No. 20-50313

In the
United States Court of Appeals
for the Fifth Circuit

YSLETA DEL SUR PUEBLO, a federally recognized sovereign Indian tribe,
Plaintiff - Appellant

v.

CITY OF EL PASO,
Defendant - Appellee

On Appeal from the United States District Court for the Western District of Texas, El Paso Division, Civil Action No. 3:17-CV-00162-DCG

BRIEF OF APPELLANT

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YSLETA DEL SUR PUEBLO, a federally recognized sovereign Indian tribe,

Plaintiff – Appellant,

v. **No. 20-50313**

CITY OF EL PASO,

Defendant – Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Ysleta del Sur Pueblo, Plaintiff – Appellant
2. City of El Paso, Defendant – Appellee
3. Barnhouse Keegan Solimon & West LLP (Counsel of record in the district court and appellate court for Plaintiff – Appellant)
4. Law Offices of Thomas E. Luebben PC (Counsel of record in the district court and appellate court for Plaintiff – Appellant)
5. Ken Coffman, Attorney at Law (Counsel of record in the district court for Plaintiff – Appellant)

6. Dickinson Wright PLLC (Counsel of record in the appellate court for Defendant – Appellee)
7. City Attorney's Office, City of El Paso (Counsel of record in the district court and appellate court for Defendant – Appellee)
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/s/ Kelli J. Keegan
Kelli J. Keegan
Counsel for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant Ysleta del Sur Pueblo ("the Pueblo") respectfully requests oral argument. To place this appeal in context, the Court will need to consider historic and legal material and laws of three sovereigns – Spain, Mexico and the United States. Oral argument will provide the Court the opportunity to question counsel regarding these matters, and their importance to the Court's resolution of the appeal. The primary issue on appeal is whether the district court had jurisdiction to adjudicate the property rights of a federally recognized Indian Pueblo to 111.73 acres of land within its Spanish land grant. The land at issue was restricted from alienation under Spanish and Mexican law, and the Pueblo maintains that since the American accession under the 1848 Treaty of Guadalupe-Hidalgo, the land has been subject to the restriction against alienation of the 1834 Indian Non-Intercourse Act. This appeal raises these and related issues regarding federal court subject matter jurisdiction. The Pueblo submits that oral argument will significantly aid this Court's decisional process when resolving these issues. *See* Fed. R. App. P. 34(a)(2)(C).

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JURISDICTIONAL STATEMENT

The Pueblo filed a complaint against the City of El Paso seeking a declaratory judgment confirming its title to 111.73 acres of real property. ROA.15-29. The district court had subject matter jurisdiction to resolve the Pueblo's claims under 28 U.S.C. §§ 1331, 1362 and 1367 because the claims arise under federal law, including a federal treaty and federal statutory and common law.

On January 15, 2020, the district court entered a Memorandum Opinion and Order (ROA.3582-3601, 3603)[1] dismissing the Pueblo's claims without prejudice, and a Final Judgment (ROA.3602)[2] dismissing the Pueblo's complaint without prejudice. The Pueblo timely filed a motion to amend the judgment and for leave to file an amended complaint pursuant to Rules 59(e) and 15(a). ROA.3604-3665. The district court entered a Memorandum Order (ROA.3687-3695)[3] denying the Pueblo's motion. The Pueblo timely filed its notice of appeal on April 13, 2020 (ROA.3696-3697)[4] from the Memorandum Order and the Memorandum Opinion and Order and Final Judgment, which are appealable final orders pursuant to 28 U.S.C. § 1291.

[1] R. Excerpts of Appellant, Tab Nos. 2 and 4.
[2] R. Excerpts of Appellant, Tab No. 3.
[3] R. Excerpts of Appellant, Tab No. 5.
[4] R. Excerpts of Appellant, Tab No. 6.

STATEMENT OF ISSUES PRESENTED

I. Whether the district court erred by holding it lacks jurisdiction to adjudicate the Treaty of Guadalupe-Hidalgo's real property guaranty of the Pueblo's title to the 111.73 acres because Congress did not enact a separate statute providing for confirmation of Spanish and Mexican grants within the El Paso area.

II. Whether the district court erred when it held that aboriginal Indian title was not pled and cannot be established to land onto which a tribe was forcibly relocated by a European sovereign.

III. Whether the district court failed to adhere to this Court's controlling precedent when it denied the Pueblo's motion to amend the judgment and for leave to file an amended complaint.

IV. Whether the district court erred when it failed to apply the Indian canons of construction to its analysis of jurisdiction, aboriginal title, application of the Non-Intercourse Act and denial of the Pueblo's motion to file an amended complaint.

STATEMENT OF THE CASE

I. Statement of Facts.

A. Ysleta del Sur Pueblo.

Ysleta del Sur Pueblo is a federally-recognized indigenous Native American Pueblo of Tigua (i.e., Tiwa-speaking) Indians.[5] The Pueblo's members originally lived at what is today the Isleta Pueblo on the Rio Grande near Albuquerque, New

[5] Federally Recognized Indian Tribe List, 86 Fed. Reg. 7554, 7557 (Jan. 29, 2021).

Mexico. ROA.17; ROA.1922-1923.[6] The Spanish were driven out of present-day New Mexico during the Pueblo Revolt of 1680. ROA.1921. As they traveled south, the Spanish removed these Tigua Indians to an area thirteen miles southeast of present-day El Paso, Texas. ROA.17; ROA.1922-1923. Today Ysleta del Sur Pueblo remains the oldest community as well as the oldest government in Texas. ROA.2486 at ¶ 55.

The Pueblo has continuously maintained itself as a sovereign, self-governing, Pueblo Indian corporate entity headed by a Cacique (religious headman), Governor, Lieutenant Governors, a War Captain and other officials whose offices date from prior to the 1680 Pueblo Revolt. ROA.1925-1926; ROA.1982; ROA.3522-3523 at ¶ 9, 13; ROA.3619 at ¶ 7. The Pueblo has maintained its traditional Indian Pueblo political system, culture and ceremonial practices from prior to its removal to the El Paso area to the present. ROA.1982; ROA.3523 at ¶ 13. The Pueblo currently has approximately 4,320 members. ROA.2710.

B. Indian Pueblos.

The Indian Pueblos have existed since time immemorial with established territories and distinctive characteristics such as complex organized governmental

[6] Charles Cutter, *Ysleta del Sur Pueblo: An Indian Corporate Entity in the Spanish and Mexican Periods* (March 4, 2019). Dr. Cutter is an expert witness for the Pueblo.

structures; traditional cultural, religious, agricultural, hunting and plant gathering practices, and highly developed acequia systems for irrigation. ROA.3521 at ¶ 4.

In 1598, Spain established its first permanent settlement in the colonial province of New Mexico. ROA.1430 at ¶ 14. In 1680, after decades of subjugation, the Indian Pueblos drove the Spanish out of the Pueblos' territory. ROA.1921. The Spanish colonists fled south, finding refuge downriver at Mission Nuestra Señora de Guadalupe del Paso, south of present-day El Paso. *Id*. A contingent of Tigua Indians of Isleta Pueblo, Piro Indians of Socorro Pueblo, and Piro Indians of Senecú Pueblo, all originally located south of present-day Albuquerque, were forced to accompany the retreating Spanish colonists. ROA.1922. In 1681, the Spanish attempted, and failed, to reconquer colonial New Mexico. *Id*. In their retreat, the Spanish attacked the Isleta Pueblo and forced its Tigua occupants to accompany the Spanish as prisoners to the El Paso area. ROA.3522 at ¶ 8. The Spanish settled these Tigua Indians in what became known as Ysleta del Sur Pueblo (i.e., "Isleta of the South," or "Southern Isleta"). *Id*.

C. Spanish Colonial Law Protected Ysleta del Sur as a "Pueblo de Indios."

On September 4, 1683, a Spanish Royal cédula confirmed a 1682 decision of Viceregal authorities in colonial Mexico City that the Spaniards and Indians in the El Paso area should live apart, with clearly delineated boundaries between the two.

ROA.3523 at ¶ 15; ROA.3621 at ¶ 13. A 1684 Spanish Royal cédula instructed the new governor of colonial New Mexico to designate:

> **to each pueblo the lands that may be needed, and the limits and boundaries**; and [do so] also for the Villa that you might create for Spaniards, **which must be separated** so that in this way the Indians may be free and discord regarding the use of land and water and woodlands may be avoided, leaving the Indians in liberty, without being subject to involuntary servitude.

ROA.1430-1431 at ¶ 18; ROA.3523 at ¶ 16 (emphasis added).

Throughout the Spanish colonial period (1680 - 1821), Ysleta del Sur Pueblo was recognized by the Spanish government as a "Pueblo de Indios," with a Spanish land grant and special protections under Spanish colonial law. ROA.1439 at ¶ 1; ROA.792 at ¶ 31; ROA.1431 at ¶ 19; ROA.1433 at ¶¶ 27, 29; ROA.1968-1969.

D. The Pueblo Received a Four-Square-League Spanish Land Grant Which was Inalienable Under Spanish Colonial law.

As the non-Indian population in colonial New Mexico grew during the eighteenth century, Spanish land holders began to encroach on Pueblo lands, often resulting in lawsuits and not infrequently resurveys of Pueblo land grants. ROA.3527 at ¶¶ 41, 43; ROA.1961-1963. To protect their lands, Pueblos invoked their right to a Pueblo league by demanding that one league be measured in each of the four cardinal directions. ROA.3527 at ¶ 42. This Pueblo league encompassed an area of approximately 17,350 acres. *Id*.; ROA.1429-1430 at ¶ 13; ROA.1961-1965; ROA.1856. All of the Pueblos in New Mexico have had their "Pueblo

League" confirmed even though only one Pueblo's valid physical grant document survived to the present.[7] On April 18, 1815, New Mexico colonial governor Alberto Maynez issued a decree stating:

> the five thousand-vara league, measured from the cross in the cemetery in each direction, **which his majesty made as a grant to every Indian Pueblo from the time of its founding**, is to be maintained in order to support the natives of the Pueblos, such that they [can] use it and cannot give or sell it without the king's permission because it is a patrimony or inherited estate. No judge or governor has the authority to sell all or part of the aforesaid league.

ROA.3530 at ¶ 55 (emphasis added) (Alberto Maynez, decree, 15 Apr. 1815, State Archives of New Mexico I:1357); ROA.1933. A Pueblo league was assigned to each of the four "Pueblos de Indios" in the El Paso area, including Ysleta del Sur. ROA.2032-2039.[8] Ysleta del Sur Pueblo's Pueblo league is confirmed in maps from the Spanish colonial and Mexican periods. *Id*. During the Spanish colonial period, Ysleta del Sur Pueblo's league was recognized and protected by the Spanish government. ROA.1431 at ¶ 19; ROA.1433 at ¶¶ 27, 29; ROA.1439.

