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

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

DEFENDANT, CITY OF EL PASO'S, MOTION FOR SUMMARY JUDGMENT

KARLA M. NIEMAN
CITY ATTORNEY
CITY OF EL PASO
State Bar No. 24048542
P.O. Box 1890
El Paso, Texas 79950-1890
Tel: (915) 212-0033

Oscar G. Gabaldon, Jr.
State Bar No. 07562900
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890
Telephone (915) 212-0033
Fax (915) 212-0033
gabaldonog@elpasotexas.gov

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Lynn H. Slade (*Pro Hac Vice*)
Walter E. Stern (*Pro Hac Vice*)
Nathan T. Nieman (*Admitted August 25, 2015*)
Post Office Box 2168
Bank of America Centre, Suite 1000
500 Fourth Street, N.W.
Albuquerque, New Mexico 87103-2168
Telephone: (505) 848-1800
lynn.slade@modrall.com
western@modrall.com
nathan.nieman@modrall.com

Attorneys for the City of El Paso

DEFENDANT, CITY OF EL PASO'S, MOTION FOR SUMMARY JUDGMENT

Defendant, City of El Paso ("City" or "El Paso"), pursuant to Fed. R. Civ. P. 56, the Court's July 22, 2015 Standing Order Regarding Motions for Summary Judgment, and Western District of Texas Local Rule CV-7, hereby moves the Court to enter summary judgment in its favor and against the Plaintiff, Ysleta Del Sur Pueblo ("YDSP" or "Pueblo").

INTRODUCTION AND SUMMARY OF ARGUMENT

The Verified Complaint for Declaratory Judgment Confirming Title to Real Property (ECF 1) ("Complaint") seeks to quiet YDSP's alleged title to 111.73 acres of land (the "Property"). ECF 1, ¶¶ 1, 5.[1] It grounds those claims exclusively upon (1) an alleged "1751 Spanish Land Grant," ECF 1, ¶¶ 9, 28, that was (2) purportedly "confirmed" in 1825 by Mexico in "the first survey of the Pueblo grant." ECF 1, ¶¶ 10-11. Its only pleaded basis for asserting federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362 is the allegation its rights are protected by the 1848 Treaty of Guadalupe Hidalgo ("Treaty").[2]

---

[1] Though the Complaint specifically claims only 111.73 acres of land in this action, it alleges an 1853 Texas survey found 8,148.34 acres of land to lie within its alleged grant, ECF 1, ¶19, and the Pueblo's responses to discovery reflect its claims would unsettle title to all properties within the alleged "grant" area. *See* Pueblo Answer to Interrogatory No. 7 ("[L]egal title to the Pueblo's 1751 Land Grant remains to this day vested in Ysleta Del Sur Pueblo."), attached as **Exhibit 1** to this Motion.

[2] Treaty of Peace, Friendship, Limits and Settlement, Feb. 2, 1848, 9 Stat. 922; *see* ECF 1, ¶ 16. Allegations regarding the Texas statute enacted February 1, 1854, which references a 1751 grant "to the inhabitants of the Town of Ysleta," and which the Pueblo asserts "confirmed its recognition of the Pueblo grant," ECF 1, ¶¶ 18-20, would appear to present a Texas law claim. The Treaty-based claim is so insubstantial as not to present a federal question invoking this Court's federal question jurisdiction.

First, the claim fails because it is undisputed there neither was a 1751 grant to the Pueblo or its predecessor, the Tigua Indians ("predecessor"), nor a survey confirming the boundaries of any such grant to the Pueblo or its predecessor. *See infra* Point I.

Second, while the Pueblo has not presented written evidence of a 1751 grant to the Pueblo, federal courts have held that the Treaty did not apply in Texas. And, even if it did, Texas law, including statutes of limitations, apply to Treaty-based claims. In any event, Texas' 1854 statutory confirmation of a grant to the "inhabitants of the Town of Ysleta," *see* ECF 1, ¶ 4, not to the Pueblo, would not support federal question jurisdiction. *See infra* Point II.A.

Third, even if the Treaty applies in Texas, and even if there were a 1751 grant the Treaty might protect, YDSP's claim fails as a matter of law because the required federal post-1848 confirmation of the claim by Congress or under a procedure prescribed by Congress, is neither alleged nor present. *See infra* Point II.B. Recent federal legislation specific to the Pueblo, enacted in 1968 and 1987, further demonstrates that Congress never confirmed a "grant" of land to the Pueblo or imposed federal law protections against alienation on any lands claimed by the Pueblo. Limited, narrow protections were provided only on specifically referenced lands in 1987, not including the "grant" as a whole or the Property. *See infra* Point II.C.

Further, the Court need not reach the merits because:

(1) The equitable doctrine of laches bars the Pueblo from claims to enjoin the City from "claiming any estate, right, title or interest in and to the Property," not to mention its effort to cast a cloud on title to all real property in the purported 8,000-plus acre "grant" area. ECF 1, Prayer for Relief, ¶¶ (a), (b); *see* Pueblo's Answer to City's

Interrogatory No. 7, attached as **Exhibit 1** to this Motion, The Pueblo's claim accrued well over 100 years ago, *see, e.g.,* ECF 1, ¶ 21 ("in the decades after Texas joined the United States, the Texas legislature passed successive incorporation acts which purported to transfer title to the Pueblo's lands."), and, given reliance by the City and countless others in real estate transactions, investment and development, and the disruption associated with any relief to the Pueblo, laches bars such relief; *see infra* Point III, and,

(2) The action, seeking to invalidate the City's title to the Property derived from a series of statutes the State enacted to clarify titles of Indians and non-Indians in the "grant" area, must be dismissed pursuant to Federal Rule of Civil Procedure 19(b) because the action threatens the State's land title-protective actions challenged here and its taxing and regulatory authority, but the State cannot be joined under the Eleventh Amendment to the Constitution of the United States. *See infra* Point IV.

The Court should end this action now and enter judgment for the City.

I. THERE IS NO DISPUTE OF FACT REGARDING THE ABSENCE OF A 1751 SPANISH LAND GRANT CONFIRMED BY AN 1825 SURVEY.

The Pueblo's effort to reach back over 250 years in time and assert the existence of an alleged 1751 Spanish grant to upset land titles across an 8,000 acre area is contradicted by the testimony of its expert witness identified to testify concerning the Spanish colonial and Mexican history of the alleged "grant" and its alleged confirmation by an 1825 Mexican survey purportedly conducted to protect the Pueblo's or its predecessor's title. ECF 1, ¶¶ 9-12. Charles R. Cutter, Ph.D., an historian specializing in Spanish colonial history, submitted his expert report on March 4, 2019, and was deposed June 28, 2019. Between his March 4, 2019 report and his subsequent deposition

testimony, Dr. Cutter's opinions evolved, leading to two unambiguous statements reflecting there is no triable issue of fact either as to whether there was a 1751 Spanish Land Grant to the Pueblo or an 1825 survey confirming such a grant to the Pueblo.

As to the alleged grant, Dr. Cutter's deposition establishes there is no document reflecting a 1751 alleged Spanish grant to the Pueblo. In deposition, he retracted and revised material parts of the following statement from his expert report:

> "A case might be made that this [February 17, 1751] episode marks the first grant of land to Ysleta Del Sur Pueblo, as some scholars have suggested. Yet considering the general context of Indian policy in the province of New Mexico, and given Ysleta Del Sur Pueblo's longstanding use and possession of its community lands, the 1751 'grant' seems to be an instance of reconfirmation of previously recognized land rights rather than the beginning of such rights."

Cutter March 4, 2019 Report, 50-51. In deposition, these exchanges occurred:

> Question (by Mr. Slade): "And first, we have an ambiguity here whether there was a 1751 decree or grant or anything of that nature?"
>
> Answer: "That's where I am at present, yes."
>
> Q: "Right. And you question whether there ever was a 1751 grant?"
>
> A: "'Grant' and that's why I had grant [in quotes]."
>
> Q. "Right. And you, in fact, question whether there ever was a 1751 grant?"
>
> A. "That's what I'm saying now. That's not what my report says."
>
> * * *
>
> Q. "But do we have any document, that you're aware of, that actually would constitute a grant from the crown to Ysleta Del Sur Pueblo about which you're aware?"
>
> A. "No."

