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. CITY OF EL PASO, Defendant.	§ § § § § § § § § §	Case No. 3:17-CV-00162-DCG

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Summary judgment determinations on the two issues raised in the Pueblo's motion will significantly advance resolution of this case. First, once the Court confirms that Ysleta del Sur Pueblo had official legal status as a "Pueblo de Indios" under Spanish law, that shifts the burden at trial to the City to identify evidence that the Pueblo was not treated according to Spanish law, and therefore not provided a four square league grant as a result of that official legal status. Second, once the Court confirms that the Indian Non-Intercourse Act[1] applies to the Pueblo and the 111 acres at issue in this case, that means any purported conveyances of the 111 acres without the Pueblo and Congress' approval were void.

The City's Response largely addresses issues not involved in this motion – whether the Pueblo received a Spanish land grant, whether the Pueblo pled an aboriginal Indian title claim in its complaint, and whether the presence of Spanish persons within the Pueblo's grant negated the grant.

I. GRANTING YDSP'S MOTION FOR PARTIAL SUMMARY JUDGMENT WILL MATERIALLY ADVANCE RESOLUTION OF THE MERITS OF THIS CASE.

A. The Pueblo Seeks Rulings on Two Discrete Issues that are Central to its Claim that It Is the Rightful Holder of Title to the 111 Acres.

The City argues that the two issues upon which the Pueblo seeks summary judgment will not materially advance resolution of the case.[2] ECF 58 at 4-7. However, whether YDSP was a "Pueblo de Indios" under Spanish colonial law, and whether the Indian Non-Intercourse Act

[1] 25 U.S.C. §177.

[2] The City also argues that the Pueblo's "Motion does not demonstrate whether 'Pueblo de Indios' status pertains to a claim over which the Court has subject matter jurisdiction." ECF 58 at 3. However, whether the Pueblo had official legal status as a "Pueblo de Indios" pertains to the Pueblo's claim that it is the rightful holder of title to the 111 acres. This Court has jurisdiction over the Pueblo's claim because it arises under federal law.

applies, are key issues that will advance the case. And because the City does not argue that there is any genuine issue of material fact, both issues can and should be decided now.

Whether the Pueblo was designated a "Pueblo de Indios" under Spanish law (the first issue on which the Pueblo's motion seeks a ruling) is a predicate to whether the Pueblo received a Pueblo four square league land grant (an issue that must be resolved in this action). The City agrees that YDSP was a "Pueblo de Indios," and does not argue there is any issue of material fact precluding summary judgment on that issue in favor of the Pueblo. But rather than stop there, the City moves to issues not raised in the Pueblo's motion and therefore reserved for trial. The City devotes most of its Response to arguing that the Pueblo did not receive a four square league Spanish land grant.[3] However, the Pueblo's motion does not seek a decision on that issue and the City's arguments in that regard are irrelevant to resolution of this motion. YDSP received a four square league Indian Pueblo land grant restricted by law from alienation. The City argues this was merely a discretionary and defeasible "right[s] to live and farm in the Ysleta area, alongside the Spanish settlers who were their neighbors," and, improbably, without secure title as against the Spanish Crown. ECF 58 at 8. That second argument by the City is not placed in issue by the present motion and remains to be addressed at trial.

[3] The City argues, without citation to fact or law, that "[r]ecognition as a Pueblo de Indios status did not imply any specific land base for a Pueblo . . . ." ECF 58 at 8. That is incorrect. The Recopilacion de Leyes de los Reinos de las Indias of 1681, and other Spanish colonial law and policy, required that Indian Pueblos be provided enough land and resources to support themselves. This and other land laws and policies were implemented in colonial New Mexico by providing each Pueblo a four square league grant from the Spanish Crown that was protected from encroachment and alienation. *See* Cutter June 27, 2019, Response Report, ECF 60-2 at 107 ("Much more than simply an 'Indian settlement,' the Pueblo de Indios had a specific political, institutional, and legal meaning, **a designation that carried with it rights to lands**, water, (and other natural resources), as well as the right to internal government." (emphasis added)).

Contrary to the City's contention, YDSP's legal theories in this case (not all of which are raised in the pending motion for summary judgment) are not "open-ended." ECF 58 at 5. The Pueblo's legal arguments in this case are focused: 1) YDSP was a "Pueblo de Indios" under Spanish colonial law, 2) YDSP received a four square league Spanish land grant and as a result holds title to the lands subject to this lawsuit, 3) the 111 acres is within that Spanish grant, 4) YDSP also holds aboriginal Indian title to the 111 acres, 5) Spanish, Mexican and American law all restricted alienation and privatization of the 111 acres, and 6) because there is no evidence of sovereign approval of a conveyance of the 111 acres by either the Spanish, Mexican or United States governments, YDSP holds title to that land.