E. The Pueblo's Land Rights Were Protected During the Mexican Period (1821-1848).

Mexico achieved independence from Spain in the Treaty of Cordoba on August 24, 1821. ROA.1427 at ¶ 1. After the organization of the state of

[7] ROA.1856-1857 (*citing* Malcolm Ebright, Rick Hendricks and Richard W. Hughes, *Four Square Leagues: Pueblo Indian Land in New Mexico* (2015) at 11).
[8] Charles Cutter, *Response of Charles R. Cutter to "Ysleta del Sur under Spain and Mexico: A Commentary," by John L. Kessell* (June 27, 2019).

Chihuahua in 1824, and until the 1848 Treaty of Guadalupe-Hidalgo,[9] the El Paso area which was previously within the Spanish colonial province of New Mexico, including Ysleta del Sur Pueblo, came under the jurisdiction of the Mexican state of Chihuahua with all matters of government administered from Chihuahua City. ROA.1971; ROA.1228 at ¶ 4; ROA.1263-1273; ROA.1440 at ¶ 4. Throughout the Mexican period, Mexican authorities considered Ysleta del Sur Pueblo to be a Pueblo Indian community entitled to its communal land base. ROA.1978-1981.

F. The Pueblo's Land Rights Were Protected by the Laws of the United States (1848-Present).

The Mexican-American War ended in 1848 with the Treaty of Guadalupe-Hidalgo, which established the Rio Grande as the boundary between the United States and Mexico. ROA.1986; ROA.2062;[10] ROA.3622 at ¶ 23. Articles VIII and IX of the 1848 Treaty guaranteed the property rights of Americans and Mexicans in the New Mexico Territory upon the accession of the United States, including the pre-existing real property rights of Ysleta del Sur Pueblo to the 111.73 acres at issue in this lawsuit (hereafter "111.73 acres" or "the Property"). ROA.1441 at ¶ 11; ROA.1987-1989; ROA.3623 at ¶ 24. Since 1848 the Pueblo's title to the Property has been continuously protected from conveyance, alienation

[9] Treaty of Guadalupe-Hidalgo of February 2, 1848, 9 Stat. 922.
[10] Rick Hendricks, *Ysleta del Sur Pueblo Under the United States, 1848-Present* (March 4, 2019). Dr. Hendricks is an expert witness for the Pueblo.

or privatization by the Indian Non-Intercourse Act. 25 U.S.C. § 177;[11] ROA.774-782.

The City's claimed interest in the Property derives from a series of fraudulent and unlawful actions during the 1850s-1880s when non-Indians purported to convey nearly all of the Pueblo's lands to themselves. ROA.18-19 at ¶ 21; ROA.3625 at ¶¶ 42-43; ROA.1892-1896 at ¶¶ 15-28; ROA.2093. The Pueblo has never consented to any conveyance, alienation or privatization of the Property. ROA.19 at ¶ 30; ROA.3626 at ¶ 45. The Pueblo's right to the Property based on its aboriginal Indian title has never been extinguished by conquest, voluntary cession, or abandonment; nor by any express act of the United States Congress purporting to take or extinguish the title. ROA.19 at ¶ 25; ROA.3621 at ¶ 11; ROA.3624 at ¶ 32; ROA.3626 at ¶¶ 46-47. Ownership of the Property remains in the Pueblo based on its communal Spanish land grant title and aboriginal Indian title as a matter of law. ROA.19-20 at ¶¶ 26-31; ROA.3626 at ¶ 48.

[11] The Act reads in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

G. The Property at Issue.

The Property is part of an area known by Pueblo members as the "Sand Hills" because the land in this area was historically covered by sand dunes. ROA.3624 at ¶ 34. 42.73 acres of the Property is encompassed by two undeveloped dirt lots, with the remainder used as a city sports park. There are no homes or businesses on the Property. ROA.16 at ¶ 5; ROA.23. The Pueblo has used and occupied the 111.73 acres as against all other Indian tribes from its establishment to the present. ROA.19 at ¶¶ 25, 29; ROA.3621-3622 at ¶¶ 11, 17. The Property continues to be used by Ysleta del Sur Pueblo members for sacred traditional cultural and religious activities, including subsistence food and plant gathering. ROA.19 at ¶ 29; ROA.3624-3625 at ¶¶ 36, 39-41; ROA.3066-3144.[12]

II. Procedural History.

A. The Pueblo's Complaint and the City's Rule 12(b)(6) Motion.

The Pueblo filed a complaint on May 22, 2017, seeking a declaratory judgment to confirm its title to the 111.73 acres against Defendants City of El Paso and El Paso Water Utilities Public Service Board's competing chain of title. ROA.15-29. On December 5, 2017, Defendants filed a motion to dismiss under Rule 12(b)(6) arguing the Pueblo failed to state a claim. ROA.79-133. On March 22, 2018, the district court entered an Order denying the motion to dismiss as to the

[12] T. J. Ferguson, *Ysleta del Sur Pueblo Oral History and Use of the 1751 Spanish Land Grant* (March 24, 2019). Dr. Ferguson is an expert witness for the Pueblo.

City and granting dismissal as to the El Paso Water Utilities Public Service Board. ROA.156-163.

B. The City's Request for Leave to Amend its Pleading.

On April 4, 2018, the City filed an answer to the Pueblo's complaint asserting two affirmative defenses: laches and lack of aboriginal title. ROA.175-176 at ¶¶ 32, 34. On April 5, 2018, the district court issued a Scheduling Order setting an August 4, 2018, deadline to file motions to amend pleadings. ROA.179.

Ten months after filing its initial answer and six months after the amendment deadline passed, on January 22, 2019, the City filed a motion for leave to amend its answer to assert twelve new affirmative defenses. ROA.229-272. The City's proposed amended answer moved its defense addressing the Pueblo's assertion of aboriginal title into the section entitled "Affirmative Defenses." ROA.245 at ¶ 38. Among the City's new affirmative defenses was the following defense challenging application of federal law prohibiting alienation of the 111.73 acres:

> 45. Plaintiff's claims must be dismissed because the lands at issue were never subject to any restraints on alienation imposed by the federal Non-Intercourse Act, 25 U.S.C. § 177. The history and treatment of those lands demonstrate that the Property and other lands were available at all times for sale and purchase without restriction.

ROA.246 at ¶ 45. The district court granted the City leave to amend, entering an order in which it addressed the Rule 15(a) standard and which differs markedly

from the court's subsequent denial of the Pueblo's motion to amend its complaint as addressed below:

> Rule 15(a) provides that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "The language of this rule evinces a bias in favor of granting leave to amend." *Smith* v. *EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (internal quotes and citation omitted). "Absent a 'substantial reason' such as undue delay, bad faith, dilatory motive, repeated failures to cure deficiencies, or undue prejudice to the opposing party, the discretion of the district court is not broad enough to permit denial." *Mayeaux* v. *La. Health Serv.* & *Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004) (internal quotes and citation omitted). "Stated differently, district courts must entertain a presumption in favor of granting parties leave to amend." *Id.*

ROA.420. The district court ruled that any prejudice to the Pueblo from allowing the City's amendment could be ameliorated by extending the deadlines in the Scheduling Order. ROA.421. The court issued a Second Amended Scheduling Order extending deadlines and continuing the trial for two months. ROA.435-437.

The parties filed cross motions for summary judgment on July 29, 2019. ROA.477-1403. In its motion for summary judgment, the City for the first time argued that the district court lacked subject matter jurisdiction. ROA.495-496. Nearly six months later, and only two weeks before trial, the court issued an opinion construing the City's motion for summary judgment as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction (ROA.3583-3584), and ruling that the court lacked subject matter jurisdiction:

> [T]he Pueblo's Complaint does not involve a substantial federal issue from which a determination from the Court would be decisive of its

> claim because **the Treaty of Guadalupe Hidalgo by itself did not guarantee the Pueblo a right of occupancy** and a present and continuing right to possession.

ROA.3597 (emphasis added).

> **[I]n the absence of any separate**, independent treaty or **applicable congressional statute recognizing and guaranteeing the rights of the Pueblo to the Property**, the Court lacks authority to determine the validity of Pueblo's claim to the land.

ROA.3599 (emphasis added).

Ignoring the Treaty's guarantees on the date Mexico ceded the area to the United States, and ignoring the Indian Non-Intercourse Act, the Court entered final judgment dismissing the complaint without prejudice. ROA.3602.

C. The Pueblo's Request for Leave to Amend its Pleading.

The Pueblo timely moved to amend the final judgment and for leave of court to file an amended complaint addressing the court's concerns regarding subject matter jurisdiction. ROA.3604-3665. On March 24, 2020, the court entered a Memorandum Order denying the Pueblo's motion. ROA.3687-3695. The court erroneously applied the Rule 59(e) standard instead of the Rule 15(a) standard, and ruled "the Court believes that the Pueblo is attempting to 'relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" ROA.3693.

On April 13, 2020, the Pueblo filed a timely notice of appeal from the March 24 Memorandum Order and the January 15 Memorandum Opinion and Order and Final Judgment. ROA.3696.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 494 (5th Cir. 2020); *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). "A motion to dismiss for lack of jurisdiction may be decided by the district court on one of three bases: the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ynclan v. Department of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991). In this case the court looked to the complaint alone as the basis for dismissal. In doing so the court was required to, "take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Stratta v. Roe*, 961 F.3d 340, 349 (5th Cir. 2020). *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981) ("Since here we have only a 'facial attack' and not a 'factual attack,' our review is limited to whether the complaint is sufficient to allege the jurisdiction.").

This Court reviews a district court's denial of a plaintiff's motion for reconsideration and motion for leave to amend the complaint for abuse of discretion. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003). *See Foman v. Davis*, 371 U.S. 178, 182 (1962). "A court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014). A court by definition abuses its discretion when it applies an incorrect legal standard. *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 249 (5th Cir. 2020).

SUMMARY OF THE ARGUMENT

The district court erred in holding it lacks subject matter jurisdiction to resolve the Pueblo's claims in this case based on two separate sources.

First, the Pueblo held *perfect title* to its Spanish grant lands on the date the El Paso area was ceded by Mexico to the United States under the 1848 Treaty of Guadalupe-Hidalgo. On the date of that cession, United States federal law controlled in the ceded lands, including the Indian Non-Intercourse Act, which prohibits alienation of any of the Pueblo's land rights without approval of the federal government. Contrary to the district court's holding, a federal statute to implement the provisions of a treaty of cession protecting pre-existing property rights is only necessary for imperfect titles. Perfect titles existed prior to any confirmation – they did not spring into existence upon confirmation as the district

court would have it. The Indian Non-Intercourse Act has applied to the Pueblo's Spanish land grant since the date of cession in 1848, and immediately prohibited alienation or privatization of the Pueblo's perfect title to the Property without federal approval. Independent of the guarantees of the Treaty of Guadalupe-Hidalgo, and as confirmed by the United States Supreme Court in *Oneida Indian Nation of N.Y. v. County of Oneida, N.Y. (Oneida I)*, 414 U.S. 661, 666-67 (1974), the federal district court has common law subject matter jurisdiction to adjudicate both the Pueblo's Spanish land grant and its aboriginal Indian title based claims to the Property under the Non-Intercourse Act and in the process resolve competing claims to the Property.

