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

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Appellee City of El Paso's (hereafter "City") Response Brief completely fails to address Appellant Ysleta del Sur Pueblo's (hereafter "Pueblo") arguments on appeal. Reduced to its simplest terms, the Pueblo's position on appeal is, first, that it holds perfect title to a four-square league Spanish land grant, which includes the land parcels subject to this litigation, and which was and is protected from alienation by the United States Constitution, Article 1, Section 8, Clause 3[1]; federal common law; and the Indian Non-Intercourse Act, 25 U.S.C. § 177 ("INIA").[2] Federal question jurisdiction exists in this case because protection of Indian land from alienation is a matter of federal constitutional law, common law and statutory law. Second, the City's Response effectively concedes that the Fed. R. Civ. P. 15(a) ("Rule 15(a)") standard – instead of the Fed R. Civ. Pro. 59(e) ("Rule 59(e)") standard – should have been applied by the district court in ruling upon the Pueblo's motion to amend the judgment and for leave to file an amended complaint. The City then incorrectly goes on to analyze and argue that the Rule 15(a) standard is not met.

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[1] "The Congress shall have power … [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; …."

[2] 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." 25 U.S.C. § 177.

ARGUMENT

The City argues first that the federal district court lacked subject matter jurisdiction because this case arises only under Texas law, a trespass to try title lawsuit is the exclusive method to determine disputed real property title in Texas, and the Pueblo's complaint states no federal cause of action; and second, that although the district court incorrectly applied the Rule 59(e) standard, it correctly rejected the Pueblo's motion to amend the judgment and for leave to file an amended complaint. Brief of Appellee 25, June 15, 2021, Doc. 00515900131 (hereafter "City Resp. ___").[3]

The City's discussion and citations to the Texas statutory and case law of trespass to try title in its Response are irrelevant to this appeal because state law is inapplicable to the federal question jurisdiction issue presented by this case. The Pueblo specifically addresses the irrelevance of the City's arguments and further mischaracterizations of the Pueblo's positions in this brief.

As further addressed below, the City concedes that the Rule 15(a) standard, not the Rule 59(e) standard, applies to the Pueblo's motion to amend the judgment and for leave to file an amended complaint. Since the parties agree that the district

[3] Citations to page numbers are to the Court's electronic filing system page numbers at the top of the parties' briefs and not the parties' page numbering at the bottom of the documents.

court utilized the wrong standard, additional argument by the City must be rejected.

Based upon its Response and failure to address these issues, the City has conceded the following Pueblo positions on appeal:

- The Pueblo was given protected legal status as a "Pueblo de Indios" by Spanish colonial authorities. Brief of Appellant Ysleta del Sur Pueblo 52, Apr. 16, 2021, Doc. 00515825721 (hereafter "Pueblo Br.___").
- The United States disclaimed ownership of any public lands in Texas upon annexation of Texas, and again upon enactment of the Compromise of 1850. Act of Mar. 1, 1845, 5 Stat. 797; Act of Dec. 29, 1845, 9 Stat. 108; Act of Sept. 9, 1850, 9 Stat. 446. Pueblo Br. 58.
- The Compromise of 1850 placed the Pueblo in Texas before the enactment of any federal statutes providing for confirmation of pre-1848 Mexican Cession property rights in areas where the federal government claimed public lands. Pueblo Br. 59.
- The Texas Legislature "recognized and confirmed" the Pueblo's Spanish land grant. H.P.N. Gammel, The Laws of Texas vol. IV, at 53 (Austin, Tex., Gammel Book Company 1898). Pueblo Br. 60.
- The INIA is applicable to the Pueblo's lands and property rights in Texas, including to its Spanish land grant. Pueblo Br. 64-68.

- As held by the United States Supreme Court in *Oneida Indian Nation of N.Y. State v. Oneida Cnty., N.Y.*, 414 U.S. 661 (1974) (*Oneida I*) and *Oneida Cnty., N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 239 (1985) (*Oneida II*), federal common law provides federal question jurisdiction for the Pueblo's protected Indian property claims. Pueblo Br. 68-70.
- As a matter of law, the Pueblo's property rights pre-existing the 1848 Mexican Cession continue to exist for purposes of federal question jurisdiction in this case without federal confirmation. Pueblo Br. 40-48.
- Federal statutes implementing the 1819 Florida Cession, the 1803 Louisiana Cession, and the 1848 Mexican Cession do not require federal confirmation of pre-existing perfected property rights (except in California). Pueblo Br. 37-49.
- The Rule 15(a) standard, not the Rule 59(e) standard, applies to the Pueblo's motion to amend the judgment and for leave to file an amended complaint.
- The Indian canons of construction are applicable. Pueblo Br. 80-82; City Resp. 23 ("the district court's reliance on U.S. Supreme Court opinions on the scope of the treaty, along with this Court's opinion in [*Burat's Heirs v. Bd. of Levee Comm'rs of Orleans Levee Dist. of State of La.*, 496 F.2d 1336 (5th Cir. 1974)] do not imply any sort of violation of the Indian canons of construction.")