If this Court finds that YDSP was considered a "Pueblo de Indios" under Spanish law, policy and administrative practice in colonial New Mexico, and that the Indian Non-Intercourse Act applies, it will simplify the issues at trial, allowing the Court to resolve the remaining issues of whether YDSP holds title to the 111 acres based on a Spanish four square league land grant to the Pueblo and/or based on aboriginal Indian title, and whether the lands were alienated in violation of law. In other words, if YDSP owned the 111 acres under Spanish law, and did so at the time the United States began exercising political control over the El Paso area, then the Court can enter its declaratory judgment confirming that the Pueblo has title to the 111 acres.

B. Case Law Cited by the City is Inapposite.

As the City notes, the 2010 amendments to Rule 56(a) expressly allow motions like the Pueblo's that focus on only part of a claim or defense. The City's citation to unreported district court cases from other jurisdictions is not to the contrary. For example, *United States v. Kellogg Brown & Root, Inc.*, No. 1:04-CV-42, 2015 WL 10937548 (E.D. Tex. June 10, 2015) did not even involve a motion for partial summary judgment seeking a ruling on a discrete issue of law

or fact. Instead, the motion there was a motion in limine seeking to limit the government's evidence. In *Cardenas v. Kanco Hay, L.L.C.*, No. 14-1067-SAC, 2016 WL 3881345, at *6 (D. Kan. July 18, 2016) the court denied defendant's motion for summary judgment because, unlike here, "material issues of fact preclude[d]" granting the motion. The facts here are undisputed. See Section II below. Finally, the City cites *Motis Energy, LLC v. SWN Prod. Co., LLC*, No. 4:17-CV-00962, 2018 WL 8732889, at *7 (S.D. Tex. Oct. 17, 2018) for the proposition that "[t]he 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." But because the City has conceded that YDSP was a "Pueblo de Indios" there is no need to leave this issue for trial. There is no "risk of an under-informed resolution devoid of critical and complex factual and legal context" as the City asserts, ECF 58 at 7.

The City's argument is not that resolution of the "Pueblo de Indios" issue will not advance the litigation, but is the opposite of that. The City fears that resolution of this question on the undisputed facts will advance the litigation further than the City would like. *Id.* That is not sufficient to defeat the Pueblo's motion for summary judgment.

II. YDSP WAS A "PUEBLO DE INDIOS" UNDER SPANISH COLONIAL LAW.

The historical record confirms that YDSP was a "Pueblo de Indios." *E.g.*, ECF 60 at 5-12 (cataloging events and documents wherein YDSP was recognized by Spanish authorities as a "Pueblo de Indios," or that status can be reliably inferred from the historical record); ECF 60-2 at 23-24 (Cutter March 4, 2019 Report [Conclusions to Section II on "Pueblo de Indios" designation] stating, "representatives of the Spanish crown recognized Ysleta del Sur as a distinctive entity, a 'pueblo de indios'"); ECF 60-2 at 126 (1727 Map by Francisco Alvarez

Barreiro with legend providing symbol for "Pueblo de Indios" and showing Senecu, Ysleta and Socorro as "Pueblo de Indios."[4]

The undisputed facts show that YDSP was a "Pueblo de Indios:"

> Undisputed Fact No. 19 (ECF 58 at p. 28): Spanish colonial authorities recognized Ysleta del Sur Pueblo as an Indian Pueblo with a tribal government having authority over its members and land.
>
> Undisputed Fact No. 29 (ECF 58 at p. 30): 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 Fact No. 38 (ECF 58 at p. 34): 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.

See also Undisputed Fact Nos. 1-8 (ECF 58 at pp. 24-26). A decision on the discrete issue of YDSP's status as a "Pueblo de Indios" will materially advance the resolution of this case and allow the trial to focus on the remaining issues which are dependent on disputed facts.

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

A. The Non-Intercourse Act Applies to All Indian Land Title.

The United States Constitution, federal common law, and the federal Non-Intercourse Act all prohibit alienation of Indian lands except by the Congress of the United States:

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

[4] Citations to page numbers are to the page numbers provided by the Court's ECF system at the top of each page.

