CASE NO. 20-2145
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUEBLO OF JEMEZ, a federally recognized Indian Tribe,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA
Defendant-Appellee,

and NEW MEXICO GAS COMPANY,
Intervenor Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico
The Honorable Senior District Judge James O. Browning
D.C. No. 1:12-cv-00800

BRIEF OF AMICI CURIAE KEWA PUEBLO (F.K.A. SANTO DOMINGO PUEBLO), OHKAY OWINGEH, PICURIS PUEBLO, PUEBLO OF ACOMA, PUEBLO OF COCHITI, PUEBLO DE SAN ILDEFONSO, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, PUEBLO OF SANDIA, PUEBLO OF SAN FELIPE, PUEBLO OF SANTA ANA, PUEBLO OF TESUQUE, TAOS PUEBLO, YSLETA DEL SUR PUEBLO, AND THE ZUNI TRIBE OF THE ZUNI INDIAN RESERVATION IN SUPPORT OF PLAINTIFF-APPELLANT PUEBLO OF JEMEZ AND REVERSAL OF THE DISTRICT COURT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae make the following disclosure: Amici Curiae Kewa Pueblo (f.k.a. Santo Domingo Pueblo), Ohkay Owingeh, Picuris Pueblo, Pueblo of Acoma, Pueblo of Cochiti, Pueblo de San Ildefonso, Pueblo of Isleta, Pueblo of Pojoaque, Pueblo of Sandia, Pueblo of San Felipe, Pueblo of Santa Ana, Pueblo of Tesuque, Taos Pueblo, Ysleta Del Sur Pueblo, and the Zuni Tribe of the Zuni Indian Reservation are not publicly traded corporations, have no parent corporations, and no publicly held corporation owns 10% (ten percent) or more of their stock.

/s/Zackeree S. Kelin
Zackeree S. Kelin
Counsel of Record for *Amici Curiae*
Dated: February 16, 2021

STATEMENT OF THE IDENTITIES AND INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* are the Kewa Pueblo (f.k.a. Santo Domingo Pueblo), Ohkay Owingeh, Picuris Pueblo, Pueblo of Acoma, Pueblo of Cochiti, Pueblo de San Ildefonso, Pueblo of Isleta, Pueblo of Pojoaque, Pueblo of Sandia, Pueblo of San Felipe, Pueblo of Santa Ana, Pueblo of Tesuque, Taos Pueblo, Ysleta Del Sur Pueblo, and the Zuni Tribe of the Zuni Indian Reservation. Amici respectfully file this unopposed brief in support of the Pueblo of Jemez (hereafter "Jemez Pueblo") because this appeal raises critical issues regarding aboriginal title.[1]

Amici are federally recognized Indian tribes whose aboriginal lands are in and around the Tenth Circuit, including in the states of Arizona, New Mexico, and Texas (collectively "New Mexico Pueblos"). The New Mexico Pueblos have lived and occupied lands in the American Southwest since time immemorial.

The New Mexico Pueblos' cultural and religious practices are uniquely tied to their aboriginal lands and the waters that have allowed these agricultural communities to survive since time immemorial in the arid southwest. Like Jemez Pueblo, Amici have numerous shrines, trails, springs, and sacred sites within their aboriginal lands that are central to their respective cultural, religious, and ceremonial

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than Amici or their counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief.

practices. The district court's novel articulation and application of the aboriginal title doctrine may impact Amici's ability to protect and access such sites going forward. This is particularly true in light of what Amici view as the district court's overreliance on the presence of more than one Pueblo in a general claim area to support its holding that Jemez Pueblo did not have aboriginal title to any part of the claim area, including specific Jemez Pueblo cultural and religious sites the district court found were too small to protect.

The New Mexico Pueblos have used these aboriginal lands from time immemorial. Once their aboriginal title to such lands is established, it continues unless abandoned or extinguished by a clear and unambiguous act of the United States or a prior sovereign that was intended to extinguish all of the rights in their property. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1162 (10th Cir. 2015). If there is any doubt about whether the United States intended to extinguish all their rights to use and occupy their lands held under aboriginal title, "the rule of construction recognized without exception for over a century has been" that ambiguities are to be resolved in favor of the tribes. *Id.* (quoting *U.S. v Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941)).

