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, REPLY BRIEF TO PLAINTIFF, YSLETA DEL SUR PUEBLO'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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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, submits this Reply Brief in response to Plaintiff's, Ysleta Del Sur Pueblo, Response in Opposition to the City's Motion for Summary Judgment, ECF 60 ("Response") as follows:

The Pueblo's legal contentions and its proffered "Additional Material Facts" do not present material fact issues or legal positions that foreclose the City's Motion for Summary Judgment. The City's arguments and authority regarding (a) the absence of a 1751 grant (the pleaded basis for the claim), ¶ 9, ECF 1, (b) the absence of a Congressional confirmation of the Pueblo's alleged "grant"; (c) the applicability of the doctrine of laches; and (d) the indispensability of the State of Texas under Fed. R. Civ, P. 19, each independently serve as a basis for summary judgment.

I. WHETHER OR NOT A SURVIVING GRANT DOCUMENT IS REQUIRED, THE PUEBLO'S ONLY CLAIM WAS TO 1751 GRANT LANDS, AND THERE IS NO EVIDENCE OF A 1751 GRANT—OR OF ANY GRANT.

Pueblo's effort to gloss over its apparent abandonment of its only pleaded claim to title, the alleged 1751 grant, ECF 1, ¶ 9, fails to create a genuine issue of fact. Its resort to mischaracterizing the testimonial record, reliance on recommendations never adopted, and ignoring or stretching historic records and testimony does not controvert there is no credible evidence of a 1751 grant—or, indeed, of any "grant" of specific lands to the Pueblo.

A. Even if the Pueblo Were a "Pueblo de Indios," Title to a Spanish Grant of Any Presumed Size Does Not Follow.

The Response at Point A, ECF 60, amounts to a series of conclusory generalizations, without citation, about the effect of "Pueblo de Indios" status supported only by citations to the

testimony and report of Dr. Charles Cutter (and non-testimonial writings of Dr. Rick Hendricks, whom the Pueblo did not offer on the Spanish and Mexican periods, which therefore do not give rise to fact issues). Dr. Cutter's testimony disclaims any reliance on a grant of any vintage and concedes the historic record of substantial mixed Spanish/Mexican and Tigua (or other Indian) residence at Ysleta is dissimilar to any "congregacion" in New Spain or any New Mexico Pueblo of which he is aware. *See* **Annex App. A (to City's Response to Pueblo's Motion) ("Annex App, A"), Ex. 22, 39, 42**.

B. The Pueblo's Proffered Historic and Testamentary Record Does Not Support Equating the Pueblo's Claim to a Grant with Those of the New Mexico Pueblos or Create Issues of Material Fact.

The record here, though presented to the wrong forum, falls far short of what New Mexico Pueblos may have presented to Congress or the Office of the New Mexico Surveyor General. In fact, as Dr. Cutter testified, all of the New Mexico Pueblos stated that each had a Spanish grant document, but could not find the documents at the time of the Treaty confirmation proceedings. *See* Cutter Dep. 44, line 6 - 45, line 5, attached as **Exhibit A** to this Reply.[1] The Pueblo's effort to resist summary judgment based on inferences retained historians now draw with respect to lands having no identified exterior boundaries is not evidence of a "grant" enforceable in this forum.

The general size of New Mexico Pueblo grants is not material because the Pueblo is materially different from the New Mexico Pueblos:[2] unlike the New Mexico Pueblos, which had lived prior to Spanish arrival in central, concentrated structures surrounded by lands over which

[1] Further, although the Response says there were "Pueblo affidavits and local tradition" supporting seven New Mexico Pueblo grants, Response, ECF 60 at 6, the Pueblo presents no such evidence in the summary judgment record here. That the "Cruzate grants" were accepted does not imply the Pueblos advancing such grants also did not have other evidence of their grants.

