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, RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF, YSLETA DEL SUR PUEBLO

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DEFENDANT, CITY OF EL PASO'S, RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF, YSLETA DEL SUR PUEBLO

Defendant, City of El Paso ("City"), 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, responds to the Motion for Summary Judgment of the Plaintiff, Ysleta Del Sur Pueblo, ECF 57 ("Pueblo Motion") as follows:

INTRODUCTION

The Pueblo Motion describes two positions that purportedly support entry of summary judgment of some sort regarding its Verified Complaint for Declaratory Judgment Confirming Title to Real Property (ECF 1) ("Complaint"), which seeks to quiet YDSP's alleged title to 111.73 acres of land (the "Property") based on an alleged 1751 Spanish land grant. ECF 1, ¶¶ 1, 5. It contends, in Point I, Ysleta del Sur Pueblo had "official legal status as a Pueblo de Indios." ECF 57 at 2-9. It then contends, in Point II, the federal Indian Non-Intercourse Act "Applies to the Lands at Issue." ECF 57 at 10-18. It purports to support those positions by enumerating a total of 64 assertedly "undisputed facts." ECF 57, Apps. A & B.

As demonstrated in this Response and the accompanying Annex, the Pueblo's legal arguments and Proposed Undisputed Facts do not support the entry of summary judgment in the Pueblo's favor.[1]

[1] The City responds to the Pueblo's proposed "Undisputed Facts," including by identifying "Controverting Evidence," in the Annex attached to this Response, which consists of Annex Appendix A, responding to the Pueblo's Appendix A, and Annex Appendix B, responding to the Pueblo's Appendix B.

SUMMARY OF ARGUMENT

The Pueblo's Complaint (1) relies exclusively upon title under an alleged "1751 Spanish Land Grant," ECF 1, ¶¶ 9, 28, and (2) asserts, as its only pleaded basis for claiming federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362, its alleged grant rights are protected by the 1848 Treaty of Guadalupe Hidalgo ("Treaty"), ECF 1, ¶ 16. Nonetheless, it now moves for summary judgment without mentioning in 18 pages of brief the alleged 1751 Grant, the year 1751, or the 1848 Treaty.[2] Instead, its entire Motion appears to seek judgment regarding two matters, neither of which is mentioned or alluded to in the Complaint: Spain considered the Pueblo a "Pueblo de Indios;" and, its claim to title to lands under a source nowhere identified in the Motion is protected by the federal Indian Non-Intercourse Act of 1790, as amended, 25 U.S.C. § 177 ("Non-Intercourse Act").[3] Summary judgment is unwarranted on either ground.

First, the Motion does not demonstrate whether "Pueblo de Indios" status pertains to a claim over which the Court has subject matter jurisdiction, and it does not. *See infra* Point I. However, whether the Pueblo had status as a "Pueblo de Indios" is of little consequence because the status pertains primarily to an Indian entity's internal relations, as recognized by Spanish or Mexican authorities, and access to certain lands. It does not establish exclusive landholdings over any specific lands, and the historic record here reflects (1) there is no alleged 1751 grant but, even if there were, (2) the Pueblo never had exclusive landholdings in the "intermixed" Tigua and

[2] Only the Treaty is mentioned in the Motion, and only in its proposed undisputed facts. *See, e.g.*, Pueblo Undisputed Fact Nos. 8-10.

[3] Perhaps seeking to shift the Complaint's exclusive focus away from the alleged 1751 grant, the Motion proposes the summary judgment it requests apply to "any lands the Pueblo proves that it owns at the trial of this action.' ECF 57 at. 18. The City would object to any effort to recast claims at this late stage.

Spanish Ysleta area. It would turn history on its head to now declare judicially it has exclusive property rights. *See infra* Point II.

Second, as the City argued in its Motion for Summary Judgment filed July 29, 2019, ECF 56, the Complaint does not allege a claim under the Non-Intercourse Act, *See* ECF 56 at 1, n.2, and its pleaded claim under the Treaty fails because the Pueblo's alleged 1751 Spanish grant never received the required Congressional confirmation. Accordingly, the Court should not reach the issue whether the Pueblo has the alleged Pueblo de Indios status, because that status could not support federal question jurisdiction over any well-pleaded claim. ECF 56 at 18-19. *See infra* Point III.

Third, even if the Court were to address the un-pleaded Non-Intercourse Act claim, it lacks merit because the Non-Intercourse Act does not support reaching back to protect tribal title under land grants of prior sovereigns under the Treaty that Congress never confirmed. The Pueblo's reliance on cases addressing claims for aboriginal title, undisputedly not at issue here—or grants confirmed by federal treaties or statutes—does not support extending the Act to the alleged grant. *See infra* Point IV. More than 160 years after the Treaty, there is no single federal case affirming unconfirmed tribal title under a "Pueblo de Indios" theory or confirming federal court protection of an alleged Spanish or Mexican grant never Congressionally confirmed. The Court should reject the Pueblo's unfounded effort to divest the City of the Property while unsettling innumerable other titles.

I. THE COURT SHOULD NOT ADDRESS THE "PUEBLO DE INDIOS" MOTION BECAUSE IT WILL NOT MATERIALLY ADVANCE RESOLUTION OF THE MERITS.

The Pueblo's motion for summary judgment on Pueblo de Indios grounds[4] cannot be dispositive of the claims alleged in the Complaint. The Pueblo apparently intends to employ the contention to support claims to lands the Motion does not define under legal theories it leaves open-ended.[5] Given such a factually and legally untethered presentation, the Court's, and the parties', efforts to address the issue now would not materially advance resolution of the merits.[6]

Although Fed. R. Civ. P. 56(g) permits the Court to "enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case," the Pueblo's Motion stretches the "partial summary judgment" aspect of Rule 56 past its breaking point. While the 2010 amendments to Rule 56(a) allow for motions on only part of a claim or defense, guidance from a court addressing the similar Rule 56(g) motion is instructive: the grant of partial rulings must still serve to "materially expedite the administrative process . . . or to enable the Court to dispose of any claims in the litigation" *United States v. Kellogg Brown & Root, Inc.*, 1:04-CV 42, 2015 WL 10937548, at *2 (E.D. Tex. June 10, 2015). The "Pueblo de Indios" motion accomplishes neither.

[4] As the Pueblo has not mentioned or made reference to the foundational claim of its Complaint, the alleged 1751 Grant, this analysis treats the Motion as one for partial summary judgment.

[5] This tactic is particularly counter-productive for summary judgment purposes given the uncertainty recently injected into the case as to the theory underlying the Pueblo's claim to title by the testimony of its only expert witness historian on the Spanish and Mexican periods, Dr. Charles C. Cutter, disavowing the existence of the alleged 1751 grant of lands to the Pueblo. *See* City's Motion for Summary Judgment, ECF 56, Point I, *and* Dr. Cutter's Rebuttal to Report of John L. Kessell, June 27, 2019 at 6-7. *See* City's Annex App. B. Add'l Evid. Nos. 40, 41.

[6] Fifth Circuit precedent forecloses the Pueblo's effort to insert a new claim under the Non-Intercourse Act through summary judgment. *See* Point III, *infra.*

In a case similar in important respects to this one, *Kellogg Brown & Root* held the better course was to defer ruling to trial:

> Given that this case involves ambiguous issues of first impression, an order under Rule 56(g) establishing the facts proposed by the government is inappropriate. The denial of summary judgment does not purport to decide a question of law or fact. It "merely postpones decision of any question; it decides none."

(Internal citations omitted).