Cutter Dep. 87, lines 8-19; 89, lines 7-11. Excerpts of the Deposition of Dr. Cutter are attached as **Exhibit 2** to this Motion.[3]

As to the alleged confirming 1825 survey, Dr. Cutter's testimony casts substantial doubt on whether the 1825 survey relied upon by the Pueblo was intended to document a grant to a Pueblo, rather than to those with property rights within the mixed Spanish and Indian community present at Ysleta from 1680 to the date of the 1825 Survey.[4] He recognized that, "[o]ddly. . . the Indian inhabitants did not take part in the survey proceedings." *Id*. at 134, lines 21-22 (quoting Report at 65). Although he found no specific indications why no Indians took part, *Id*. at 137, line 20, he found it "possible" it resulted from a "spirit of liberalism" motivating Spaniards to attempt to "acquire the lands" of Indian communities. *Id*. at 137, line 12-19. In fact, in 1841, Ysleta disavowed the 1825 survey on which they now rely, because they had not been present. *Id*. at 145, line 2-17. In any event, Dr. Cutter testified there is no indication in the documents pertaining to the 1825 survey whom it was intended to benefit. *Id*. at 172, lines 1-4.[5]

---

[3] As noted, Dr. Cutter, refers to the alleged 1751 grant as a "grant" in quotation marks. See also Cutter Report, 50-51. The City adopts that reference here. Excerpts of Dr. Cutter's March 4, 2019 Report are attached as **Exhibit 3** to this Motion.

[4] Dr. Cutter also testified there always were Spanish residents in the Ysleta area, "intermixed" with the Tigua, a pattern he did not find in the "upriver" Pueblos with which he worked. Cutter Dep. 61, line 19-64, line 23. Dr. Rick Hendricks, the Pueblo's historian for the period from the Treaty of Guadalupe Hidalgo to the present, also testified that in 1854 the majority of the inhabitants of the town of Ysleta were non-Indians, and that there were non-Indians living in the area of the "grant" in 1751 as well. Hendricks Dep. 32, lines 19-21; 33, line 4-15; 33, line 20; 32, line 12. Excerpts of Dr. Hendricks' deposition are attached as **Exhibit 4** to this Motion.

[5] Even if there were factual disputes as to these matters, the undocumented and inferential underpinnings of the claim reinforces dismissal under laches or jurisidictional grounds.

The testimony of the Pueblo's own Spanish and Mexican history expert requires no elaboration. There is no triable issue whether (1) there was a 1751 grant or (2) whether Mexico confirmed a grant to the Pueblo or its predecessor in 1825.

II. THE PUEBLO'S CLAIMS TO ENFORCE THE ALLEGED "GRANT" BASED ON THE 1848 TREATY FAILS BECAUSE THERE IS NO UNITED STATES' CONGRESSIONAL CONFIRMATION.

The Treaty of Guadalupe Hidalgo ("Treaty"), the only federal law alleged to invoke this Court's jurisdiction, is not self-executing. The absence of any confirmation of the Pueblo's alleged "grant" by the United States Congress, or in a manner Congress authorized, dooms the Pueblo's Treaty-based claim to the City's "Property." First, the Treaty has no application in the State of Texas. And, even if the Treaty did apply, the State of Texas's confirmation of the alleged "grant" by the Act of February 1, 1854, *see* ECF 1, ¶ 20, confirmed a grant not to the Pueblo, but rather to "the [largely Hispanic] inhabitants of the Town of Ysleta."[6] Moreover, any such confirmation would be a creature of Texas state law, not supporting the Court's federal question jurisdiction.

Second, the Complaint does not allege the U.S. Congress, or a proceeding Congressionally authorized, confirmed its alleged "grant," there is no such evidence, and a Spanish or Mexican grant is judicially unenforceable under the Treaty absent such

[6] Dr. Hendricks opined that the Texas Act of February 1, 1854 did not secure appropriately the Tigua Indians' rights to the land subject to that Act "[b]ecause of all the subsequent action that results in the loss – of land. So, I don't believe that was – I don't believe it secured it at all." He continued, testifying that "Texas, however, failed to recognize the rights to Indian lands that New Mexico Pueblos had." Hendricks Dep., 39, line 15-40, line 4; *see also* Hendricks March 4, 2019 Report, 10. Excerpts of Dr. Hendrick's March 4, 2019 Report are attached as **Exhibit 5** to this Motion. Finally, Dr. Hendricks testified that he does not have "any evidence" that the Texas legislature by its Act of February 1, 1854, intended to confirm a grant to the Tigua Indians. Hendricks Dep., 34, lines 21-24.

confirmation. Consequently, the Complaint fails to allege a cognizable claim arising under federal law and this Court lacks subject matter jurisdiction.[7]

A. The Treaty of Guadalupe Hidalgo Does Not Apply to the State of Texas.

In 1845, three years before the Treaty of Guadalupe Hidalgo, the United States annexed the Republic of Texas as a State. *See* Joint Resolution for Annexing Texas to the United States, J. Res. 8, 28th Cong., 5 Stat. 797-98 (1845); Ordinance of Annexation Approved by the Texas Convention on July 4, 1845. Finally, by Joint Resolution dated December 29, 1845, the Congress admitted Texas "into the Union on an equal footing with the original States in all respects whatever." J. Res. 1, 29th Cong., 9 Stat. 108 (1845). At no time during the annexation process did Texas or the United States ever recognize any Spanish or Mexican land grants located within the boundaries of the Republic or the State of Texas.

Because Texas was already a State at the end of the Mexican-American War, it was in a markedly different position from the rest of the territory – mainly what is essentially present day, New Mexico, Arizona, and California -- that only came under the jurisdiction of the United States through the Treaty of Guadalupe Hidalgo.[8]

In *Amaya v. Stanolind Oil & Gas Co.*, 62 F.Supp. 181, 191 (S.D. Tex. 1945), U.S. District Judge Hannay, in an exhaustive opinion quoted and cited *Elisha Basse v. City of Brownsville*, 154 U.S. 610 (1875), and *McKinney v. Saviego*, 59 U.S. 235 (1855), for the

[7] The Complaint does not allege any claim under the federal Non-Intercourse Act, 25 U.S.C. § 177, or that its alleged "grant" is subject to any federal restrictions against alienation. Accordingly, federal question jurisdiction rises or falls under its Treaty claim.

[8] Texas was an "independent nation" unlike the other territories covered under the Treaty and owned the public land within Texas. *See* Dep. of Professor Lawrence C. Kelly, 37, line 6-38, line 15. Excerpts of Professor Kelly's deposition re attached as **Exhibit 6** to this Motion.

proposition that the Treaty of Guadalupe Hidalgo did not apply in Texas, because, among other grounds, lands within Texas were not part of Mexico on February 2, 1848. On appeal, the the Fifth Circuit affirmed on other grounds holding, even if the Treaty applied, any rights arising under Spanish or Mexican grants are subject to Texas law time-based defenses. *See Amaya v. Stanolind Oil Co.*, 158 F.2d 554, 558 (5th Cir. 1946).

Here, the grant confirmed by the State of Texas was to the "inhabitants of the Town of Ysleta," and not to the Tigua Indians or their successor, the Pueblo. Moreover, even if the alleged "grant" were confirmed to the Pueblo, Texas delay-based defenses would bar presentation of any claim now. *See Amaya*, 158 F.2d at 558 (5th Cir. 1946) ("[T]he main purpose of statutes of limitation relating to land is to put titles at rest, . . . the benefits of which, under the treaty and under the statutes of Texas, were available to Mexicans and Texans alike"). *See* Point III, *infra.*

B. The Treaty of Guadalupe Hidalgo, if Applicable, Did Not Automatically Confirm Land Grant Titles; the U.S. Congress Needed to Act for Any Land Grant to be Recognized Under Federal Law – and It Has Not.

Strikingly absent from the allegations in the Pueblo's Complaint is any assertion that the United States, acting through Congress, recognized and confirmed the alleged "grant" to the Pueblo. The Pueblo's contention that Article 8 of the Treaty "guaranteed" the protection of Spanish land grant titles, ECF 1, ¶16, overlooks the requirement of a confirmation or recognition of title by the United States. Although Article 8 of the Treaty states in relevant part: ". . . property of every kind, now belonging to Mexicans not established there, shall be inviolably respected." 9 Stat. 922, 929, Supreme Court decisions and relevant history make clear Spanish and Mexican grants remain judicially

unenforceable after 1848 without Congressional confirmation. That confirmation is absent here.