Second, the Treaty of Guadalupe-Hidalgo guarantees the Pueblo's real property interests at issue in this case, and no separate federal statutory procedure is required to allow federal courts to confirm Spanish and Mexican land grants in the El Paso area of Texas because, unlike in that portion of the ceded lands that was not incorporated into the State of Texas, the United States relinquished any claims to public lands in Texas. The straightforward response to the court's conclusion that it lacks jurisdiction is that no separate implementing statute to determine the existence of private rights in Spanish or Mexican grants in the El Paso area as against the United States, much less a perfect title, was necessary because the United States disclaimed any land rights in Texas pursuant to the

Texas annexation and the Compromise of 1850. *See* Act of Mar. 1, 1845, §§ 2, 5 Stat. 797; Act of Dec. 29, 1845, 9 Stat. 108; Act of Sept. 9, 1850, 9 Stat. 446, 447. Therefore, there was no need for the functions served by the implementing statutes cited by the district court because within Texas there was no need to adjudicate private rights as against the United States, unlike within the rest of the Mexican cession.[13] Validating statutes did not resolve conflicts between private parties, and, with the exception of the 1851 Act to Settle Private Land Claims in California, did not require federal confirmation of perfect titles.

The Pueblo's complaint satisfies the federal well-pleaded complaint rule by asserting a possessory right to lands protected from alienation. The Indian Non-Intercourse Act established a trust relationship between the United States and the Pueblo arising on the date the Pueblo's lands were ceded by Mexico to the United States. Pursuant to controlling United States Supreme Court authority, federal common law subject matter jurisdiction lies to adjudicate the Pueblo's federally protected possessory rights to the Property. The district court also had federal

[13] In elevating specific legislative procedures, such as the 1851 Act to Settle Private Land Claims in California, 9 Stat. 631 (Mar. 3, 1851) ("1851 CPLCA"), and the New Mexico Surveyor-General Act, 10 Stat. 308 (July 22, 1854) ("1854 SGNM"), over the general property guarantees of the Treaty of Guadalupe-Hidalgo, courts were swayed by a desire to separate Hispanic property from the public domain as quickly as possible to facilitate westward expansion. Christine Klein, *Treaties of Conquest: Property Rights, Indian Treaties and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. Rev. 201, 222-23 (1996).

question jurisdiction to adjudicate the Pueblo's federally protected title pursuant to 28 U.S.C. §§ 1331 and 1362. The district court's dismissal of this case pursuant to Rule 12(b)(1) for lack of jurisdiction in the absence of federal grant confirmation, treating the Pueblo's property rights as non-existent for jurisdictional purposes, is reversible error.

Finally, instead of applying the liberal Rule 15(a) standard to the Pueblo's motion to amend the judgment and for leave to amend its complaint – as this Court and the Supreme Court direct – the district court erroneously applied the Rule 59(e) standard to deny the Pueblo's motion.

ARGUMENT

I. The District Court Erred by Holding it Lacks Jurisdiction Because Congress Did Not Enact a Separate Statute Providing for Confirmation of Spanish and Mexican Grants Within the El Paso Area.

The central issue in this appeal is whether the district court erred when it held it lacks jurisdiction to adjudicate the Pueblo's right to occupy the Property. The court held that it lacked subject matter jurisdiction because Congress did not enact a statute to confirm Spanish land grants *as against the United States* in that portion of the New Mexico Territory transferred to Texas by the Compromise of 1850. In so holding, the district court fundamentally misapplied controlling law on this issue.

A. Article III Courts Have Jurisdiction to Determine the Meaning of Treaties as a Matter of Federal Law.

The United States Constitution, in Article VI, paragraph 2, makes treaties the supreme law of the land on the same footing with acts of Congress. The clause was a direct result of one of the major weaknesses of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress's promises was dependent on the state legislatures. Samuel B. Crandall, *Treaties, Their Making and Enforcement*, ch. 3 (2d ed. 1916).

As the Supreme Court noted in *Edye v. Robertson (Head Money Cases)*:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.

112 U.S. 580, 598 (1884) (quoted with approval in *Medellín v. Texas*, 552 U.S. 491, 505-06 (2008)). The meaning of treaties, as of statutes, is determined by the courts:

> If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.

Sanchez-Llamas v. Oregon, 548 U.S. 331, 353-54 (2006) (*quoting Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

B. The 1848 Treaty of Guadalupe-Hidalgo Guarantees Property Rights in the Area Ceded to the United States.

The Treaty of Guadalupe-Hidalgo formally concluded the war with Mexico and the United States acquired the Mexican Cession, including that part of Texas east of the Rio Grande governed by the state of Chihuahua. ROA.2062.

The 1848 Treaty protected land titles in formerly Mexican territory that became part of the United States. Article VIII states:

> In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

ROA.1322-1323.

Article IX states that Mexicans who choose to remain in the United States and no longer be Mexican citizens will be "incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution." In the meantime, they were to be "maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." ROA.1323.

C. The 1848 Treaty Guaranteed the Pueblo's Property Interests.

The district court dismissed the present action based on the court's ruling that it did not have jurisdiction to adjudicate the Pueblo's right to occupy the Property, which is within its Spanish land grant. The court based this ruling on its belief that the Pueblo's Spanish grant real property rights cannot exist in the absence of "validating" legislation, and therefore there are no underlying property rights to be protected by the federal Indian Non-Intercourse Act and, concomitantly, no federal question jurisdiction. ROA.3599. In other words, according to the district court the Pueblo's Spanish grant is effectively a "non-grant" and non-existent for jurisdictional purposes. The district court's holding is inconsistent with federal statutes providing for confirmation of pre-existing titles in the 1848 Mexican Cession, and with case law applying and interpreting those statutes, as well as similar statutes applying to the 1819 Florida Cession and the 1803 Louisiana Purchase.

The case of *United States v. Percheman*, 32 U.S. 51 (1833), is instructive. There the claimant of a Spanish land grant in Florida submitted his 2,000-acre claim to a board of commissioners created by the statute of March 3, 1823,[14] to "examine into and confirm the claims before them." *Percheman*, 32 U.S. at 91. The board rejected his claim, and the claimant sued the United States in federal

[14] Act of Mar. 3, 1823, 3 Stat. 754.

district court for East Florida to confirm the grant pursuant to jurisdiction conferred by the Act of May 26, 1830.[15] *Id.* at 51. The court confirmed his grant and the Supreme Court affirmed. The claimant was successful in adjudicating his perfect title as against the United States without a unique statutory confirmation process. *Id*. at 87-88.

Delassus v. United States, 34 U.S. 117 (1835), involved an 1824 Act of Congress which conferred subject matter jurisdiction on the federal district court for Missouri to adjudicate *imperfect* titles. The *Delassus* Court adjudicated the title and held for the claimant. *Delassus* makes clear that the real issue concerning the enforceability of property protections stated in the 1803 Louisiana Purchase, the 1819 Florida Cession and the 1848 Treaty of Guadalupe-Hidalgo is not whether the respective treaty is "self-executing" in the sense that a claimant can simply sue the United States to quiet title against the United States without a grant of jurisdiction, but instead whether Congress has waived sovereign immunity and conferred federal subject matter jurisdiction on the district courts in cases involving title claims against the United States. Because the federal courts are courts of limited jurisdiction as specified by Congress and interpreted by the Supreme Court, there must be a specific jurisdictional grant and an implied or express waiver of sovereign immunity before a claimant may sue the United States.

[15] Act of May 26, 1830, 4 Stat. 405.

The only thing that "non-self executing" means is that the United States will not allow itself to be sued to enforce a treaty without a separate grant of subject matter jurisdiction. In that sense, no treaty is "self-executing." *See generally* Carlos Manual Vásquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995). Because the United States is not a defendant in this action, any discussion of whether the Treaty of Guadalupe-Hidalgo is "self-executing" is irrelevant to the issues in this case.

D. The Need to Separate Private Land from Public Property and to Perfect Imperfect Titles Led Congress to Adopt Statutory Procedures to Confirm Land Grants in the Florida Cession, the Louisiana Purchase and the Mexican Cession as Against the United States.

Pre-existing perfect and imperfect Spanish and Mexican law property rights continued to exist following the 1848 Cession. Congress enacted certain statutes to establish a confirmation process to allow it to identify public lands in the far West so that those public lands could be open to settlement. As there were no federal public lands in Texas, Congress had no need to adopt validating statutes allowing suits against the United States arising out of land claims in Texas. For those states and territories where Congress did adopt validating statutes, perfect and imperfect titles were distinguished and treated differently. Yet other than to separate public land from private property, there was no need to adjudicate perfect titles, as recognized by the 1803 Louisiana Purchase confirmation statutes and the 1891

Court of Private Land Claims Act, 26 Stat. 854 (Mar. 3, 1891) ("1891 CPLC"). However, imperfect titles existing upon Senate approval of the Treaty of Guadalupe-Hidalgo required the new sovereign to "perfect" such titles by "complet[ing] whatever she [Spain], in good faith, had begun, but left unfinished." *Percheman*, 32 U.S. at 65. Other Supreme Court decisions in the first half of the nineteenth century followed *Percheman* in emphasizing the customary international legal principle that perfect titles under a former sovereign retained their valid and perfect status under the new sovereign.[16]

The mandate of Section 6 of the 1891 CPLC was expressly limited to imperfect titles. Section 8 allows claims based on perfect title, but expressly does not require that they be submitted for confirmation. Imperfect title claims not

[16] The United States was and is obligated to comply with the Treaty of Guadalupe-Hidalgo. *E.g.*, *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644, 662 (1876); *Chaves v. Whitney*, 4 N.M. 611 (1888). The United States Supreme Court has frequently held that the international "law of nations" protects pre-existing private property rights in ceded territories. *E.g.*, *Percheman*, 32 U.S. at 65; *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857) (stating that, after the change in sovereignty, "private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged...This is the principle of the law of nations."); *Astiazaran v. Santa Rita Land & Min. Co.*, 148 U.S. 80, 81 (1893) (private property within ceded territory entitled to protection). "A treaty is in the nature of a contract between nations." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254 (1984). As Chief Justice Marshall observed, "The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted." *United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801).

submitted within two years are "abandoned and … forever barred," but not claims of perfect title. *Ainsa v. New Mexico & Ariz. R. Co.*, 175 U.S. 76, 84 (1899).