By similar logic, the court in *Cardenas v. Kanco Hay, L.L.C.*, No. 14-1067-SAC, 2016 WL 3881345, at *7 (D. Kan. July 18, 2016), found a fragmentary resolution by motion for partial summary judgment unproductive:

> There may be parts of claims, such as liability, upon which a motion for partial summary judgment may be granted. This would be consistent with the history of Rule 56. See 10B Federal Practice & Procedure § 2736 (2016). But, that is a much larger aspect or "element" of plaintiff's negligence claim than the issues raised in plaintiff's motion. Plaintiff's motion asks the court to make piecemeal findings on matters which the court cannot confidently decide on the basis of the summary judgment record. This is not consistent with Rule 56 or Rule 1 because it does not promote a just, speedy or inexpensive determination of this dispute. Instead, it encourages wasteful motion work relating to issues which, at least in this case, are infused with questions of fact and, perhaps, credibility.

See also Motis Energy, LLC v. SWN Prod. Co., LLC, in which Judge Atlas of the Southern District of Texas rejected a partial summary judgment motion on "liability" because that term was "not an element of a breach of contract claim" for which the movant brought suit. No. 4:17-CV-00962, 2018 WL 8732889, at *6 (S.D. Tex. Oct. 17, 2018). The court recognized "[t]he Fifth Circuit has long held a district court, 'in its discretion in shaping the case for trial, may deny summary judgment as to potions of the case that are ripe therefor, for the purpose of achieving a more orderly or expeditious handling of the entire litigation.'" As applicable here, the court quoted the Advisory Committee comments to the 2010 Amendments: "'The court may conclude that it is better to leave

open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event."

Any slight chance the Pueblo's Motion would expedite resolution of any portion of the Pueblo's case as framed in its Complaint is far outweighed by the risk of an under-informed resolution devoid of critical and complex factual and legal context.

The Pueblo appears to view its motion as a component to be plugged into whatever it might advance as a claim to divest the City's title, and imperil numerous others', to "*any lands the Pueblo proves that it owns at the trial of this action*." ECF 57, at 1, 18 (emphasis added). The Court should decline to address the Pueblo's "Pueblo de Indios" Motion at this stage because the issue cannot be appropriately addressed without reference to the context in which it would be asserted to advance a specific claim, in this case, to specific lands under a specific legal theory. Here, the claim ultimately fails precisely because of facts and circumstances inextricably tied to the application of the doctrine in the uncharacteristic context of an area inhabited at all times by a mixed Indian and Spanish population. Any determination of the issues outside of, and prior to consideration of, the full factual context, is premature and risks resulting in a conclusion that may prove fundamentally wrong.

If, however, the Pueblo seeks to employ the requested "Pueblo de Indios" declarations in pursuit of a claim not forwarded in its earlier pleadings—the previously unalleged claims the Non-Intercourse Act applies, or if it seeks to substitute a "Pueblo de Indios" claim for its previously alleged claim under the 1751 grant—it is barred from doing so. A motion for summary judgment cannot be used to raise claims not "well-pleaded" in the Complaint. *See U.S. ex rel. DeKort v. Integrated Coast Guard Systems*, 475 Fed.Appx. 521, 522 (5th Cir. 2012). *See* Point III, *infra.*

II. WHETHER THE PUEBLO WAS A "PUEBLO DE INDIOS" CANNOT SUPPORT ITS CLAIMS TO TITLE UNDER THE FACTS OF THIS CASE.

Even if the Court were to consider the Pueblo's Motion pertaining to its alleged "Pueblo de Indios" status, it would not materially advance resolution of the issues here. Neither the published articles, nor its expert's testimony, nor the slim caselaw it advances suffice to parlay possible recognition as a "Pueblo de Indios" into support for a claim to the alleged 1751 grant or the Property.

For reasons which will become abundantly clear, the Pueblo seeks to advance its "Pueblo de Indios" contention in concept, divorced from the facts on the ground. Recognition as a Pueblo de Indios status did not imply any specific land base for a Pueblo, and there is no credible evidence of a specific grant to the Pueblo. Given the history of the Ysleta area, in which at all times following 1680 Tiguas, and other Indians, and an increasing number of Spanish residents co-existed within the alleged grant area, recognition as a Pueblo de Indios, if given, at most accorded the Tigua rights to live and farm in the Ysleta area, alongside the Spanish settlers who were their neighbors. It could not support the exclusive right to possession claimed here. The Pueblo advances no authority such status can invest a Pueblo de Indios to exclusive title to lands inhabited by the mixed Indian and Hispanic community present at all times at Ysleta,

A. The Pueblo's Cited Authority Does Not Support Claims to Exclusive Right to the Grant Area.

The Pueblo's contention it was considered a Pueblo de Indios by Spain must be considered in light of the undisputed facts: (1) there was no 1751 Spanish grant to the Pueblo, *see* City Mot., ECF 56, p. 4-5; (2), possibly influenced by "liberalized" Mexican policies undermining land rights of indigenous peoples, *see* City's Annex Appendix A, Controverting Evidence ("Annex App. A Contra. Evid.") to Pueblo Fact Nos. 36, 37, the alleged 1825 survey relied upon by the Pueblo, *see*

Complaint, ECF 1, ¶¶ 10, 11, was created without Pueblo involvement and was later disclaimed by the Pueblo for that reason, *see* City Mot. p. 5, and Annex App. A Contra. Evid. Nos. 36, 37; and (3) Spanish (or Mexican) residents always were present in the Ysleta area, and in increasing numbers, "intermixed" with the Tigua. City Mot., p. 5, n. 4, and Annex App. A Contra. Evid. No. 31.

Whether or not the Pueblo had a traditional internal governing structure and, as a general matter, Spanish law protected lands "held by the Indians,"[7] the record and cited law fail to demonstrate Pueblo de Indios status could support exclusive possession either of the Property or the more than 8,000 acre alleged "grant" which forms the only pleaded legal predicate for the Pueblo's claim to the Property.

The caselaw the Pueblo advances in support of its Pueblo de Indios contention is unsupportive or more likely contradictory. *In re Contests of City of Laredo,* 675 S.W.2d 257, 265–66 (Tex. App. 1984), *writ refused NRE* (Nov. 28, 1984), is a water case and does not involve Indian lands at all. Consequently, the extended quotations from the case at pages 5-6 of the Pueblo's Motion pertain both to rights of non-Indian communities and their intersection with Indian rights under Spanish law. The Motion suggests incorrectly that all references to "Pueblo" or "pueblo" in the long quotes pertain to Indian pueblos, but that is not the case: the case concerns the non-Indian City of Laredo, formerly the non-Indian Pueblo de Laredo.[8]

[7] *See* Pueblo Mot., ECF 57, 3, *citing* Recopilacion, Book IV, Title 12, Law 17.

[8] "The pueblo water right is the paramount right of a town or city of this country as successor of a Spanish or Mexican pueblo . . . for the use of the town or city and its inhabitants." *City of Laredo,* 675 S.W. 2d at 259.

As is critical here, *City of Laredo* further confirms that Spanish law sought to separate Spanish from Indian lands and communities, requiring separation to separate areas, "where the Indians may have their game, without getting mixed up with the other Spanish game," 675 S.W.2d at 263, n.4, *quoting* Recopilacion, Book IV, tit. 5, Law 6, *quoting* Recopilacion, Book IV, tit. 5, Law 6. The undisputed evidence here is that precisely the opposite occurred in the "intermixed" Ysleta community[9]. *See* Annex App. A Contra. Evid. No. 31.