- The 1848 Treaty of Guadalupe-Hidalgo, 9 Stat. 922 ("Treaty of Guadalupe-Hidalgo"), guarantees pre-existing property rights in the Mexican Cession, including the Pueblo's Spanish land grant, as a matter of the law of nations. Pueblo Br. 14-37, 38, n.16.

I. No Treaty or Federal Confirmation of the Pueblo's Land Rights is Required to Establish Federal Question Jurisdiction.

A. The Continued Existence of the Pueblo's Pre-existing Property Rights Does Not Depend on the 1848 Treaty of Guadalupe-Hidalgo.

The City quotes *El Paso Cnty. Water Improvement Dist. No. 1 v. Int'l. Boundary and Water Comm'n, U.S. Sec.*, 701 F. Supp. 121, 123 (W.D. Tex. 1988) to the effect that there is no federal question jurisdiction for claims based on United States international treaties in the absence of a specific provision permitting a private cause of action. City Resp. 20. The case is inapposite. Although the Pueblo's Brief references the important private property protections stated in Articles VIII and IX of the 1848 Treaty of Guadalupe-Hidalgo, which inform this issue, *e.g., Strother v. Lucas*, 37 U.S. 410, 435 (1838) (the law of nations protects property in a conquered country), the Pueblo does not rely on the proposition that the Treaty provides a private cause of action or that federal question jurisdiction arises from the Treaty. A lawsuit against the United States to enforce international treaty provisions requires that the treaty expressly provide federal court subject

matter jurisdiction and an express or implied waiver of sovereign immunity, or that subject matter jurisdiction and the waiver of sovereign immunity be provided by subsequent legislation. *See Delassus v. United States*, 34 U.S. 117, 130, 132-33 (1835); Pueblo Br. 36-37. Private property claims against parties other than the United States are properly brought in state courts in the absence of such a provision, **unless** it is a claim involving title to Indian land, which is protected from alienation by the federal law. *Oneida I*, 414 U.S. at 674. While the United States is bound by the "law of nations" to honor the terms of the 1848 Treaty of Guadalupe-Hidalgo and preserve pre-existing property rights, *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857) (under the law of nations, a change of sovereignty does not affect private relations), even in the absence of specific treaty terms protecting private property, *United States v. Percheman*, 32 U.S. 51, 65 (1833), the Treaty is not the foundation of the Pueblo's claims.

In this context, the district court and the City cite *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644, 661 (1876) and *Astizaran v. Santa Rita Land & Mining Co.*, 148 U.S. 80, 81-82 (1893) "to describe the scope of governmental obligations under the Treaty of Guadalupe Hidalgo." City Resp. 21-22. Contrary to the City's characterization of the Pueblo's claims, the Pueblo does not dispute that the Treaty of Guadalupe-Hidalgo does not confer jurisdiction on the federal courts to adjudicate private disputes among non-federal claimants to

Spanish and Mexican land grants, or as between such claimants and claimants pursuant to the federal public land laws, such as the homestead acts, although it does obligate the United States to respect pre-1848 property rights as a matter of the law of nations. Pueblo Br. 21-22. For that reason, neither of these cases, nor *Burat's Heirs*, which stands for the same proposition, are relevant to this case. The Pueblo asserts a Spanish land grant title and aboriginal Indian title, and federal subject matter jurisdiction pursuant to the Constitution, federal common law and the INIA – not the 1848 Treaty of Guadalupe-Hidalgo. Although the trial court characterized *Burat's Heirs* as "the parallel Fifth Circuit case", ROA.3594, it is not parallel for the reason that the Treaty of 1803, on which the Burats relied for their claim, provided no federal protection to any title they claimed, *Burat's Heirs*, 496 F.3d at 1341, whereas in the case at bar the Constitution, federal common law and the INIA all provide such protection.