The district court dismissed the case at bar based on the proposition that "[The] Pueblo's Asserted Right to the Property is Not a Federally Derived Property Right and Supreme Court Precedent Has Foreclosed the Authority of Federal Courts to Determine the Validity of the Pueblo's Claim to the Land." ROA.3591-3601. The court relied primarily on *Tameling*, 93 U.S. 644, *Burat's Heirs v. Board of Levee Comm'rs of Orleans Levee Dist. of State of La.*, 496 F.2d 1336 (5th Cir. 1974) and *Astiazaran*, 148 U.S. 80 to conclude that in the absence of a statute providing for federal confirmation of the Pueblo's Spanish grant, no property right exists subject to the Indian Non-Intercourse Act. Although all three of these cases were dismissed for lack of federal jurisdiction, none are apposite here.

In *Burat's Heirs*, a case that did not involve a federally recognized Indian tribe, the Fifth Circuit, distinguishing *Oneida I*, held that federal question jurisdiction does not exist merely because title to land devolved from a federal patent or because the case involved two conflicting patents. 496 F.2d at 1341 ("We find little guidance in the *Oneida* decision that helps the Burats. That case involved a federally protected right of an Indian tribe to possession of land.").

Tameling involved an attempt to evict Tameling based on title originating in a congressionally-confirmed Mexican grant. Tameling attacked the validity of the

grant. The Supreme Court held only that the *congressional confirmation* of the grant was dispositive, and the federal courts lacked jurisdiction to adjudicate its validity. The Court's comment (quoted in the district court opinion in the case at bar at ROA.3596) that "[t]he duty of providing the mode of securing [property rights] and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government" is dicta. 93 U.S. at 661 (distinguishing the process to address imperfect title adopted by Congress for California from the process adopted by Congress for New Mexico, stating: "We have repeatedly held that individual rights of property, in the territory acquired by the United States from Mexico, **were not affected by the change of sovereignty and jurisdiction**. They were entitled to protection, whether the party had the full and absolute ownership of the land, **or merely an equitable interest therein, which required some further act of the government** to vest in him a perfect title.") (emphasis added).

Finally, *Astiazaran* involved a contest between rival claimants under the same Mexican grant wherein the Surveyor-General of New Mexico recommended Congressional confirmation, but Congress had not acted, and the claim was still pending. The Supreme Court held only that the 1854 SGNM and the Arizona Surveyor-General Act, 16 Stat. 304 (July 15, 1870), reserved to Congress final action on the confirmation of grant claims recommended by the Surveyor-General

and precluded judicial adjudication of the validity of grants pending before Congress. The text quoted by the district court is dicta, but notable for the fact it refers only to the requirement to validate imperfect titles, ROA.3596-3597, as opposed to perfect titles, which, by implication, and under the Louisiana Acts and the 1891 CPLC, did not require confirmation. *Astiazaran*, 148 U.S. at 81-82 ("Undoubtedly **private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection**, whether the party had the full and absolute ownership of the land, **or merely an equitable interest therein, which required some further act of the government** to vest in him a perfect title.") (emphasis added). It is also noteworthy that the territorial court initially adjudicated the claim before Congress enacted the 1891 CPCL. *Compare Astiazaran*, 148 U.S. 76, *with Ainsa*, 175 U.S. 76 (Arizona territorial court had jurisdiction to adjudicate an unconfirmed perfected Mexican grant as against a federal homestead patent because no federal confirmation proceeding was pending).

Because the Pueblo is an Indian tribe that holds perfect title to its lands, these cases are all inapposite. And contrary to the district court's conclusion that the Pueblo's Spanish grant does not exist in the absence of federal confirmation, ROA.3599, there was no universal requirement that all private titles within the 1803 Louisiana Purchase and the 1848 Mexican Cession, perfect and imperfect

alike, be confirmed by the United States or deemed null. Only the 1851 CPLCA required that both perfect and imperfect titles be filed and confirmed. *Botiller v. Dominguez*, 130 U.S. 238 (1889). The title confirmation provisions for the Louisiana Purchase and New Mexico Territory were similar in requiring filing only for imperfect titles, but the provisions for Louisiana and California (1851 CPLCA) were similar in creating a board or commission to administratively determine imperfect titles (but including perfect in California), and those not filed within two years were forfeited. The 1854 SGNM did not require any filing and had no deadline, but relied on the Surveyor-General to investigate the grants and recommend confirmation by Congress if appropriate. Congress's failure to confirm had no effect on any title.

Aboriginal Indian titles that pre-exist 1848 were not included in or affected by the statutory confirmation mandate, although they are imperfect titles. Section 13, Second, of the 1891 CPLC states: "[n]o claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place." That language confirmed that actionable unextinguished aboriginal Indian title property rights exist within the Mexican Cession, and confirmed that nothing in the 1891 CPLC changed that as to lands within the geographic scope of that statute. Those aboriginal property rights continue to exist to this day without federal confirmation. *See Pueblo of Jemez v. United States (Jemez I)*, 790 F.3d

1143 (10th Cir. 2015); *United States v. Abouselman*, 976 F.3d 1146 (10th Cir. 2020). That no federal confirmation process was enacted or needed to be enacted by Congress applicable to the El Paso area and the Pueblo's perfect title to its lands does not mean that the Pueblo's Spanish grant simply never existed for federal jurisdictional purposes. Instead, a holding that the Pueblo's perfect title never existed is an outright denial of rights protected by the Treaty of Guadalupe-Hidalgo and a violation of the Treaty.

In sum, there were three categories of title within the Mexican Cession: perfect title, imperfect title, and aboriginal Indian title. Outside of California, the validating statutes required confirmation only of non-Indian imperfect titles; they did not require validation of perfect title or aboriginal Indian title. *Compare Botiller*, 130 U.S. 238 (1851 CPLCA required that both perfect and imperfect titles be submitted and confirmed), *with Grant v. Jaramillo*, 28 P. 508, 510-11 (N.M. 1892) (the 1891 CPLC "was not intended to apply to claims which were supported by a complete and perfect **title** from the Mexican government, but, on the contrary, only to such as were imperfect, inchoate, and equitable in their character ….") (citing *Botiller*, 130 U.S. at 246-47), *and with Ainsa*, 175 U.S. 76 (federal confirmation of perfect Mexican title not required for New Mexico territorial court jurisdiction).

Section 13 of the 1891 CPLCA also makes clear that confirmation provides no more than a quitclaim from the United States and expressly preserves third party rights.

> Fifth. No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; …. Sixth. No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed.

In *Dent v. Emmeger*, 81 U.S. 308, 312-13 (1871), the Court held that:

> Titles which were perfect before the cession of the territory to the United States continued so afterwards, and were in nowise affected by the change of sovereignty. . . . Perfect titles are as valid under the new government as they were under its predecessor. But inchoate rights, … were of imperfect obligation, and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them.

With respect to New Mexico, the Territorial Supreme Court in *Grant*, 28 P. at 510 – a contest between a federal patentee and the claimant of an unconfirmed, imperfect Mexican grant – distinguished between perfect titles and imperfect titles, holding that the district court lacked jurisdiction because imperfect titles must be confirmed "especially in view of the fact that congress has made very ample provisions by creating [the 1891 CPLCA] with the exclusive jurisdiction to try and determine the validity of such claims."

In *United States v. Roselius*, 56 U.S. 36, 37-38 (1853), a claim against the United States by a holder of perfect title pre-existing the 1803 Louisiana Purchase, the case was dismissed for lack of jurisdiction. The Court said:

> These are the facts stated in this petition; and if they are true, the District Court had no jurisdiction of the case, and no right to pronounce judgment upon the validity of the title. The acts of 1824 and 1844, authorize a proceeding of this kind in those cases, **only where the title set up is imperfect**, but equitable. . . . Indeed the words of the act of 1824, conferring this special jurisdiction on the District Courts, appear to be too plain for controversy. **Now the title set up by the petitioner is a complete legal title; and if he can establish the facts stated in his petition his title is protected by the treaty itself, and does not need the aid of an act of Congress to perfect or complete it.** For undoubtedly, if the possession of the land has been held continually by the petitioner and those under whom he claims, under the judicial sale made by the French authorities in 1760, the legal presumption would be that a valid and perfect grant had been made by the proper authority, although no record of it can now be found.

(emphasis added; citations omitted).

In *Chaves v. Whitney*, 16 P. 608 (N.M. 1888), the New Mexico Territory Supreme Court made clear that both perfect and imperfect Spanish and Mexican titles existed in the Territory of New Mexico as a matter of law following the American accession prior to and after the 1854 SGNM, and prior to the 1891 CPLCA. Perfect titles were unaffected by either Act. The plaintiffs claimed an 1845 Mexican grant (Sandoval Grant) and the defendant claimed under an 1819 Spanish grant (Baca Grant). The Sandoval Grant lay partly within the Baca Grant. The Sandoval Grant was approved by the Surveyor-General, but neither grant had

been confirmed by Congress. The 1891 CPLC did not yet exist. The defendants were in possession. Rejecting the plaintiffs' contention that they held the better title as a result of the Surveyor-General's approval, the Court said that, although its jurisdiction was limited by Congress's failure to provide "some manner. . . for the final settlement of the title," "the courts would be permitted to exercise a limited jurisdiction to the extent of protecting the possession from intrusion by wrong–doers or persons having no superior title." *Id.* at 616. It added that:

> The lands covered by the grants are not open to settlement. The claimants who acquired possession under the grants prior to 1848, and those who hold by purchase or descent from them, are entitled to possession until congress shall in some manner provide for the final settlement of the title. Until the courts are invested with full jurisdiction, all they can do is to preserve the *status in quo* of the estate and parties.

Id. Although the Court concluded it had no jurisdiction to finally adjudicate the titles, it rejected the argument that "until after the confirmation or rejection of such grants through this mode of procedure the courts have no jurisdiction whatever to hear and determine any question arising under such grants in this territory . . . ." *Id.*; *Ainsa*, 175 U.S. 76. It did not treat the grants as null or non-existent, as the district court has here. The validating statutes did not create the property rights; they only provided a means to quiet title as against the United States.

The district court's conclusion that the Pueblo has no property right claim whatsoever that is subject to protection under the Indian Non-Intercourse Act is

erroneous. The district court has the cart before the horse – a Spanish or Mexican grant came first – any federal statute providing a process for such grant to be confirmed as against the United States came later. The Pueblo is in the same position as a holder of perfect title following the Louisiana Purchase or the Mexican Cession. No federal confirmation is necessary for the property right to exist (although a statute conferring jurisdiction on federal district courts is required to adjudicate a grant as against the United States). *Id.*

For every federally-confirmed grant there must be a pre-existing perfect or imperfect title to be confirmed. The confirmations could not apply to thin air, nor be subject to the notion that all such titles were "ghost" titles that only came into being upon confirmation. The Court in *California Powder Works v. Davis*, 151 U.S. 389 (1894) makes this clear. Both parties claimed pursuant to Mexican grants which were confirmed under the 1851 CPLCA. However, the 1851 CPLCA did not resolve the dispute as between them, and the plaintiff prevailed on the basis of a superior, pre-existing, Mexican title.