The only other judicial authority the Motion cites, *United States ex rel. Pueblo of San Ildefonso v. Brewer*, 184 F. Supp. 377, 379-80 (D.N.M. 1960), *cited* Pueblo Motion at 8, underscores two reasons the Pueblo's claims fail as a matter of law:

First, Judge Waldo Rogers of the District of New Mexico recognized two federal statutes applied: as required by federal law, the Pueblo of San Ildefonso's grant from the Crown of Spain "was confirmed [by Congress] on December 22, 1858, 11 Stat. 374, to which "[t]the [federal] patent . . . was executed on November 1, 1864." 164 F. Supp. at 378.[10] Judge Rogers further found another federal statute "dispositive of the case": Act of June 7, 1924, ch. 331, 43 Stat. 636, known as the Pueblo Lands Act of 1924, which applied to the New Mexico Pueblos and specifically addressed, as applied to San Ildefonso, the manner in which the title federally confirmed by the 1858 statute and 1864 patent could be divested.

Second, at least three of the seven conditions in the numbered paragraphs the *Brewer v. San Ildefonso* court concluded applied to Spanish grants to Indians under Spanish law, 184 F. Supp. at 379, are notably absent here: there is no evidence here of a "grant" by the "Viceroy,

[9] *City of Laredo* also contradicts the Motion's premise that Indian rights must be communal: "Indians shall be left in possession of the full amount of lands belonging to them, *either singly or in communities*, . ." *Id.* at 266, n.15 (emphasis added).

[10] *See* City's Mot., Point II.B,2, ECF 56, pp. 11-15.

Governor [or] Captain-General" of the lands claimed," *Id.* at 379, ¶ 3; there is no grant to Ysleta "in the name of the Pueblo," *id.* ¶ 7; and, contrary to the requirement "[a]ll non-Indians were expressly forbidden to reside upon Pueblo lands." *Id.* ¶ 4, at all times from 1680 to present, non-Indians were a constant, and growing, percentage of the Ysleta population. *See* Annex App. A Contra. Evid. No. 22 The conditions for a grant of lands to a Pueblo de Indios are undisputedly not present here.

B. The Discovery Record Does Not Support Claims to Exclusive Right to the Property of the Alleged "Grant" Area.

Refuting application of the "Pueblo de Indios" construct to support a claim to title is the mixed Spanish, non-Indian—and members of other tribes or Pueblos—and Tiguas present from 1680 to present at Ysleta. The Pueblo's expert on the history of Ysleta during the Spanish and Mexican period, Dr. Charles C. Cutter, testified: (a) there were 17 Spanish heads of households in present at Ysleta in 1692, Cutter Dep. 58, lines 19-23, consistent with the preference of Governor De Vargas for "mixed Spanish and Indian residence," which he believed "best served Crown and colony," Cutter Dep. 41, line 11-14, a policy that never changed during the colonial period; and (b) the Indian as compared to Spanish residential "proportions changed. But it seems like throughout the colonial period there were Hispanic residents," and they were "mixed" with the Tiguas; Cutter Dep. 61, line 25-62, line 21, Cutter Dep., 58, line 19-62, line 21, Annex App. A, Contra. Evid. Nos. 22, 26. Further, the demographic data identified in the Report of Dr. John L. Kessell ("Kessell Rept."), at 10-11, 13-14, 18-19, and Appendix A (tabulation of census data), attached as Annex App. A, Contra. Evid. Nos. 22, 31, establishes that, by 1749, over 1 in 10 residents were Hispanic, by 1760, over one-third were Hispanic, and in 1776 and 1784, well before the 1825 survey relied upon by the Pueblo, over half were Spanish, with the Spanish majority consistently established thereafter.

Dr. Cutter's testimony reflects further doubt whether the Pueblo can be considered a Pueblo de Indios in any sense supporting a grant of exclusive possession of any land. Unlike New Mexico Pueblos, he recognized there is no "central residential structure occupied exclusively by Tigua members. Cutter Dep. 61, line 9-12. Instead, the "the population was dispersed, small farms around an area." Cutter Dep. 61, lines 15-18. He is not aware of "another Pueblo [with] . . . that kind of residential pattern of Spanish living within and side-by-side the Pueblo members." Cutter Dep. 64, lines 19-22. That residential pattern continued throughout the Spanish colonial and Mexican period. Cutter Dep. 65, lines 5-14. Annex App. A, Contra. Evid. Nos. 22, 31

The demographic data Dr. Cutter and Dr. Kessell found further refutes the Pueblo's position the alleged "grant" arose from a "congregacion" or "reduccion" process under Spanish colonial law intended to reinforce Indian communities. *See* Pueblo's Motion, ECF 57, at 3, n. 2, Proposed Fact No. 6. As recognized by the *City of Laredo* case, 675 S.W.2d at 263, n.4, and *Brewer v. Pueblo de San Ildefonso,* 184 F. Supp. at 379, Spanish colonial law did not countenance non-Indians, Spanish or otherwise, residing within lands granted to Pueblos. Dr. Cutter, who testified he believed Ysleta del Sur's status derived from a "congregacion" or "reduccion," was unaware of "other congregaciones where—elsewhere, that included substantial populations of non-tribal members." Cutter Dep. 101, lines 21-24; Annex App. A, Contra. Evid. Nos. 22, 31. There is substantial, irreconcilable dispute whether, beyond being recognized as having the internal structure and relationship with Spain of a Pueblo de Indios, the Pueblo had exclusive property rights derived from status as a Pueblo de Indios.

The historic record pertaining to Ysleta raises a fundamental issue, whether the undisputedly mixed Indian and Hispanic population could give rise to the right of exclusive possession of the alleged grant lands the Pueblo now claims. At all times from 1680-1682 through

the Spanish and Mexican periods non-Indians were present, landholders, and farmers alongside the Tigua and other tribes' members present at Ysleta. *See* Annex App. A, Contra. Evid. Nos. 22, 31. The Pueblo advances neither federal caselaw nor expert testimony establishing precedent for recognizing the rights claimed here in any comparable situation.

III. Because Federal Question Jurisdiction Must be Pleaded on the Face of the Complaint, the Pueblo's Motion for Summary Judgment as to the Application of the Indian Non-Intercourse Act Should be Denied.

The Complaint pleads unambiguously a claim for relief under an alleged 1751 Spanish land grant it claimed was enforceable under the February 2, 1848 Treaty of Guadalupe Hidalgo ("Treaty"). The Complaint neither expressly nor impliedly claimed the Court should invalidate titles under the Non-Intercourse Act, 25 U.S.C. § 177. ECF 1, *passim.* However, even if the Complaint had alleged a Non-Intercourse Act claim, it would be unavailing, because the Non-Intercourse Act applies only to tribal claims under doctrines recognized under federal law; it cannot apply to rights under Spanish or Mexican law, whether by a Crown grant or otherwise, without confirmation by Congress or by a proceeding authorized by Congress, because such claims are not recognized, indeed are foreclosed, under federal law. *See* City's Mot., Points II.A, B, ECF 56. This Court lacks jurisdiction under 28 U.S.C. § 1331 both because the only claim pleaded under the "Constitution, laws, or treaties of the United States," that pleaded under the Treaty, is foreclosed by controlling authority *and* because the Complaint did not plead a claim under the Non-Intercourse Act, and the City's defense the Non-Intercourse Act does not apply does not infuse a federal question claim that it applies into the Complaint.[11] *See* City's Mot., Point II.D, ECF 56.

