

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.

**Appeal from the United States District Court
for the Western District of Texas**
Hon. David Guaderrama, United States District Judge

**AMICUS CURIAE BRIEF OF PROFESSOR
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Supplemental Statement of Interested Parties

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and law firm have an interest in this amicus brief.

Amicus is Professor Manuel García y Griego of the University of New Mexico

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Date: May 24, 2021.

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Interest of the Amicus Curiae

Associate Professor of History LM García y Griego respectfully presents this amicus curiae brief in support of the appeal by Ysleta del Sur Pueblo in this case. The author (Ph.D. in History, UCLA, 1988) is currently on the faculty at the University of New Mexico and serves as director of the UNM Land Grant Studies Program as well as Principal Investigator for the New Mexico Land Grant Council.¹ He teaches Mexican history and Pueblo Indian history from colonial times to the present and conducts research on land grants. As such, he has a particular vantage point on the historical property claims of Ysleta del Sur Pueblo (YDSP).

The author has an interest in the protection of the property rights of Spanish and Mexican community land grants confirmed under the Treaty of Guadalupe Hidalgo. For eleven years he served on the Board of Trustees of a non-Pueblo Spanish/Mexican land grant first established in 1763 and currently recognized under the laws of the state of New Mexico. This entity, the Cañón de Carnué grant, maintains a corporate interest in the protection of Treaty of Guadalupe Hidalgo property rights.²

¹ His full CV may be viewed at www.tinyurl.com/yaknmjZ.

² The brief is submitted pursuant to Fed. R. App. P. 29(a), and Fifth Circuit Local Rule 29. All parties have consented to the submission of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no

Argument

I. Introduction

This *amicus* brief focuses on certain turning points in the history of Ysleta del Sur Pueblo that are relevant to this appeal. It stresses that the history and characteristics of YDSP fall well within those of New Mexico's Indian Pueblos located approximately 300 to 400 miles to the north. It notes that the first Indian Agent assigned to the New Mexico Pueblos believed, in 1849, that Ysleta del Sur was under his office's jurisdiction and that the history of YDSP, like that of the Pueblos to the north, made them all subject to the laws of the United States applicable to Indian tribes and communities. For this reason, this brief discusses the historical parallels as well as the differences between YDSP and the New Mexico Indian Pueblos.

The historical record supports the interpretation that YDSP was essentially a New Mexican Indian Pueblo during the Spanish colonial period. With Mexico's independence in 1821 this history begins to diverge. This brief seeks to identify the most important changes that occurred as well as stressing certain continuities from the Spanish period. Early in the

person other than the amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Mexican period, in 1823, the jurisdiction of El Paso region was removed from New Mexico and assigned to the state of Chihuahua.³ After the War with Mexico, El Paso became part of the United States and after the Compromise of 1850, part of the state of Texas.

In 1854 the Ysleta del Sur Pueblo Spanish land grant was confirmed by the Texas Legislature months before the U.S. Congress enacted legislation to confirm land claims in New Mexico.⁴ Here we see another divergence: the confirmation of Indian Pueblos in New Mexico was carried out under a federal process while the confirmation of the YDSP grant was done under Texas state law. Starting in the 1850s, when Texas legislative acts served to facilitate the privatization of the YDSP land grant, there was another divergence. Despite an 1876 U.S. Supreme Court decision⁵ that facilitated the privatization of New Mexican Pueblo lands, the loss of land control in New Mexico was proportionately smaller and to some extent reversed through U.S. congressional action beginning in 1924.⁶ These

³ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 157. Except for cases and statutes, source citations will take the form: author, abbreviated title, page number, and note number, when appropriate. The source bibliography lists the complete citation of historical sources.

⁴ An Act to establish the offices of Surveyor-General of New Mexico, Kansas, and Nebraska, to grant Donations to actual Settlers therein, and for other purposes, 10 Stat. 308 (July 22, 1854).

⁵ *United States v. Joseph*, 94 U.S. 614 (1876).

⁶ Pueblo Lands Act, 43 Stat. 636 (June 7, 1924).

differences are to be acknowledged. Nevertheless, the experience of the Indian Pueblos in New Mexico is instructive, both as a historical parallel that reminds us of the character of YDSP as an American Indian community and as a distinct history that illustrates the significance of federal oversight and protection—or lack thereof—of Indian property rights.