The aboriginal title doctrine has been part of federal Indian law since the founding of the United States, and the "rules governing aboriginal title have been upheld and reaffirmed for so long that "'they should now be considered no longer

open.'" *Pueblo of Jemez,* 790 F.3d at 1162 (quoting *Santa Fe*, 314 U.S. at 345). Yet the district court in this case created a brand-new rule not previously recognized by any court anywhere. It held for the first time that in addition to the longstanding requirements of establishing aboriginal title recognized by the U.S. Supreme Court and this Circuit—*i.e.*, actual, exclusive, and continuous use and occupancy to the land claimed for a long time[2]—for what it classified as minute areas, Jemez Pueblo needed to show more:

> Although no case deals with aboriginal title to such minute areas, the Court believes that to establish aboriginal title to a discrete geographic feature, such as a shrine, spring, or trail, a Tribe must show that it had the ability, if it wished, to exclude local, adverse Tribes from the surrounding land or from the feature itself if there is evidence of other Tribes in the vicinity.

Jemez v. U.S., Memorandum Opinion and Order, Document 461[3] Filed 09/0217/20; *see also id.* at 2 ("Jemez Pueblo may not seek aboriginal title to very small sub-areas when it has not proven aboriginal title to the surrounding areas."). This new requirement—that a tribe must establish aboriginal title to a surrounding area to

[2] *Pueblo of Jemez v. United States,* 790 F.3d 1143, 1165 (10th Cir. 2015).

[3] To avoid confusion over short form citations, Amici have chosen to reference the ECF documents. ECF 461 is published at *Pueblo of Jemez v. United States*, 2020 WL 5238734. ECF 404 refers to *Pueblo of Jemez v. United States*, 430 F. Supp. 3d 943 (D.N.M. 2019), *amended on reconsideration*, No. CV 12-0800 JB\JFR, 2020 WL 5238734 (D.N.M. Sept. 2, 2020).

establish title to a small area—departs from the basic legal principles at the heart of the aboriginal title doctrine, which focus on use rather than size, and could impact current and future aboriginal title cases. Amici are therefore concerned about the district court's departure from well-settled law.

SUMMARY OF THE ARGUMENT

The rules regarding aboriginal title do not change based on the size of land at issue. The doctrine instead focuses on how the property was used (*e.g.*, the aboriginal title doctrine has been used to establish a host of usufructuary rights, such as fishing rights, hunting rights, water rights, gathering rights, and grazing rights) without regard to size. By requiring that a tribe establish title to a surrounding area to be able to claim title to a specific area, the district court's decision departs from the foundational principles of the aboriginal title doctrine, adds needless confusion and uncertainty to the centuries-old doctrine, and should be reversed.

The district court's decision is also at odds with general principles of real property law, including the longstanding principle that small interests are worthy of protection and that the extent of an interest in property is a different question from whether such an interest exists. While the size of land is certainly germane to determining the extent of an interest that is obtained and retained by use (*e.g.*, how much area does a prescriptive easement include), as well as the scope of an injury to a property interest incurred from the use of another (*e.g.*, how much compensation

is due from a trespass or taking), it is not relevant to whether such interest is cognizable. The areas of prescriptive easements and encroachments, trespass, and eminent domain, all areas that center around how land is used, provide helpful examples of these fundamental principles.

Amici further submit that the district court's finding that members of other Pueblos occasionally used the general claim area for their own respective traditional practices should not affect Jemez Pueblo's aboriginal title to specific subparts of the claim area it used exclusively. Jemez Pueblo's traditional and religious life and belief system are still vibrantly alive; Jemez Pueblo continues to use and revere today a particular shrine ("Shrine") and trail ("Trail") leading to it at issue here. Though small, they are not too small or insignificant to protect, and the aboriginal title doctrine allows for more than one tribe to inhabit or use a general area without destroying the exclusive nature of the claimant tribe's use or aboriginal title to a specific area. The district court erred by imputing its finding of non-exclusive use to the general claim area to the entire claim area, particularly in light of the habits, ways of life, and customs of the Indians that were found to have used the general claim area.