[11] However, even if a Non-Intercourse Act claim were properly before the Court, it would be insubstantial because the Act does not reach undocumented and Congressionally unconfirmed claims under the Treaty and the laws of prior sovereigns. *See* Point IV, *infra.*

As a general principle, "[a] claim which was not pleaded in the complaint[] cannot be raised for the first time on summary judgment." *Shah v. Plano Indep. Sch. Dist.*, No. 4:17-CV-00685, 2018 WL 5795456, at *3 (E.D. Tex. Nov. 5, 2018). Just as "Plaintiff[ ] cannot assert new claims in a response to a motion for summary judgment," *Brewer v. Bank of Am.*, No. 4:13-CV-638, 2014 WL 12575864, at *5 (E.D. Tex. Sept. 29, 2014), *R. & R. adopted sub nom. Brewer v. Bank of Am., N.A.*, No. 4:13-CV-638, 2015 WL 123775 (E.D. Tex. Jan. 7, 2015), *aff'd*, 627 F. App'x 358 (5th Cir. 2015), neither can a plaintiff assert new claims in a motion for summary judgment based upon defendant's answer to the complaint. *See U.S. ex rel. DeKort v. Integrated Coast Guard Systems*, 475 Fed.Appx. 521, 522 (5th Cir. 2012) (a motion for summary judgment cannot be used to raise new claims); *see also N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004) (while "we recognize that the pleading requirements under the Federal Rules are relatively permissive, they do not entitle parties to manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment."

Federal court decisions under the "well-pleaded complaint doctrine" recognize a claim "pertains solely to what appears on the face of the complaint without reference to interrogatory answers or other extraneous evidence." *Dardeau v. W. Orange-Grove Consol. Indep. Sch. Dist.*, 43 F. Supp. 2d 722, 726 (E.D. Tex. 1999) (movants "cannot now point to an interrogatory answer to support their argument that plaintiffs have sought monetary damages for state constitutional violations and therefore have invoked federal question jurisdiction."). The Pueblo cannot piggyback onto the City's affirmative defense, incorporate the subject of the defense—without formal amendment—into its claims for relief, and then request this Court grant its motion for summary judgment on that issue.

As the City demonstrated in its Motion, federal question jurisdiction exists only when the "well-pleaded" allegations of a complaint establish (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). Neither prong of the applicable test applies to salvage the Complaint here. The Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under 28 U.S.C. § 1331.[12]

IV. Even if the Court Considers a Non-Intercourse Act Claim, It Would Fail.

Any claim under the Non-Intercourse Act must fail because (1) no claim arising under the Non-Intercourse Act can protect rights asserted to arise under Spanish or Mexican law unless the claim was confirmed by Congress or in a Congressionally prescribed proceeding, and no applicable confirmation exists here;[13] and (2) the Pueblo's Complaint alleges neither aboriginal title nor rights protected by treaty of statute, the doctrines present in all of the authority the Motion cites in support of Non-Intercourse Act applicability. The City's research disclosed no authority supporting applying the Non-Intercourse Act to claims of Native American groups arising under other sources, and none specifically arising under alleged law of a prior sovereign under the Treaty unconfirmed by Congress. The cases establish the principle the Non-Intercourse Act pertains only to claims asserting some federally recognized form of tribal title. No such claim is presented here.

A. The Non-Intercourse Act Does Not Apply to Claims Under Spanish or Mexican Law Not Confirmed by Congress.

[12] To the extent the Pueblo claims jurisdiction with respect to its contention the Act of the Texas Legislature dated February 1, 1854, *see* ECF 1, ¶ 20, its claim would arise under Texas state law and also would not support federal question jurisdiction.

[13] The City incorporates by reference its Motion for Summary Judgment, Part II, ECF 56.

The inescapable consequence of the Supreme Court's holdings that only Congress can validate a land grant or claim under Spanish or Mexican law asserted under the Treaty, *see* City's Mot., Point II A, B, ECF 56 at 7-18, is that the same rule applies to such claims of Indian tribes, bands, or Pueblos. Consistent with the rule stated in *Tameling v. United States Freehold & Emigration Co*., 93 U.S. 644 (1877), and its progeny, Congress expressly legislated to confirm grants to the New Mexico Pueblos,[14] grants to tribes generally in the Territory of New Mexico,[15] and as to tribes in other parts of the lands acquired from Mexico under the Treaty.[16] Claims by Indians, like that asserted here, *to enforce grants under Spanish or Mexican law* were barred if not presented under the applicable statutory procedure. *See Barker v. Harvey*, 181 U.S. 481, 486-87 (1901).[17]

In *Barker*, certain Mission Indians in California, as defendants, claimed a right of permanent occupancy based on occupation of the premises long before the plaintiffs' predecessors received Mexican land grants. *Id*. at 481. Plaintiffs' predecessors, however, received confirmation

[14] *See* Act of December 22, 1858, 11 Stat. 374, confirming Spanish grants to numerous New Mexico Pueblos, including the Pueblos of Jemez, Acoma, San Juan, Picuris, Cochiti, San Felipe, and Santo Domingo, among others.

[15] See Act of July 22, 1854, 10 Stat. 308, establishing the Office of the Surveyor General for New Mexico; see also Act of March 3, 1891, 26 Stat. 854, establishing the Court of Private Land Claims to provide for the settlement of land claims in the New Mexico Territory and other areas.

[16] *See* Act of March 3, 1851, 9 Stat. 631 (California).

[17] In *Barker v. Harvey*, the Court stated that the United States' obligation under the Treaty "is entirely consistent with the right of this Government to provide reasonable means for determining the validity of all titles within the ceded territory, to require all persons having claims to land to present them for recognition, and to decree that all claims which are not thus presented shall be considered abandoned." *Id*.

of, and patents for, their land grants through a Congressionally-approved process. *Id*. at 482-84. After reviewing certain authority, the Court continued:

> As between the United States and Warner [Plaintiffs' predecessor in title], the patent is conclusive of the title of the latter as any other patent from the United States is of the title of the grantee named therein. As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land within the language of the statute "part of the public domain of the United States." . . . So far, therefore, as these Indians are concerned, the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the Government, and the Government has conveyed it to Warner.
>
> If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration . . . Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.

Id. at 490-92. While arising in California, the Court's analysis, when considered in light of its other decisions in *Tameling* and other cases discussed in the City's Motion, *see* Point II.B, ECF 56, applies with equal force in this case.[18]

The failure of the Pueblo to secure Congressional confirmation of its alleged 1751 grant precludes application of the Non-Intercourse Act here as Congressional confirmation of a land grant would be a necessary prerequisite to its application. Without a confirmed grant, there is no land to which the Non-Intercourse Act protections could attach. The City's research disclosed no

[18] In fact, should the Pueblo be correct that the El Paso area was subject to the United States' obligations under the Treaty of Guadalupe Hidalgo regarding recognition of Spanish and Mexican land grants, this analysis applies with even greater force. Moreover, if the United States failed in its obligations under the Treaty, this action is not the proper forum and these parties are not proper parties to address such claims. *See Barker*, 181 U.S. at 488 ("If the treaty was violated . . . it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court . . . has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the . . . United States, as a sovereign power, chooses to disregard.")

case applying the Non-Intercourse Act to a grant or other title asserted under Spanish or Mexican law that had not received Congressional recognition, and the Pueblo cites none.

B. The Pueblo's Motion Does Not Support Applying the Non-Intercourse Act to Claims Under Spanish or Mexican Law.

The Pueblo's Motion relies exclusively on (1) tribal claims to lands confirmed by Congress or as prescribed by Congress or (2) for claims to possessory rights under aboriginal title.[19] Neither line of cases pertains here.