This brief relies almost entirely on well-known, often-cited, and readily available published histories. These include peer-reviewed materials published by university presses, U.S. government reports, two dissertations, two published personal accounts of expeditions, and an on-line encyclopedia made available by the Texas Historical Society. For several Pueblo histories this brief relies on the ninth volume of the *Handbook on North American Indians*, published by the Smithsonian Institution in 1979. Certain works published fifty or more years ago remain unsurpassed for the factual points made in this brief and are cited here as well.

II. Ysleta del Sur and the Pueblos of the north: a useful comparison

Ysleta del Sur Pueblo arose as the consequence of three circumstances. In 1680 the Indian Pueblos of the north united to expel their Spanish overseers. Some of the inhabitants of Isleta Pueblo, located in an island on the Río Grande about 20 miles south of Albuquerque, New

Mexico, were forced to accompany the Spanish as captives while they fled south. They also were voluntarily accompanied by Piro inhabitants of now extinct Pueblos south and east of Isleta.⁷ Whether for this reason or others, these villages, comprised of people known as Mansos and Piros, later were abandoned and became extinct. Upon arriving at Paso del Norte (El Paso)⁸ Spanish authorities organized an effort to retake possession of northern New Mexico, and eventually succeeded in overcoming subsequent rebellions in the 1690s.

A second circumstance is that when the Spanish returned triumphantly to Santa Fe in that decade some Isletans chose to stay in the vicinity of El Paso rather than return to their village. These El Paso Isletans, along with Piros and Mansos, established Ysleta del Sur Pueblo, also known as "Tigua Pueblo," after the Tiwa language spoken at the New Mexico pueblos of Isleta, Sandía, and two extinct pueblos (Alameda and Puarai).⁹ The third circumstance was the formal organization of Ysleta del Sur Pueblo as a "*pueblo de indios*" (town of Indians), a self-governed community land grant recognized as such in eighteenth century Spanish

⁷ Spicer, *Cycles of conquest*, map, 154; 163.

⁸ Hackett, *Revolt of the Pueblo Indians*, cxviii;

⁹ Houser, "Tigua Pueblo," 340; Walz, *History of the El Paso area*, 300.

documents.¹⁰ Like Senecú, another Pueblo with which it shared a boundary, Ysleta straddled the Río Grande.¹¹

The organization of self-governing Indian communities in colonial New Spain, including New Mexico with some variations, followed a template established by Spanish Crown decrees beginning in the 1500s. These executive orders were compiled in a voluminous collection of several books in four volumes known as the "laws of the Indies" under the abbreviated title "Recopilación" ("compilation").¹² These statutes had several purposes. One was to congregate dispersed indigenous communities into a village or villages with a Roman Catholic church at the center of the town square. As Spicer notes, the Pueblos already inhabited compact villages, and unlike other indigenous communities, no further concentration was necessary to facilitate Spanish governance and oversight by missionaries.¹³ Other purposes were to organize the defense of the region against Navajos, Apaches, and other nomadic bands, and to

¹⁰ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 141, 148 note 7.

¹¹ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 160 (map).

¹² Spain, *Recopilación*, 1841. This 1841 edition was the fifth printing of the original *Recopilación* published in 1681.

¹³ Spicer, *Cycles of conquest*, 153, 288. On the Spanish law mandating concentrations (*reducciones*) see Spain, *Recopilación*, 1841, 229 (Vol 2, Book 6, Title 3, Law 8); Ebright, Hendricks and Hughes, *Four square leagues*, 16.

protect the village from encroachment by Spanish and *mestizo* (mixed-race) outsiders, later known simply as “Mexicans.”¹⁴

The land area assigned to *pueblos de indios* varied, depending upon the density of population concentration in the region and other factors considered by the governor or other assigning official. In colonial New Mexico, which included the El Paso region, there emerged the practice of distributing four square leagues. Typically, 5,000 *varas* (one league) was measured from the church in the village in the four cardinal directions, thus establishing a square parcel of approximately 17,350 acres. (One *vara* is approximately 33 inches; one league about 2.6 miles.¹⁵) Although no authoritative document has been found specifying the four-square league area as a mandate, the rule has been inferred from its consistent application in litigation records. The first instance in the years after the reconquest appears in a petition by a private party for land near San Felipe Pueblo in 1704, followed by an identical ruling for the San Ildefonso Pueblo grant.¹⁶ Ysleta del Sur was also recognized as a four-square league pueblo.¹⁷

¹⁴ Spain, *Recopilación*, vol 2, 121 (Volume 2, Book 4, Title 12, Law 17); Ebright, Hendricks and Hughes, *Four square leagues*, 25.