ARGUMENT

I. The District Court's Decision Departs from the Foundational Principles Governing Aboriginal Title and Real Property Law.

a. The Foundational Principles Governing Aboriginal Title Focus on Use and Occupancy Rather than Size.

The aboriginal title doctrine in Federal Indian law dates to the foundation of the United States and the U.S. Supreme Court's decision in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), which held that "discovery gave title to the [European] governments…by whose authority, it was made." That title, however, is "subject …to the Indian right of occupancy of land they have occupied for years before European arrival." *Id.* at 573-74. This right of occupancy recognizes that:

> **[Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion**; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Id. at 574 (emphasis added). As the Supreme Court has continuously held, other than the limitation on alienation, "the right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee….[and is] as sacred and securely safeguarded as fee simple absolute title." *United States v. Shoshone Tribe*, 304 U.S. 111, 116-17 (1938); *accord Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668-69 (1974); *Mitchel v. United States*, 34 U.S. 711, 746 (1835).

To establish aboriginal title, a tribe must show "actual, exclusive and continuous use and occupancy for a long time." *United States v. Abouselman*, 976 F.3d 1146, 1156 (10th Cir. 2020) (citing *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 784 (1993)). This sacred title is retained unless and until it is abandoned or there is a clear and unequivocal act of the sovereign to extinguish all of the tribe's rights in the subject land. As this Court noted previously in *Pueblo of Jemez*, "an extinguishment [of a tribe's aboriginal rights] cannot be lightly implied," and any "doubt whether aboriginal title been validly extinguished . . . [must] be resolved in favor of the Indians." *Jemez*, 790 F.3d at 1162 (quoting *Santa Fe Pacific*, 314 U.S. at 354).

The reference points for questions concerning Indian possession and occupancy, including questions regarding abandonment and exclusivity, have always been the way of life, habits, and customs of the tribes that use the property at issue. As described in *Mitchel v. United States*, 34 U.S. 711, 745 (1835):

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and from their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

Thus, a number of traditional practices—including the use of waters to fish (*United States v. Michigan*, 471 F.Supp. 192, 256 (W.D. Mich. 1979), aff'd as modified, 653

F.2d 277 (6th Cir. 1981)); the use of lands to hunt (*State v. Coffee*, 556 P 2d. 1185, 1188 (Idaho 1976)); the use of lands to graze (*United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989)); and the use of water sufficient to irrigate their lands (*Winters v. United States*, 207 U.S. 564 (1908))—have been safeguarded under the aboriginal title doctrine. And, access to the sites where those usufructuary rights are exercised has been recognized as a component of rights retained under the doctrine.[4] *See, e.g.*, *United States v. Winans*, 198 U.S. 371 (1905) (discussing reserved rights to cross private land to reach traditional fishing areas); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012) §18.02 at 1123 (noting that "treaty-reserved hunting, fishing, and gathering rights off reservation lands are akin to easements running with the burdened lands, and include easements to access hunting, fishing, and gathering sites.").

Amici, like the district court, have found no aboriginal title case that applied different rules based on the size or type of land at issue. To the contrary, the case law consistently applies the same rules across a multitude of different sizes and types of land. *See, e.g., Miller v. United States*, 159 F.2d 997, 1000 (9th Cir. 1947) (recognizing aboriginal title to tidal lands and requiring compensation for

[4] Many aboriginal title cases deal with the extent to which rights were reserved by treaty. These aboriginal title rights could not be reserved if the subject tribe did not have them to begin with. "The treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted." *Winans*, 198 U.S. at 381.

condemnation of 10.95 acres of land); *Cramer v. United States*, 261 U.S. 219, 225 (1923) (recognizing aboriginal title to 175 acres); *Dann*, 873 F.2d at 1200 (9th Cir. 1989) (recognizing aboriginal grazing rights "restricted to the number and type of animals grazed by them or by their lineal ancestors"). So long as a tribe can show actual, exclusive, and continuous use and occupancy for a long time, aboriginal title is established regardless of how big or small an area is at issue.

