish grant lands. The historical record is clear that residents of the El Paso area have been continuously aware of the Pueblo and its Spanish land grant.[31]

Any "societal expectations" that ignored the existence of the Pueblo and its 1751 grant could not be "justified." The United States Supreme Court opinion in *Oneida* controls in this case. 470 U.S. 226 (1985). The City's laches defense cannot be expanded from its application in *Sherrill* to preclude this action at law seeking only to confirm the Pueblo's title to the 111 acres.

3. The City Provides no Evidentiary Facts Showing That Judgment Declaring the Pueblo's Ownership of 111 Acres of Vacant Land Would be "Disruptive of Justified Societal Interests."

[31] Diamond, Tom, *Chronology and Related Historical Material*, Ysleta del Sur Pueblo Archives, v. 3, pp. 96-124.

a) The majority of the land at issue is vacant, unimproved and unoccupied.

All of the land at issue in this action is unoccupied. It is undisputed that 42.73 acres are vacant and unimproved. 69 acres are used as a public park consisting of a small parking lot, minimal playground equipment, dugouts for six baseball fields and bleachers for those fields and two to three other sports fields. See City's Proposed Fact Nos. 48-51. And in any event, this action does not seek ejection of the City from the land at issue, so the City's complaint that it has invested money to improve the land used for a park is irrelevant to a declaration confirming the Pueblo's title to that land.

b) The City's Allegations of "Reasonable Reliance" are without evidentiary support, and irrelevant.

The City did not acquire political control over the 111 acres until 1955, and bought portions as recently as 1970. The City's assertion that it was "unaware" of the Pueblo's claims is incredible given the record facts, and the City's own participation in and settlement of a suit based on the Pueblo's Spanish grant title years ago. Finally, the City objects that the Pueblo "failed to give notice" of its claims. ECF 56 at 22-23. But there is no notice requirement:

> The State contends that Plaintiffs' claims are barred or mitigated by Plaintiffs' failure to notify the State of any potential liability as a result of the land transactions at issue. Plaintiffs attack this defense as arising under state law and therefore inappropriate as a defense to an Indian land claim action. The Court can find no precedent for this type of defense under federal law. Furthermore, the Court agrees with Plaintiffs that such a defense under state law is unavailable to Defendants in light of the Supreme Court rulings in *Oneida I* and *Oneida II*. The Court orders this defense stricken with leave to replead if Defendants are able to present some scenario under federal law through which this defense could succeed.

Oneida Indian Nation of New York v. New York, 194 F. Supp. 2d 104, 130 (N.D.N.Y. 2002).

The doctrine of laches does not bar the Pueblo's claim.

IV. TEXAS IS NOT A NECESSARY PARTY, LET ALONE A PARTY THAT MUST BE JOINED IF FEASIBLE.

A. Rule 19 is not jurisdictional.

Rule 19 does not divest a court of subject-matter jurisdiction. *Lincoln Property Co. v. Roche*, 546 U.S. 81, 90 (2005) (Rule 19 addresses "party joinder, not federal-court subject-matter jurisdiction."). Litigants' tendency to incorrectly read Rule 19 as determinative of subject-matter jurisdiction led to elimination of the term "indispensable party" in the Rule. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863 (2008) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 117, n.12; 119 (1968).

B. Texas is Not a Required Party Under Rule 19(a).

The Fifth Circuit Court of Appeals has set out the Rule 19(a) test as follows:

> Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. First the district court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Hood ex rel. Mississippi v. City of Memphis, Tenn., 570 F.3d 625, 628 (5th Cir. 2009). The City does not argue, so conceded, that the Court can accord complete relief among existing parties, and that disposing of the action without Texas will not subject an existing party to a substantial risk of incurring inconsistent obligations.[32] Instead the City appears to argue that Texas:

> claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair

[32] *Haggerty v. Texas S. Univ.*, 391 F.3d 653, 658 (5th Cir. 2004) (issue not argued in brief is waived).

or impede the person's ability to protect the interest.

Fed. R. Civ. P. Rule 19(a)(1)(B)(i). Yet, Texas does not have a "claim relating to the subject of the action." The ruling on the 111 acres at issue is limited to the parties and the land that is the subject of this action. *Ysleta Del Sur Pueblo v. City of El Paso*, No. EP-17-CV-00162-DCG, 2019 WL 1131421, at *4 (W.D. Tex. Mar. 12, 2019) ("this Court's decisions are not binding even onto itself in a different lawsuit" (footnote omitted)). This Court has ruled in the absence of Texas, in a case decided on an unopposed motion for summary judgment that the Pueblo's Spanish land title continues to exist. *Id.* at n.5 (citing Order, *Ysleta del Sur Pueblo v. El Paso Electric Co.*, EP-16-CV-00035-KC (W.D. Tex. Feb. 24, 2017), ECF No. 43.