¹⁵ Ebright, Hendricks and Hughes, *Four square leagues*, 11.

¹⁶ Ebright and Hendricks, "The Pueblo league," 97, 159, note 31.

¹⁷ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 148, note 6.

Some of the characteristics of Ysleta del Sur during the colonial period diverge from what is commonly assumed to be the pattern of the Pueblos to the north. The YDSP grant was founded a considerable distance away from the villages of its first inhabitants (Isleta and other Pueblos near Albuquerque). As Spicer notes, however, only Acoma, Isleta, Taos, and Picuris maintained their villages at their pre-Hispanic locations.¹⁸ Jemez Pueblo, for example, was re-founded under Spanish rule at its present site miles distant from the original hamlets occupied before the arrival of the Spanish.¹⁹

A close analogy to YDSP is Laguna Pueblo, founded in the late 1690s by refugees from the Pueblos of Cochití, Santo Domingo, and Jemez during their rebellion in the 1690s against the Spanish reconquest.²⁰ Like YDSP it was located miles away from the ancestral lands of its founders. Like YDSP Laguna Pueblo included inhabitants from more than one indigenous pueblo. Like YDSP the Lagunas adopted a single Pueblo language—Keres—spoken by some, but not all, of its founding exiled inhabitants.

¹⁸ Spicer, *Cycles of conquest*, 169.

¹⁹ Sando, "Jemez Pueblo," 418.

²⁰ Hawley, "Laguna Pueblo," 438.

One may also note that Ysleta del Sur Pueblo's architecture differs markedly from the classical Pueblo multistory apartments at Taos and Acoma Pueblos. However, it is also the case that while the Pueblos at the moment of Spanish contact often were comprised of compact multi-story villages, this pattern changed after the arrival of the Spanish.

In sum, YDSP fits well the overall pattern of New Mexico pueblos as described by Spicer: self-governing autonomous communities that spoke one of five mutually unintelligible languages, each with several dialects, grew crops using irrigated agriculture, and inhabited compact communities whether multi-story or not.²¹ When one examines the similarities as well as the differences among New Mexico's Pueblo communities, it is evident not only that, as is well known, Ysleta del Sur originated from New Mexico's pueblos, it also retained a way of life within the New Mexican historical pattern.

III. Continuity under Mexican administration

Mexican Independence brought some changes in political administration when colonial New Mexico became the Territory of New Mexico and as the jurisdiction of El Paso was transferred to the newly created state of Chihuahua in 1823. As is well known, the Mexican

²¹ Spicer, *Cycles of conquest*, 153.

government invited Americans to settle in Texas and in 1836 they rebelled, established the Republic of Texas, and shortly thereafter petitioned the United States for admission as a state. The Anglo and Mexican populations of Texas were concentrated in the vicinity of San Antonio and Austin and in the region between the Río Grande and Nueces river. Texas' population moved north even as it gradually expanded to the west. Dallas was founded in 1841 and Fort Worth in 1849.²² Direct communication between Austin or San Antonio and the El Paso region before 1849 was either rare or nonexistent. The territorial claim of the Texas Republic and later the state of Texas that its western boundary was at the Río Grande (and would have included Albuquerque and Santa Fe), and as far north as Wyoming, was aspirational but not supported by inhabitants with allegiance to Texas.

El Paso was ruled by Mexican government officials at least until December 1846, and exercised authority over YDSP in the 1840s. In 1841 the Mexican Prefect of El Paso del Norte organized a hearing to address a boundary dispute between two neighboring Pueblos: Ysleta del Sur and Senecú.²³ (As a current textbook of New Mexico history indicates, a "prefect" was the title of a Mexican official who exercised executive

²² García y Griego and Calderón, *Más allá del río Bravo*, 18.