The district court erred by requiring Jemez Pueblo to establish aboriginal title to an undefined surrounding area as a condition of establishing title to a specific area the court deemed too small to protect. This new test is unworkable and offers no guidance on how courts in the future will determine how small is too small or how much of a surrounding area a tribe must exclude other tribes from to establish title to a specific area. If not corrected, the decision will bring needless confusion and uncertainty to the well-established, centuries-old aboriginal title doctrine.

b. The District Court's Decision Is Inconsistent with General Principles of Real Property law.

The aboriginal title doctrine is part of the common law of real property. *Jemez*, 350 F. Supp. 3d at 1093-94 (referring to aboriginal title as "within the bundle of recognized property rights" and part of estates recognized in the common law of real property); *see also Abouselman*, 976 F.3d at 1156 (noting that "[a]boriginal title was recognized by all European sovereigns and the United States"). Indeed, it has often been explained with reference or comparisons to other

common law rights in real property. *See Shoshone Tribe*, 304 U.S. at 116-17 (explaining that aboriginal title "right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee" and it is "as sacred and as securely safeguarded as is fee simple absolute title" and includes the "constituent elements of the land itself," such as mineral rights and standing timber rights); *M'Intosh*, 21 U.S. at 574 (explaining that aboriginal title is a "legal as well as just claim"). It is therefore significant when a court, like the district court in this case, deviates from general principles of real property law to reach its decision without explaining why doing so is warranted.

The district court strayed from the general principles of property law in two important respects: 1) it is well recognized that even small interests in real property are worthy of recognition and protection and 2) the extent of a property interest is a different question from whether such an interest exists. Proscriptive easements and encroachments, trespass, and the law of eminent domain are all areas of property law that center around how land is used and help illustrate how these fundamental principles are generally applied.

Under the common law, a prescriptive easement may be created by open, adverse, and continuous use over a statutory period. Black's Law Dictionary, 528 (7th ed. 1999). An entire body of case law deals with small encroachments, such as the foundations of buildings encroaching just feet onto adjacent properties, or even

roofs and eaves encroaching just feet or inches over the airspace of an adjacent property. *See* 2 A.L.R.3d 1005 (originally published in 1965) (collecting cases). Likewise, trails used for pilgrimages by tribes are subject to prescriptive easements, with the scope of the easement being determined by its use. *U.S. on Behalf of Zuni Tribe of New Mexico v. Platt*, 730 F. Supp. 318, 323 (D. Ariz. 1990) (holding that "[t]he Zuni Tribe is entitled to a prescriptive easement over the land of the defendant for the purposes of their quadrennial pilgrimage," which was determined to be 55 feet wide). So long as all the elements for establishing a prescriptive easement are met, the size of the encroachment or amount of land adversely possessed is not a barrier to establishing the easement; the rules do not change based on how big or small the land at issue is.

The law of trespass is another example of size not being a legal hurdle to a cognizable interest in real property worthy of protection. "[A] trespass may be committed on, beneath, or above the surface of the earth, and may be committed upon the vertical as well as the horizontal surface of another's premises….[even the] invasion of another's airspace need not be more than de minimis in order to constitute a trespass." 75 Am. Jur. 2d Trespass § 30; *see also* Restatement (Second) of Torts § 159. Thus, even small invasions of the property of another are generally protected, and the rules do not change based on the size of the land that was invaded by another.

Similarly, small interests held by individuals in real property are protected under the law of eminent domain and the Takings Clause of the Fifth Amendment to the United States Constitution when taken for public use. For example, in *Babbitt v. Youpee,* 519 U.S. 234 (1997), the U.S. Supreme Court held that a provision of a statute that required a 2% or less fractional interest in an Indian allotment that produced less than $100 of income to escheat to a tribe was an impermissible taking. States' eminent domain statutes also protect small interests. *See, e.g.*, N.M. Stat. Ann. 1978, § 42A-1-29 ("A person authorized to exercise the right of eminent domain … *who may take or damage any property* for public use without making just compensation…is liable to the condemnee, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time the property is or was taken or damaged…") (emphasis added). Like the examples above, the size of the interest is not a barrier to establishing an interest worthy of recognition and protection; size is relevant only to determining the extent of the interest or damage to an interest.