1. Rights under the Treaty are Judicially Unenforceable in the Absence of Congressional Confirmation.

For the Pueblo's alleged "grant" to have any validity under federal law, Congress, directly or through procedures it established, would have to evaluate the "grant," determine its validity and, if valid, then act to confirm the title. *See Grisar v. McDowell*, 73 U.S. 363, 379 (1867). It is undisputed that no such steps have been taken with respect to the Pueblo's alleged "grant."[9]

In a series of opinions relatively contemporaneous with the negotiation and execution of the Treaty and the subsequent evaluation of Spanish and Mexican grants by the United States, Congress and the Supreme Court provided clear and unambiguous direction prescribing the process for federal recognition of such grants.

In *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644 (1877), the Court considered the validity of an 1843 grant in New Mexico. The Court acknowledged 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." *Tameling*, 93 U.S. at 661. However, the Court recognized a condition on judicial enforcement of any land claims: ***"The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed, was within the appropriate province of the political department of the government."*** *Id*. (emphasis added).

[9] Dr. Hendricks testified as follows: "Q: Mr. Hendricks, did the United States recognize or confirm the 1751 grant, that's at issue in this case, following the Treaty of Guadalupe Hidalgo? A: The United States did not." Hendricks Dep. 18, lines 5-9.

In implementing the Treaty, the *Tameling* Court observed that Congress chose a range of mechanisms through which Spanish and Mexican grants would be examined:

> In discharging [its duty to prescribe a confirmation process], Congress required that all titles to real property in California, whether inchoate or consummate, should undergo judicial examination. . . . But Congress legislated otherwise for the adjustment of land claims in New Mexico. By the eighth section of the act of 1854, 10 Stat. 308, the duty of ascertaining their origin, nature, character, and extent was expressly enjoined upon the surveyor general of that Territory. He was empowered for that purpose to issue notices, summon witnesses, administer oaths, and perform all necessary acts in the premises. He was directed to make a full report, with his decision, as to the validity or invalidity of each claim, under the laws, usages and customs of the country before its cession to the United States. ***That report . . . was to be laid before Congress for such action as might be deemed just and proper.***

Tameling, 93 U.S. at 661-62 (emphasis added).[10] In the case of the 1843 grant at issue there, the Surveyor General concluded that the "grant is a good and valid grant," recommended that Congress confirm it, and Congress did. *Id*. at 663. On that basis, the Court concluded: "[t]he final action on each claim, reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum." *Id*. at 662.

In *Astiazaran v. Santa Rita Land and Mining Co.*, 148 U.S. 80 (1893), the Court considered another Mexican land grant in the New Mexico Territory. The Surveyor General made recommendations to Congress, but Congress never acted on them, and there had been no congressional confirmation. *Id.* at 80-81. The Court, tracking *Tameling*, required confirmation of land grants either through direct Congressional confirmation, as in *Tameling*, or through a congressionally-prescribed judicial process

[10] *See also* Hendricks, et al., FOUR SQUARE LEAGUES: PUEBLO INDIAN LAND IN NEW MEXICO, 144 (U.N.M. Press 2014), describing the 1854 act of Congress creating the Office of Surveyor General of New Mexico, who was to ascertain "'the origin, nature, character and extent of all claims to land under the laws, customs, and usages of Spain . . . .'"

such as that prescribed for California.[11] Because Congress had not yet acted on the Surveyor General's recommendation, the Court stated:

> The action of Congress, when taken, being conclusive upon the merits of the claim, ***it necessarily follows that the judiciary cannot act upon the matter while it is pending before Congress***; for if Congress should decide the same way as the court, the judgment of the court would be nugatory; and if Congress should decide the other way, its decision would control.

Id. at 83 (emphasis added).

It is undisputed Congress has not taken any action to confirm, directly or indirectly, the alleged "grant" remains unaddressed by Congress. Thus, the Pueblo claims to the Property based on the "grant" are judicially unenforceable. *See also United States v. Santa Fe*, 165 U.S. 675, 714 (1897), *and United States v. Sandoval*, 167 U.S. 278, 294-95 (1897). This Court lacks jurisdiction over the claim.

2. Federal Actions Concerning the New Mexico Pueblos Reinforce Congressional Confirmation is Necessary to Validate Treaty Rights.

The Pueblo's alleged "grant" history stands in stark contrast to those confirmed to the Pueblo Indians of New Mexico.[12] The City will not address all the distinctions here, but the Supreme Court's opinion in *United States v. Sandoval*, 231 U.S. 28 (1913) [hereinafter *Sandoval*], is illuminating: In *Sandoval*, "[t]he question to be considered . . . is ***whether the status of the Pueblo Indians [in New Mexico] and their lands*** is such that

---

[11] For California, the passage of Ch. 41, 31st Cong., 9 Stat. 631 (1851), created a board of commissioners to examine claims, to be followed by district court and U.S. Supreme Court review.

[12] This authority contradicts the efforts of the Pueblo's expert historians to draw comparisons and parallels between the YDSP and the New Mexico Pueblos. *See* Hendricks Dep. 40 ("Texas, however, failed to recognize the rights to Indian lands the New Mexico Pueblos had."); Hendricks Report, 10.

Congress" can prohibit the introduction of liquor. *Id*. (emphasis added).[13] The Court observed that the lands belonging to the several Indian Pueblos were *"**confirmed by Congress since the acquisition of that territory by the United States***. 10 Stat. 308, c. 103, § 8, 11 Stat. 374, c. 5." 231 U.S. at 39 (emphasis added).[14]

Congress' authority to prescribe conditions for recognition of prior sovereigns' grants to Indian Pueblos is further enhanced given Congress' broad authority over Native American tribal nations, according to the Court:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired ….
>
> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."

Sandoval, 231 U.S. at 45-46. The Court concluded, therefore, that the federal statute prohibiting the introduction of liquor into Indian country applied to the confirmed land grants of the New Mexico Pueblos. *Sandoval* confirms that Congress' extending protections to New Mexico Indian Pueblos, protections that it did not extend to YDSP,

---

[13] Dr. Hendricks testified that *United States v. Sandoval* applies to New Mexico Pueblos, but not to Texas Pueblos. *See* Hendricks Dep. 80, line 24–81, line 15.

[14] The statutes cited include the Act of December 22, 1858, confirming grants to numerous New Mexico Pueblos, including grants to the Pueblos of Jemez, Acoma, San Juan, Picuris, Cochiti, San Felipe, Santo Domingo, among others, and to non-Indian New Mexico communities.

falls within its plenary power. *See Alaska v. Native Village of Venetie*, 522 U.S. 520, 531 n.6 (1998). Its decisions may not be second-guessed here.[15]

The Court reinforced its *Sandoval* decision in *United States v. Candelaria*, 271 U.S. 432 (1926), where the United States brought a quiet title suit on behalf of the New Mexico-located Pueblo of Laguna against defendants claiming interests in Pueblo lands that had been confirmed by Congress in the Pueblo. The Court stated:

> While we recognized in [*Sandoval*] that the Indians of each [New Mexico] pueblo, collectively as a community, have a fee-simple title to the lands of the pueblo . . ., ***we held that their lands, like the tribal lands of other Indians owned in fee under patents from the United States, are 'subject to the legislation of Congress enacted in the exercise of the government's guardianship' over Indian tribes and their property***.
>
> The purpose of Congress to subject the [New Mexico] Pueblo Indians and their lands to that legislation, if not made certain before the decision in the *Joseph* Case, was made so in various ways thereafter. Two manifestations of it are significant. A decision of the territorial court in 1904, holding their lands taxable, was promptly followed by a congressional enactment annulling the taxes already levied and forbidding further levies (33 Stat. 1069, c. 1479); and a decision of that court in 1907, construing the statute which prohibits the sale of liquor to Indians and its introduction into Indian country as not including these Indians or their lands, was shortly followed by an enactment declaring that the statute should be construed as including both (36 Stat. 560, c. 310).

271 U.S. at 562 (internal citations omitted)(emphasis added). The legislation *Candelaria* referenced also included the February 21, 1851 Appropriations Act for the Indian

---

[15] As the Supreme Court said in *Sandoval* regarding the New Mexico Pueblos:

> . . . in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. . . . 'it is the rule of this court to follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.'

Id. at 46-47, *quoting United States v. Holliday*, 70 U.S. 407, 419 (1865).

Department, which provided in Section 7: "That all the laws now in force, regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes of the Territories of New Mexico and Utah." Ch. 14, 31st Cong., 9 Stat. 574, 587 (1851). On its face, this legislation applies to the Territory of New Mexico and its tribes, including its Pueblos. The Court also stated explicitly that the Non-Intercourse Act "with others 'regulating trade and intercourse with the Indian tribes' ***was extended*** over 'the Indian tribes' of New Mexico in 1851." 271 U.S. at 441 (emphasis added). "Thus it appears that Congress, in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians." *Id.* at 442. The restriction was not ***extended*** to Texas, the YDSP, or the "grant."