1. Congress Expressly Applied the Non-Intercourse Act to the New Mexico Pueblos in the Cases the Pueblo Cites.

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The cases the Pueblo relies on holding the Non-Intercourse Act applicable to the New Mexico Pueblos afford the Pueblo no support here. In each of the three cases, a federal statute expressly mandated the Non-Intercourse Act apply to the New Mexico Indian's lands,[20] the Spanish grants to which also were confirmed specifically by Congress. *See, e.g., United States v. Sandoval,* 231 U.S. 28, 39 (1913), *cited,* Pueblo Mot. at 11, 15, ECF 57. As the *Sandoval* Court noted, the Spanish grant to the Santa Clara Pueblo "was confirmed by Congress since the acquisition of that territory by the United States. 10 Stat. 309, chap. 103, § 8; 11 Stat. 374, chap. 5," and, as to the New Mexico Pueblos, "by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the government

[19] The only case not relying on aboriginal title or a Congressional grant among its citations, *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1046-47 (5th Cir. 1996), dismissed the Tonkawa Tribe's complaint on other grounds and ruled Texas' land commitment unenforceable; hence, it never decided the applicability of the Non-Intercourse Act to the alleged State of Texas grant.

[20] Section 7 of the February 21, 1851 Appropriations Act for the Indian Department provided: "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).

have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . .". 231 U.S. at 46. Similarly, the Court in *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926), cited, Pueblo Mot. at 11, recognized 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, 9 Stat. 587, c. 14, s 7, including the Laguna Pueblo the Congressionally confirmed grant to which was involved there.

To the same effect, *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 242, n.9 (1985), *cited*, Pueblo Motion at 16, while interpreting restrictions on alienation imposed by the later Pueblo Lands Act of 1924, 43 Stat. 636, 641[21], recognized "[i]n 1851, Congress extended the provisions of "'the laws now in force regulating trade and intercourse with the Indian tribes' to 'the Indian tribes in the Territor[y] of New Mexico.' 9 Stat. 587." The application of the Non-Intercourse Act to the New Mexico Pueblos, even if the Non-Intercourse Act were pleaded here, would not support applying it to the Pueblo's claim here.

These repeated enactments reflect the Congressional determination that the distinctive characteristics of Pueblo lands required statutory clarification to render the Non-Intercourse Act applicable. Recognizing the effect of Congress' not having so legislated with respect to Ysleta del Sur requires consideration of the "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 506, (2000). "Congress will not be presumed to have done a useless, ineffective, or absurd thing." *Consumers Union of U.S., Inc. v. Sawhill*, 512 F.2d 1112, 1118 (Temp. Emer. Ct. App.), *on reh'g*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975). In

[21] The Pueblo Lands Act of 1924, Act of June 7, 1924, 43 Stat. 636, intended to clarify and resolve conflicting land claims within Pueblo land grants, also applied expressly to the Pueblos of New Mexico only.

Fund for Animals v. Kempthorne, 472 F.3d 872, 877 (D.C. Cir. 2006), the court upheld the Fish and Wildlife Service's decision to exclude mute swans from protection as consistent with statutory language of certain amendments:

> Plaintiffs' interpretation of the sense of Congress provision would render the Reform Act meaningless, as plaintiffs candidly acknowledge . . . Even accepting that Congress on occasion may enact a statute that turns out to have no effect, courts presume that Congress has used its scarce legislative time to enact statutes that have some legal consequence. That plaintiffs interpret the Reform Act to be an empty gesture is yet another indication that their submission is erroneous.

See also *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 216(1995) (interpretation that would leave a statute "utterly without effect" is "a result to be avoided if possible"); *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977), ("[w]e should not and do not suppose that Congress intended to enact unnecessary statutes."). Congress' not extending the Non-Intercourse Act to the Pueblo, despite it having done so for the New Mexico Pueblos, reflects an intent not to include Ysleta del Sur and other "transplanted" Pueblos in the El Paso area under the Act.

2. The Only Other Cases Cited Address Aboriginal Title Claims Not Present Here.

Equally unsupportive of any Pueblo claim the 1751 grant is protected by the Non-Intercourse Act are the authorities it cites addressing claims based on aboriginal title. *See, e.g., United States v. Santa Fe Pac. R. Co.,* 314 U.S. 339 (1941), *cited,* Pueblo Mot. at 11, ECF 57, which concerned the Hualapai (spelled Walapai in the opinion) Tribe's claims to its ancestral aboriginal lands, expressly excluding Spanish grant claims. *Id.* at 345 ("[w]hatever may have been the rights of the Walapais under Spanish law, [it would not affect the claims considered pertaining to] Indian [aboriginal] rights of occupancy."). The Tribe's lands in Arizona were within New Mexico in 1851 and, hence, subject to the same statute extending the Non-Intercourse Act to the New Mexico Pueblos as applied to the Pueblos in *Sandoval* and *Candelaria*. *Id.* at 350.

As its own General Counsel, Ronald L. Jackson, who should know, as he filed a $4 billion aboriginal title claim against the State of Texas on behalf of the Pueblo,[22] testified, the Pueblo asserts no aboriginal title claim in this action. *See* Dep. of Robert L. Jackson, 95, line 24 – 98, line 7. Attached as Annex App. B Contra. Evid. No. 28.

The several *Oneida Indian Nation* cases the Motion cites apply a similar analysis. They hold the Non-Intercourse Act applicable to claims to possession of land under federal treaties between the United States and the Oneida Nation confirming the Nation's rights to its aboriginal lands. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); *cited* Pueblo Mot. at 15l; *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 538 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226 (1985), *cited*, Pueblo Mot. at 14.

To the extent *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 498-99 (1967), and *Alabama-Coushatta Tribe of Tex. v. United States*, No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000), hold the Non-Intercourse Act applies to tribal land claims within Texas, both concerned only claims arising from aboriginal title, and neither addressed tribal claims under alleged Spanish or Mexican grants that never received Congressional confirmation, as the Treaty required, to render them judicially enforceable. The Non-Intercourse Act does not serve to over-ride the imperative of Congressional confirmation effectuating Congress' powers over implementation of international treaties.[23] Any recognition of rights arising under Spanish and Mexican law, as

[22] *See Ysleta del Sur Pueblo v. State of Texas*, W.D. Tex. No. EP 99 CA 0098, dismissed July 2, 1999, *on appeal*, Fifth Circuit No. 99-50656, affirmed (Feb. 1, 2000) (per curiam). The Complaint from the cited case is attached as part of Annex App. B Contra. Evid. No. 28.

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[23] Non-Intercourse Act inapplicability is supported by cases reflecting some recognized tribal title, or recognized reservation status, is necessary to apply statutes pertaining to tribes to specific lands. *See Cass City. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113-14 (1998) (exemption

evidenced by statutes applicable to New Mexico, Arizona, and California, must stem from recognition by Congress, or under a procedure prescribed by Congress for that purpose.

CONCLUSION

Both Pueblo Motions for Partial Summary Judgment suffer from an unqualified absence of precedent: no reported decision—or even a factual forerunner in any other Indian community—supports treating an historically "mixed" Indian and non-Indian community as a "Pueblo de Indios" *or* declaring the Indian community arising from that mix entitled to all rights in the commonly occupied area. Prematurely addressing this complex and unprecedented issue on such a partial record will not advance resolution of the merits. Application of the Non-Intercourse Act, if adequately pleaded, to such a grant is equally unsupported by any citation of applicable authority. For the foregoing reasons, Defendant, City of El Paso, requests that summary judgment in favor of the Pueblo be denied.

Dated: August 12, 2019

Respectfully submitted,

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from state taxation); *Bates v. Clark*, 95 U.S. 204, 208-09 (1877) (laws restricting importation of alcohol into "Indian country.").

-And-

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WE HEREBY CERTIFY that on this 12th day of August 2019, we served the foregoing electronically upon the following parties or counsel:

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

APPENDIX A: Response to Proposed Undisputed Facts for Section I of Pueblo's Motion for Summary Judgment entitled:

YSLETA DEL SUR PUEBLO HAD OFFICIAL LEGAL STATUS AS A "PUEBLO DE INDIOS."