These principles are also echoed in the aboriginal title doctrine itself. As discussed in *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1380 (Fed. Cir. 1983):

> The trial judge acknowledged that the Wichitas did not abandon two villages and adjacent cultivated tracts in the Oklahoma portion of the Spanish Fort area before the United States acquired jurisdiction over that region. **Yet he evidently felt that these sites were insignificant enough to ignore; he incorrectly concluded that a general abandonment by the Wichitas of perhaps *most* of the claimed lands**

> **in Oklahoma effectively prevented them from recovering for the loss of *any* lands there.**

(bolded emphasis added)(italics in original).

Like the trial court in *Wichita*, the district court here erred by not applying rules regarding aboriginal title in a straightforward manner to all parts of the claim area. Even small areas are worthy of protection under the doctrine and general principles of real property law.

II. Traditional Practices of Other Pueblos in the General Claim Area Do Not Affect Jemez Pueblo's Aboriginal Title to the Jemez Shrine and Trail at Issue Here.[5]

"The definition of the terms 'aboriginal use and occupancy' have been defined 'to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers.'" *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1165 (10th Cir. 2015) (quoting *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct. Cl.1967)). Accordingly, an extensive and detailed portion of the record in this case was dedicated to documenting how specific Pueblos used specific areas in the general claim area for the own unique cultural, religious, and ceremonial purposes.

[5]Amici's focus on specific subareas areas should not be construed to mean that Amici believe Jemez did not establish title to other areas as well. These areas are emphasized here because they are representative of how the district court's new rule is unworkable.

The New Mexico Pueblos do not disclose the name, location, or significance of the many sites they hold sacred. The specific details describing Jemez Pueblo's sacred sites were filed under seal in both this Court and the district court. Amici are therefore unable to discuss here the religious and emotional gravity of Jemez Pueblo's claims. Amici do, however, appreciate their signal importance and believe that this Court, having access to the sealed documents, will as well. *See, e.g.*, ECF 404 ¶¶ 464-65 at 213; ECF 404 ¶¶ 45, 48 at 18, 20 – 21; ECF 404 ¶¶ 45, 48, 643, at 18, 21 (redacted portions of the record discussing details of particular subareas and uses).

What Amici are able to state is that the district court found that Jemez Pueblo "describe[d] trails that lead from [redacted] as spiritual channels and umbilical cords, and place special significance on the trail that leads to" a particular Jemez shrine. ECF 404 at 206, ¶¶ 433-72. This appears to include trails in the Banco Bonito, an area where the district court found that "Jemez Pueblo people were the only Tribal people ever to occupy" (ECF 461 at ¶ 631), that are part of "a complex trail network, which it established over many centuries, for resource procurement, and to access agricultural areas, shrines, springs, and ancestral Jemez Mountains village sites." ECF 404 ¶ 431 at 205. A specific Jemez Trail and Shrine were delineated by testimony and documented on various maps entered into the record, and "the only

specific evidence of non-Jemez Pueblo trails in the Valles Caldera limits non-Jemez Pueblo trails to the Valles Caldera's eastern side." ECF 461 at ¶ 647 at 39 - 40.

There was also detailed evidence in the record describing other Pueblos' use of other parts of the claim area for their own unique cultural and religious purposes. For example, the district court found that "[m]embers of several affiliated communities, including Zia, Santa Clara, San Ildefonso, and Kewa are known to have gathered varied plant resources, hunted game animals, harvested bird feathers, and collected rocks and minerals in the Valles Caldera. Some locations . . . are marked with shrines shared by different communities." (ECF 461 at ¶ 583), and documented Zia Pueblo's use of other parts of the claim area for specific purposes. *See, e.g.*, ECF 461 at ¶ 584 (documenting Zia Pueblo's use of a specific area for herb gathering); ¶ 589 (documenting a specific site for Zia Pueblo's collection of plants); ¶ 596 (documenting Zia Pueblo's pilgrimages to San Antonio Mountain). The district court also documented uses by Santa Clara Pueblo for cultural and religious pilgrimages. *See, e.g., id*. at ¶ 609 (identifying Santa Clara Pueblo's traditional access point and routes within the general claim area).