Conceding that Texas has no title interest, the City is left to argue two other alleged interests: (1) "taxing and regulatory jurisdiction" [ECF 56 at 28]; and (2) "specific policies for land and economic development for the area" [ECF 56 at 29]. But the City did not cite to any state policy or program in support of these nebulous assertions, because there is none. Instead: "**Texas has no state property tax.** The Texas Constitution and statutory law authorizes local governments to collect the tax. The state does not set tax rates, collect taxes or settle disputes between you and your local governments." (Emphasis in original).[33] And as to "policies for land and economic development," El Paso is a home rule City.[34] It sets "policies for land and economic development." *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002), *as supplemented on denial of reh'g* (Aug. 29, 2002) ("Home-rule cities . . . derive their powers from the Texas Constitution. They possess "the full power of self government and look to the Legislature not

[33] https://comptroller.texas.gov/taxes/property-tax/basics.php (last visited August 12, 2019).
[34] El Paso City Charter § 1.1, available at: https://www.elpasotexas.gov/~/media/files/coep/municipal%20clerk/elections/2011-05-14/2%20%20article%20i%20%20ii%20of%20the%20city%20charter%20revised%20121310.ashx?la=en (last visited Aug. 12, 2019).

for grants of power, but only for limitations on their power.").

For a nonparty's interest to be sufficient under Rule 19 it must be a legally protected interest, and not merely a financial interest or interest of convenience. *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 230 (3d Cir. 2005) (holding appellants "cannot qualify as necessary parties under Rule 19(a)(2)(I)" citing 3A, Moore's Federal Practice ¶ 19.07–1(2)).[35] Texas claims no title to the land at issue, and has no financial interest in this action. At most, it has an interest of convenience, which is insufficient to make it a necessary party.

C. Even if Texas Were a Necessary Party, This Action Should Continue in its Absence.

1. Rule 19(b)'s four factors.

Rule 19 "instructs that nonjoinder even of a required person does not always result in dismissal." *Pimentel*, 553 U.S., 862. Instead, "[w]hen joinder is not feasible, the question whether the action should proceed, turns on the factors outlined in subdivision (b)." *Id.*; Fed. R. Civ. P. 19(b). The analysis under Rule 19 is fact-specific. *United States v. Rutherford Oil Corp.*, 2009 WL 1351794, at *2 (S.D. Tex. May 13, 2009) (denying Rule 19 motion to dismiss). The four Rule 19(b) factors are:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Wyandotte Nation, 200 F. Supp. 2d at 1291-92, *quoting* Fed. R. Civ P. 19(b).

[35] *See also Sales v. Marshall*, 873 F.2d 115, 121-22 (6th Cir. 1989) (rejecting state's contention "that it was a necessary party under Rule 19(a)(2) because it was seeking to assert a right to recover costs, a part of every action," holding: "The district court correctly held that [the State's] interest does not relate to the subject of the action").

2. An Absent Party's Sovereign Immunity is Not Dispositive.

The City cites *Fluent v. Salamanca Indian lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) for the proposition that "when an assertedly indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." ECF 56 at 30. But the Second Circuit itself has not followed this dicta in *Fluent*. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2d Cir. 2000) (criticizing district court which "dismissed these claims . . . with no explanation apart from a citation to *Fluent"*).

Courts in this Circuit also disagree with the dicta in *Fluent. Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 78 F. Supp. 2d 589, 602–03 (E.D. Tex. 1999) ("*Fluent* . . . will not be followed by this court"), *aff'd in part, rev'd in part and remanded*, 261 F.3d 567 (5th Cir. 2001). In *Gensetix, Inc. v. Baylor Coll. of Med.*, the court engaged in an analysis of all Rule 19(b) factors, holding that "[t]hree out of the four Rule 19(b) factors weigh in favor of dismissal. Accordingly, the Court holds that UT is a necessary and indispensable party, making dismissal appropriate." 354 F. Supp. 3d 759, 773-774 (S.D. Tex. 2018).

Circuit courts also decline to treat sovereign immunity as "a compelling interest that provides little need for balancing the Rule 19(b) factors." In *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002), the court confirmed that all four Rule 19(b) factors, and not sovereign immunity, determine whether a party is indispensable, stating "[c]ognizant of these out-of-circuit decisions, the Ninth Circuit has, nonetheless, consistently applied the four part balancing test." The Tenth Circuit recognizes that sovereign immunity does "not abrogate the application of Rule 19(b)" and considers holdings in cases from

other circuits suggesting sovereign immunity is compelling by itself as "*dicta*." *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999).