[2] In 1851, despite Mr. Calhoun's recommendations, Congress extended the Indian Non-Intercourse Act (INIA) to the New Mexico Pueblos, but not to the Pueblo. *See* City's Motion, ECF 56, at 11.

they claimed exclusive possession, the Pueblo arrived in 1680 with Spanish settlers who remained throughout the Spanish and Mexican periods, constantly composing larger percentages of the area's population. *See* **Annex. App. A**, **Nos. 22 42, Ex. 7, 11**. The four square league concept, as applied to the New Mexico Pueblos, was intended to prevent Spanish encroachment upon Indian uses of historic lands, but that policy had no effect given substantial Spanish populations were living and farming side-by-side with Tigua and other Indians at Ysleta. *See* **Annex-App. A, Ex. 4, 5**. The Pueblo seems to concede this by relying in part on Texas law for the proposition that Texas law does not recognize laches in trespass to try title cases. *See* Response, 22, n. 28. By the same token, the Fifth Circuit held that that there is nothing in the Treaty that "suggests that the property of Mexican citizens would not be subject to the valid, and non-discriminatory, property laws of the State of Texas." *Amaya v. Stanolind Oil & Gas Co*., 158 F.2d 554, 557 (5th Cir., 1946).

The Response grossly mischaracterizes the testimony of the City's expert historian, John Kessell: he did not "confirm the existence of the 1751 grant [or] that it was to [the Pueblo]." Response, ECF 60, 5. His report actually stated "the year 1751 has never been in doubt" *in the eyes of certain other historians*, citing the Pueblo's two experts, one of whom later retracted the cited testimony. Dr. Kessell testified emphatically there was no grant, at any time, to the Pueblo ("never"). *See* Kessell Dep. 84, line 4-86, line 14, attached as **Exhibit B** to this Reply.[3]

Next, the Pueblo urges the Court to accept that, following adoption of the 1821 Mexican Constitution, which "liberalized" laws formerly protecting indigenous lands, spawning an

[3] In the "boundary disputes" cited by the Pueblo, ECF 60, 5-7, the Spanish or Mexican authorities determined the rights of the disputants with respect to a specific boundary *line* between adjoining interests. In none of the cited disputes does the record reflect the exterior boundaries of either disputant's parcel. Nor does the resolution of the dispute concerning Socorro Pueblo establish either the size of Socorro's alleged grant or imply any size of an alleged grant to Ysleta.

"entrepreneurial spirit" in which Mexicans sought to acquire Indians' lands, an exclusively Hispanic party, from the then-majority Hispanic populace of Ysleta, sought to survey lands for the benefit of the Pueblo, which the Tiguas later disavowed because they did not participate. *See* Cutter Dep. 133, line 20-138, line 10, **Annex App. A, Ex. 10**.

Finally, the Texas legislature's confirmation of a 1751 grant unambiguously identified the "inhabitants of the Town of Ysleta" as beneficiaries of the legislation. As of 1854, the population of the Ysleta area was "majority non-Indian." *See* Hendricks Dep. 32, line 14-15, **Annex to City's Motion, Ex. 4.** No evidence or authority supports the Texas legislature legislatively dispossessed the majority Hispanic and non-Indian population of their lands by confirming a "grant" to the Pueblo.[4]

II. THE ABSENCE OF CONGRESSIONAL CONFIRMATION OF THE PUEBLO'S ALLEGED "GRANT" DEPRIVES THE COURT OF JURISDICTION AND RENDERS SUMMARY JUDGMENT APPROPRIATE.

The Pueblo's Response cites no authority refuting the City's authority requiring congressional confirmation prior to any federal court relief. Point II of the City's Motion demonstrates that the lack of congressional confirmation deprives this Court of the authority to consider the Pueblo's "grant" claim. The *Tameling-Astiazaran* analysis and rule is clearly applicable: ". . . the judiciary cannot act upon the matter while it is pending before Congress; for if Congress should decide the same way as the court, the judgment of the court would be nugatory; and if Congress should decide the other way, its decision would control." *Astiazaran*, 148 U.S. at

[4] The Pueblo chastises the City for referencing their expert's, Dr. Cutter's, testimony that there is no historic record for "congregaciones," Pueblos de Indios, or four square league grants to communities always having substantial, and increasing, populations of Hispanic residents "intermixed" with Indians. ECF 60, 11. However, the Pueblo has failed to advance evidence of another Pueblo so characterized and so recognized. Neither the legal status of the Town of Ysleta in 1854 nor a reference in a City historic report, *see* Response, 11, n.16, contradict the historic record to which Dr. Cutter testified or inform the Court of the Texas Legislature's intent.