But despite the extensive and detailed findings made by the district court concerning traditional practices in the general claim areas of Jemez Pueblo and other Pueblos, there was no specific evidence that any other Pueblo actually used the specific Jemez Trail or Shrine. The habits, modes, and ways of life of other tribes

using the general claim area did not include specific and continuous use of the Jemez Trail or Shrine. The evidence instead showed a significant amount of respect and cooperation among the Pueblos in regard to the respective traditional practices of each.[6] Jemez Pueblo was therefore not required to show that it theoretically could have excluded other Tribes from its Trail or the Jemez Shrine because it was the only tribe found to have actually and continually used those these particular areas[7] for particular uses.

The district court correctly cited the law on this issue, noting that:

> [T]o defeat Jemez Pueblo's exclusivity claim, the United States' "[e]vidence of use and occupancy by other groups 'must be specific.'" Native Vill. of Eyak v. Blank, 688 F.3d at 628 (quoting Alabama-Coushatta Tribe of Texas v. United States, No. 3-83, 2000 WL 1013532, at *17 (Fed. Cl. June 19, 2000)). See Wichita Indian Tribe v. United States, 696 F.2d 1378, 1385 (Fed. Cir. 1983). In Wichita Indian Tribe v. United States, the United States Court of Appeals for the Federal Circuit rejected the United States' argument that other Indian tribes interfered with the Wichita Indian Tribe's exclusive use and occupancy of a claim area in Texas, because "the evidence supporting mutual use of this land [was] not specific enough to justify

[6] By way of example, witnesses testified that exclusion of another Pueblo from accessing its respective ceremonial areas would be disrespectful (*see* Tr. Trans at 2071: 12 - 15) and that certain Pueblos consider Jemez Pueblo to be gatekeepers to the Caldera (*see* Tr. Tran. At 2730: 5 -9). Thus, use by other Pueblos of the general claim area cannot reasonably be considered to have interfered with Jemez Pueblo's use of specific areas.

[7] A showing of the ability to exclude is also not required when other uses were minimal, not occurring at the same time, or where the evidence of other uses is too general to be relied on by the trial court. *Zuni Tribe of New Mexico v. United States,* 12 Cl. Ct. 641, 617-20 & nn.13-15 (1987); *Caddo Tribe of Oklahoma v. United States,* 35 Ind. Cl. Comm. 321, 358-360 (Ind. Cl. Comm. 1975).

> a finding of a lack of exclusive use of all the Texas lands, especially given the Wichitas' role as traders and their friendly relationship with these tribes." Wichita Indian Tribe v. United States, 696 F.2d at 1385. See Alabama-Coushatta Tribe of Texas v. United States, No. 3-83, 2000 WL 1013532, at *17 (concluding that a hearing officer's finding -- that other Tribes' presence in the claim area precluded the claimant Tribe's ability to establish exclusive use -- was clearly erroneous, because the record contained "no probative evidence" that the other Tribes "occupied or used" the claim area); Spokane Tribe of Indians v. United States, 163 Ct. Cl. at 64 n.5 ("[S]cattered observations that other Indians were at one or another time found at one or another spot [inside the claim area] cannot be given any substantial weight. These casual observations do not indicate whether the alien Indians were there as visitors, on a temporary basis, etc.").

ECF 404 at 511-552 ¶ 440 (quotations and citations in original). But the district court failed to apply this law to the context of how the claim area in this case was actually used.