²³ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 143.

authority over a district within a Mexican state or territory.²⁴) That same year the government of Texas unofficially organized an invading expedition to New Mexico whose purpose it was to provoke a secessionist movement. Members of the ill-fated expedition were captured by New Mexicans, arrested, sent to El Paso, and from there to Mexico City under guard. One of its participants published a two-volume testimonial in which he reported his treatment by Mexican authorities in El Paso during that south-bound journey.²⁵

IV. U.S. conquest and the Compromise of 1850

The next incursion into the territory was the invasion of New Mexico by the U.S. Army at the start of the war with Mexico. The army under Colonel William Doniphan's command was charged with proceeding south from Santa Fe to meet the Mexican Army in Chihuahua. After battling Mexicans at Brazito outside of El Paso on Christmas Day, 1846, Doniphan's forces occupied El Paso for 46 days before proceeding to Chihuahua.²⁶ Local Mexican officials were clearly in charge of affairs at El Paso in the winter of 1846-1847. The national government of Mexico finally signed the Treaty of Guadalupe Hidalgo a year later, in February 1848,

²⁴ Sánchez, Spude and Gómez, *New Mexico; a history*, 79.

²⁵ Kendall, *Narrative of the Texan Santa Fé expedition*, 32.

²⁶ Hughes, *Doniphan's expedition*, 105.

acknowledging U.S. sovereignty north of the Rio Grande and the northern half of its territory including New Mexico.

In March, 1848 Texas re-asserted its claim to a western boundary as far as the Río Grande in New Mexico, assigning the name "Santa Fe County" to the region. This provoked an angry response from New Mexicans, who refused to acknowledge Texas' authority, leading to a threat by the Texas governor "to establish Texas authority over the area by force." Texans sensed that they might establish their western boundary in part by seizing relatively unprotected communities near El Paso. In 1849 "public meetings were held in Austin 'to determine whether a practicable route could be had between Austin and El Paso,'" a tacit admission that, despite its claims, the state exercised no effective authority over El Paso. In June a company of soldiers and a number of settlers departed from San Antonio, arriving in El Paso in September. Four months later, in January 1850, the Texas legislature established El Paso County before the U.S. Congress would act to settle the boundary between Texas and New Mexico with the Compromise of 1850.²⁷

²⁷ Texas State Historical Association, *Handbook of Texas on-line*, accessed May 21, 2021.

There is no indication that the U.S. Congress assented to these actions by the state of Texas in 1849 or early 1850. They constituted a *fait accompli* that would have significant consequences for the future of Ysleta del Sur Pueblo.

It is noteworthy that the governor and Indian agent appointed for New Mexico assumed, in 1849, that the Pueblos in the vicinity of El Paso—he named Ysleta and Socorro—were under his jurisdiction.²⁸ That October 1849 communication to the Commissioner of Indian Affairs included an inventory list of eighteen other Indian Pueblos in the Territory of New Mexico. This U.S. official, who also held the position of first Territorial governor of New Mexico, believed El Paso to be under his jurisdiction, as it had been under Mexican governors. Thus the state of Texas *claimed* jurisdiction over El Paso, Albuquerque, Santa Fe, and other areas north, but had no legal authority as far as the governor of New Mexico appointed by the President of the United States was concerned. In late 1849 and well into 1850, then, Ysleta del Sur Pueblo could have expected to have its grant confirmed pursuant to the Treaty of Guadalupe Hidalgo in a manner similar to the Pueblos to the north. As is well known, the Compromise of

²⁸ Calhoun, Indian Agent to Medill, Commissioner of Indian Affairs, 4 October 1849, reproduced in U.S. Office of Indian Affairs, *The official correspondence of James S. Calhoun*, 39.

1850 was enacted in September 1850. Within this complex legal package the boundaries of Texas and New Mexico were established and El Paso was assigned to Texas.

V. Pueblo land grants confirmed

After the cession of Florida by Spain to the U.S. in 1821 a dispute arose regarding a Spanish land grant in that territory that was eventually decided by the U.S. Supreme Court in 1833. The court affirmed:

"A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King cedes that only which belonged to him; lands he had previously granted, were not his to cede. . . . The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."²⁹

The purpose of confirmation under the Treaty of Guadalupe Hidalgo, therefore, was to separate the public domain—the lands previously owned by the Mexican government now belonging to the United States—from lands held privately, including corporately-held Indian communities. This is what in fact occurred in the Territory of New Mexico. The Surveyor General

²⁹ *United States v. Percheman*, 32 U.S. 51, 87 (1833).

of New Mexico investigated the claim, made a recommendation, and the Secretary of the Interior transmitted it to Congress. However, this process did not occur in Texas because the United States did not claim public domain lands in Texas.