> While the confirmation of these claims might be conclusive as against the United States and those claiming under them, such confirmation and patent could have no effect upon the interests of third persons in respect of grants to them from the former sovereign. *** The treaty extended no protection to a fraudulent claim, nor did proceedings under the statute, to which each was respectively not a party or privy, determine any such question as between these private parties, neither

> of whom claimed under the United States by title subsequent, but both of whom claimed under patents based upon Mexican grants.

Id. at 394-95.

Federal validation statutes were neither comprehensive nor all-inclusive of titles that pre-existed the Mexican Cession. With the exception of imperfect titles outside of California after 1893 (the deadline to submit to the 1891 Court of Private Land Claims), pre-1848 property rights existed prior to confirmation and continued to exist without federal confirmation. For a claim to succeed before the 1851 CPLCA, the 1854 SGNM, or the 1891 CPLC, there obviously had to be a pre-existing perfect or imperfect title under Spanish or Mexican law to be adjudicated and confirmed. Those rights did not spring into existence as of the dates of the validating statutes. *United States v. O'Donnell*, 303 U.S. 501, 513 (1938) ("Confirmation when made was as effective and conclusive upon all [subsequent federal] patents under the Swamp Lands Act as if made at the date of the treaty."). The district court's conclusion that the Pueblo's Spanish grant cannot exist without federal confirmation for purposes of application of the Indian Non-Intercourse Act and federal question jurisdiction is simply wrong. The district court had jurisdiction to confirm that the Pueblo had perfect title to its grant lands when those lands were ceded to the United States in 1848, and then had jurisdiction to confirm that the Pueblo's perfect title could not be alienated thereafter because of the restrictions in the Indian Non-Intercourse Act. Its failure

to recognize this subject matter jurisdiction was error, and should be reversed by this Court.

II. The Pueblo Had Perfect Title to its Spanish Grant Lands in 1848.

A. The Pueblo Had Legal Status as a "Pueblo de Indios" Under Spanish Colonial and Mexican Law.

The first step in confirming the federal court's jurisdiction requires a determination that the Pueblo had perfect title to its Spanish grant lands prior to and at the time of cession of those lands by Mexico. As to that issue, the factual record shows that from its establishment in 1680, the Pueblo was denominated by Spanish colonial authorities as a "Pueblo de Indios." ROA.1439 at ¶ 1; ROA.792 at ¶ 31; ROA.1431 at ¶ 19; ROA.1433 at ¶¶ 27, 29; ROA.1968-1969. As applied to characterize a Pueblo Indian village, the term "Pueblo de Indios" had specific legal consequences. The communal lands of a "Pueblo de Indios" were protected from settlement, privatization, and conveyance to non-Indians by Spanish colonial law and administration. A "Protector of the Indios" was appointed for the Pueblo at least as early as 1755. ROA.1433-1434 at ¶¶ 29-30.

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

The Recopilación de Leyes de los Reinos de las Indias ("Recopilación"), published in 1681, codified the laws applicable to Spanish colonies promulgated to that date. There are nine books in the Recopilación. Although Book VI is the only

one devoted entirely to Indians, each of the nine books has some laws that refer to Indians. S. Lyman Tyler, *The Indian Cause in the Spanish Laws of the Indies: With an Introduction and the First English Translation of Book VI, Concerning the Indians, from the Recopilación de Leyes de los Reinos de las Indias (Madrid, 1681)* (1980).

"Pueblos de Indios" are Indian Pueblos and villages subject to particular provisions of Spanish law. For instance, Book VI, Title 3, Law 1 is titled in Spanish, "De las Reducciones y Pueblos de Indios." This translates as, "Concerning Reductions and Towns of the Indians." ROA.855-861.[17]

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

> Law 17: Lands that have been held by the Indians or that have false titles shall not be admitted to composicion, and the Fiscales and Protectors shall carry out justice. In order to better favor and protect the Indians and so that they may not be wronged, We command that there shall be no composiciones of lands that the Spaniards may have acquired from the Indians contrary to Our Royal Decrees and Ordinances, or that they may possess under a faulty title, because in those cases it is Our will that the Fiscales Protectores, … shall carry

17 The concept of "Pueblos de Indios" was not born of any one piece of royal legislation. The concept – with extensive political, economic, and legal implications – developed over the course of the sixteenth century. Most of the political and ideological scaffolding of the concept was established by the latter part of the 1500s, the result of many royal orders, decrees, cédulas and policy decisions by the Spanish Crown. By the publication of the Recopilación in 1681, the term "Pueblo de Indios" was firmly entrenched in the administrative and political lexicon of the Spanish Empire. ROA.1427-1429 at ¶¶ 3-5, 8.

> out justice and the law which is applicable from Decrees and Ordinances in order to request nullification of such contracts.[18]

ROA.767-768 (S. Lyman Tyler, *Spanish Laws Concerning Discoveries, Pacifications, and Settlements among the Indians: With an Introduction and the First English Translation of the New Ordinances of Philip II, July 1573, and of Book IV of the Recopilación de Leyes de los Reinos de las Indias, Relating to these Subjects*, 165-666 (1980)).

2. The Designation "Pueblo De Indios" Had Critical Legal Consequences in Spanish Colonial Law, Including Prohibition on Alienation of Tribal Lands.

The consequences of the designation "Pueblo de Indios" are critical. Not all Indian settlements were given that designation. In the far north of New Spain, Indians who refused to live under Spanish political and religious authority were known as "gentiles" or "bárbaros." And their communities did not enjoy any of the legal rights that Spain guaranteed to the "Pueblos de Indios." ROA.1937-1967.

Recognition as a "Pueblo de Indios" gave an Indian Pueblo specific protections afforded by the Spanish crown, including specific prohibitions on the alienation of the Pueblo's lands:

> 'Lands to be left in possession of the Indians.' We command that the sale, grant and composition of lands be executed with such attention, that the Indians shall be left in possession of the full amount of lands

[18] "Composición" refers to "composición de tierras" and refers to the regularization of land titles, and their subsequent legalization, by way of a fee to the Royal Treasury.

> belonging to them, either singly or in communities, together with their rivers and waters; and the lands which they shall have drained or otherwise improved whereby they may, by their own industry, have rendered them fertile, or reserved in the first place, **and can in no case be sold or alienated**.

In re Contests of the City of Laredo, 675 S.W.2d 257, 266 n.15 (Tex. Ct. App. 1984) (quoting Book IV, Title 12, Law 18 of the Recopilación), *writ refused* (Nov. 28, 1984) (emphasis added; citation omitted). *Accord Abouselman*, 976 F.3d at 1154-55.

3. The Pueblo was a Designated "Pueblo de Indios" Under Spanish Law.

The City conceded that the Pueblo was designated a "Pueblo de Indios" by Spanish colonial authorities, ROA.1430-1431, 1433-1434 at ¶¶ 18-19, 27, 29-30, and that restrictions on alienation were consistent with the Recopilación. ROA.1432 at ¶ 25. The City also conceded that a "Protector de Indios" was appointed for Ysleta del Sur Pueblo and Socorro Pueblo by Spanish colonial authorities in order to ensure no harm would come to the lands "which belong to them as Pueblos." ROA.1433-1434 at ¶ 30.

4. The Prohibition on Alienation of the Pueblo's Tribal Land Continued During the Mexican Period.

The Pueblo's Spanish land grant was protected from conveyance, alienation and privatization by Mexican law during the period of Mexican sovereignty and jurisdiction over the El Paso area. Indeed, the same protections accorded "Pueblos

de Indios" (and the Pueblo in particular) during the Spanish colonial period continued throughout the Mexican period, 1821-1848. ROA.1437 at ¶ 38; ROA.1978-1981; ROA.1163-1164, 1182-1183, 1187-1188 (expert depositions confirming Indian tribes falling within exemption of ancient communities and exemption to prevent lands belonging to Indians from being laid open for settlement and exploitation from non-Indians).

After 1824, the Mexican state of Chihuahua, had jurisdiction over the El Paso district. ROA.1971; ROA.1228 at ¶ 4; ROA.1263-1273; ROA.1440 at ¶ 4. Chihuahua enacted its specific colonization law on May 26, 1825, "Ley de Colonización para el Estado libre de Chihuahua" [Colonization Law for the Free State of Chihuahua], which made vacant lands subject to private ownership and exploitation. However, Article 3, Section 2 of the law specifically exempted the El Paso area from the Colonization Law. ROA.1190-1196; ROA.1436 at ¶ 35. Additionally, Articles 13, 17, 18, 19 and 20 further protected the communal lands of "ancient communities" (i.e. Indian Pueblos) from any potential claims.

The 1825 Chihuahua state colonization law directed town councils or judges to establish monuments and boundaries for ejidos [communal lands] and included the Indian Pueblo land grants south of El Paso. ROA.1172-1178; ROA.2053-2054. The Pueblo's Spanish land grant was surveyed by Mexican authorities in 1825. ROA.1980-1981; ROA.2054-2055. The final survey enclosed more than 17,000

acres, the approximate size of a Pueblo four square league grant. ROA.2053-2054. The City has conceded that Chihuahua's colonizing law exempted "ancient communities" from the sale and settlement of vacant lands to private ownership, that Indian Pueblos fell within the exception for ancient communities in Mexico's colonization law, and that the state of Chihuahua's colonizing law did not include the El Paso area and the Pueblo. ROA.1436 at ¶¶ 34-35.

5. Summary of Restrictions on Alienation of Indian Pueblo Lands in the Spanish and Mexican Periods.

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

> 1. The Pueblo Indians of New Mexico were considered wards of the Spanish Crown.
>
> 2. The fundamental legal basis for the Pueblo Land Grants lies in the Royal Ordinances.

> 3. Only the Viceroy, Governors and Captains-General could make grants to the Indians, and only these officials had the authority to validate sales of land by the Indians.
>
> 4. All non-Indians were expressly forbidden to reside upon the Pueblo lands.
>
> 5. The Spanish Government provided legal advice, protection and defense for the Indians. Provincial officials had the authority to appeal cases directly to the Audiencias in Mexico.
>
> 6. The Indians had prior water rights to all streams, rivers and other waters which crossed or bordered their lands.
>
> 7. The Pueblo Indians had their land in common, the land being granted to the Indians in the name of the Pueblo.

Id. at 379-80.

B. History of American Sovereignty Over the El Paso Area.

1. Texas Independence and the Mexican War.

Texas declared independence from Mexico on March 2, 1836 and routed Mexican General Santa Anna's forces at the Battle of San Jacinto on April 21. ROA.2060. Santa Anna agreed to Texas's demands for independence and accepted the Rio Grande as the border between the Texas Republic and Mexico in the Treaties of Velasco. ROA.2060. However, Mexico did not accept that boundary and continued to exercise its sovereignty considerably further east, including all of the lands within the Chihuahuan Acquisition. ROA.1984-1985; ROA.2061; ROA.1272-1273.

