United States Department of the Interior

OFFICE OF THE SOLICITOR
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Memorandum

To: Secretary

From: Solicitor

Subject: Eastern Boundary of the Sandia Pueblo Grant

I. Introduction

The question of the proper location of the eastern boundary of the 1748 Spanish land grant to the Pueblo of Sandia in central New Mexico has been a matter of public controversy for many years. In December 1988, Solicitor Ralph Tarr issued an Opinion, in which Secretary Hodel concurred, rejecting the Pueblo's claim that the eastern boundary of its grant should be resurveyed and located along the main ridge of the Sandia Mountain rather than along a foothill ridge. 96 I.D. 331 (1988) (hereafter Tarr Opinion). The Pueblo challenged the Tarr Opinion in federal district court in the District of Columbia. The court eventually issued an Opinion and Order setting aside the Tarr Opinion and remanding the matter to the Department for further proceedings. Pueblo of Sandia v. Babbitt, Civ. No. 94-2624 (D.D.C., July 18, 1998) (hereafter, 1998 District Court Opinion).

The Order was appealed, but appellate proceedings were stayed for more than a year pending mediation efforts. Eventually discussions produced a settlement agreement executed between the United States, the Pueblo, and the Sandia Peak Tram Company, which participated as *amicus* in the District Court. See Agreement of Compromise and Settlement between Pueblo of Sandia. the Sandia Peak Tram Company, and the United States, dated April 4, 2000. The settlement agreement remains in effect until November 15, 2002 (subject to a limited "opt-out" clause; see id., Article XVII), but must be ratified by Congress in order to become permanent. Two months ago, the Court of Appeals for the District of Columbia Circuit dismissed the appeal for lack of jurisdiction because the District Court's action was not a final, appealable decision. 231 F.3d 878 (D.C. Cir., 2000).

The Court of Appeals noted, in dismissing the appeal, that a very large administrative record had been compiled on this issue, and that Interior had "the option of re-opening the record to solicit additional comments from the public before conducting its reevaluation." 231 F.2d at 882. On

December 5, 2000, I sent letters to all identifiable interested parties advising them that the Department was again considering the question of the Pueblo's eastern boundary, and that they may submit additional historical evidence or legal analysis by January 5, 200l. A public notice to this effect was also published in the Federal Register on December 11, 2000. 65 F.R. 77385. We received, and have considered, additional material submitted by the Pueblo of Sandia, the County of Bernalillo and the Sandia Mountain Coalition (the latter two were intervenors in the lawsuit), the City of Albuquerque, and the Sandia Peak Tram Company. The intervenors filed a petition for rehearing on December 22, 2000, with the Court of Appeals; that petition was denied on January 11, 200l.

My reconsideration of the Tarr Opinion's conclusion on the boundary issue does not depend on a formal remand from the court, but is based on the implied power of federal agencies to reconsider previous agency decisions. See American Trucking Assn. v. Atchison, Topeka and Santa Fe Railway Co., 387 U.S. 397, 416 (1967); see also Arizona v. California, 530 U.S. 392, 120 S.Ct. 2304, 2313-14 (2000) (noting an earlier Solicitor's reversal of an opinion by one of his predecessors). Mindful of the importance of stare decisis, I have, in my tenure as Solicitor, generally reconsidered earlier opinions only when I have become convinced a previous opinion is seriously mistaken on a matter of some importance, and I have provided a reasoned explanation for doing so. See Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 (10th Cir. 1987); Hatch v. FERC, 654 F.2d 825, 834 (D.C.Cir. 1981). Recently I reversed Part IV of the Tarr Opinion, which concluded that the Secretary of the Interior lacks statutory authority to reconsider allegedly erroneous surveys to correct errors where Indian land was involved. This reversal was in an Opinion I issued on a boundary dispute between two other New Mexico Pueblos, Santa Ana and San Felipe, in which I concluded that the Secretary has such authority. See M-37000 (December 5, 2000).

II. Background

The Pueblo of Sandia lies on the east side of the Rio Grande north of the City of Albuquerque, New Mexico. See Map attached as Exhibit A. In 1748 the Spanish colonial government made a land grant to the Pueblo. The core issue in this dispute is where the eastern boundary of that grant is located. The Tarr Opinion provided an extensive discussion of the matter. See 96 I.D. at 332-42. Here I will provide only a skeletal outline of the events which led to the current controversy, before turning to a reevaluation of that Opinion.