B. Federal Common Law Standing Alone Confers Subject Matter Jurisdiction for Indian Property Claims.

The City contends that "[t]he Pueblo does not provide any authority to prove any independent, federal right of action to determine property rights." City Resp. 23. This is incorrect.

Even apart from the INIA, federal common law subject matter jurisdiction exists for this federally protected Indian land rights claim. Pueblo Br. 64-66.

Although this is implicit in the decision in *Oneida I*, the Supreme Court made it clear in its decision in *Oneida II*:

> 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. [Footnote 5 omitted.] In *Johnson v. McIntosh, supra,* the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent. Subsequently in *Marsh v. Brooks,* 8 How. 223, 232, 12 L.Ed 1056 (1850), it was held: "That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is the result of the decision in Johnson v. Mc Intosh." More recently, the Court held that Indians have a common-law right of action for an accounting of "all rents, issues and profits" against trespassers on their land. *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941). [Footnote 6 omitted.] Finally, the Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. Citing *United States v. Santa Fe Pacific R. Co., supra,* at 347, 62 S.Ct., at 252, we noted that the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action. 414 U.S., at 668–669, 94 S.Ct., at 777–778. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.,* at 674, 94 S.Ct., at 781 (citing *United States v. Forness,* 125 F.2d 928 (CA2), cert. denied *sub nom. City of Salamanca v. United States,* 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942)). 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.

Oneida II, 470 U.S. at 235-36.[4]

[4] "*See also Fellows v. Blacksmith,* 19 How. 366, 15 L.Ed. 684 (1857) (upholding trespass action on Indian land); *Inupiat Community of the Arctic Slope v. United States,* 230 Ct.Cl. 647, 656–657, 680 F.2d 122, 128–129 (right to sue for trespass is one of rights of Indian title), cert. denied, 459 U.S. 969, 103 S.Ct. 299, 74 L.Ed.2d 281 (1982) (right to sue for trespass is one of rights of Indian title); *United States v. Southern Pacific Transportation Co.,* 543 F.2d 676 (CA9 1976) (damages

The *Oneida II* Court went on to discuss extensively whether the Nonintercourse Acts pre-empted whatever right of action the Oneidas may have had at common law, making clear that federal subject matter jurisdiction for Indian property rights claims pre-existed the Nonintercourse Acts and has not been pre-empted by subsequent statutes. *Id.* at 236-40. The Pueblo's complaint clearly states an Indian property rights claim independent of the INIA.

The City cites *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000) for the proposition that "an action to put a plaintiff in possession of real property held by the defendant is a quiet title action, and that a federal court does not have the power to adjudicate that interest in property." City Resp. 17. This is a broad mischaracterization of the holding in *Laney*. The case holds only that the Pueblo's lawsuit naming Texas state officials as defendants was a quiet title action against the State and the State has Eleventh Amendment immunity from suit. It does not hold, as the City asserts, that federal courts lack jurisdiction to adjudicate Indian property quiet title actions. That is simply wrong. *Pueblo of Jemez v. United States*, 790 F.3d 1143 (10th Cir. 2015); *Pueblo of Santa Ana v. Baca*, 844 F.2d 708, 711 (10th Cir. 1988); *Picuris Pueblo v. Oglebay Norton Co.*, 228 F.R.D. 665

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available against railroad that failed to acquire lawful easement or right-of-way over Indian reservation); *Edwardsen v. Morton*, 369 F.Supp. 1359, 1371 (DC Alaska 1973) (upholding trespass action based on aboriginal title)." *Oneida II*, 470 U.S. at 236, n.6.

(D.N.M. 2005). The case at bar is not a claim against the State of Texas, nor its officials, and the Eleventh Amendment is inapplicable. *Laney* is inapposite.

The City's citation of *Vigil v. Hughes*, 509 Fed. Appx. 796 (10th Cir. 2013) is likewise irrelevant. In *Vigil*, a pro se plaintiff sought to litigate a land boundary overlap, asserting that federal subject matter jurisdiction existed simply because "the claim to the land by Vigil's grandmother arose out of 'Land Grant(s), from Spain via the Guadalupe Hidalgo treaty Between Spain and the United States.'" *Id*. at 797. The dismissal of that claim for lack of federal jurisdiction is unsurprising. Here, the Pueblo does not claim federal subject matter jurisdiction grounded upon the 1848 Treaty of Guadalupe-Hidalgo, but rather upon the fact it is asserting Indian common law possessory claims to Indian property protected from alienation by federal law. *See Oneida II*.