The United States annexed Texas on December 29, 1845. Act of Mar. 1, 1845, 5 Stat. 797; Act of Dec. 29, 1845, 9 Stat. 108. The annexation acknowledged Texas's claim to the west bank of the Rio Grande as its boundary with Mexico rather than the traditional limit of the Nueces River, even though Texas as an independent nation had never exercised control over the area between the Nueces and the Rio Grande, much of which was part of the Mexican state of Chihuahua. ROA.1984-1985. The annexation exacerbated tensions between the United States and Mexico. General Zachary Taylor's occupation of the disputed territory between the Nueces and the Rio Grande provoked a clash between United States and Mexican troops on April 25, 1846. At President Polk's urging, Congress approved a declaration of war against Mexico on May 13.

American troops routed Mexican forces near present-day Las Cruces, New Mexico, on December 25, 1846. They entered the area of El Paso del Norte, (present-day Ciudad Juarez, Mexico) on December 27. A United States invasion force entered Mexico City on September 15, 1847. ROA.2061.

2. The 1848 Treaty of Guadalupe-Hidalgo.

The Treaty of Guadalupe-Hidalgo, February 2, 1848, formally concluded the war. The United States acquired the Mexican Cession, including that part of Texas east of the Rio Grande governed by the state of Chihuahua. ROA.2062.

3. The Pueblo and the Compromise of 1850.

The Compromise of 1850 settled Texas's western border at its present location, and included the El Paso area in Texas. The Pueblo was not subject to Texas jurisdiction until 1850. ROA.2067.

From the time of its initial military occupation by United States forces on December 27, 1846, and until September 9, 1850, the 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, including Ysleta del Sur and all of the other Indian Pueblos. ROA.2060-2061. This temporary wartime/military government continued until Congress enacted the Organic Act Establishing the Territory of New Mexico as part of the Compromise of 1850. Act of Sept. 9, 1850, 9 Stat. 446.

In 1849 President Zachary Taylor named James S. Calhoun as the first United States Indian agent for New Mexico, stationed in Santa Fe. On October 4, 1849, Calhoun sent a list of all New Mexico Indian Pueblos to the United States Commissioner of Indian Affairs, including the El Paso area Pueblos of Socorro and Ysleta. ROA.2065-2066; ROA.2157.

On October 14, 1849, Calhoun again reported to the Commissioner of Indian Affairs with a list of Pueblos that included Ysleta and Socorro. ROA.2072. On October 15, 1849, Calhoun made a sketch map of possible sites for Indian agencies

to serve the Pueblos, including Ysleta and Socorro. ROA.2066. Writing again to the Commissioner of Indian Affairs on November 16, 1849, Calhoun contended the Pueblo Indians should be included under the wardship status of the 1834 Indian Non-Intercourse Act. ROA.2066; ROA.2160. On March 30, 1850, Calhoun proposed the creation of six districts to administer the Indians, one of which would have consisted of Ysleta del Sur and Socorro Pueblos. ROA.2065-2066.

Congress enacted the Compromise of 1850 on September 9, including the Organic Act Establishing the Territory of New Mexico; which, inter alia, provided that Texas relinquish its claim to New Mexico Territory east of the Rio Grande, and established Texas's western boundaries in their present locations.

Of particular importance to the issues in this case, the United States ceded its claims of public lands within Texas's new boundaries to Texas. Act of Mar. 1, 1845, 5 Stat. 797; Act of Dec. 29, 1845, 9 Stat. 108; Act of Sept. 9, 1850, 9 Stat. 446. As a result, the United States did not retain public lands in Texas, so had no reason to determine the scope of federal public lands that would otherwise be open to settlement. This was not the case in the other territories and states within the lands ceded from Mexico, and Congress adopted statutory mechanisms for those territories and states intended to identify public lands. But the fact that the Pueblo was within Texas did not extinguish its Spanish land grant rights. ROA.2067.

As a result of the Compromise of 1850, the Pueblo became part of El Paso County, Texas. The Compromise of 1850 separated and isolated the Tiguas of Ysleta del Sur Pueblo from the New Mexico Territory and from the other Pueblos that remained in New Mexico. Nevertheless, in 1851, Calhoun reminded United States Commissioner of Indian Affairs Luke Lea that there were two Pueblo Indian communities in Texas that were not listed in a census of New Mexico Pueblo Indians. ROA.2067.

On July 22, 1854, Congress created the Office of the Surveyor-General for New Mexico to implement the Treaty of Guadalupe-Hidalgo in the New Mexico Territory. ROA.2506.

The first Surveyor-General, William Pelham, was referred to Calhoun's reports on the Pueblos of New Mexico, which included the Indian Pueblos of "Isletta" and Socorro in Texas opposite El Paso, Mexico. ROA.2071. Instructions to Pelham on August 21, 1854 from the Commissioner of the United States General Land Office, with the approval of the Secretary of the Interior, stated:

> [I]t is obligatory on the Government of the United States to deal with the private land titles, and the 'pueblos' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done-to go that far, and no further. This is the principle which you will bear in mind in acting upon these important concerns.

ROA.2072.

The very thorough August 21, 1854 instructions to the New Mexico Surveyor-General noted Indian agent Calhoun's reports of July 29 and October 14, 1849, which include the El Paso area Pueblos of Ysleta del Sur and Socorro in his lists of New Mexico Pueblos. ROA.2072-2073. However, the 1854 statute creating the Office of the Surveyor-General of New Mexico limited the Surveyor-General's jurisdiction to New Mexico Territory. 1854 SGNM.

4. Recognition of the Pueblo's Spanish Land Grant by the Texas Legislature.

On February 1, 1854, the Texas legislature adopted "An Act for the relief of the inhabitants of the town of Ysleta in the county of El Paso." This 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," which was subsequently referred to by Texas authorities as the "Ysleta Town Tract." ROA.2071-2072. The Texas General Land Office issued a patent to "the inhabitants of Ysleta," rather that the "Town," on February 17, 1858. ROA.2071-2072. No individuals were identified as owners, acknowledging the communal nature of the grant, and confirming the patent was to the Pueblo.

5. Implementation of the Treaty of Guadalupe-Hidalgo.

Because of the sovereign immunity of the United States, and in the absence of the 1972 Quiet Title Act, 28 U.S.C. § 2409a, waiving the United States'

sovereign immunity for actions brought within its 12-year statute of limitations, there was no means for private property claimants within the Mexican Cession to secure their titles as against the United States.

To allow parties to secure their property rights protected by the Treaty of Guadalupe-Hidalgo as between private parties and the United States, Congress passed the 1854 SGNM; the 1891 CPLC; and the 1851 CPLCA.

In *O'Donnell*, the Supreme Court described the function of the 1851 CPLCA:

> Under that act the General Land Office was required to issue a patent for all claims finally confirmed 'by the said commissioners, or by the said District or Supreme Court.' Section 13. The act declared that final decision of the Board, or the District or the Supreme Court should '**be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.'** Section 15.
>
> ***
>
> [T]he role of the Government was not that of a litigant. It was . . . supervisory: 'to superintend the interests of the United States' in the performance, through an administrative agency, of its treaty obligation to ascertain for the Mexican claimants, and for itself, what lands had been withdrawn from the public domain by the Mexican grants.

303 U.S. at 512 and 516 (emphasis added). The United States did not warrant the title. Any patent issued was in the nature of a quitclaim. *E.g.*, *Burat's Heirs*, 496 F.2d at 1337; *California Powder Works*, 151 U.S. at 394-95.

Because the Pueblo's grant was never in conflict with the United States, no implementing legislation was necessary. Within the Mexican Cession, the United States fulfilled its Treaty obligations simply by not nullifying any pre-existing property rights encompassed by the Treaty. In short, the validating statutes did not create the grant title, as if the title sprang into being only upon federal confirmation. *Ainsa*, 175 U.S. 76, is directly on point. The holder of a perfect Mexican grant title sued to quiet title as against claimants under a federal homestead patent. The Arizona Territory district court, affirmed by the Territorial Supreme Court, dismissed for lack of jurisdiction because the grant had not been confirmed by Congress or the 1891 CPLC. The court noted that "[t]he duty of securing such rights, and of fulfilling the obligations imposed upon the United States by the treaty [Guadalupe-Hidalgo], belongs to the political department; and Congress may either itself discharge that duty, or delegate its performance to a strictly judicial tribunal or to a board of commissioners," but concluded that "**where no such proceedings are expressly required by Congress, the recognition of grants of this class in the treaty itself is sufficient to give them full effect**" and reversed. *Id.* at 79-80 (emphasis added). *See also Astiazaran*, 148 U.S. 80 (dispute between competing claimants to a Mexican grant dismissed only because of pending confirmation of the grant by Congress pursuant to a report of the Surveyor-General under the 1854 SGNM).

III. Once the United States Took Political Control of the El Paso Area, United States Law Prohibited Conveyance, Alienation or Privatization of the Pueblo's Spanish Grant Lands.

A. The United States Constitution, Federal Common Law, and the Indian Non-Intercourse Act Prohibit Alienation of Indian Lands Except Pursuant to Specific Congressional Authorization.

The second step to confirming the federal court's jurisdiction requires nothing more than confirmation that all federal laws, including the Indian Non-Intercourse Act, applied to the lands ceded to the United States by Mexico as soon as those land fell under the jurisdiction of the United States. As to that issue, it is beyond dispute that Congress has the exclusive authority to regulate the affairs of Indian Tribes, including the conveyance or extinguishment of title. The Constitution provides that Congress, and only Congress, can regulate commerce with Indian tribes. U.S. Const. art. I, § 8, cl. 3 (commonly known as the "Indian Commerce Clause"); *Brackeen v. Haaland*, No. 18-11479, 2021 WL 1263721, at *55 (5th Cir. April 6, 2021) (en banc) (U.S. Const. art. I, § 8 empowers Congress "to regulate commerce with foreign Nations, among the several States, and with the Indian Tribes"). The Indian Commerce Clause provides that "Congress shall have the Power . . . To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." *Id*. This power was previously articulated in the Articles of Confederation, which has its roots in British Indian policy and Spanish colonial law. Cohen's Handbook of Federal Indian Law

§ 1.02[1], at 13 (Nell Jessup Newton ed. 2012) (hereinafter, "Cohen's Handbook"); *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913) ("The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, …."); *Brackeen*, 2021 WL 1263721, at *54 ("The Supreme Court has long recognized Congress's broad power to regulate Indians and Indian tribes on and off the reservation.").

1. Transfers of Indian Lands Without Congressional Authorization and in Violation of the Indian Non-Intercourse Act are Void.

The Non-Intercourse Act voids any transfer or conveyance of protected Indian lands not authorized by Congress.

> *No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity*, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (emphasis added).