25 U.S.C. § 177 (emphasis added). The statute is not ambiguous. It does not limit the source of the "title or claim" nor does it require congressional confirmation. The City is unable to identify a single case that states otherwise. Federal common law also protects Indians' rights to their land, protection that is not pre-empted by the Nonintercourse Act, "which put in statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974). The City's argument against this "accepted rule" has been resolved against the City's position for nearly eighty years:

> Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.'

United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-47 (1941).[5]

All that is necessary to invoke the protections of the Non-Intercourse Act in response to the City's defense is to show that YDSP: 1) is an Indian Tribe; 2) has "title or claim" to "lands;" 3) to which there has been an alleged "purchase, grant, lease, or other conveyance;" and 4) such conveyance was not "made by treaty or convention entered into pursuant to the Constitution." YDSP has submitted evidence showing there is no genuine issue of material fact as to any one of these elements. *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 903 (D. Mass. 1977) ("Whether it meets the criteria for protection under the Nonintercourse Act is a question of fact which is susceptible of proof like any other"). Because the City does not and cannot cite a single case holding the Indian Non-Intercourse Act is inapplicable without congressional confirmation, it is left to rely on cases in which other considerations were present but not dispositive.

[5] The *Santa Fe* Court rejected the "congressional affirmation" argument following a detailed analysis of the reasons Indian lands are protected under federal law in the first instance. *Id*.

By its terms, the Non-Intercourse Act protects **all** Indian land "title or claim" from alienation without the consent of Congress, including the 111 acres at issue in this case. *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir. 1976) (applying Non-Intercourse Act to Indian land set aside by the executive branch Indian Commissioner in 1859, without congressional confirmation).[6]

The City relies heavily on *Sandoval* and *Candelaria* to support its argument that an unambiguous federal statute still requires further congressional "confirmation" before it can apply to this federally recognized tribe of Pueblo Indians.[7] The City's argument is the same discredited "Pueblo people are not Indians" analysis made by the Supreme Court in *United States v. Joseph*, 94 U.S. 614 (1876), and early courts of New Mexico, but since rejected:

> While we recognized in [*Sandoval*] that the Indians of each pueblo, collectively as a community, have a fee-simple title to the lands of the pueblo (other than such as are occupied under executive orders), 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 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 (Territory v. Delinquent Tax List of Bernalillo County, 12 N. M. 136, 76 P. 307), was promptly followed by a congressional enactment annulling the taxes already levied and forbidding further levies and a decision of that court in 1907, construing the statute which prohibits the sale of liquor to Indians and its introduction into the Indian country as not including these Indians or their lands (United States v. Mares, 14 N. M. 1, 88 P. 1128), was shortly followed by an enactment declaring that the statute should be construed as including both.

United States v. Candelaria, 271 U.S. 432, 440–41 (1926). *See also Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 378 (1st Cir. 1975) ("In *Candelaria*, the Court

[6] "The acts of the heads of departments are the acts of the executive. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact." *U.S. v. Walker River Irr. Dist.*, 104 F.2d 334, 338–39 (9th Cir. 1939) (citations omitted).
[7] *U.S. v. Sandoval*, 231 U.S. 28 (1913); *U.S. v. Candelaria*, 271 U.S. 432 (1926).

held that the Pueblos did come within the [Non-Intercourse] Act. . . . The Court found that the Pueblos were a simple, uninformed people such as the Act was intended to protect and pointed to federal recognition in the past as evidencing Congress' intention to protect the Pueblos").

B. Canons of Statutory Construction Only Apply When a Statute is Ambiguous.

The City's citation to canons of statutory construction ignores the requirement that canons of construction only be applied when, unlike here, the statutory language is ambiguous:

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002). Canons of construction cannot be applied to interpret the Non-Intercourse Act because its language is unambiguous:

> the conclusion is inescapable that, as a matter of simple statutory interpretation, the Nonintercourse Act applies to the Passamaquoddies. **The literal meaning of the words employed in the statute, used in their ordinary sense, clearly and unambiguously encompasses all tribes of Indians**, including the Passamaquoddies; the plain language of the statute is consistent with the Congressional intent; and there is no legislative history or administrative interpretation which conflicts with the words of the Act.

Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 655 (D. Me.) (emphasis added), *aff'd* 528 F.2d 370 (1st Cir. 1975). Courts "cannot interpret federal statutes to negate their own stated purposes. *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973). Here, the City does not quote the statute, or make any attempt to argue that its language is ambiguous. Moreover, the City omits citation to the most important canons of statutory construction in cases involving Indian tribes – The Indian Canons of Construction:

> Finally, even if a latent ambiguity might be found in the statutory language, **two cardinal principles of statutory construction buttress plaintiffs' position that the Nonintercourse Act applies to all Indian tribes in the United States**, including the Passamaquoddies. The Supreme Court has consistently held that [1]

> language used in statutes conferring benefits or protection on Indians must be construed in a nontechnical sense, as the Indians themselves would have understood it, and [2] that all ambiguities in such statutes are to be resolved in favor of the Indians. The Court holds that **the Nonintercourse Act is to be construed as its plain meaning dictates** . . . .

Joint Tribal Council of Passamaquoddy, 388 F. Supp. at 660 (emphasis added).

C. The Treaty of Guadalupe Hidalgo did Not Require Congressional Confirmation of Pueblo Indian Land Title.

In its response to the City's motion for summary judgment, YDSP set out in detail the law confirming that the Treaty of Guadalupe Hidalgo is self-executing and does not require congressional confirmation to protect YDSP's treaty rights. ECF 60 at 16-18 (incorporated here by reference). *United States v. O'Donnell*, 303 U.S. 501, 511-12 (1938) ("While the treaty [of Guadalupe Hidalgo] provided that the claimants under Mexican grants might cause their titles to be acknowledged before American tribunals, it was silent as to the mode of selection or creation of such tribunals. The United States was left free to provide for them in its own way") (footnote omitted)); *accord Amaya*, 158 F.2d at 556 ("A treaty . . . is generally self-operating in that it requires no legislation by either Congress or the state.").

D. The Pueblo Pled An Aboriginal Title Claim.

The City's contention that "the Pueblo asserts no aboriginal title claim" is incorrect. ECF 58 at 2. Moreover, the City's contention is irrelevant to the present motion. *See also* response to City's alleged Undisputed Fact No. 28. Regarding the City's contention, the Pueblo's complaint avers facts showing that, as to the Property, the Pueblo had "actual, exclusive, and continuous use and occupancy 'for a long time."'[8] *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998 (Ct.Cl.1967). Use and occupancy is measured "in accordance with the way of life,

[8] ECF 1 at ¶¶ 25-30; ECF 1 at ¶29 ("The Property has been used by the Pueblo since before the 1751 Spanish land grant and continues to be used by the Pueblo.").

habits, customs and usages of the Indians who are its users and occupiers." *Id.* That is all that is required to state a claim based on aboriginal title.[9] A statement by a lawyer who is not counsel in this case, did not assist in drafting the complaint, and who was not testifying on behalf of the Pueblo regarding the complaint, is irrelevant.[10] That the words "aboriginal title" are not in the complaint is correct.[11] But equally clear is that those words are not necessary. *City of Shelby, Miss.*, 574 U.S. at 10. It is the Court, and not a witness at a 30(b)(6) deposition on different issues, to determine whether the Pueblo's complaint asserts an aboriginal title claim. *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) ("There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge.").

CONCLUSION

Ysleta del Sur Pueblo requests that the Court grant its motion and enter rulings in favor of the Pueblo (1) confirming that the Pueblo had official legal status as a "Pueblo de Indios" and (2) confirming that the Indian Non-Intercourse Act applies to the Pueblo and the 111 acres at issue.

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[9] The Supreme Court has rejected the need to plead legal theories in a complaint. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10 (Our decisions in *Bell Atlantic Corp. v. Twombly,* and *Ashcroft v. Iqbal* are not in point, for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. . . . For clarification and to ward off further insistence on a punctiliously stated "theory of the pleadings," . . . "The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that **it is unnecessary to set out a legal theory for the plaintiff claim for relief**." (italics in original, bold emphasis added).

[10] Mr. Jackson's testimony was not on behalf of the Pueblo, it was his own opinion. ECF 58-29 p. 5 (Jackson Dep. lines 14-18): "MR. BARNHOUSE: Once again, I would only note that is beyond the scope of the notice for this 30(b)(6) deposition. He's not -- this isn't an official position of the Pueblo. Now, at this point, he's testifying on his own."

[11] ECF 58-29 p. 7 (Jackson Dep. Lines 3-7): Counsel for the City asked, "Within the four corners of the complaint, do you find any reference to a claim that the Pueblo retains aboriginal title to the lands involved here?" Mr. Jackson responded: "I don't see it in the complaint."

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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