The definitive answer to the City's contention that the case at bar is simply a state law quiet title action for which "a trespass to try title lawsuit is the exclusive method to determine disputed real property title in Texas," City Resp. 14, is provided by the following statement in *Oneida I*, quoting from *United States v. Forness*, 125 F.2d 928 (2nd Cir. 1942), addressing federal common law jurisdiction for Indian land claims, and the Second Circuit's Opinion in *Oneida II*, respectively:

> [T]he Second Circuit held that the Indian rights were federal and that 'state law cannot be invoked to limit the rights in lands granted by the

> United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent.' Id., at 932. There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.

Oneida I, 414 U.S. at 674. Here the property in question was granted to the Pueblo by Spain, not the United States, but the same analysis applies. The Second Circuit in *Oneida II* elaborated on the INIA statutory basis for federal question jurisdiction for Indian land rights:

> [I]n enacting the Nonintercourse Acts Congress must have expected that they would be enforced by private actions since they were clearly intended for the benefit of the Indian tribes. The federal statutory structure was extremely simple and had not even approached the complexity which led to the adoption of the Cort v. Ash requirements. Indeed, the right to enforce the Acts through private actions has been assumed by various lower federal courts. See, e.g., Mashpee Tribe v. New Seabury Corp., 427 F.Supp. 899, 903 (D.Mass.1977); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F.Supp. 780, 784 (D.Conn.1976); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F.Supp. 798, 805 & n. 3 (D.R.I.1976). Private enforcement has also been favored because of the federal government's poor performance of its statutory obligation to protect the Indians. The congressional directives embodied in the Nonintercourse Acts frequently have been disregarded by the executive branch. See, e.g., Narragansett Tribe, 418 F.Supp. at 806 & n. 4. Thus, by necessity, Indian tribes have been permitted to enforce the Acts. In any event we believe that under conventional Cort v. Ash analysis, the Indians have an implied private cause of action to enforce the Nonintercourse Acts' proscriptions.

Oneida Indian Nation of N.Y. State v. Oneida Cnty. N.Y., 719 F.2d 525, 523-33 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom., Oneida II*.[5]

C. No Federal Confirmation of the Pueblo's Spanish Land Grant is Necessary to Establish Federal Question Jurisdiction.

The City contends that "[t]he Pueblo does not allege any independent treaty with it [sic] to establish occupancy rights, nor that any act of Congress fulfilled any obligations to secure any property rights in El Paso. The Pueblo does not identify any acts of Congress that provide for 'the mode of securing these rights,' which the Supreme Court identified as missing from the Treaty of Guadalupe Hidalgo." City Resp. 22-23. No treaty between the Pueblo and the United States, nor any Congressional enactment providing for "the mode of securing these rights," is required to create or secure these rights. It has been understood at least since the Supreme Court's decision in *Johnson v. McIntosh*, 21 U.S. 543 (1823), that aboriginal Indian title does not depend for its existence on any federal treaty or statute, nor does the Pueblo's Spanish land grant title. Both pre-existed the United States and are protected by the Constitution, federal common law, and the INIA. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345, 351 (1941). As discussed extensively at Pueblo Br. 40-48, with supporting authority, the Pueblo's perfected Spanish land grant title exists apart from any federal confirmation for

[5] This holding was specifically affirmed by the Supreme Court. *Oneida II*, 470 U.S. at 253.

purposes of establishing federal common law subject matter jurisdiction. Additionally, the INIA provides coterminous federal protection for Indian land rights and concomitant federal question jurisdiction. Moreover, the reason there was no Congressional enactment providing for federal confirmation of Spanish and Mexican land grants in Texas following the 1848 Mexican Cession is that the federal government claims no public domain lands in Texas, there was no need to identify federal as opposed to private lands in Texas, and such legislation was otherwise unnecessary. Pueblo Br. 37-49.