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
1. The Spanish colonial province of New Mexico exercised jurisdiction over El Paso, including the geographic area that encompasses Ysleta del Sur Pueblo, after the Pueblo Revolt of 1680 until the 1821 Treaty of Cordoba.	Undisputed	
2. During the Spanish colonial period, the governor of New Mexico at Santa Fe had the same jurisdiction over the four Indian Pueblos downriver from El Paso as over all the other Indian Pueblos in New Mexico.	Undisputed	
3. Spain had a well-developed body of law on indigenous communities and their land rights. This body of law was compiled, codified, and published in 1681 as "Recopilación de Leyes de los Reynos de las Indias ("Recopilación").	Undisputed	

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
4. The Recopilación consisted of earlier laws, like the 1493 Bull Inter Caetera issued by Pope Alexander VI and 1537 Sublimis Deus issued by Pope Paul III, and granted exclusive jurisdiction of newly discovered lands to the Spanish crown and established the crown's obligation to evangelize indigenous communities, making the Indians wards of the crown and furthering colonial aims.	Undisputed	
5. The Recopilación applied throughout the Spanish colonial period until 1821.	Undisputed	
6. The Recopilación provided Spanish authorities instructions on the process of congregación, also referred to as reduccion, which involved moving Indians from one area to another or concentrating scattered Indian settlements to start a new Indian Pueblo. This facilitated Spanish administrative and religious control.	Disputed as to applicability to "mixed" Indian and Spanish communities.	*In re Contests of City of Laredo*, 675 S.W.2d 257, 263, n.4 (Tex. App. 1984) 675; *Pueblo de San Ildefonso v. Brewer*, 184 F. Supp. 377, 379 (D.N.M. 1960), Cutter Dep. 101, lines 21-24. Attached as **Annex Appendix A, Exhibit 1**.
7. Once a group of Indians went through congregación, the new or larger group of Indians would be designated with official status of "Pueblo de Indios."	Disputed, as to applicability to "mixed" Indian and Spanish communities present at Ysleta	Cutter Dep. 50, lines 9-16 (Spanish policy favored pre-existing communities); 50, line 23-51, line 10 (Spanish policy adopted to local conditions); Cutter Dep. 73, line 8-16 (none in New Mexico; except on where established at site of prior habitation). Attached as **Annex Appendix A, Exhibit 2**.

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
8. "Pueblo de Indios" existed throughout the Spanish empire in the New World as it was an important feature to the Spanish crown because it tied Indian groups to the political, legal, and colonial system of Spain.	Undisputed	
9. The designation of "Pueblo de Indios" conferred land and resource rights and the right to an internal self-government.	Disputed.	Kessell Dep. 35, line 19-24. Attached as **Annex Appendix A, Exhibit 3**.
10. The Spanish crown provided legal advocates, known as "Protector de Indios" to adjudicate and defend Pueblos de Indios and Indians generally.	Disputed.	Cited depo. text does not support proposed fact.
11. Under the Recopilación, a "Pueblo de Indios" was to have sufficient land and resources to sustain itself.	Disputed as to variations in local application..	Objection to all questions cited at Cutter Dep. 154: 10-155:4, leading.
12. Spain established and regularized a minimum land base for Indian communities. The minimum land base (measured in varas) varied from region to region.	Disputed as to application to conditions at Ysleta.	Kessell Dep. 122, line 3-9 (spirit of Recopilacion that Indians have sufficient land to sustain themselves); Kessell Dep. 84, line 4-85, line 12. Attached as **Annex Appendix A, Exhibit 4**.
13. The Spanish colonial province of New Mexico had a territorial norm for the minimum land bases for the Indian Pueblos in New Mexico. The four-square-league grant (approximately 17,400 acres) [was] considered	Disputed as to application to Ysleta.	Kessell Depo. 35, line 25-36, line 16 (four square leagues not applicable to El Paso area pueblos). Expert Report of John L. Kessell, Ph.D 13-14. Attached as **Annex Appendix A, Exhibit 5**.

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
since as early as 1704 a legal minimum land base at the Pueblo Indian missions. This minimum land base was considered a right of the Indian Pueblos.		
14. In 1598, Spain established its first permanent settlement in the colonial province of New Mexico.	Undisputed	
15. The Tiguas of Ysleta del Sur Pueblo came from Isleta Pueblo, and settled in the area of present-day El Paso, Texas, as a result of the Pueblo Revolt in 1680.	Undisputed	
16. Ysleta del Sur Pueblo came about as a process of congregación.	Disputed	Cutter Dep. 101, line 21 to 102, line 9 (Recopilacion did not contemplate mixed Indian/non-Indian congregaciones, and no evidence congregacion created at Ysleta. Attached as **Annex Appendix A, Exhibit 6**.
17. The Tiguas brought with them a pueblo organizational structure with a military and leadership system in place consisting of war captions, officers, and a governor, as typical pueblos are organized.	Disputed	Cited text of Kessell Dep. does not support proposition asserted ("I wouldn't characterize Ysleta as a tribal government yet')
18. A 1684 decree appointing Domingo Jironza Petriz de Cruzate's to New Mexico governorship established that the Tiguas were assigned land as a result of congregacion and referred to the Tiguas of Ysleta as a "Pueblo de Indios." The decree instructed Cruzate	Undisputed	

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
to be "making congregacions and settlements as may be necessary at the most favorable sites for the Indians who may have left [the upper Rio Grande[.]]"		
19. Spanish colonial authorities recognized Ysleta del Sur Pueblo as an Indian Pueblo with a tribal government having authority over its members and land.	Undisputed	
20. The Spanish used the Tiguas of Ysleta as laborers to construct La Mission de San Antonio de Ysleta del Sur Catholic Church, also known as mission Corpus Christi de la Ysleta de los Tiguas. This mission is still used by the Pueblo today.	Undisputed	
21. Don Diego de Vargas was the territorial Governor of the colonial province of New Mexico in 1691.	Undisputed	
22. Governor de Vargas recognized Indian land rights under the Recopilación or other Spanish law for the Indian Pueblos in the colonial province of New Mexico, which included Ysleta del Sur Pueblo.	Disputed	Cutter Depo. 41, lines 2-14 (De Vargas believed "mixed" Spanish and Indian communities at Ysleta best served Crown and colony." Cutter Depo. 39, line 10-40, line 23 (Spanish arrive with Tigua in 1680-1682 and by 1692 17 Spanish heads of families. Cutter Depo. 58, line 19-65, line 14 (mixed Spanish and Indian inhabitants, farmers, no central Pueblo structure, knows of no "upriver" Pueblo with

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
		similar population pattern). Attached as **Annex Appendix A, Exhibit 7**.
23. A 1692 dispute between Governor de Vargas and Franciscan friar Fray Joaquin de Hinojosa arose when Hinojosa requested that Governor de Vargas define specific boundaries for the Pueblos' Indian land and to convey to the friars mission lands and facilities that the Indians were occupying. Governor de Vargas refused to define specific boundaries of the Pueblos' Indian land and refused to convey the lands being occupied by the Indians to the friars.	Undisputed	
24. The Franciscans wanted a specific boundary for what was recognized as communal Indian land.	Undisputed	.
25. Restrictions on alienation are consistent with the Recopilación, which Governor de Vargas applied throughout New Mexico.	Undisputed	
26. In 1692 a boundary dispute between the Ysleta del Sur Pueblo and a neighboring pueblo confirm that Ysleta del Sur is a "Pueblo de Indios" with assigned land rights. Governor de Vargas settled the dispute by establishing a boundary between the two Pueblos thereby recognizing land rights to	Disputed as to term "assigned land rights" and reference to Recopilacion.	Cutter Dep. 57, line 1-58, line 25; Cited text indicates a boundary line between undefined lands of two Pueblos. Does not define extend of lands. Attached as **Annex Appendix A, Exhibit 8**.