Shortly after the international boundary was fixed, the Mexican government expropriated the portion of YDSP's grant parcel located south of the Río Grande by transferring ownership of that parcel to YDSP's neighbor, Senecú Pueblo, which also owned parcels on both sides of the river. In response, the Texas Legislature enacted two bills early in 1854. The two bills transferred Senecu's lands *north* of the river to YDSP and acknowledged YDSP's grant parcel that remained on the Texas side of the international boundary.³⁰

Bowden reports that the General Land Office file corresponding to the confirmation of YDSP does not include the original Spanish granting documents. As it happens, the absence of Pueblo granting documents is not unusual. Ebright and Hendricks report that many Pueblo grants in New Mexico were unable to produce authentic Spanish documentation pertaining to their recognition by crown authorities in the 1690s.³¹ The

³⁰ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 144-145.

³¹ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 148, note 7; Ebright, Hendricks and Hughes, *Four square leagues*, 205-234.

practice of the Surveyor General of New Mexico, following the 1854 statute that enabled his office,³² was to recognize the legality of village grants even in the absence of documents, based on the fact of the demonstrable existence of village(s) and local testimony. An explicit example regarding a Pueblo grant was the case of Santa Ana Pueblo. In 1867 Surveyor General John Clark reported that he had "been unable to find any record of a grant to the pueblo of Santa Ana," but that after taking testimony from the governor and lieutenant governor and four "disinterested citizens. . . I am satisfied that they have a valid claim" and therefore recommended "that it be confirmed."³³ The recommendation was accepted by the General Land Office, the Secretary of the Interior, and the U.S. Congress.

The expedited manner in which New Mexico's Indian Pueblo claims were handled had much to do with persuasive arguments presented nearly two decades previously by James Calhoun, the first Indian Agent assigned to New Mexico. Calhoun had argued that the Pueblo Indians of New Mexico were "entitled to the early and especial consideration of the government of the United States [as] they are the only tribe in perfect amity

³² An Act to establish the offices of Surveyor-General of New Mexico. . .and for other purposes, 10 Stat. 308 (July 22, 1854).

³³ Clark to Wilson, 5 January 1867, in U.S. House of Representatives, *Pueblo of Santa Ana*, 2.

with the government. . .”³⁴ Without quick confirmation, he noted, the Pueblos would lose lands to encroachment by Mexicans. Among the very first New Mexican land grants reviewed by Congress were seventeen Pueblos confirmed mainly as four-square league Pueblo grants.³⁵ All were approved.

VI. Post adjudication tribulations for Ysleta del Sur and community land grants in New Mexico

In 1854 the U.S.-Mexican boundary changed again and added nearly 30,000 square miles to the Territory of New Mexico. U.S. Ambassador to Mexico James Gadsden, a railroad entrepreneur, negotiated the transfer of this territory for the purpose of facilitating a railroad route from Texas to California. The construction of the railroad through this territory was delayed until after the Civil War. The prospect of a railroad line stimulated land speculation in El Paso in the 1850s and 1860s, leading to fraudulent practices in which the Ysleta del Sur Pueblo lost much of its land.³⁶

That there was a competitive market for land in the El Paso region had been clear even before the U.S. invasion of New Mexico. In 1846 the Mexican Prefect of El Paso del Norte "was engaged in disposing of lands in

³⁴ U.S. Department of Interior, 1854, 93.

³⁵ U.S. Department of Interior, 1885, 290.