3. Application of the Four Factors Confirms that Texas is Not Indispensable.

As to the first factor, the case so heavily relied upon by the City is directly on point:

> Kansas's interest in protecting these rights is aligned with the interest of the defendant landowners, who also seek to prevent the tribe from obtaining a declaratory judgment quieting title in the tribe. Although there is not a precise alignment of interests between the defendant landowners and Kansas, the court finds that the potential prejudice to the state is lessened by the fact that the defendant landowners seek the same outcome, if for different reasons. Further, there is no basis to conclude that a judgment rendered in Kansas's absence would prejudice the existing parties. Plaintiff and the counterclaimants could obtain satisfaction of their claims without joining Kansas as a party.

Wyandotte Nation 200 F. Supp. 2d at 1292. The City has not identified any way in which Texas is not aligned completely with the City. Any interest Texas has "in the titles issued under the statues its legislature enacted," also aligns with the City's interests:

> [i]t is as if every time someone claimed that someone else was encroaching on his property he would have to sue not only the alleged encroacher (here Exxon) but also the alleged encroacher's predecessors in title right back to King James or Lord Baltimore (here the U.S.). So far as can be determined from an utterly inadequate record, the relationship of the U.S. to the Indians' controversy with Exxon and the other occupiers of the land in derogation of the Indians' alleged occupancy rights is that of a predecessor in title (to Exxon), no more.

Sokaogon Chippewa Cmty. v. State of Wis., Oneida Cty., 879 F.2d 300, 304 (7th Cir. 1989).[36]

As to the second factor, the City has not identified a divergence between its interests and the alleged interest of Texas, so it cannot be determined whether the prejudice the City alleges could be mitigated.

[36] *See also Picuris Pueblo v. Oglebay Norton Co.*, 228 F.R.D. 665, 668 (D.N.M. 2005) ("The fact that the United States issued the patent to Franklin's predecessor in interest is insufficient to transform the United States into an indispensable party").

Regarding the third factor, the decision in *Wyandotte Nation* is again dispositive:

> Third, the court must analyze whether a judgment rendered in the absence of Kansas would be adequate. Kansas's presence or absence would have no bearing on the determination of the property rights at issue in this litigation . . . . The court finds that it may adequately and completely adjudicate the issues before it regardless of whether Kansas is joined.

Wyandotte Nation, 200 F. Supp. 2d 1293.

Finally, addressing the fourth factor the Court considers "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." This factor weighs in the Pueblo's favor because the Pueblo would be left without an adequate remedy to vindicate its rights. *Sac & Fox Nation,* 240 F.3d 1250, 1260 (noting that a court should be "extra cautious" before dismissing an action under Rule 19(b) when no alternative forum exists); *Rishell v. Jane Phillips Episcopal Mem. Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir.1996) ("The absence of an alternative forum would weigh heavily, if not conclusively against dismissal ....").

It furthers the interests of "equity and good conscience" that this "action should proceed among the existing parties." Fed. R. Civ. P. 19(b)(1). Texas is not a necessary party, let alone a party that must be joined.

CONCLUSION

Ysleta del Sur Pueblo requests that the Court deny the City's summary judgment motion.

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Respectfully submitted,

BARNHOUSE KEEGAN SOLIMON & WEST LLP

/s/ Kelli J. Keegan

Kelli J. Keegan
Justin J. Solimon
Randolph H. Barnhouse
Admitted Western Dist. of Texas
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Tel: (505) 842-6123
Fax: (505) 842-6124

kkeegan@indiancountrylaw.com
dbarnhouse@indiancountrylaw.com
jsolimon@indiancountrylaw.com

LAW OFFICES OF THOMAS E. LUEBBEN PC
Thomas E. Luebben
P.O. Box 1134
Sandia Park, NM 87047
Tel: (505) 269-3544
tluebbenlaw@msn.com

KEN COFFMAN, ATTORNEY AT LAW
Ken Coffman
State Bar No. 04497320
221 N. Kansas Street, Suite 503
El Paso, TX 79901-1430
Tel: (915) 231-1945
Fax: (915) 225-0555
ken@kclawfirm.net

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

Oscar G. Gabaldón, Jr.
gabaldonog@elpasotexas.gov

Lynn H. Slade (*Pro Hac Vice*)
lynn.slade@modrall.com

Walter E. Stern (*Pro Hac Vice*)
western@modrall.com

Nathan T. Nieman
nathan.nieman@modrall.com

Attorneys for Defendant

/s/ Kelli J. Keegan
Kelli J. Keegan