83; *see also Barker v. Harvey*, 181 U.S. 481 (1901). In the absence of some form of Congressional confirmation, this Court lacks jurisdiction.[5]

The Pueblo's effort to distinguish this authority and the appropriate result fails. First, Congressional confirmation was not expressly "required" by the text of the Treaty of Guadalupe Hidalgo ("Treaty").[6] But, the Supreme Court's decisions make clear, lack of confirmation forecloses judicial relief. The need for Congressional confirmation is demonstrated by the wide range of federal statutes designed to evaluate, recognize and confirm, where appropriate, Spanish grants. Surely, Congress' actions have meaning. *See* City's Response, Point IV.B, ECF 58.

The Pueblo's reliance on *United States v. Joseph*, 94 U.S. 614 (1876), is misplaced. First, *Joseph* focused on the application of a federal statute specific to Taos Pueblo in the Territory of New Mexico, Section 7 of the Act of July 27, 1851, 9 Stat. 574, 587, extending the INIA to that jurisdiction. 94 U.S. at 615. Further, *Joseph*'s analysis is not persuasive after the Court's decision in *United States v. Sandoval*, 231 U.S. 28, 48-49 (1913).

The Pueblo's reliance on *Pueblo of Santa Rosa v. Fall*, 12 F.2d 332 (D.C. Cir. 1926), also is misplaced. *See* Response, ECF 60, 14. *Pueblo of Santa Rosa* held a tribal right under a treaty with Mexico is unenforceable without Congressional confirmation. 12 F.2d at 335-36. Contrary to the contention of the Response, the D.C. Circuit did not conclude that only the Gadsden Treaty,

[5] The Pueblo's discussion of fraudulent and/or undocumented grants, *see* Response, ignores that it is Congress' prerogative to make a decision concerning which grants to be confirmed; under *Tameling* and progeny, it is not this Court's role.

[6] It makes no sense that Congress was required to confirm every Spanish and Mexican land grant claim under the Treaty, and that is not what the City argues. Rather, the City submits that absent a Congressional confirmation, the Pueblo's claims are not cognizable under federal law. The various federal laws providing for grant confirmation make it clear that Congress, or any congressionally approved confirmation processes, had sole authority to grant or deny confirmation.

Article VI "bar[red] recognition of fee ownership of a Pueblo Indian land grant." Response, 14. Rather, the case addressed whether the Santa Rosa Pueblo's "mere prescriptive right was so protected by the terms of the Gadsden Treaty or the treaty of Guadalupe Hidalgo, as to be enforceable in the courts." 12 F.2d at 335. While the D.C. Circuit ruled that the Gadsden Treaty "forbids relief by the courts," the court continued: the "power lies alone in Congress to extend to these people protection similar to that [Congress has] thrown around the Pueblos of New Mexico . . .." *Id.*at 336.[7] The result is consistent with the *Tameling-Astiarazan* line of authority: the federal courts are without authority to provide relief in the absence of Congressional confirmation.

The Pueblo's theory, which reduces all Congressional confirmation efforts to insignificance (or in its terms, "not material," *see* Response, ECF 60, Objections or Disputes to Proposed Undisputed Facts), fails as a legal and historical matter.[8]

The Pueblo's conclusory contentions, *see* Response, 16, regarding the import of the 1968 and 1987 federal legislation regarding the Pueblo fail to undermine the City's analysis. Section 105 of the 1987 Act, 25 U.S.C. §1300g(5), cannot support the Pueblo's contention that the entire alleged "grant" is part of the "reservation" established under the 1987 Act. However, if it were their claim, a decision affirming the "grant" as a reservation would radically alter criminal and civil jurisdiction in the entire area. The El Paso City Council certainly did not intend its resolution, *see* Response, ECF 60, Ex. 11 (p. 3), supporting the 1987 legislation to serve as "Trojan horse," to divest the City and its citizens of title to lands in the entire "grant" area, including the Property.

