

No. 20-50313

---

---

In the  
**United States Court of Appeals**  
for the **Fifth Circuit**

---

YSLETA DEL SUR PUEBLO, a federally recognized sovereign Indian tribe,  
*Plaintiff - Appellant*

v.

CITY OF EL PASO,  
*Defendant - Appellee*

On Appeal from the United States District Court for the Western District  
of Texas, El Paso Division, Civil Action No. 3:17-CV-00162-DCG

---

**BRIEF OF AMICUS CURIAE**  
**THE ALABAMA-COUSHATTA TRIBE OF TEXAS**  
**IN SUPPORT OF APPELLANT**

---

Frederick R. Petti  
PETTI AND BRIONES PLLC  
8160 East Butherus Drive  
Suite 1  
Scottsdale, Arizona 85260  
(602) 396-4890  
fpetti@pettibriones.com

*Counsel for Amicus Curiae The Alabama-Coushatta Tribe of Texas*

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Ysleta del Sur Pueblo, Plaintiff – Appellant
2. City of El Paso, Defendant – Appellee
3. Barnhouse Keegan Solimon & West LLP (Counsel of record in the district court and appellate court for Plaintiff – Appellant)
4. Law Offices of Thomas E. Luebben PC (Counsel of record in the district court and appellate court for Plaintiff – Appellant)
5. Ken Coffman, Attorney at Law (Counsel of record in the district court for Plaintiff – Appellant)
6. Dickinson Wright PLLC (Counsel of record in the appellate court for Defendant – Appellee)
7. City Attorney’s Office, City of El Paso (Counsel of record in the district court and appellate court for Defendant – Appellee)
8. Modrall, Sperling, Roehl, Harris & Sisk, P.A. (Counsel of record in the district court for Defendant – Appellee)

/s/ Frederick R. Petti  
Frederick R. Petti  
*Counsel for Amicus Curiae*  
*The Alabama-Coushatta Tribe of Texas*

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF IDENTITY, INTEREST IN THE CASE AND AUTHORITY TO FILE .....	1
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	2
I.    The Indian Non-Intercourse Act Applies in Texas .....	2
CONCLUSION .....	4

## TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Alabama-Coushatta Tribe of Tex. v. United States</i> , No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000).....	2
<i>Johnson v. M’Intosh</i> , 21 U.S. 543 (1823).....	2
<i>Lipan Apache Tribe v. United States</i> , 180 Ct. Cl. 487 at 493 (1967) .....	2, 3
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974) .....	3
<i>United States v. Cook</i> , U.S. (Wall.) 591, 592 (1874) .....	2
<i>United States v. Santa Fe Pac. R. Co.</i> , 314 U.S. 339 (1941) .....	2, 3
<i>United States v. Texas</i> , 339 U.S. 707, 70 S. Ct. 918, 94 L. Ed. 122.....	3

### Other Authorities

Non-Intercourse Act, 25 U.S.C. § 177.....	3
---	---

### Rules

#### Federal Rules of Appellate Procedure:

Rule 29(a)(4)(E).....	1
-----------------------	---

**STATEMENT OF IDENTITY, INTEREST IN THE CASE AND  
AUTHORITY TO FILE**

The Alabama-Coushatta Tribe of Texas (the “Alabama-Coushatta”) is a sovereign, federally recognized self-governing Indian tribe located near Livingston, Texas that, like the Ysleta del Sur Pueblo (the “Pueblo”), holds and has held Indian lands in the State of Texas, since before Texas became a state. The Alabama-Coushatta have an exceptional interest in the outcome of this appeal to ensure that the Indian Nonintercourse Act, 25 U.S.C. § 177, is applied to all Indian lands within the State of Texas. Specifically, the Alabama-Coushatta write to address the district court’s refusal to apply the Indian Nonintercourse Act to lands of a federally recognized Indian Tribe in the State of Texas.

The Alabama-Coushatta have sought, and obtained, consent from both Appellant and Appellee to the filing of this Brief. In doing so, the Alabama-Coushatta note that this brief was not authorized in whole or in part by counsel for its members, or its counsel - fund the preparation or submission of this Brief. *See* FED. R. APP. P. 29(a)(4)(E).

**PRELIMINARY STATEMENT**

If the Pueblo perfected title under the Spanish land grant of 1848, later accepted as valid by the United States in the Treaty of Guadalupe Hildalgo, those lands are protected under the Indian Non-Intercourse Act. The Non-Intercourse Act has already been applied to aboriginal lands of the Alabama-Coushatta Tribe

of Texas, in Texas. The Act should similarly be applied to aboriginal lands held in Texas by the Pueblo.

## ARGUMENT

### I. The Indian Non-Intercourse Act Applies in Texas

The Supreme Court has recognized the American Indians' right to occupy and possess their aboriginal homelands since the early nineteenth century.

*Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823); *see also United States v. Cook*, U.S. (Wall.) 591, 592 (1874). Known as "aboriginal title," it is "as sacred as fee simple of the whites." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. at 345.