Following *Sandoval* and *Candelaria*, the Supreme Court confirmed that some Congressional direction is necessary to extend federal protection to Indian lands. In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288 n. 20 (1955), in which the Supreme Court rejected Alaska Native claims to land, the Court distinguished the Alaska Natives from the New Mexico Pueblos:

> It is significant that even with the Pueblo Indians of the Mexican Land Cessions, despite their centuries-old sedentary agricultural and pastoral life, the United States found it proper to confirm to them a title in their lands.
>
> * * *
>
> Disputes as to the Indian titles in the Pueblos and their position as wards required congressional action for settlement. *See* Brayer, Pueblo Indian Land Grants of the "Rio Abajo," New Mexico; Cohen, Handbook of Federal Indian Law, c. 20. ***These problems were put in the way of solution only by congressional recognition of the Pueblos' title to their***

> ***land and the decisions of this Court as to their racial character as Indians, subject to necessary federal tutelage***. [Citations omitted.]

(Emphasis added.)

Like the Alaska Native claims in *Tee-Hit-Ton*, Congress has never confirmed the Pueblo's alleged "grant." This Court lacks federal question jurisdiction to address the claim.

C. Despite Two Federal Laws Specific to the Pueblo, the United States Congress has Not Acted to Recognize or Confirm the "Grant."

The Pueblo does not claim Congress has confirmed its alleged "grant." Even the two federal statutes it cites *see* ECF 1, ¶¶ 22-24, do not reference the alleged "grant" or the Property or any Congressional confirmation of the alleged "grant" or the Property.

1. The 1968 Act "Relating to the Tiwa Indians of Texas" does not Provide Congressional Confirmation of the Alleged "Grant."

The plain text of the 1968 Tiwa Indian Act, Public L. No. 90-287, 90th Cong., 82 Stat. 93 (1968) [hereinafter 1968 Act], *see* ECF 1, ¶¶ 22-23, unambiguously does not provide Congressional recognition of the alleged "grant:" After naming the tribe the "Tiwa Indians of Ysleta, Texas," the 1968 Act states in Section 2:

> Nothing in this Act shall make such tribe or its members eligible for any services performed by the United States for Indians because of their status as Indians nor subject the United States to any responsibility, liability, claim, or demand of any nature to or by such tribe or its members arising out of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to the Tiwa Indians of Ysleta Del Sur.

Id. at § 2.

At its core, the 1968 Act simply allowed a trust relationship between the State of Texas and the Pueblo, did not purport to establish a federal trust obligation, and

confirmed the alleged "grant."[16] Moreover, the 1968 Act affirmatively disclaims that any federal statutes applicable specifically to tribes had applied or had been extended to the Pueblo or its alleged "grant." The Complaint is simply incorrect in implying the 1968 Act "confirmed" any prior "recognition of the Ysleta del Sur Pueblo as an Indian tribe." ECF 1, ¶ 22.

The legislative history of the 1968 Act supports the Act's limited scope and provides context for the Pueblo's history since 1848. In House Report No. 90-558, at 2 (1967), the Committee of Interior and Insular Affairs stated:

> Considering how many other tribes, groups, and bands of Indians in the country have been recognized by the United States, it is virtually impossible to explain how the Tiwas have been missed up to this time. The most plausible explanation is that the Texas Tiwas, unlike most other tribes, never had occasion to enter into a treaty with the United States, ***that they never occupied land which was subject to Federal jurisdiction,*** that they were far removed from the other known Indian groups, ***that at the time recognition was being extended to the other Pueblo Indians the Tiwas were resident in Texas and Texas was in the Confederacy***, ...

(emphasis added).[17] The Department of the Interior wrote the House Committee stating that the Tiwa Indians "have never been recognized by the United States as Indians . . ., and such recognition is not contemplated by this bill," adding:

> The bill purports to transfer to the State the responsibility of the United States, if any, for these Indians. The United States does not have any responsibility, and the bill provides that its enactment will not create any

[16] *See also* Hendricks Dep. 87, line 16–88, line 19; 92, line 14–93, line 22.

[17] Roughly 20 years later, Senate Report No. 100-36 reported, in reference to the 1968 Act: "However, it seems that this [1968] Act did not alter the relationship between the United States and the tribe because the Federal government never seemed to have assumed in the past any trust responsibilities over the tribe. *** the tribal lands are provided protection only by state law . . . ." S. Rep. No. 100-36 at 2 (1987); *see also* S. Rep. No. 100-90, at 7 (1987) (The Tribe had not been subject to federal supervision and had received no federal Indian services before the 1968 Act, and that status continue [sic] after its enactment.").

> responsibility. It is therefore not clear, at least to us, how the enactment of the bill will help the State assert a trust responsibility for the group. If it will have that effect, however, we certainly have no objection to its enactment.

Id. at 3. To consistent effect, the report of the Pueblo's counsel, Mr. Tom Diamond, titled "Jornada del Muerto: A Story of the Tigua Indians," published in the Congressional Record, 114 Cong. Rec S3683-87, 90th Cong. (1968), does not reference or describe a 1751 Spanish grant to the Pueblo.[18]

2. The 1987 Ysleta Del Sur Restoration Act does not Provide Congressional Confirmation of the Pueblo's Alleged "Grant."

The Pueblo returned to Congress seeking federal recognition nearly 20 years after the 1968 Act. Even when Congress considered the land base of the Pueblo as part of its legislative efforts and the enactment of the Ysleta Del Sur Restoration Act of 1987, Pub. L. No. 100-89, 100th Cong., 101 Stat. 666, 25 U.S.C. §§1300g *et seq*. (1987) ("1987 Act"), Congress did not recognize the existence or validity of the alleged "grant." In the 1987 Act, Section 103(a), Congress provided:

> The Federal trust relationship between the United States and the tribe is hereby restored.[19] The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation.

[18] Instead, Mr. Diamond's report stated: "***It would appear today that [the] only recourse these Indians have for reparation is to entreat with the President and Congress to recognize their entitlement to the same basic rights as all other Indians***." *Id*. at S3686 (quoting Mr. Diamond's report) (emphasis added).

[19] "Restored," in light of history, is incorrect here.

The referenced "reservation" is defined in Section 101(3) of the 1987 Act, 25 U.S.C. §1300g(3), referring to four limited categories of land, but does not include the alleged "grant" as a whole or even the Property.[20]

Following the Treaty, Congress has enacted no law confirming the alleged "grant" and has not recognized or established any procedure to enable the Pueblo to obtain congressionally-recognized ownership of the alleged "grant." The Pueblo has no federally enforceable claim to the Property or the alleged "grant."

D. No Federal Question Jurisdiction Exists Once the Court Determines There is no Congressionally Authorized Confirmation.

For a claim to be one "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, it must assert a right or immunity created by the Constitution, laws, or treaties of the United States as an essential element of the plaintiff's cause of action. Federal question jurisdiction exists only when the "well-pleaded" allegations of the complaint establish that (1) "federal law creates the cause of action" or (2) "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota LLC*, 843 F.3d 325, 329 (8th Cir. 2016) (internal citations omitted).

---

[20] *See* Congressman Ronald D. Coleman's prepared statement, that the Pueblo's lands up to that time had been "provided protection only under state law." Hearings on H.R. 1344 before S. Select Comm. on Indian Affairs, 99th Cong., at 32 (1986). Congressman Ronald D. Coleman, in testimony on the House floor stated that the "legislation seeks . . . to provide adequate protection of the reservations . . .," referring to the Pueblo's 100 acre reservation recognized under Texas law. 131 Cong. Rec. H12015, 99th Cong. (1985). Even the Pueblo's governor at the time acknowledged that "our lands have not permanent protected status." Hearings before the S. Select Comm. on Indian Affairs, 99th Cong., at 22 (June 25, 1986) (Statement of Michael Pedraza, Governor, Ysleta Del Sur Pueblo, El Paso, Texas). While focused on the Pueblo's 100 acre "reservation" recognized by Texas, these comments would apply equally to all lands the Pueblo currently claims.

Neither is present here. *See also Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 672 (8th Cir. 1986).