The City complains that while the Pueblo is asserting a "perfect" Spanish land grant title, the Pueblo does not define that term. City Resp. 23-24. Contrary to the City's contention, the Pueblo is not arguing the merits of its claim by that assertion. Whether the Pueblo's Spanish land grant title is good as against the City must be resolved by actual adjudication of the Pueblo's claim. However, it is very important that the Court understand that the City is dead wrong in asserting that all pre-existing property rights within the 1819 Florida, 1803 Louisiana, and 1848 Mexican cessions, as required by those treaties and the law of nations to be respected by the United States, necessarily depend for their validity and adjudication as between non-federal parties on federal confirmation pursuant to some Congressionally-mandated statutory process. As discussed in detail at Pueblo Br. 37-49, and with the exception of the Act to Settle Private Land Claims

in California, 9 Stat. 631 (Mar. 3, 1851), as interpreted by the Supreme Court in *Botiller v. Dominquez,* 130 U.S. 238 (1889), only imperfect titles were required by Congress to be federally-approved, and that because the treaties of cession required the United States to allow claimants to perfect their titles as they could have done had sovereignty not changed. This proposition is clearly explained in *Ainsa v. New Mexico & A. R. Co.*, 175 U.S. 76 (1899):

> A grant of land in New Mexico [which included the El Paso area in 1848], which was complete and perfect before the cession of New Mexico to the United States, is in the same position as was a like grant in Louisiana or in Florida, and is not in the position of one under the peculiar acts of Congress in relation to California, and may be asserted, as against any adverse private claimant, in the ordinary courts of justice.
>
> In the present case, the Mexican grant [or Spanish grant] in question being asserted by the plaintiff to have been complete and perfect by the law prevailing in New Mexico before the cession of the country to the United States, and it being agreed that this grant had neither been confirmed nor rejected by Congress, and that no proceedings for its confirmation were pending before Congress or before the surveyor general at the time of the commencement of this suit, this court, for the reasons above stated, is of opinion that the courts of the territory of Arizona had jurisdiction, as between these parties, to determine whether the grant was complete and perfect before the cession by Mexico to the United States.

In fact, the *Ainsa* Court noted that under the federal land grant confirmation statutes applicable in Louisiana and Florida, federal courts specifically **could not** adjudicate and confirm perfected grants in those areas. *Id.* at 84.

D. The Indian Non-Intercourse Act Also Confers Subject Matter Jurisdiction.

Ysleta del Sur Pueblo is a federally recognized Indian Pueblo to which all relevant federal Indian law applies, including the INIA. The City's Response mentions the INIA only twice – at City Resp. 25-26 – and only in the context of its argument that the Pueblo's motion to amend the judgment and for leave to file an amended complaint was properly denied by the district court. The City does not argue that the INIA is inapplicable to provide federal question jurisdiction in this case and therefore concedes its applicability. *See* Pueblo Br. 64-68.

II. The District Court Erred When It Denied the Pueblo's Motion to Amend the Judgment and for Leave to File an Amended Complaint.

The City agrees that the legal standard used by the district court to evaluate the Pueblo's motion to amend should have been Rule 15(a), not Rule 59(e). City Resp. 26-27 ("Among the factors to consider when reviewing a party's motion for 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 allowance of the amendment, and futility of amendment[.]'") Specifically, the City cites to *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170 (5th Cir. 2018), for the applicability of these Rule 15(a) factors, a case in which this Court references the exact cases cited by the Pueblo in its Opening Brief, *i.e.*, *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594,

597 n.1 (5th Cir. 1981) and *Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus, the parties agree that the proper procedure to decide a plaintiff's post-judgment motion for leave to amend its complaint under Rule 59(e) is to apply Rule 15(a). The City also relies upon this Court's opinion in *Schiller v. Physicians Res. Grp. Inc.*, which only confirms the Rule 15(a) standard applies. 342 F.3d 563, 566 (5th Cir. 2003). City Resp. 27.

After the City articulates the proper Rule 15(a) standard, it takes two simultaneous yet contrary positions: it (1) reiterates and supports the district court decision based on use of the wrong Rule 59(e) standard; and (2) argues that the grounds used for rejection by the district court are "apparent" under Rule 15(a), even though the Rule 15(a) factors were expressly rejected and not applied. Both positions are incorrect.

First, although it identifies the correct Rule 15(a) standard, the City reiterates the same caselaw relied upon by the district court in applying the wrong Rule 59(e) standard – the latter of which is a separate standard to "serve[ ] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." City Resp. 27 (quoting ROA.3690). The cases cited by the district court and relied upon by the City are ones in which a party **does not** request leave to amend a complaint post-judgment, and therefore to which the Rule 15(a) standard **does not** apply. *See* City Resp. 27 (quoting *Exxon Ship. Co. v.*

Baker, 554 U.S. 471 (2008); *United States Equal Emp. Opportunity Comm'n v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333 (11th Cir. 2016)). Thus, they are completely inapplicable.