³⁶ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 146.

that area for his own benefit and preparing fraudulent deeds for sale."³⁷

The arrival of Americans in 1849 did not signify improvement. "In 1852 the people of Ysleta petitioned the governor of Texas for protection from the injuries suffered from Americans who lived there and ignored law and order and attempted to divest the people of their land. . ." ³⁸ The pressures intensified when a group of citizens residing in Ysleta "procured the passage of an Act by the Texas Legislature on May 9, 1871, incorporating the community under the name of 'The Town of Ysleta'" for a second time.³⁹ In his review of the archives of the El Paso County Deed Records Houser notes that after the 1871 incorporation ". . .land speculators divested the Indians of most of the tribal lands. This was accomplished by deeding certain tracts to non-Indians without recompense or by confiscating land from Indians who were unable to pay the realty tax imposed by the incorporation or were heavily encumbered by debt. As late as 1881, a previous Indian governor of Ysleta informed a visitor 'that the American and Mexican [sic] were crowding into their beautiful valley taking up, without recompense land belonging to people of the pueblo.'" ⁴⁰

³⁷ Houser, "Tigua Pueblo," 340.

³⁸ Houser, "Tigua Pueblo," 340.

³⁹ Bowden, *Spanish and Mexican land grants in the Chihuahua acquisition*, 145-146; quote at p. 146.

⁴⁰ Houser, "Tigua Pueblo," 340.

To the north, Indian Pueblos in New Mexico also experienced a loss of control over their lands, though proportionately much less than Ysleta. In large part this was the result of actions by Indian Agents representing the pueblos, who mediated disputes regarding the encroachment by non-Pueblo inhabitants from nearby villages. The protection afforded by Indian agents diminished markedly after the U.S. Supreme Court decided *United States v. Joseph* in 1876. The Court held that the Pueblos had complete title to their land, unlike reservation Indians on trust lands. Accordingly, they could sell portions of their land grants.⁴¹ Lands never intended to be sold were alienated under this new legal interpretation, or lost due to fraudulent transaction.

In 1913 the U.S. Supreme Court changed course when it decided *United States v. Sandoval*.⁴² This was a case regarding the power of Congress to prohibit the introduction of intoxicating liquors because of the status of the Pueblos as Indians, and also was extended to other matters. The Court responded to the potential objection that congressional legislation could not apply to Pueblo lands on the grounds that the Pueblos had a fee simple title by stating:

⁴¹ *United States v. Joseph*, 94 U.S. 614 (1876).

⁴² *United States v. Sandoval*, 231 U.S. 28 (1913).

"It is true that the Indians of each pueblo do not have such a title to all the lands connected therewith. . . but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged over those tribes and their affairs."⁴³

This ruling clouded the titles of all non-Pueblo owners of lands within the Pueblo grants.

Congress eventually responded with the 1924 Pueblo Lands Act.⁴⁴ This statute appointed a Pueblo Lands Board and established a process to compensate parties who returned lands to a Pueblo or to provide the Pueblo with compensation for certain lands where the title was confirmed to non-Indians. Seven Pueblo grants in northern New Mexico which had a combined confirmed land area of 111,357.50 acres presented 24,139.88 acres in adverse claims, about half of which were approved by the Pueblo Lands Board.⁴⁵ Thus, prior to the Pueblo Lands Act, these seven Pueblos had lost control of between 11% and 22% of their original confirmed lands,

⁴³ *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

⁴⁴ Public Law 68-253, 43 Stat. 636 (1924); U.S. General Accounting Office, *Treaty of Guadalupe Hidalgo*, 158.

⁴⁵ Baca, *Somos indígena*, 592.

depending upon how the loss is calculated. Later congressional action provided additional monetary compensation to the Pueblos for their losses. Collectively, New Mexico's nineteen Indian Pueblos received over \$130 million in 2001 dollars to settle their claims.⁴⁶

The loss of control of land by Ysleta del Sur Pueblo was drastic by comparison. Houser reported that in the 15-year period following the 1871 incorporation, "land speculators divested the Indians of *most* of the tribal lands [emphasis added]."⁴⁷ This suggests that YDSP controlled less than 50% of its original acreage. He further noted that at the time he was writing (1979) YDSP managed about 119 acres—less than *one percent* of the land confirmed in 1854.⁴⁸ Houser did not focus on calculating the extent of the loss of control of land, but clearly it was an overwhelming proportion of the acreage previously confirmed. By contrast, seven of the Pueblos of northern New Mexico had lost at most 22% of their confirmed lands.

This overwhelming loss of control of lands by YDSP resembles the experience of non-Pueblo Spanish/Mexican community land grants in New

⁴⁶ U.S. General Accounting Office, *Treaty of Guadalupe Hidalgo*, 158.