Even where the underlying right to possession of land is asserted to arise under federal law, "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress. . . . the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for arising under jurisdiction merely to allege that ownership or possession is claimed under [Federal law]." *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 675 (1974) (citations and internal quotations omitted). Here, any federal law-based claim is foreclosed by the absence of any Congressional, or Congressionally authorized, confirmation of the alleged 1751 grant. Hence, the claim fits precisely the Supreme Court's description of a claim purporting to invoke federal law but is "so insubstantial, implausible, foreclosed by prior decisions of [the] Court, or otherwise completely devoid of merit as not to involve federal controversy within the jurisdiction of the District Court, . . ." *Oneida*, 414 U.S. at 666.

III. THE PUEBLO'S CLAIM IS BARRED BY THE DOCTRINE OF LACHES.

The U.S. Supreme Court and other federal courts have uniformly apply the equitable defense of laches to bar long delayed tribal land claims. The analyses of those courts bar the Pueblo's claim. The Pueblo bases its claim to the Property on a "grant"

allegedly issued over 250 years ago. Moreover, over 160 years ago, in 1854, Texas confirmed a grant to "the inhabitants of the Town of Ysleta," not to the Pueblo.[21]

A. The Pueblo has Inexcusably Delayed Filing this Action.

The Complaint alleges a Spanish land grant purportedly made in 1751. It further alleges, "in the decades after Texas joined the United States, the Texas state legislature passed successive incorporation acts which purported to transfer title" to the lands. *See* ECF 1, ¶ 21. Texas passed those incorporation acts – which the Pueblo's expert historian, Rick Hendricks, testified were elements of "theft" by Texas of the Pueblo's lands, *see* Hendricks Dep. 85, line 9-86, line 7 – well over 100 years ago, concluding with 1889 and 1915 statutes. Those statutes unambiguously cleared titles conveyed in accordance with those incorporation acts. Yet, despite myriad opportunities to assert its ownership rights over the last 150-plus years, only now does the Pueblo file litigation asserting it is entitled to possession of the City's Property – and can threaten the 1751 "grant" lands.

B. The City and Others have Reasonably Relied on the Absence of the Current Claim.

The Pueblo's delay is all the more inexcusable in light of substantial and detrimental reliance by the City of El Paso -- not to mention the reliance of hundreds if not thousands of business people, residents, and several public entities who have engaged in countless real property transactions and invested substantial energies, moneys, and their futures in development and improvement of their properties in the "grant" area. That reliance – based on titles arising from the 1854 and subsequent Texas laws regarding the Town of Ysleta – requires dismissal of the Pueblo's claims under the laches doctrine.

[21] The State of Texas then issued a patent to the "Inhabitants of the Town of Ysleta" in 1873, over 140 years ago. *See* Hendricks Dep., Exhibit 9.

With respect to the Property, with substantial transparency and public participation, the City has undertaken the establishment and development of Blackie Chesher Park and other works on the lands subject to this suit, in justifiable reliance on over a century of settled understandings concerning ownership of the lands derived from conveyances by the Town of Ysleta following the 1854 Act of the Texas legislature and subsequent Texas state statutes. For the Pueblo to pursue its claim today would substantially prejudice the City, its residents, and public entities with responsibility for the well being of residents and users of the Ysleta grant area.

1. The City's Reliance.

The City's reliance is established through the City's acquisition of the parcels which comprise the Property between 1944 and 1970. *See* Affidavit of Jorge Acosta, attached as **Exhibit 7** to this Motion, ¶¶ 4(a)-4(g); the City's Annexation of a larger area encompassing the alleged "grant" area by City Ordinance No. 1285 on March 15, 1955, by which it undertook delivery of services throughout the alleged grant area and exerts taxing authority to support such services and its police power regulation; *see* Affidavit of Laura Prine, attached as **Exhibit 8** to this Motion, ¶¶ 6-8; and the City's development of Blackie Chesher Park, occupying 69.0 acres of the 111.73 acres claimed in this case, to provide recreation facilities for residents of the area, including its commitment to a Texas Department of Parks and Wildlife grant to improve the Park facilities, requiring commitment of the facilities to park purposes and the transfer of lands to the Ysleta Independent School District for El Valle Elementary School. *See* Affidavit of Joel W. McKnight, attached as **Exhibit 9** to this Motion, ¶¶ 3-11. City officials were unaware the Pueblo claimed title to the Property, the Park, and the "grant" area until after this action

was filed. *See* McKnight Aff., ¶ 11, Prine Aff., ¶ 9. The Pueblo failed to give notice of objections to the City's taking such actions. *See* Deposition of Ronald L. Jackson, **Exhibit 11,** p. 117, line 25 - p. 124, line 7.

2. Public Entities' Reliance.

Public entities with responsibility for the well-being of residents and users in the Ysleta grant area reasonably relied on the Pueblo's apparent acquiescence in development through their numerous investments in facilities serving the alleged Ysleta grant area outside the Property, but within the purported Ysleta grant area, including by the City, the Ysleta Independent School District, the County of El Paso, El Paso County Water Improvement District No. 1, El Paso Housing Authority, El Paso Water Utilities, a division of the City of El Paso, People of the State of Texas, Texas A & M University, The United States of America, and at least three utility companies. *See* Affidavit of Mariano Soto, attached as **Exhibit 10** to this Motion, ¶¶ 2-5(a)-(k).

C. Federal Case Law Requires Dismissal of the Pueblo's Claims.

The traditional test for laches is a two-part test: (a) unreasonable delay in pursuing the claim; and (b) prejudice to the defendant because of the delay. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-18 (2005); *see also Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2nd Cir. 2010) [hereinafter *Oneida*]. These elements are clearly met in this case.

In the context of long-delayed Indian land claims, the Supreme Court in *City of Sherrill*, 544 U.S. at 198, reversed the district court and court of appeals decisions and applied the doctrine of laches to bar the Oneida Nation's effort to "unilaterally revive[] its

ancient sovereignty" over, and avoid paying property taxes on lands long taxed and regulated by the City of Sherrill, New York.[22] Material here, the Court commented:

> When a party belated asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. There is no dispute that it has been two centuries since the Oneida's last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose."

544 U.S. at 200, *quoting County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 262 ((Stevens, J., dissenting in part).

Since *City of Sherrill*, lower federal courts have applied the Court's analysis, including for example the Second Circuit in *Oneida*:

> the equitable defense recognized in [*City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 209 (2005)] and applied in *Cayuga [Indian Nation v. Pataki*, 413 F.3d 266 (2nd Cir. 2005)] does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiff's injury.

617 F.3d at 127. In *Oneida*, where the Oneida Indian Nation asserted possessory claims for alleged violations of the Non-Intercourse Act, the Second Circuit considered "whether

---

[22] In support of its analysis, *see* 544 U.S. at 217, the Court discussed *Felix v. Patrick*, 145 U.S. 317 (1892), which held laches barred an action by an Indian's heirs to establish a constructive trust over lands she had conveyed in violation of federal statutory restrictions. The claim was brought 28 years after the transaction, and in the intervening time, "[t]hat which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases." *Felix*, 145 U.S. at 334. The Court held the long passage of time, the change in the character of the property, the transfer of some of the property to third parties, and other factors supported a bar of laches against the plaintiffs. *Id.* at 326, 334-35. The Court also found "[t]he decree prayed for in this case, if granted, would . . . result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation." *Id.* at 335.

and in what circumstances equitable principles might limit relief available to present day Indian tribes deprived of ancestral lands many years ago in violation of federal law." *Id.* at 117. Following *City of Sherrill*, the Second Circuit held laches or fundamental principles of equity barred the Nation's claims to possession of the lands. *Id.*

Applying *City of Sherrill* and *Oneida*, if any injustice was done to the Tigua Indians, it began – at the latest -- with Texas' 1854 confirmation of a grant to the "inhabitants of the Town of Ysleta," followed by the Texas incorporation and quiet title statutes authorizing the sale of lands, and thereafter validating those titles issued, by the Town of Ysleta, the first of which was enacted between 160 years and over 100 years before this suit was filed. Thereafter, over the ensuing 100-plus years and based on the Acts of the legislature of the State of Texas and the Town of Ysleta, property owners, both original grantees and subsequent successors in title, justifiably invested in their homes and business.