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

quotations omitted). Title acquired from the Pueblo Indians violates the Non-Intercourse Act and is void. In *Sandoval*, 231 U.S. at 48-49, the Supreme Court confirmed that the Non-Intercourse Act's restraints on alienation of Indian lands applied to the Pueblo Indians. In consequence, *United States v. Candelaria*, 271 U.S. 432, 442 (1926), specifically found the Non-Intercourse Act applies to Pueblo lands.

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

2. The Indian Non-Intercourse Act Applies to Indian Lands Located Within Texas.

The Indian Non-Intercourse Act's prohibition is effective against private parties who attempt to convey or otherwise obtain Indian lands in violation of the terms of the Non-Intercourse Act. *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1046 (5th Cir. 1996). This Court's application of the Non-Intercourse Act to Texas is consistent with holdings from the federal Court of Claims in *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487 (1967) and *Alabama-Coushatta Tribe of Tex. v. United States*, No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19,

2000). These federal courts have confirmed that the Non-Intercourse Act applies to all Indian lands, including Indian lands in Texas:

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

Alabama-Coushatta Tribe of Tex., 2000 WL 1013532 at *62 (citations and quotations omitted).

IV. The Pueblo Has Properly Invoked Federal Subject Matter Jurisdiction in This Case.

A. The Indian Non-Intercourse Act Provides Federal Question Jurisdiction.

In concluding that federal question jurisdiction is lacking in this case, the district court again erred when it decided the jurisdictional issue without addressing the Pueblo facts demonstrating that the Pueblo had perfect title to its Spanish land grant in 1848, which was protected from conveyance by the Indian Non-Intercourse Act, and which together provide subject matter jurisdiction to the federal courts to resolve the Pueblo's claims.

In *Oneida I*, 414 U.S. 661, the Supreme Court held that the Oneida Indian Nation stated a federal cause of action cognizable under 28 U.S.C. § 1331 in claiming a right to possession of certain lands it alleged had been ceded to the State of New York "without the consent of the United States and hence ineffective to

terminate the Indians' right to possession under," inter alia, the Nonintercourse Act. *Id.* at 664-65.

As in *Oneida I*, the Pueblo's complaint asserts a possessory right. ROA.20. The Pueblo's claim of jurisdiction is on all fours with the *Oneida I* decision.

> Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits. **Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States** within the meaning of both s 1331 and s 1362.

414 U.S. at 666-67 (citation omitted; emphasis added).

Although *Oneida I* references a treaty, it does not require it as a basis for jurisdiction. *Id*. A treaty or federally-confirmed Spanish or Mexican land grant is not required to establish federal jurisdiction over an Indian land claim, including aboriginal Indian title claims. *Jemez I*, 790 F.3d 1143. The court cannot require the tribal plaintiff to prove the existence of the treaty, grant or Indian title **before** exercising jurisdiction to determine whether it exists. *Id.* at 1147 ("On remand, the

Jemez Pueblo will have to prove that it had, and still has, aboriginal title to the land at issue in the case.").

If the district court were to be affirmed on the basis of its conclusory statements that it lacks jurisdiction because neither the Treaty of Guadalupe-Hidalgo, nor a separate congressional statute "recogniz[es] and guarantee[s] the rights of the Pueblo to the Property," ROA.3597, 3599, there would be no federal jurisdiction for aboriginal Indian title claims, the Indian Non-Intercourse Act notwithstanding.

B. The Pueblo has Established Federal Question Jurisdiction for Purposes of Rule 12(b)(1).

The district court treated the City's Motion for Summary Judgment, as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. However, the governing legal standard for jurisdictional review requires the court to presume that the well-pleaded factual allegations in the plaintiff's complaint are true. *Stratta*, 961 F.3d 340; *Paterson*, 644 F.2d 521. In this case, the court is obligated by law to give the Pueblo the opportunity to prove the existence of its Spanish land grant prior to and on the date of the Mexican Cession. The allegations of a possessory right in the Pueblo's complaint trigger the application of the Indian Non-Intercourse Act and, concomitantly, federal subject matter jurisdiction. As the Court said in *Oneida I*, 414 U.S. at 675, "the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage

for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, …."

The Pueblo's claim based on its perfect Spanish land grant title that was accepted as valid by the United States in the Treaty of Guadalupe-Hidalgo arises from federal common law, which protects against trespass on federally protected Indian trust land, as well as the Indian Non-Intercourse Act. *See e.g.*, 20 Charles Wright & Mary Kane, *Federal Practice & Procedure Deskbook*, § 18, The Meaning of "Arising Under" (2d ed. 2002) (claims derived under federal common law constitute a basis for federal question jurisdiction). Moreover, there is common law federal question jurisdiction over Indian land claims. In *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226 (1985), the Court said:

> Numerous decisions of this Court prior to *Oneida I* recognized at least implicitly that Indians have a federal common-law right to sue to enforce their aboriginal land rights. . . . In keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law.

Id. at 235-36 (citing *Johnson v. McIntosh*, 21 U.S. 543 (1823)). The Indian Non-Intercourse Act applies to all Indian lands, *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), and the Pueblo is asserting a claim for Indian land.

In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463 (1976), the Supreme Court said of 28 U.S.C. § 1362:

> Looking to the legislative history of § 1362 for whatever light it may shed on the question, we find an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. . . . [I]t would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

Id. at 472-73 (emphasis added).[19]

There can be no doubt that the United States can invoke federal question jurisdiction and sue to protect the Pueblo's Spanish land grant rights. *Sandoval*, 231 U.S. 28 (a trust relationship exists between the United States and Indian Pueblos of New Mexico); *Candelaria*, 271 U.S. at 443 ("The Indians of the pueblo are wards of the United States, and hold their lands subject to the restriction that the same cannot be alienated in any wise without its consent."); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941).

In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), an unrecognized Indian tribe sought a declaratory judgment as to the applicability of the Indian Non-Intercourse Act to the Tribe's aboriginal Indian title lands. On the basis of the allegations in the Tribe's complaint, the First

[19] The Pueblo pled 28 U.S.C. § 1362, together with 28 U.S.C. § 1331, as its basis for federal question jurisdiction.

Circuit affirmed the district court's finding that the Non-Intercourse Act established a trust relationship between the United States and the Tribe, and the Act:

> imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act, . . . [t]he purpose of the Act . . . acknowledge[s] and guarantee[s] the Indian tribes' right of occupancy . . .

Id. at 379 (citing *Santa Fe Pac. R.R. Co.*, 314 U.S. at 348). The First Circuit court also stated that "the trust relationship pertains to **land transactions which are or may be** covered by the Act, and is rooted in rights and duties encompassed or created by the Act." *Id.* (emphasis added). Although the basis for federal jurisdiction in *Passamaquoddy* was the Administrative Procedure Act, 5 U.S.C. §§ 701-706, *Passamaquoddy* makes clear that the assertion of tribal land rights protected by the Indian Non-Intercourse Act triggers federal question jurisdiction where "land transactions … are or may be covered by the Act." *Id.* at 379. The Indian Non-Intercourse Act applies to the Pueblo, just as it did to the Passamaquoddy Tribe, and imposes a fiduciary duty upon the United States to protect the Pueblo's land titles. There being no exemption from the Indian Non-Intercourse Act applicable to the Pueblo, the land rights it holds come within the ambit of the Act, and the only question here is whether the district court can assume for jurisdictional purposes that because no federal validation statute

applied to the El Paso area, the Pueblo's Spanish land grant title is literally non-existent for purposes of the Indian Non-Intercourse Act.

V. The District Court Erred When It Failed to Recognize Theories Pled and Litigated that Satisfy Jurisdictional Requirements.

"[U]nder Rule 8 of the Federal Rules of Civil Procedure, it is enough that plaintiff plead sufficient facts to put the defense on notice of the theories on which the complaint is based." *TIG Ins. Co. v. Aon Re, Inc.*, 521 F.3d 351, 357 (5th Cir. 2008); *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013) ("So long as a pleading alleges facts upon which relief can be granted, it states a claim even if it 'fails to categorize correctly the legal theory giving rise to the claim.'") (citation omitted). Using specific terms is not required. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

A. The Court Erred When it Held That Aboriginal Indian Title Cannot be Established to Land Onto Which a Tribe Was Forcibly Relocated by a European Sovereign.

Aboriginal Indian title "refers to land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance." Cohen's Handbook § 15.04[2], at 999.

> The concept of aboriginal title, sometimes called 'Indian title' or 'native title,' comes from a recognition that the property rights of indigenous people persist even after another sovereign assumes

> authority over the land. . . . Aboriginal title was recognized by all European sovereigns and the United States, and 'is considered as sacred as the fee simple of the whites.'

Abouselman, 976 F.3d at 1155-1156 (citations omitted). Indian title is established by "actual, exclusive and continuous use and occupancy for a long time." *Id*. at 1156; *Alabama-Coushatta Tribe of Tex.*, 2000 WL 1013532 at *13.

As an initial matter, the district court misconstrued the law on aboriginal Indian title. It asserted that an Indian title claim must derive from "historical evidence of the Pueblo's long-standing physical possession of the Property **'from time immemorial' to the time the colonists arrived**." ROA.3593 (emphasis added). But that is incorrect. Physical possession *from time immemorial to the time the colonists arrived* is not an element of Indian title. In fact, courts have refrained from specifying or fixing a precise number of years or starting date to establish what constitutes a "long time." *Alabama-Coushatta Tribe of Tex.*, 2000 WL 1013532 at *30. Instead, courts consistently approach the question of what constitutes a "long time" as an ad hoc determination based on the particular circumstances of each case. *Id*. at *38. "[R]ather than fixing an arbitrary minimum period to represent a 'long time,' the Panel will evaluate whether the time period during which the Tribe actually, continuously, and exclusively used and occupied the land, was long enough for the Tribe to 'transform the area into domestic territory.'" *Id*. Accordingly, the fact that a tribe was relocated, whether

through force by a prior sovereign or otherwise, is of no legal consequence. *Sac and Fox Tribe of Indians of Okla. v. United States*, 179 Ct. Cl. 8 (1967) ("It is a matter of common knowledge that in the course of years, and especially during the early years of the United States, the use and occupancy of land by Indian tribes changed continuously."); *United States v. Seminole Indians of Fla.*, 180 Ct. Cl. 375, 387 (1967) ("even if the Commission had measured the Seminoles' occupancy at a later date, *i.e.*, from the time that they were first clearly denominated as Seminoles (1765), still the more than 50 years that would have elapsed between that date and the date of cession (1823) would have been sufficient, as a matter of law, to satisfy 'the long time' requirement essential for Indian title.").