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
both Pueblos and applying the Recopilación which provided that "they were to have an area that will sustain their corporate entity."		
27. Spanish maps from the 18th century confirm Ysleta del Sur Pueblo is a "Pueblo de Indios."	Undisputed	
28. In May of 1726, Brigadier Pedro de Rivera visited the El Paso area and in his inspection report he made clear reference to Ysleta del Sur Pueblo being a "Pueblo de Indios."	Disputed	Cited text states only Ysleta was a Pueblo; does not state "Pueblo de Indios.".
29. A document authored in 1755 confirms Ysleta del Sur Pueblo is a "Pueblo de Indios." El Paso resident, Francisco Joaquín Sánchez de Tagle laid claim to lands in the area of the Ysleta del Sur Pueblo and the Socorro Pueblo. Local magistrate, Justicia Mayor Manuel Antonio San Juan, summoned the officials and leadership of the "Natives of the Pueblos of Señor San Antonio de la Ysleta and Nuestra Señora de la Pura y Limpia Concepción del Socorro" to determine whether the claim by Tagle would prejudice the Pueblos' land rights.	Undisputed	
30. A Protector de Indios was appointed to Ysleta del Sur Pueblo and the Socorro Pueblo in order to ensure	Undisputed	

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
no harm would come to the lands "which belong to them as Pueblos."		
31. There has been no change since 1680 that would affect Ysleta del Sur Pueblo's designation as a "Pueblo de Indios."	Disputed	Kessell Repot p. 11-12, 19-21 and Appendix A. Attached as **Annex Appendix A, Exhibit 9**.
32. In 1825, Felix Pasos surveyed the Ysleta del Sur tract at the directive of the governor of the state of Chihuahua to identify lands that were vacant and available for exploitation.	Disputed as to basis for purpose of survey.	Objection leading questions to Expert Cutter; Cutter Dep. 133, line 20-138, line 10; Kessell Rept. 14-19. **Annex Appendix A, Exhibit 10**

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
33. The directive of the governor of the state of Chihuahua was based on Chihuahua's 1825 colonization law which made vacant lands subject to private ownership and exploitation.	Disputed	Cutter Dep. 133, line 20-138, line 10; Kessell Rept. 14-19. Attached as **Annex Appendix A, Exhibit 10**.

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
34. The state of Chihuahua's colonizing law exempted "ancient communities" from the sale and settlement of vacant lands to private ownership. Indian Pueblos fell within the exception for ancient communities in Mexico's colonization law.	Undisputed	
35. The state of Chihuahua's colonizing law did not include the area of El Paso and Ysleta del Sur Pueblo.	Undisputed	

PROPOSED UNDISPUTED FACTS	DISPUTED or UNDISPUTED	CONTROVERTING EVIDENCE (if disputed)
36. Felix Pasos identified that there were no vacant lands within the Ysleta del Sur tract in his 1825 field survey notes and therefore the state of Chihuahua's new colonization law did not affect Ysleta del Sur Pueblo's land rights in any event.	Dispute "and therefore the State of Chihuahua's new colonization law did not affect Ysleta del Sur Pueblo's land rights in any event." Unestablished.	Cutter Dep., 61, line 19 to 64, line 23; Deposition of Dr. Rick Hendricks ("Hendricks Dep."), p. 32, lines 19-21. Attached as **Annex Appendix A, Exhibit 11**.
37. Felix Pasos 1825 survey notes show that he began his survey at the northeast corner because it was a well-known feature or marker, "evidently on the border of Ysleta and neighboring land."	Disputed as to basis for conclusion "on the border of Ysleta and neighboring land."	Cutter Dep. 135, line 20-138, line 10; Kessell Rept. 14-19. Attached as **Annex Appendix A, Exhibit 10**.
38. Proceedings carried out by Prefect Jose Maria Elias Gonzalez in June 1841 to resolve a boundary dispute between the Pueblos of Ysleta del Sur and Senecu recognized each as distinct corporate entities with functioning Pueblo Indian governments.	Undisputed.	
39. There was no change of Ysleta del Sur Pueblo's designation as a Pueblo de Indios" or its land rights during the period of Mexican sovereignty.	Disputed.	Kessell Rept. 14-19 (survey by Hispanics, population change); Cutter Dep. 139, line 11-142, line 2 (transfer approved by Mexica authorities); Kessell Dep. 138, l. 1-141, line 6. Exhibit 7 to Dep. of John Kessell. Attached as **Annex Appendix A, Exhibit 12**.

City of El Paso's Additional Material Facts for Section I of Pueblo's Motion for Summary Judgment entitled:

"YSLETA DEL SUR PUEBLO HAD OFFICIAL LEGAL STATUS AS A 'PUEBLO DE INDIOS.'"

PROPOSED UNDISPUTED FACTS	EVIDENCE
40. There was no grant to Ysleta del Sur Pueblo in 1751.	Deposition of Dr. Charles Cutter ("Cutter Dep."), p. 87, lines 8-19; p. 89, lines 7-11; Cutter Report, 50-51. Attached as **Annex Appendix A, Exhibit 13**.
41. No document describing the alleged 1751 grant exists.	Cutter Dep., 88, lines 7-15. Dr. Cutter's Rebuttal to Report of John L. Kessell, June 27, 2019 at 6-7. Attached as **Annex Appendix A, Exhibit 14**.
42. 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; Deposition of Dr. Rick Hendricks ("Hendricks Dep."), p. 32, lines 19-21. Attached as **Annex Appendix A, Exhibit 11**.
43. 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 **Annex Appendix A, Exhibit 15**.

APPENDIX B: Response to Proposed Undisputed Facts for Section II of Pueblo's Motion for Summary Judgment entitled:

"THE INDIAN NON-INTERCOURSE ACT APPLIES TO THE LANDS AT ISSUE."

PROPOSED UNDISPUTED FACTS	UNDISPUTED or DISPUTED	CONTROVERTING EVIDENCE (if disputed)
1. The Spanish colonial province of New Mexico exercised jurisdiction over El Paso, including the geographic area that encompasses Ysleta Del Sur Pueblo, after the Pueblo Revolt of 1680 until the 1821 Treaty of Cordoba.	Undisputed.	
2. Spanish colonial authorities recognized Ysleta del Sur Pueblo as an Indian Pueblo with a tribal government having authority over its members and land.	Undisputed.	
3. The Spanish colonial province of New Mexico had a territorial norm for the minimum land bases for the Indian Pueblos in New Mexico. The four-square-league grant (approximately 17,400 acres) [was] considered since as early as 1704 a legal minimum land base at the Pueblo Indian	Disputed in part regarding the assertions concerning the "four square league" and its application to Pueblo land grants.	Kessell Depo. 35, line 25-36, line 16 (four square leagues not applicable to El Paso area pueblos). Expert Report of John L. Kessell, Ph.D. 13-14. Attached as **Annex Appendix B, Exhibit 1**.