Second, it makes no difference that the district court's grounds are "apparent." City Resp. 27. Even if "apparent," the district court applied the wrong grounds for dismissal because it applied the wrong Rule 59(e) standard. The district court did not "clearly" take into consideration the Rule 15(a) factors as grounds. City Resp. 26-27. This is because – as the City argues – those factors would have included: "repeated failure to cure deficiencies by amendments previously allowed;" "undue prejudice to the opposing party by virtue of allowance of the amendment;" and "futility of amendment." City Resp. 26-27. Those Rule 15(a) factors were never considered. ROA.3690-3691.

Finally, in the absence of the district court correctly applying the Rule 15(a) factors to make a determination under Rule 15(a), the City takes on this burden itself by arguing that the Pueblo "waited" to file its motion and "significantly change[d]" its claims. City's Resp. 25. These arguments should also be rejected by the Court. The district court ruled on the City's motion for summary judgment, construed it as a motion for lack of subject matter jurisdiction, and dismissed the case on January 15, 2020. ROA.3582-3601. The parties completed briefing on their cross-motions for summary judgment five months earlier, and those motions

were pending when the case was dismissed. ROA.2314-2401 and ROA.2473-2500. It is reasonable that the Pueblo would not see a need to amend its complaint since (1) a motion under Fed. R. Civ. P. 12 was not pending; (2) the district court had not yet interpreted the summary judgment motion as such, and (3) the City had already specifically acknowledged the Pueblo's causes of action in its pleadings and extensive litigation had occurred on those claims to that point. *See Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 523 (7th Cir. 2015). ("[A] plaintiff who receives a [Fed. R. Civ. P. 12] motion and who has good reason to think the complaint is sufficient may … choose to stand on the complaint and insist on a decision without losing the benefit of the well-established liberal standard for amendment with leave of court under Rule 15(a)(2).").

The City's argument that the Pueblo "significantly change[d]" its claims is also inaccurate. First, the City provides no convincing argument that the Pueblo's aboriginal Indian title claim and the applicability of the INIA were not subsumed in the complaint and/or actually litigated. In fact, even before it obtained new counsel and filed its own amended answer over a year and a half after litigation began, the City had notice of and was litigating the Pueblo's aboriginal Indian title claim. ROA.175-176; ROA.2575-2747. Then, after it did obtain new counsel, the City specifically re-confirmed this in its amended answer, and specifically addressed the Pueblo's assertion of the INIA. ROA.429-430 ROA.2575-2747.

The City made these statements in its pleadings because it had full notice of and was litigating the Pueblo's causes of action. *Agredano v. State Farm Lloyds*, 975 F.3d 504, 506 (5th Cir. 2020) ("In addition to the lack of pleading deficit, this is not a situation where State Farm was surprised by the Plaintiffs' request. State Farm never brought a Rule 12(e) claim that it did not understand the pleadings and, indeed, it clearly was aware of the § 542.060 claim…."). *See also Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018) ("a complaint need not contain 'detailed factual allegations'; rather, it need only allege facts sufficient to "state a claim for relief that is plausible on its face."). Even if the complaint was deficient, the City admits – as did the district court – that 28 U.S.C. § 1653 can be used to cure technical deficiencies in a complaint's causes of action to avoid the exact result here. City Resp. 28; ROA.3693-3694. *See Stanley v. Cent. Intel. Agency*, 639 F.2d 1146, 1159-60 (5th Cir. 1981) (holding "[l]eave to amend defective allegations of subject matter jurisdiction should be freely given"); *Carlton v. Baww, Inc.*, 751 F.2d 781, 789 (5th Cir. 1985) (providing opportunity to assert correct jurisdictional basis for lawsuit).[6] As for the other two claims included in the Pueblo's proposed amended complaint, the City cites to no

[6] *See also United States for Use and Benefit of Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.") (quoting Fed. R. Civ. P. 15(b)).

authority that claims arising out of the same facts and circumstances of the case must be rejected when amendment is considered. In fact, this Court has held to the contrary. *Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1070 (5th Cir. 1981) (holding "[a] complaint that is defective because it does not allege a claim within the subject matter jurisdiction of a federal court may be amended to state a different claim over which the federal court has jurisdiction.")

CONCLUSION

Therefore, the Pueblo respectfully requests that the Court reverse the district court's orders and remand the case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2020, 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, type-style, and type-volume limitations of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and 32(a)(7)(B), as well as Fifth Circuit Rule 32. Excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,124 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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