While the Pueblo directly asserts claims only against the City in this action and only with regard to a single set of parcels totaling 111.73 acres, the principles outlined in the *Oneida*, *City of Sherrill* and *Cayuga* cases provide compelling basis on which to conclude that laches bars the Pueblo's claim.[23] *See also United States v. Washington*,

[23] Here, applicable state statutes of limitation have long since expired relative to the Pueblo's claims. *See* Act of February 11, 1860, Laws 1860, c. 78: giving certain district courts power to investigate any claim for land against the State having its origin prior to December 19, 1836, and to confirm such claims, and providing that the act should "continue in force until February 11, 1865, and no longer;" Tex. Civ. Prac. & Rem. Code § 16.004: "A person must bring suit on the following actions not later than four years after the day the cause of action accrues: specific performance of a contract for the conveyance of real property . . .;" Tex. Civ. Prac. & Rem. Code § 16.024: "A person must bring suit to recover real property held by another in peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues;" Tex. Civ. Prac. & Rem. Code § 16.025: "A person must bring suit not

864 F.3d 1017, 1030-31 (9th Cir. 2017) (laches applied to a delay of 30 years); *Onandaga Nation v. New York*, 500 F. App'x 87, 89 (2d Cir. 2012) (laches barred ancestral tribal land claim in the face of proffered evidence that the Onandaga Nation would show that they "strongly and persistently protested" the population and development of their ancestral lands); *New Jersey Sand Hill Band of Lenape & Cherokee Indians v. Corzine*, 2010 WL 2674565 at *21 (D.N.J. June 30, 2010) (applying *Sherrill* and *Cayuga* to a claim that ripened 208 years earlier).

This analysis and result is consistent with the application of laches to a land grant claim arising under the Treaty of Guadalupe Hidalgo. In *Gonzales v. Yturria Land & Livestock Co.*, 72 F.Supp. 280 (S. D. Texas 1947), District Judge Hannay granted the dismissed plaintiffs' claims to be the rightful owners of, and seeking to recover, land under Article VIII of the Treaty of Guadalupe Hidalgo, and asserting that the defendants' chain of title was either forged or obtained by fraud. 72 F.Supp. at 281. Judge Hannay sustained defendants' laches defense:

> There certainly should be some period of time beyond which grants and patents should cease to be open to such attacks in the hands of innocent bona fide holders. The door should be closed at some time against the temptation to frauds and perjuries, otherwise there will be no security in paper titles.

72 F. Supp. at 282 (citations and quotations omitted).[24] The case is persuasive here.

---

later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another . . ..;" and Tex. Civ. Prac. & Rem. Code § 16.026: "A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession . . .." As the Court of Appeals for the Fifth Circuit stated, "It should not be overlooked that the main purpose of statutes of limitation relating to land is to put titles to rest, . . . the benefits of which, under the treaty [of Guadalupe Hidalgo] and under the statutes of Texas, were available to Mexicans and Texas alike." *Amaya.*, 158 F.2d at 558.

[24] *Cf. Nevada v. United States*, 463 U.S. 110, 129, n. 10 (1983), where the Court stated "The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases

The Pueblo's insolated and sporadic assertions of arguably related rights and interests, such as its recording of ambiguous federal filings in real property records,[25] in no way substitute for the inexcusably delayed filing of an action asserting the present claims. The Pueblo's unconscionable delay in asserting claims upsetting the City's justifiable reliance, and threatening countless other titles, requires the dismissal with prejudice of this action under the laches doctrine.

IV. THE STATE OF TEXAS IS A RULE 19 REQUIRED PARTY WHICH CANNOT BE JOINED, UNAVOIDABLE PREJUDICE TO THE STATE NECESSITATES DISMISSAL OF THIS ACTION UNDER RULE 19(B).

The Pueblo and its experts have alleged that the State of Texas is complicit in the "theft" of the Pueblo's "grant." In his report and deposition, Dr. Hendricks asserts that "The State of Texas has been complicit in the theft of the Ysleta Del Sur Pueblo lands," and argues that the complicit actions start with the passage of the Act of February 1, 1854 confirming a grant to the "inhabitants of the Town of Ysleta" and continue through a series of Texas statutes authorizing the incorporation of the Town of Ysleta, and the legislation quieting title to the lands sold by the Town under the incorporation acts. Hendricks Dep. 85, line 9–86, line 7. Those Texas statutes reflect Texas state policy for the development of the Ysleta area, including both the Property and the alleged grant area. In addition, the Pueblo's contention that its claims here pertain to all lands within

---

concerning real property, land and water. *See Arizona v. California*, 460 U. S. 605, 460 U. S. 620 (1983)."

[25] *See, e.g.*, Notice of Claim, August 12, 1993, asserting claim against the United States for return of all land in five Texas counties. Though filed 24 years prior to the filing of this action, the Pueblo did not file litigation against the City or others asserting specific claims to specific properties, including the Property—or asserting the broad claim referenced in the Complaint and the Pueblo's Answer to the City's Interrogatory No. 7.

the over 8,000 acre alleged "grant" area threatens to divest the State of taxing and regulatory jurisdiction over lands within the area. This action must be dismissed pursuant to Federal Rule of Civil Procedure 19(b) because the State cannot be joined in this action under the Eleventh Amendment to the Constitution of the United States.

In deciding whether an action must be dismissed for failure to join an indispensable party, the court must "first determine if a person must be joined to the lawsuit under Rule 19(a)," and then "determine under Rule 19(b) whether the absent party is indispensable." *Turner v. Pavlicek*, No. CIV.A. H-10-00749, 2011 WL 4458757, at *7–8 (S.D. Tex. Sept. 22, 2011) (internal citations omitted). As for the former, joinder is required if the court cannot accord complete relief among existing parties, or if the party to be joined "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1). "If joinder would destroy the court's jurisdiction, the court must then determine under Rule 19(b) whether the absent party is indispensable." *Turner*, No. CIV.A. H-10-00749, 2011 WL 4458757, at *8 (citing *Hood ex rel. Miss. v. City of Memphis, Tenn.*, 570 F.3d 625, 628–29 (5th Cir. 2009)). A finding of indispensability depends on the balance of four factors: (1) the extent to which a judgment rendered in the party's absence might prejudice that or existing parties; (2) the extent to which any prejudice could be mitigated by protective provisions in the judgment, shaping the relief, or other measures; (3) whether a judgment rendered absent the necessary party would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ.

P. 19(b). "If the balance of these factors results in a finding that the absent party is indispensable, then the case must be dismissed. If not, the case may continue without joining the additional party." Turner, No. CIV.A. H-10-00749, 2011 WL 4458757, at *8. Here, the case must be dismissed.

A. The State of Texas is a Necessary Party.

On the basis of taxation and regulation alone, federal courts have found states to be necessary parties. Where, as here, the interests of the State further include its specific policies for land and economic development for the area, necessity is assured. In *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1291 (D. Kan. 2002), the District of Kansas found lesser equities to render Kansas a necessary party. The court considered the Wyandotte Nation's failure to join both the State of Kansas and the United States in its quiet title action for land within Kansas City when, as here, the plaintiff tribe claimed to have held a continuous interest in the land. *Id.* at 1281. The State's argument that it was a necessary party because "it possess[ed] the taxation, regulatory, and jurisdictional interests concomitant with . . . state sovereignty" was availing, because if the tribe prevailed, "Kansas would lose the taxation, regulatory, and jurisdictional powers it exercises over these lands." *Id.* at 1288, 1290.[26]

Here, as in *Wyandotte*, the State is a necessary party for the same reasons: it possesses the taxation, regulatory, and jurisdictional interests concomitant with state sovereignty. Texas' additional involvement—confirmation of the land grant,

[26] As the *Wyandotte* court noted, "[l]and held in trust by the federal government on behalf of Native American tribes is exempted from state or local taxation by 25 U.S.C. § 465, and from local zoning and regulatory requirements pursuant to 25 C.F.R. § 1.4(a). Further, it is not subject to state criminal or civil jurisdiction, absent consent of the tribe. 25 U.S.C. §§ 1321(a), 1322(a)." *Id.* at 1288.

authorization of the sale of lands within the grant area by the Town, and legislative quieting of titles in the grant—reinforce that Texas is a 'necessary party.' In the Fifth Circuit, "while the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder." *Hood,* 570 F.3d at 628 (internal quotation marks omitted). The City has met its burden.

B. Joinder of the State is Not Feasible.

The Eleventh Amendment grants a State sovereign immunity from suit by a private party in federal court. *See Idaho v. Coeur D'Alene Tribe of Idaho,* 521 U.S. 261 (1997). To this end, "the Court has recognized waiver only where a state statute or constitutional provision specifies the State's intention to subject itself to suit." *Tillotson v. Esparza*, No. EP-15-CV-178-DB, 2015 WL 13343277, at *3 (W.D. Tex. Sept. 8, 2015), *aff'd*, 681 F. App'x 424 (5th Cir. 2017) (internal quotation marks omitted). There is no such statute or provision here. Joinder of the State is therefore infeasible.