"The law of aboriginal title applies to lands in the United States, even when formerly held by Spain, Mexico or the Republic of Texas." *Alabama-Coushatta Tribe of Tex. v. United States*, No. 3-83 2000 WL 1013532 at \*44 (Fed. Cl. June 19, 2000), *citing Lipan Apache v. United States*, 180 Ct. Cl. 487 at 493 (1967). In the absence of a clear and plain indication in the public records that the sovereign intended to extinguish all of the [claimants'] rights in their property, Indian title continues. *Alabama-Coushatta Tribe of Texas* at \*45 *citing Lipan Apache*, 180 Ct. Cl. at 492 (*quoting Santa Fe*, 314 U.S. at 353).

To afford aboriginal title proper respect, the law requires that its termination, or "extinguishment" may occur only through an affirmative, formal act by the

sovereign. *Alabama-Coushatta Tribe of Tex.* at \*44, citing *Santa Fe* 314 U.S. at 347); *Lipan Apache*, Ct. Cl. at 492.

Texas attained statehood on “equal footing with the original States in all respects whatever.” *Alabama-Coushatta Tribe of Texas* \*62 citing Joint Resolution of December 29, 1845, 9 Stat. 108; *United States v. Texas*, 339 U.S. at 713. “The United States Constitution, treaties and federal statutes became applicable to the State of Texas and the Indians within Texas’ borders on December 29, 1845.” *Alabama-Coushatta Tribe of Texas* at \*62 citing *Lipan Apache*, 180 Ct. Cl. at 499; *United States v. Texas*, 339 U.S. 707, 70 S. Ct. 918, 94 L. Ed. 122; *Oneida Indian Nation v. County of Oneida*, 414 U.S. at 670.

Protecting “sacred” aboriginal title is accomplished through application of the Non-Intercourse Act, 25 U.S.C. § 177 which reads:

*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 in equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.*

Like in *Alabama-Coushatta Tribe of Texas*, the law of aboriginal title applies in this case, if the Pueblo’s aboriginal title was established by Spain and Mexico before Texas became a state. Also, as in *Alabama-Coushatta Tribe of Texas*, federal statutes such as the Non-Intercourse Act, became applicable to the State of Texas and the Indians within Texas’ borders on December 29, 1845. This



means that any attempt to “extinguish” title to the Pueblo’s lands required Congressional approval to be valid. Absent a clear and plain indication of Congressional desire to extinguish the Pueblo’s rights by treaty or convention in the public records, any encumbrance on the Pueblo’s aboriginal rights is void and in violation of federal law, as directed by the Indian Non-Intercourse Act. It is undisputed that Congress has never extinguished the Pueblo’s aboriginal rights. As in *Alabama-Coushatta Tribe of Texas*, Indian title therefore continues with the Pueblo.

### CONCLUSION

The Indian Non-Intercourse Act protects the Pueblo’s aboriginal rights, if established, to the subject land at issue. Only Congress can extinguish the Pueblo’s aboriginal title. Congress has not done so. Title today to the land at issue rests with the Pueblo.

May 14, 2021

Respectfully submitted,

/s/ Frederick R. Petti

Frederick R. Petti  
PETTI AND BRIONES PLLC  
8160 East Butherus Drive  
Suite 1  
Scottsdale, Arizona 85260  
Telephone: (602) 396-4890  
Facsimile: (602) 954-5245

*Counsel for Amicus Curiae  
The Alabama-Coushatta Tribe of Texas*

## CERTIFICATE OF SERVICE

I certify that on May 14, 2021, the foregoing Brief of Amicus Curiae The Alabama-Coushatta Tribe of Texas was filed via the Court's Electronic Case Filing System, and through that system, notice and service of filing were made upon all counsel of record, including the following:

Randolph H. Barnhouse  
dbarnhouse@indiancountrylaw.com  
Kelli J. Keegan  
kkeegan@indiancountrylaw.com  
*Counsel for Appellant*

Mark C. Walker  
mwalker@dickinsonwright.com  
Mario Franke  
mfranke@dickinsonwright.com  
*Counsel for Appellee*

*/s/ Frederick R. Petti*  
\_\_\_\_\_  
Frederick R. Petti

**CERTIFICATE OF CONFERENCE**

I certify that Counsel for Amicus Curiae conferred with Counsel for Appellant and Counsel for Appellee, and both Parties consented to the Alabama-Coushatta Tribe of Texas's submission of this Brief as amicus curiae.

/s/ Frederick R. Petti

Frederick R. Petti

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-face and type-style of Federal Rules of Appellate Procedure 29 and Fifth Circuit Rule 32. *See* FED. R. APP. P. 29(a)(4), 29(b)(4), 29(b)(4) and 32(g)(1). Excluding the parts exempted by the Federal Rules of Civil Procedure 32, this Brief contains 833 words in proportionately-spaced, size-14, Times New Roman font, as determined by the word processing program Microsoft Word 2010.

I further certify that all privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, that the electronic submission of this Brief is an exact copy of any paper document filed pursuant to Fifth Circuit Rule 25.2.1.

/s/ Frederick R. Petti  
Frederick R. Petti

*Counsel for Amicus Curiae*  
*The Alabama-Coushatta Tribe of Texas*