PROPOSED UNDISPUTED FACTS	UNDISPUTED or DISPUTED	CONTROVERTING EVIDENCE (if disputed)
missions. This minimum land base was considered a right of the Indian Pueblos.		
4. The Mexican State of Chihuahua exercised jurisdiction over El Paso, including the geographic area that encompasses Ysleta del Sur Pueblo, from 1824 until the Treaty of Guadalupe Hidalgo of 1848.	Disputed, to the extent that the Republic of Texas and the United States did not accede to the exercise of such jurisdiction.	*Clark v. Hiles*, 2 S.W. 356, 357 (Tex. 1886) (acknowledging Republic of Texas' December 16, 1836 declaration); *see also* Report of Professor Lawrence C. Kelly, p. 8 and fn. 15; Expert Report of Rick Hendricks, PhD. at 4 ("The annexation [by the United States] acknowledged Texas' claim to the west bank of the Rio Grande as the boundary with Mexico. . . ."); *see generally Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181, 183-189 (S.D. Texas 1945), citing and quoting various sources, including (a) March 2, 1836 Texas Declaration of Independence; (b) May 14, 1836 Treaty of Velasco (signed by Mexican President Santa Anna, but not ratified by the Mexican Congress); (c) Republic of Texas Act of December 19, 1836, defining the boundaries of the Republic of Texas. Attached as **Annex Appendix B, Exhibit 2**.
5. The Republic of Texas was established in 1836.	Undisputed.	
6. The Republic of Texas was annexed into the United States on December 29, 1845, and formally joined the union on February 19, 1846.	Undisputed.	
7. The Mexican State of Chihuahua	Disputed, to the extent that the	*Clark v. Hiles*, 2 S.W. 356, 357 (Tex. 1886)(acknowledging Republic of

PROPOSED UNDISPUTED FACTS	UNDISPUTED or DISPUTED	CONTROVERTING EVIDENCE (if disputed)
exercised jurisdiction over El Paso until 1848.	Republic of Texas and the United States did not accede to the exercise of such jurisdiction.	Texas' December 16, 1836 declaration); *see also* Controverting Evidence in response to Proposed Undisputed Fact No. 4, *infra*. Attached as **Annex Appendix B, Exhibit 2**.
8. The Republic of Texas never exercised jurisdiction over the El Paso area.	Disputed.	*See* Controverting Evidence in response to Proposed Undisputed Fact No. 4, *infra*. Attached as **Annex Appendix B, Exhibit 2**.
9. In 1848, the United States and Mexico entered the Treaty of Guadalupe Hidalgo.	Undisputed.	
10. Article V of the Treaty of Guadalupe Hidalgo establishes the Rio Grande as the boundary between the United States and Mexico.	Undisputed.	
11. Articles VIII and IX of the Treaty of Guadalupe Hidalgo guarantee and protect the property rights of Mexican citizens.	Undisputed that Articles VIII and IX are property quoted in the "Evidence" supporting the proposed fact.	
12. The United States' Congress enacted the first Indian Trade and Intercourse Act in 1790. It was reenacted with minor modifications in 1793, 1796, 1799, and 1802. The current version, the Act of June 30, 1834, codified	Undisputed.	

PROPOSED UNDISPUTED FACTS	UNDISPUTED or DISPUTED	CONTROVERTING EVIDENCE (if disputed)
as 25 U.S.C. 177, continues uninterrupted the prohibition on tribal land conveyances (hereinafter "Non-Intercourse Act").		
13. The El Paso area did not come within the jurisdiction of the United States until February 2, 1848, the effective date of the Treaty of Guadalupe Hidalgo.	Disputed.	Report of Professor Lawrence C. Kelly, p. 8 and fn. 15; Expert Report of Rick Hendricks, PhD. at 4 ("The annexation [by the United States] acknowledged Texas' claim to the west bank of the Rio Grande as the boundary with Mexico. . . ."); *see generally Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181, 183-189 (S.D. Texas 1945), citing and quoting various sources, including (a) March 2, 1836 Texas Declaration of Independence; (b) May 14, 1836 Treaty of Velasco (signed by Mexican President Santa Anna, but not ratified by the Mexican Congress); (c) Republic of Texas Act of December 19, 1836, defining the boundaries of the Republic of Texas. *See also* Amaya, 62 F. Supp. at 188-191, quoting and citing various sources including: (a) President Polk's 1845 Inaugural Address; (b) President Polk's December 1, 1845 First Annual Message to Congress; (c) L.W. Newton and H.P. Gambrell, History of Texas, p. 244; Wooten's History of Texas, Vol. 1, p. 688, citing President Polk's December 8, 1846 Second Annual Message to Congress. Attached as **Annex Appendix B, Exhibit 3**.
14. The Compromise of 1850 established the Territory of New Mexico and established the	Undisputed.	

PROPOSED UNDISPUTED FACTS	UNDISPUTED or DISPUTED	CONTROVERTING EVIDENCE (if disputed)
boundary between the Territory of New Mexico and the State of Texas.		
15. As result of the Compromise of 1850, El Paso, including the geographic area that encompasses Ysleta del Sur Pueblo, fell within the boundaries of El Paso County, Texas.	Undisputed.	

City of El Paso's Additional Material Facts for Section II of Pueblo's Motion for Summary Judgment entitled:

"THE INDIAN NON-INTERCOURSE ACT APPLIES TO THE LANDS AT ISSUE."

PROPOSED UNDISPUTED FACTS	EVIDENCE
16. In the negotiation and ratification of the Treaty of Guadalupe Hidalgo of 1848, the United States retained the authority to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico to confirm bona fide grants from those governments.	*See, e.g.*, Act of July 24, 1854, 10 Stat. 308, An Act to Establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, etc. Attached as **Annex Appendix B, Exhibit 4**.
17. The United States Congress never confirmed a grant of land from Spain or Mexico to the Ysleta Del Sur Pueblo.	Hendricks Dep. 18, lines 5-9 attached as Exhibit 4 to City's Motion for Summary Judgment, ECF 56. Attached as **Annex Appendix B, Exhibit 5**.
18. In contrast, the United States Congress confirmed land grants to the Pueblos of New Mexico.	Act of December 22, 1858, 11 Stat. 374. Attached as **Annex Appendix B, Exhibit 6**.
19. The United States Congress never extended the Indian Non-Intercourse Act to any alleged Spanish or Mexican land grant to the Tigua or Tiwa Indians or its successor, the Ysleta Del Sur Pueblo.	*See* H.R. Rep. No. 558, 90th Cong. 1st Sess. (1967); Senate Rep. No. 100-36, 100th Cong. 1st Sess. (1987). Attached as **Annex Appendix B, Exhibit 7**.
20. 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 to City's Motion for Summary Judgment, ECF 56; Hendricks Dep. 92, lines 12-22 attached as Exhibit 4 to City's Motion for Summary Judgment, ECF 56. Attached as **Annex Appendix B, Exhibit 8**.
21. 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). Attached as **Annex Appendix B, Exhibit 7**.
22. The United States Congress affirmatively extended the Indian Non-Intercourse Act to the Pueblos of New Mexico.	Act of February 27, 1851, 9 Stat. 574, 587. Attached as **Annex Appendix B, Exhibit 9**.
23. 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 . . .	Texas Act of February 1, 1854.

is hereby fully recognized and confirmed."	
24. 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; Report of Dr. John L. Kessell ("Kessell Rep."), Exhibit 1 to Depo. of John L. Kessell, Appendix A attached as Exhibit 15 to City's Motion for Summary Judgment, ECF 56. Attached as **Annex Appendix B, Exhibit 10**.
25. 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 to City's Motion for Summary Judgment, ECF 56. Attached as **Annex Appendix B, Exhibit 11**.
26. 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 to City's Motion for Summary Judgment, ECF 56; Hendricks Dep., 54, line 3 to 55 line 4, attached as Exhibit 4 to City's Motion for Summary Judgment, ECF 56. Attached as **Annex Appendix B, Exhibit 12**.
27. 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 to City's Motion for Summary Judgment, ECF 56. Attached as **Annex Appendix B, Exhibit 13**.
28. The Pueblo does not assert a claim for aboriginal title to the Property of the alleged 1751 grant in the Complaint in this case.	Dep. of Robert L. Jackson, 95, line 24 – 98, line 7. Attached as **Annex Appendix B, Exhibit 14**.