C. Because the State is Indispensable, the Case Must be Dismissed.

As a threshold matter, "[i]t has been held that when an assertedly indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (quoting *Associated Dry Goods Corp. v. Towers Fin. Corp.,* 920 F.2d 1121, 1124 (2d Cir. 1990)). Nevertheless, balancing of the 19(b) indispensability factors warrants dismissal of this action given the Pueblo's inability to join the State.

A challenge to the validity of the land transactions authorized by the State, upon which the City's title is grounded, must involve the State, because the entire plan of record land ownership upon which the non-State defendants—and countless others—depend could be clouded, overturned, or called into question should the Pueblo prevail. Relief here cannot be shaped so as to lessen this prejudice, nor can prejudice be mitigated by protective provisions in the judgment. Fed. R. Civ. P. 19(b). A decision as to the validity of transfers between the State and the City necessarily implicates the State's interests in the titles issued under the statutes its legislature enacted specifically for that purpose. Finally, the lack of an alternative court forum does not counsel dismissal of an action against a sovereign for nonjoinder. *See, e.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991); *see also Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005) (dismissing suit when Indian tribe is indispensable party), *cert. denied*, 126 S.Ct. 1338 (2006); *Wendt v. Smith*, 273 F.Supp.2d 1078, 1084 (C.D. Cal. 2003). The factor is "outweighed by the paramount importance to be accorded to the State's immunity from suit." *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48 (2d Cir. 2004).

A judgment for the Pueblo in this case would directly confound those State policies intended to provide a land base for development of the area and contravene Texas' regulation and taxation in the alleged "grant" area. The action cannot proceed "in equity and good conscience" without joinder of the State. Because the State cannot be joined given its immunity from suit, the action must be dismissed under Federal Rules of Civil Procedure 12(b)(7) and 19(b).

CONCLUSION

For the foregoing reasons, Defendant City of El Paso requests that judgment be entered in its favor and against the Pueblo.

Dated: July 29, 2019

Respectfully submitted,

KARLA M. NIEMAN
CITY ATTORNEY,
CITY OF EL PASO
State Bar No. 24048542
P.O. Box 1890
El Paso, Texas 79950-1890
Tel: (915) 212-0033

Oscar G. Gabaldon, Jr.
State Bar No. 07562900
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890
Telephone (915) 212-0033
Fax (915) 212-0033
gabaldonog@elpasotexas.gov

-And-

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: */s/ Lynn H. Slade*
Lynn H. Slade
Walter E. Stern
Nathan T. Nieman
Post Office Box 2168
Bank of America Centre, Suite 1000
500 Fourth Street, N.W.
Albuquerque, New Mexico 87103-2168
Telephone: (505) 848-1800
lynn.slade@modrall.com
western@modrall.com
nathan.nieman@modrall.com

Attorneys for the City of El Paso

WE HEREBY CERTIFY that on this 29th day of July 2019, we served the foregoing electronically upon the following parties or counsel:

Kelli J. Keegan
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
kkeegan@indiancountrylaw.com

Ken Coffman
221 N. Kansas Street, Suite 503
El Paso, Texas 79901-1430
ken@kclawfirm.net

Attorneys for Plaintiff

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By:*/s/ Lynn H. Slade*

ANNEX TO CITY OF EL PASO'S MOTION FOR SUMMARY JUDGMENT

PROPOSED UNDISPUTED FACTS

PROPOSED UNDISPUTED FACTS	**EVIDENCE**
1. There is no clear evidence there ever was a 1751 grant.	Deposition of Dr. Charles Cutter ("Cutter Dep."), p. 87, lines 8-19; p. 89, lines 7-11 attached as **Exhibit 2**; Cutter Report, 50-51 attached as **Exhibit 3**.
2. No document describing the alleged 1751 grant exists.	Cutter Dep., 88, lines 7-15 attached as **Exhibit 2**.
3. Since 1680, there always were Spanish residents in the alleged "grant" area "intermixed" with Tigua tribal members.	Cutter Dep., 61, line 19 to 64, line 23 attached as **Exhibit 2**; Deposition of Dr. Rick Hendricks ("Hendricks Dep."), p. 32, lines 19-21 attached as **Exhibit 4**.
4. No Tigua Indians (or Ysleta Del Sur Pueblo members) participated in the 1825 survey of the alleged "grant."	Cutter Dep., 134, lines 21-22 attached as **Exhibit 2**.
5. In 1841, the Tigua Indians disavowed the 1825 survey.	Cutter Dep., 145, lines 2-17 attached as **Exhibit 2**.
6. The historical record concerning the 1825 survey provides no evidence concerning who the 1825 survey was intended to benefit.	Cutter Dep., 172, lines 1-4 attached as **Exhibit 2**.
7. In 1845, the State of Texas was admitted into the United States.	ECF 1, ¶ 12; *see also* March 1, 1845 Joint Resolution for Annexing Texas to the United States, 5 Stat. 797-798; Joint Resolution dated December 29, 1845, 9 Stat. 108.
8. In 1848, the Mexican-American War ended with the Treaty of Guadalupe Hidalgo, Treaty of Peace, Friendship, etc., 9 Stat. 922.	ECF 1, ¶ 12; *see also* 1848 Treaty, 9 Stat. 922.
9. The United States did not confirm the alleged 1751 grant after the Treaty of Guadalupe Hidalgo.	Hendricks Dep. 18, 5-9 attached as **Exhibit 4**.
10. On February 1, 1854, the State of Texas enacted a state statute stating that "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 . . . is hereby fully recognized and confirmed."	Texas Act of February 1, 1854.

PROPOSED UNDISPUTED FACTS	**EVIDENCE**
11. At the time of the Texas 1854 land grant confirmation, a majority of the inhabitants in the "grant" area were non-Indian.	Hendricks Dep., p. 32, lines 19-21; p. 33, lines 4-15; and p. 33, line 20 to p. 34, line 12 attached as **Exhibit 4**; Report of Dr. John L. Kessell ("Kessell Rep."), Exhibit 1 to Depo. of John L. Kessell, Appendix A attached as **Exhibit 15**.
12. On May 10, 1873, the Texas Secretary of State, Mr. James P. Newcomb, certified the copy of the original 1854 Texas statute of February 1, 1854.	Deposition of Professor Lawrence C. Kelly ("Kelly Dep."), Exhibit 7 attached as **Exhibit 14**.
13. On May 28, 1873, pursuant to the Act of February 1, 1854, Texas Governor Edmund J. Davis executed a Patent to "The inhabitants of the Town of Ysleta."	Kelly Dep. Exhibit 8 attached as **Exhibit 14**; Hendricks Dep., 54, line 3 to 55 line 4, Exhibit 9A.
14. On January 27, 1858, the Texas legislature enacted an "Act to Provide for the Incorporation or Towns and Cities" (the "1858 Act").	Hendricks Report, 16; Hendricks Dep. Exhibit 8 attached as **Exhibit 13**.
15. Under the 1858 Act, the Town of Ysleta incorporated and subsequently conveyed at least 40 pieces of property to individuals.	Hendricks Report, 18 attached as **Exhibit 5**.
16. On May 9, 1871, the Texas legislature enacted "An Act to Incorporate the Town of Ysleta in El Paso County" ("1871 Act").	Hendricks Report, 19; Hendricks Dep. Exhibit 10 attached as **Exhibit 13**.
17. The 1871 Act authorized conveyances of land within the 1854 grant area on petitions from people seeking to buy land.	*See* Hendricks Dep. Exhibit 10 attached as **Exhibit 13**.
18. The 1871 Act also authorized, following the public posting of any petition for purchase, any Ysleta citizen to speak for or against granting the petition.	Hendricks Report, 20 attached as **Exhibit 5**.
19. On August 9, 1873, Town of Ysleta Mayor Baptiste Mariany signed fifteen deeds to occupied properties.	Hendricks Report, 20 attached as **Exhibit 5**.
20. On August 23, 1873, Town of Ysleta Mayor Jose Maria Gonzalez signed forty-one deeds.	Hendricks Report, 20 attached as **Exhibit 5**.