[7] On appeal, the Supreme Court dismissed due to the Pueblo's counsel's lack of authority and did not consider the merits. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 321 (1927).

[8]*See* City's Motion, Point II.B; Hendricks Report at p. 10: grant confirmation was a "most significant" right that the NM Pueblos received. *See* City Motion, ECF 56, Exhibit 4.

The Pueblo concedes that the only arguable confirmation in the period of United States sovereignty over the area was the February 1, 1854 Act of the Texas State Legislature.[9] Questions presented concerning the interpretation of that State action, including which grantee was intended and what "bundle of rights" confirmed are questions of Texas state, not federal, law.

The Pueblo's Response fails to demonstrate how it invokes federal question jurisdiction in the absence of Congressional recognition of its alleged rights under the Treaty. To "arise under" federal law, the Pueblo's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the Pueblo's requested relief depends on the resolution of a substantial question of federal law. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27–28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). The Pueblo's Complaint does neither. The Pueblo's reliance on 28 U.S.C. § 1362 does not broaden federal question jurisdiction. *See, e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 784 (1991) (Section 1362 eliminated the jurisdictional amount in controversy for "'arising under' claims brought by Indian tribes.").

The Pueblo's contention the City's affirmative defense under the INIA supplies a federal question, *see* Response, ECF 60, 13-15, disregards a plaintiff may not "establish federal

[9] Even the plain language of the 1854 Texas legislature's confirmation belies that it intended to confirm a grant to the Pueblo, when compared with the Act of February 6, 1854, titled "An Act relating to the Indians of Texas," which set aside twelve leagues of land from the Texas public domain to be selected by, and ceded to, the United States for "the use and benefit of the several tribes of Indians residing within the limits of Texas." Act of February 6, 1854, §§ 1-2. The Act also ceded jurisdiction to the United States "so far as to enable it to extend any act of Congress now existing or hereafter to be passed regulating trade and intercourse with the Indian tribes . . . ." *Id*. at § 4. The Act of February 4, 1856, is to the same effect, but limited to the "use and benefit of the several tribes of Indians residing west of the Pecos River, and within the limits of the State of Texas." The Texas legislature knew how to set aside lands for a tribe, and unambiguously did not in the Act of February 1, 1854 confirming a grant to "the Inhabitants of the Town of Ysleta."

jurisdiction by asserting in its complaint that the defendant will raise a federal-law *defense* to the plaintiff's claim, or by including in its complaint allegations of federal-law questions that are not essential to its claim." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1383 (9th Cir. 1988) (emphasis in original).[10]

III. LACHES APPROPRIATELY BARS THE PUEBLO'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF.

The Pueblo mischaracterizes its claims and requested relief in an attempt to avoid laches. The Complaint expressly seeks an injunction "enjoining the defendants from claiming any right, title or interest in or to the Property" and seeks "all other relief that the Court deems proper." Complaint, ECF 1, Prayer for Relief. Even if laches did not bar purely declaratory relief, which the City denies, it bars the Pueblo's declaratory *and* injunctive action. The Oneida Indian Nation ("OIN") in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213-214 (2005), which the Pueblo strives unsuccessfully to distinguish, also sought both declaratory and injunctive relief. *See also Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 275 (2nd Cir. 2005) (though Nation pleaded ejectment and damage claims actions at law, laches barred claim because the result would be "comparably disruptive"). The Pueblo's declaratory judgment claim to be implemented through injunctive relief, is fully subject to laches.