⁴⁷ Houser, "Tigua Pueblo," 340.

⁴⁸ Houser, "Tigua Pueblo," 341. The largest tract mentioned by Houser is 60 acres; this was obtained by the Pueblo after 1969 and held in trust by the state of Texas, though it is unclear whether it is located within the original boundaries of lost lands. Smaller tracts are referred that, together with the trust lands, total 119 acres but that may overlap with the trust lands.

Mexico. Those community land grants petitioned Congress for redress in the late 1990s and the General Accounting Office was charged in 2000 with investigating the implementation of the Treaty of Guadalupe Hidalgo. According to its 2004 report, nearly 5.4 million acres were confirmed as non-Pueblo community land grants in New Mexico. By 2000 about 5.0 million acres had been lost.⁴⁹ These community grants thus managed a combined land area five percent in size of the originally confirmed acreage.

It should surprise no one that fraudulent practices, land swindles, and tax delinquencies were largely responsible for post-confirmation loss of control of land. Land speculation by newcomers and fraudulent practices by government officials who used their public position to advance nefarious private interests reached a peak in the 1870s in New Mexico, much as occurred in Ysleta del Sur Pueblo. The practice in New Mexico became so notorious it attracted the attention of the national press, which dubbed its perpetrators as the "Santa Fe Ring."⁵⁰ William deBuys, David Benavides, and Ryan Golten have documented actions that led to loss of control of land by non-Pueblo Spanish/Mexican land grants.⁵¹ Clearly, the absence of federal oversight facilitated this unfortunate outcome.

⁴⁹ U.S. General Accounting Office, *Treaty of Guadalupe Hidalgo*, 149.

⁵⁰ Ebright, *Land grants and lawsuits*, 266.

⁵¹ deBuys, "Fractions of justice," 71-97; Benavides and Golten, 857-926.

VII. Conclusion

The Treaty of Guadalupe Hidalgo requires the U.S. to respect pre-existing real property rights. That the region of El Paso came under the jurisdiction of the state of Texas in 1850 had significant consequences as a practical matter for YDSP's property rights as an Indian Pueblo. Indeed, the Indian Agent assigned to New Mexico in 1849 believed that Ysleta fell under the same federal jurisdiction as did seventeen other New Mexican pueblos which received federal confirmation and protection of their four-square league Spanish land grants. Had YDSP been located within the boundaries of the New Mexico Territory after the Compromise of 1850 there is little doubt that its four-square league grant would have been confirmed by Congress given that YDSP was recognized as an Indian Pueblo subject to special property protections throughout the Spanish and Mexican periods and shared the same legal and administrative history as the northern Pueblos through 1850.

The historical record also shows that the state of Texas exercised no legal jurisdiction over the El Paso area and YDSP until 1850. It acquired nominal jurisdiction when it created El Paso County in January of that year, an act intended to preemptively wrest the territory from federal jurisdiction.

However, Texas' jurisdiction was aspirational until the Compromise of 1850 established the boundaries between New Mexico and Texas.

Finally, the post-1850 confirmation record of Ysleta del Sur is noteworthy for what occurred when compared to Pueblo and non-Pueblo community grants to the north. Despite the acknowledgement of its Spanish Pueblo land grant by the Texas legislature in 1854, it experienced the loss of control of land much greater in proportion to that of New Mexico's Pueblos, even after 1876, when prohibitions against the conveyance of New Mexico Pueblo lands were lifted until 1913. The only difference was that post-1850 those Pueblos fell within the New Mexico territory's boundary while YDSP fell within state of Texas' boundary. YDSP did not receive the protections provided by federal Indian agents further north. Neither did it have the benefit of a remedy afforded by the 1924 Pueblo Lands Act that quieted title to both Pueblo and private lands and partially compensated New Mexico's pueblos for their loss. Instead, the history and magnitude of the loss of control of lands by YDSP were contrary to its status as an Indian Pueblo and the special property protections that accompanied that status.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that on May 24, 2021, the foregoing Motion was filed with the Clerk for the United States Court of Appeals for the Fifth Circuit, and that all counsel of record were served by electronic means on that same date.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,303 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Time Roman 14-point for text; 12-point for footnotes.

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