PROPOSED UNDISPUTED FACTS	**EVIDENCE**
21. Under the 1871 Act, the Town conveyed "common lands" within the "grant" area to 259 petitioners, including 43 individuals identified as Tigua Indians.	Hendricks Report, 20 attached as **Exhibit 5**.
22. Neither the Pueblo nor its predecessor protested the incorporation of the Town of Ysleta or any of the subsequent conveyance by the Town under the 1871 Act.	Hendricks Dep. 55, line 6 to 56, line 8 attached as **Exhibit 4**.
23. On or about August 3, 1880, the Town of Ysleta incorporated for a third time.	Hendricks Report, 22 attached as **Exhibit 5**.
24. During the period from August 3, 1880 until October 25, 1895, the Town of Ysleta made 277 conveyances of land within the "grant" area, of which 18 to 20 were made to Indians.	Hendricks Report, 22 attached as **Exhibit 5**.
25. On April 2, 1889, the Texas legislature enacted "An Act to quiet land titles in the towns of Socorro, Ysleta and San Elizario" ("!889 Act").	Hendricks Report, 23 attached as **Exhibit 5**, and Exhibit 14 attached as **Exhibit 13**.
26. The 1889 Act provided that all genuine deeds made by the Town of Ysleta to lands within its corporate limits are declared valid and operative, "saving the rights of any third parties."	Hendricks Report 23-24 attached as **Exhibit 5**, and Exhibit 14 attached as **Exhibit 13**.
27. The 1889 Act "was designed to quiet title to create a more perfect title and thus legalize the transfers of the land, including to non-Indians.	Hendricks Report 24 attached as **Exhibit 5**.
28. On June 3, 1915, the Texas legislature enacted a law that validated sales and conveyances of land granted to towns and villages by Spanish and Mexican authorities.	Hendricks Dep. Exhibit 15 attached as **Exhibit 13**; Hendricks Report 25 attached as **Exhibit 5**.
29. The United States Congress has never confirmed or recognized, or authorized a proceeding that has confirmed or recognized, the alleged 1751 Grant.	Hendricks Dep. 18, lines 5-9 attached as **Exhibit 4**.
30. The United States Congress has never extended the federal Non-Intercourse Act, 25 U.S.C. ¶ 177, to the alleged 1751 Grant as a whole.	*See* H.R. Rep. No. 558, 90th Cong. 1st Sess. (1967); Senate Rep. No. 100-36, 100th Cong. 1st Sess. (1987).

PROPOSED UNDISPUTED FACTS	**EVIDENCE**
31. The United States Congress has never extended the federal Non-Intercourse Act, 25 U.S.C. ¶ 177, to the Property at issue in this action.	*See* H.R. Rep. No. 558, 90th Cong. 1st Sess. (1967); Senate Rep. No. 100-36, 100th Cong. 1st Sess. (1987).
32. The United States Congress expressly confirmed land grants to the Pueblos of New Mexico.	Act of December 22, 1858, 11 Stat. 374.
33. The United States Congress expressly extended the Non-Intercourse Act and related statutes to the New Mexico Pueblos in 1851.	Act of February 27, 1851, 9 Stat. 574, 587.
34. In 1968, Congress enacted "An Act Relating to the Tiwa Indians of Texas," Act of April 12, 1968, Public Law 90-287 ("1968 Act").	Hendricks Dep. Exhibit 20 attached as **Exhibit 13**.
35. The Pueblo had neither been subject to federal supervision nor received any federal Indian services before passage of the 1968 Act, and that situation continued after PL 90-287, the 1968 Act, was signed into law.	Hendricks Report, 30 attached as **Exhibit 5**; Hendricks Dep. 92, lines 12-22 attached as **Exhibit 4**.
36. The 1968 Act did not affect the Pueblo's land claim, did not provide a confirmation of the "grant" to the Pueblo by the U.S. Congress, and failed to assert the Pueblo's amalgamated property rights.	Hendricks Dep. 87, line 16 to 88, line 19; 92, line 14 to 93, line 22 attached as **Exhibit 4**; Hendricks Report, 30 attached as **Exhibit 5**.
37. It was not until 1987 that the United States first recognized the Tigua Indians (renamed at that time the Ysleta Del Sur Pueblo) as a federally recognized tribe.	*See* 25 U.S.C. §§ 1300g *et seq.*; Hendricks Dep. 92, lines 12-22 attached as **Exhibit 4**.
38. On August 18, 1987, Congress enacted legislation concerning the Ysleta Del Sur Pueblo, Public Law 100-89, 101 Stat. 666, codified at 25 U.S.C. §§ 1300g *et seq*. ("1987 Act").	25 U.S.C. §§ 1300g *et seq*.
39. The 1987 Act established a reservation for the benefit of the Pueblo.	25 U.S.C. §§ 1300g(3), 1300g-4.
40. The reservation established by the 1987 Act did not include the alleged "grant" or any lands not specifically mentioned in the Act..	Hendricks Report, 35 attached as **Exhibit 5**; Hendricks Dep. 110, lines 2-11 attached as **Exhibit 4**; *see also* 25 U.S.C. §§ 1300g(3), 1300g-4.
41. The reservation created by the 1987 Act did not include the Property.	25 U.S.C. §§ 1300g(3), 1300g-4.

PROPOSED UNDISPUTED FACTS	**EVIDENCE**
42. On August 12, 1993, the Pueblo filed an affidavit of Julian Granillo with the County Clerks of five Texas counties, which asserted claims to lands covering all of the five counties including alleged Senecu, Socorro, Ysleta, and Ascarate grants in El Paso County.	Jackson Dep. Exhibit 2, P04002-P04013, **Exhibit 12 to this Motion**.
43. Following the filing of the 1993 Affidavit, the Pueblo took no action through the courts or otherwise to assert its alleged superior title to the lands within the alleged Ysleta "grant" area until at the earliest 2016.	Jackson Dep. at p. 117, line 25-p. 121, line 4 attached as **Exhibit 11**.
44. The Pueblo asserts it presently has legal title to all lands within the 1751 alleged "grant."	Pueblo Answer to Interrogatory No. 7: "[L]egal title to the Pueblo's 1751 Land Grant remains to this day vested in Ysleta Del Sur Pueblo." Attached as **Exhibit 1**.
45. The City acquired the properties which comprise the Property between 1944 and 1970.	Affidavit of Jorge A. Acosta, ¶¶ 4(a)-4(g) attached as **Exhibit 7**.
46. The City formally annexed a larger area encompassing the alleged "grant" area by City Ordinance No. 1285 on March 15, 1955.,; *see*;	Affidavit of Laura Prine, ¶¶ 6-7 attached as **Exhibit 8**.
47. By virtue of the annexation, the City undertook delivery of services throughout the alleged grant area and exerts taxing authority to support such services and its police power regulation.	Affidavit of Laura Prine, ¶¶ 6-7 attached as **Exhibit 8**.
48. The City undertook development of Blackie Chesher Park ("Park") between 1958 and 1991.	Affidavit of Joel W. McKnight, ¶¶ 3-6 attached as **Exhibit 9**.
49. Blackie Chesher Park occupies 69.0 acres of the 111.73 acres of the Property claimed in this case, to provide recreation facilities for residents of the area,	Affidavit of Joel W. McKnight, ¶¶ 3-6 attached as **Exhibit 9**.
50. Since 1991, the Park has been in a continuous and long-term series of improvements to better serve the needs of nearby communities. As built it contains a playground, soccer fields, softball fields, a baseball field, public art, and walking paths**.**	Affidavit of Joel W. McKnight, ¶ 7 attached as **Exhibit 9**.

PROPOSED UNDISPUTED FACTS	**EVIDENCE**
51. To support improvements to the Park, the City has committed to a Texas Department of Parks and Wildlife grant, requiring commitment of the lands and facilities to park purposes.	Affidavit of Joel W. McKnight ¶ 9, attached as **Exhibit 9**.
52. Numerous public entities occupy lands within the alleged "grant" area, in addition to the City, including the Ysleta Independent School District, the County of El Paso, El Paso County Water Improvement District No. 1, El Paso Housing Authority, El Paso Water Utilities, a division of the City of El Paso, People of the State of Texas, Texas A & M University, The United States of America, and at least three utility companies.	Affidavit of Mariano Soto, attached as **Exhibit 10** to this Motion, ¶¶ 2-5(a)-(k), and attached **Exhibits B, C, and D**.
53. The Pueblo failed to give notice of objections to such actions, including specifically development of Blackie Chesher Park and a City Police Command Center and Ysleta Independent School District elementary school in the immediate vicinity of the Park.	Depo. of Ronald L. Jackson, p. 117, line 25-p. 121, line 4 attached as **Exhibit 11**.
54. City officials were unaware of the Pueblo's claims until after this action was filed.	*See* Affidavit of Joel W. McKnight, ¶ 11, Affidavit of Prine, ¶ 9 attached as **Exhibit 9**.