Jemez Pueblo was the only tribe found to have used its Trail and Shrine for specific purposes for a long time. It therefore did not have to meet any of the exceptions to the exclusivity requirement—1) the joint-and amicable use exception (2) the dominated use exception or the (3) the permissive use exception[8]—which

[8] These three exceptions are discussed in *Alabama-Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532, at *12 (Fed. Cl. June 19, 2000). To the extent these exceptions apply at all, they should be applied to every discrete area within the claim area. For the Pueblos, generally, the permissive use and the joint-and amicable use exceptions are of great importance where a Pueblo's aboriginal title to a land area has previously been adjudicated. As noted in the Resolution of Pueblo of Acoma, authorized use of a discrete trail or shrine by another Pueblo is subject to protocols in place among the Pueblos since time immemorial. Plaintiff's Trial Exhibit PX204 at §6(a).

come into play only when exclusivity is not established to specific portions of the claim area in the first place, or in other limited circumstances. *Wichita*, which did not rely on any of these exceptions to find that the Wichita tribe had title to part but not all of the claim area, comports with this approach and should be followed here. *Wichita*, 696 F.2d at 1384 ("Appellants argue that the trial judge contradicted himself when he held that, because of a lack of exclusive use, the Wichitas did not establish aboriginal title to *any* lands outside of their villages and adjacent cultivated areas…Appellants' view has a great deal of merit.").

In summary, had the district court applied long and well-established rules regarding aboriginal title in a straightforward manner to all parts of the claim area, its conclusions would have been different. Instead, it imputed its findings concerning traditional uses of the general claim area to the entire area. This imputation constitutes reversible error.

CONCLUSION

The aboriginal title claims are just and legal claims. *M'Intosh*, 21 U.S. at 574. The Jemez Shrine and Trail are central to the Jemez people's identity and way of life. They deserve and require protection.

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(b)(i), I certify that this brief complies with the applicable type-volume limitation. The brief is proportionately spaced, in 14-point, Times New Roman font in accordance with Fed. R. App. P. 32(a)(5)(a). The brief contains 4,829 words, excluding sections exempted by Fed. R. App. P. 32(a)(7)(f). I relied on my word processor to obtain the count, and it is Microsoft Word 2008.

In accordance with Fed. R. App. P. 29, all parties have consented to the filing of this Amicus brief. No party's counsel has authored the brief in whole or in part. No party's counsel has contributed money that was intended to fund preparing or submitting the brief.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry

/s/Zackeree S. Kelin
Zackeree S. Kelin
Counsel of Record for *Amici Curiae*
Dated: February 16, 2021

ADDITIONAL CERTIFICATIONS

The undersigned hereby certifies the following:

1. All required privacy redactions have been made.

2. The hard copies of the foregoing brief submitted to the clerk's office are exact copies of this ECF filing.

3. That a copy of the foregoing Brief, as submitted in digital form via the court's ECF system, has been scanned for viruses with Webroot SecureAnywhere, last updated February 16, 2021, and, according to the program, is free of viruses.

/s/Zackeree S. Kelin
Zackeree S. Kelin
Counsel of Record for *Amici Curiae*
Dated: February 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February 2021 I electronically filed the foregoing *BRIEF OF AMICI CURIAE KEWA PUEBLO (F.K.A. SANTO DOMINGO PUEBLO), OHKAY OWINGEH, PICURIS PUEBLO, PUEBLO OF ACOMA, PUEBLO OF COCHITI, PUEBLO DE SAN ILDEFONSO, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, PUEBLO OF SANDIA, PUEBLO OF SAN FELIPE, PUEBLO OF SANTA ANA, PUEBLO OF TESUQUE, TAOS PUEBLO, YSLETA DEL SUR PUEBLO, AND THE ZUNI TRIBE OF THE ZUNI INDIAN RESERVATION IN SUPPORT OF PLAINTIFF-APPELLANT PUEBLO OF JEMEZ AND REVERSAL OF THE DISTRICT COURT* with the Clerk of the Court using the CM/ECF system. The CM/ECF system will cause all CM/ECF participants to be served by electronic means.

/s/Zackeree S. Kelin
Zackeree S. Kelin
Counsel of Record for *Amici Curiae*
Dated: February 16, 2021