Second, the district court erred by not recognizing that the Pueblo sufficiently pled an Indian title claim. The complaint averred that the Property was used by the Pueblo before receiving a grant from Spain and continues to be used by the Pueblo, and that the Property has never been vacated or abandoned by the Pueblo. ROA.19 at ¶¶ 25, 26 and 29. In response, the City pled a detailed affirmative defense to the Pueblo's aboriginal Indian title claim. ROA.175-176 at ¶ 32 (City's original answer filed April 4, 2018); ROA.429 at ¶ 38 (City's amended answer filed March 12, 2019). The parties also conducted extensive discovery on the Pueblo's aboriginal Indian title claim, including written discovery, expert

reports and depositions. ROA.2572-2577;[20] ROA.2585-2592, 2594-2595, 2599-2608, 2611-2613, 2616, 2619-2621, 2626, 2630, 2636-2637, 2639, 2644, 2648-2650, 2652-2665, 2667, 2670, 2677-2684. The Pueblo sufficiently pled an Indian title claim, and the record demonstrates that from the beginning, the parties were litigating that claim.

B. The Pueblo's Aboriginal Indian Title Claim is an Independent Basis for Federal Question Jurisdiction.

It is well recognized that federal courts have jurisdiction over aboriginal Indian title claims because they arise under the Constitution, laws, or treaties of the United States. *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1081 (2d Cir. 1982). Claims arising under the laws of the United States are entitled to be brought in a court of the United States and "[n]owhere was it suggested that [federal] courts would be acting improperly in adjudicating" Indian title claims. *Id*. at 1082. Indian title claims are not only based on a "perpetual right of possession" to the territories they inhabited, but they are enforceable and can only be construed under federal law. *Mitchel v. United States*, 34 U.S. 711, 713 (1835). "Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered

[20] Optional R. Excerpts of Appellant, Tab No. 7.

with or determined by the United States." [21] *Cramer v. United States*, 261 U.S. 219, 227 (1923); *Santa Fe Pac. R.R. Co.*, 314 U.S. at 345; *Abouselman*, 976 F.3d at 1157. *See also Brackeen*, 2021 WL 1263721 at *55 (…"the federal government treated tribes as quasi-sovereigns from the very start.") (referencing Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1061-1067 (2015)).

C. The Pueblo's Complaint Adequately Raised Application of the Non-Intercourse Act.

The Pueblo's complaint avers that it is the rightful holder of title to the Property, and in response, the City specifically pled the Non-Intercourse Act, 25 U.S.C. § 177, as an affirmative defense. ROA.430 at ¶¶ 45-46. As set forth above, the Pueblo does not claim that its title derives from the Non-Intercourse Act. The Non-Intercourse Act is not a grant of title, but rather a federal law restricting alienation of Indian land. Specifically, the City contended that purported transfers of the Pueblo's Property without the consent of the United States government were valid. *Id.* The parties also conducted extensive discovery on the application of the Non-Intercourse Act, and the Pueblo moved for partial summary judgment on the

[21]Only the United States can extinguish Indian title "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise" and "[n]o matter the method used, the sovereign's intent to extinguish must be clear and unambiguous; 'an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.'" *Abouselman*, 976 F.3d at 1156 (citations omitted).

issue, which was fully briefed. ROA.2579-2580;[22] ROA.2697-2747; ROA.777-782, 1228-1403 at ¶¶ 1-15, 1439-1445 at ¶¶ 1-15, 2319-2322, 2329-2333. The Pueblo sufficiently raised application of the Non-Intercourse Act, and the record demonstrates that the parties were litigating that claim. The Pueblo's retention of the perfect title it held at the time of Mexican Cession was protected from alienation without consent of the federal government by the Non-Intercourse Act, and the Pueblo's request that the district court protect the Pueblo's perfect title in and continued right to occupy these lands establishes federal court subject matter jurisdiction.

VI. The District Court Failed to Adhere to This Court's Controlling Precedent When it Denied the Pueblo's Motion to Amend.

A plaintiff may request leave to amend its complaint by seeking to alter or reopen a judgment under Rule 59(e). *Rosenzweig*, 332 F.3d at 864. In that situation:

> the disposition of the plaintiff's motion to vacate under rule 59(e) should be governed by the same considerations controlling the exercise of discretion under rule 15(a). Consequently, our discussion of the motion under rule 15(a) applies equally to the motion under rule 59(e).

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 n.1 (5th Cir. 1981), *citing Foman v. Davis*, 371 U.S. 178, 182 (1962) *and* 6 Charles Wright & Arthur Miller, *Federal Practice and Procedure* § 1489 (3d ed. 1971)). Thus, instead of applying

[22] Optional R. Excerpts of Appellant, Tab No. 7.

the Rule 59(e) standard, district courts must apply the Rule 15(a) standard, which mandates amendment be "freely given." *Foman*, 371 U.S. at 182 (citation omitted); *Rosenzweig*, 332 F.3d at 864; *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 271 (5th Cir. 2010). Factors that may justify denial of leave to amend include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [and] futility of the amendment." *Id.*; *Dussouy*, 660 F.2d at 598; *Rosenzweig*, 332 F.3d at 864. In the absence of such factors, the Supreme Court and the Fifth Circuit have applied the Rule 15(a) standard to require that amendment be permitted. *Dussouy*, 660 F.2d at 598; *Foman*, 371 U.S. at 182.

Here, the Pueblo filed a motion to amend the judgment and for leave to file an amended complaint. ROA.3604-3663. The district court denied the motion, erroneously applying the Rule 59(e) standard to the motion instead of the Rule 15(a) standard. ROA.3690. *Cruson*, 954 F.3d at 249 (holding a court by definition abuses its discretion when it applies an incorrect legal standard). The district court asserted that the Pueblo's post-judgment motion was required to assert "whether the Court committed manifest error of fact or law, whether newly discovered evidence exists, or whether there has been an intervening change in the controlling law." ROA.3691. That was error because the district court was required to apply

the more liberal standard under Rule 15(a), as the Supreme Court and this Court have both directed.

The district court also improperly relied on cases where there had already been a judgment on the merits.[23] Those cases have no bearing here because the district court never entered judgment on the merits. Instead the district court construed the City's motion for summary judgment as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and then dismissed based on the district court's belief that jurisdiction was lacking. ROA.3582-3601.

Finally, the district court's denial of amendment based on the Pueblo's inclusion in its proposed amended complaint of two alternative legal theories arising out of the same facts and circumstances of the case is also error. The Supreme Court and the Fifth Circuit have allowed amendment even when an additional legal theory is included. *Dussouy*, 660 F.2d at 598; *Foman*, 371 U.S. at 182. Indeed, "[t]he policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading." *Dussouy*, 660 F.2d at 598.

[23] *Briddle v. Scott*, 63 F.3d 364, 376 (5th Cir. 1995) (denying post-judgment amendment sought more than a year after the court rendered summary judgment on the merits of the habeas petition); *Benson v. St. Joseph Reg'l Health Ctr.*, 575 F.3d 542 (5th Cir. 2009) (denial of post-judgment amendment after entering summary judgments on the merits); *Vielma v. Eureka Co.*, 218 F.3d 458 (5th Cir. 2000) (same).

VII. The District Court Failed to Apply the Indian Canons of Construction.

The special canons of construction applicable to Indians requires that:

> [I]n the Government's dealings with the Indians … [t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.

Choate v. Trapp, 224 U.S. 665, 675 (1912). The Supreme Court explained the application of the Indian canons in *Oneida II*:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians . . . with ambiguous provisions interpreted to their benefit . . . 'Absent explicit statutory language,' . . . this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.
>
> The Court has applied similar canons of construction in nontreaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous,' . . . and will not be 'lightly implied,' . . . Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," . . . the Court concluded that it '[c]ertainly' would require 'plain and unambiguous action to deprive the [Indians] of the benefits of that policy.'

470 U.S. at 247-48 (citations omitted).

The district court erred when it failed to apply the Indian canons to its interpretation of the Treaty of Guadalupe-Hidalgo in general, and the court's ruling that there must be a Congressional statute before federal courts have jurisdiction to enforce real property interests protected by the Treaty of Guadalupe-Hidalgo in

particular. Looking only to statutes passed by Congress to allow identification of public lands, the district court erroneously held that by extension a similar statute was required in Texas. But as noted above, in Texas there was no issue of public lands, and no need for Congress to identify a process to confirm what lands were public – i.e. open to settlement. Instead, without applying the Indian canon, the district court erroneously held that the Treaty language is somehow ambiguous, and as such:

> **the Treaty of Guadalupe Hidalgo by itself did not guarantee the Pueblo a right of occupancy and a present and continuing right to possession.**

ROA.3597 (emphasis added).

> [I]n the absence of any separate, independent treaty or applicable congressional statute recognizing and guaranteeing the rights of the Pueblo to the Property, the Court lacks authority to determine the validity of Pueblo's claim to the land.

ROA.3599. Yet the Treaty's language is not ambiguous. Article VIII states:

> In the said territories, **property of every kind**, now belonging to Mexicans not established there, **shall be inviolably respected**. **The present owners, the heirs of these,** and all Mexicans who may hereafter acquire said property by contract**, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States**.

ROA.1322-1323 (emphasis added).

And Article IX states that Mexicans who choose to remain in the United States and no longer be Mexican citizens will be "incorporated into the Union of

the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution." In the meantime, they were to be "**maintained and protected in the free enjoyment of their** liberty and **property**, and secured in the free exercise of their religion without restriction." ROA.1323. To the extent the district court felt this language was somehow insufficient (without addressing how it is unclear), that ambiguity required the district court to apply the Indian canon of construction.

This Court, properly applying the Indian canon, should reverse the district court and confirm the subject matter jurisdiction of the federal courts to enforce the Pueblo's real property rights guaranteed to it by Congress when the Senate approved the Treaty of Guadalupe-Hidalgo, and then protected from alienation without federal government approval by the Indian Non-Intercourse Act.

The district court also erred when it failed to apply the Indian Canon of Construction to its analysis of the Pueblo's aboriginal title claim, failed to apply the Indian Canon of Construction to its analysis of application of the Non-Intercourse Act to the Pueblo's claims, and when it failed to apply the Indian Canon to this Court's precedent allowing amendment of a complaint.

CONCLUSION

The Pueblo respectfully requests that the Court reverse the district court's orders dismissing the Pueblo's claims and complaint for lack of subject matter jurisdiction, reverse the district court's order denying the Pueblo's request for leave to amend, and remand the case to the district court for further proceedings.

April 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, the foregoing document was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit, and the following counsel of record were served electronically via the Court's CM/ECF system on that same date:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and type-style of Federal Rule of Appellate Procedure 32(a)(5), 32(a)(6), and 32(a)(7)(B), as well as Fifth Circuit Rule 32. I further certify that this brief complies with the Court's Order of April 6, 2021, increasing the word limit to 18,000 words. Excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 16,805 words in proportionately-spaced, size-14, Times New Roman font, as determined by the word processing program Microsoft 365 version 2103.

I further certify that all privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, that the electronic submission of this brief is an exact copy of any paper document filed pursuant to Fifth Circuit Rule 25.2.1, and that this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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