The law/equity distinction the Pueblo advances is false. The Pueblo launched this litigation for the express purpose of securing "a declaratory judgment . . . confirming its title to the Property

[10] Even though not pled in the Complaint, a "well-pleaded complaint" for a tribal land claim should include a legally tenable allegation that the Indian Non-Intercourse Act (INIA) applies. The record here demonstrates that the INIA does not apply. *See also* S. Bill 193, 30th Cong. 1st Sess. (1848) and S. Bill 293, 31st Cong. 2d Sess. (1851), both of which ultimately failed but each of which sought affirmatively to extend the INIA to Texas. Clearly, those operating contemporaneously with the enactment of the Treaty thought affirmative steps were required to apply the INIA.

and that the defendants . . . ***be forever enjoined from asserting any interest in or to the Property adverse to the Pueblo***." ECF 1, ¶ 31 (emphasis added). An injunction barring one from asserting his rights leaves no rights at all. It is the Pueblo, not the City, that has conflated law and remedy. A legal action seeking equitable remedies cannot be characterized as an "action at law." If this action can proceed unaffected by the laches doctrine, countless other titles in the alleged "grant" area—or in other former Spanish or Mexican grants, will be challenged on the same grounds.

The Pueblo relies on isolated and sporadic feints at asserting its claims to all lands within five Texas Counties, including the alleged grant area, ignoring its repeated failures to specifically put the City or Ysleta area public institutions, business, and individuals on appropriate notice their efforts to develop properties, businesses, and individual lives are asserted to be in trespass on unchallengeable tribal title. The Pueblo claims it provided "formal and informal notice" of objection to the City's acquisition of land for, and building of, Blackie Cheshire Park between 1958 and 1991, *see* City's Motion, **Annex. App. Ex. 9, Aff. of Joel McKnight, Ex. A**, citing news reports of its claims to all lands within five Texas Counties and its filing of a notice of its filing with the United States Secretary of the Interior with five County Clerks in 2003. *See* Response App. Exs. 8, 9. Reliance on such tactics, while failing to object formally to the City's actions to annex the grant area or build and develop the Park and City Police Command Center, while accepting their public benefits for its members, reflects the inequity of the Pueblo's claim.

IV. THE PUEBLO'S ARGUMENT CONCERNING STATE OF TEXAS' INDISPENSABILITY IGNORES THE STATE'S CENTRAL ROLE IN ESTABLISHING AREA TITLES; RULE 19 DISMISSAL IS APPROPRIATE.

The Pueblo contends "Texas does not have a claim relating to the subject matter of the action" because the ruling on the Property is "limited to the parties and the land that is the subject of the action." Response, 26. The Pueblo argues Texas is not a necessary party because it collects

no state property tax and because El Paso is a Home Rule City. *Id.* The Pueblo unduly narrows the City's argument. A holding adverse to the City will affect the State's interest in the titles its policies and laws promoted and established, particularly where, as here, the decision may prove persuasive "in a future lawsuit that may call into question the titles held by the City's citizens and grantees over the remainder of the 8,000 acres." *Ysleta Del Sur Pueblo v. City of El Paso*, No. EP-17-CV-00162-DCG, 2019 WL 1131421, at *4 (W.D. Tex. Mar. 12, 2019).

"Rule 19 excludes only those *claimed* interests that are patently frivolous," *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir.), *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir. 2001) (emphasis in original): *see also Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1291 (D. Kan. 2002). The State may have an interest where the validity of State actions including its "confirmation of the land grant, authorization of the sale of lands within the grant area by the Town, and legislative quieting of titles in the grant," *see* Motion, ECF 56, 31, is called into question. To invalidate the chains of title of innumerable grantees deriving ultimately from the State, as well as the legislatively authorized quieting of titles in the grant, is to invalidate action by the State of Texas, rendering it a party not only necessary but indispensable.

CONCLUSION

For the foregoing reasons, Defendant, City of El Paso, requests that summary judgment be entered in favor of the City.

Dated: August 19, 2019

Respectfully submitted,

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WE HEREBY CERTIFY that on this 19th day of August 2019, we served the foregoing electronically upon the following parties or counsel:

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