The sovereign power of Spain over the territory of New Mexico passed to the Republic of Mexico in 1821, and then to the United States in 1848 pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922. Article VIII of that Treaty established the right of "Mexicans" to retain the property which they owned in the ceded area. Pueblo Indians had been treated as Mexican citizens (see United States v. Sandoval, 231 U.S. 28, 45 (1913)), and were viewed as entitled to this protection when Congress passed the Surveyor-General Act of 1854. 10 Stat. 308.

Section 8 of the 1854 Act directed the Surveyor-General of New Mexico, a Presidential

appointee under instructions from the Secretary of the Interior, to make a "full report" to the Congress on the validity of all claims under the laws, customs, and usages of Spain and Mexico, plus a report on the nature of the titles to the land held by "all pueblos." Such a report "shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty . . . between the United States and Mexico . . . ." 10 Stat. 309. The Surveyor-General filed his report with the Secretary of the Interior in 1856, who then transmitted it to Congress. Exec. Doc. No. 36, H.R., 34'h Cong., 3'd Sess. (1857). One of the key issues in this matter is the translation and interpretation of a boundary call in the 1748 grant which reads as follows: " . . . y por el Oriente la Zierra Madre llamada de Sandia . . . ." The Surveyor-General's report included a translation of that phrase as "and on the east, the main ridge called Sandia." Id. at p. 11.

An Act of Congress which became law on December 22, 1858, confirmed the land claim of the Pueblo, along with the land claims of 16 other Pueblos and five non-Indian towns, and directed the Commissioner of the Land Office to survey these claims and to "cause a patent to issue therefor." 11 Stat. 374. An 1859 survey of the Sandia Pueblo Grant conducted by one R.E. Clements (hereafter, the "Clements survey") ran the eastern boundary roughly along the top of a foothill on the western slope of the mountain, rather than along the true crest of the mountain. The Clements survey also included within the grant boundaries a narrow wedge of land on the south stretching to the east of the western foothill, but not all the way to the crest of the mountain. See Map of the Claim Area attached as Exhibit B. The 1864 patent issued to the Pueblo by President Lincoln adopted the metes and bounds description of the 1859 survey.

The Pueblo has contended, since first approaching the Department in 1983, that the true eastern boundary is the crest of the mountain, and that the 1859 survey and the 1864 patent are erroneous and should be corrected. About 10,000 acres of land now managed as part of the Cibola National Forest are involved. Most of this acreage was designated as the Sandia Mountain Wilderness in Section 2 of the Endangered American Wilderness Act. 92 Stat. 42. The disputed area also contains about 700 acres of private inholdings.

In a November 30, 2000 letter to the Secretary, attorneys for the Pueblo renewed the Pueblo's petition to resurvey the boundary along the crest of the mountain, and repeated earlier disclaimers of any right, title or interest in any of the inholdings. (As applicable law provides, and the December 11th Federal Register notice stated, the exercise of the Secretary's survey authority cannot affect the titles of private landowners. See Section XI, infra.)

In a November 21, 2000 letter to the Secretary, the attorney for the County of Bernalillo and the Sandia Mountain Coalition also contended that the Clements survey is erroneous, apparently because it includes within the boundaries of the Pueblo of Sandia the wedge of land on the southeast noted above, and also other lands further than one league east of the center of the Pueblo. See Section VII infra.

III. The Burden of Proof

The Tarr Opinion recited the "usual presumption that surveys and patents of the United States are correct," and concluded that this presumption can be overcome only by establishing by a "preponderance of the evidence" that a survey or patent is "fraudulent" or "grossly erroneous." 96 I.D. at 342. It concluded that the Pueblo had failed to establish fraud or gross error and consequently had failed to satisfy this burden of proof.

In its 1998 decision vacating the Tarr Opinion, the Federal District Court suggested that the burden of proof for overcoming the presumption of survey correctness should be lowered when the party claiming error is an Indian tribe. Pueblo of Sandia v. Babbitt, Civ. No. 94-2624, slip op. at 8-l1 (D.D.C. July 18, 1998). Specifically, the court determined that the general presumption of survey correctness is tempered by the well-established canon of construction which holds that ambiguous expressions in treaties and other instruments involving Indians should be liberally construed, with ambiguous expressions resolved in favor of the Indians. See, e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992). The court found as a matter of law that the Tarr Opinion "unjustifiably denigrates the Indian-favoring policy and elevates the presumption of survey regularity . . . [and forced] the Pueblo to satisfy an unnecessarily high burden to vindicate their claim." Pueblo of Sandia, slip op. at 8-9. Because, in the words of the court, the Tarr Opinion "myopically fails to find ambiguity" in the proper interpretation of the 1748 Spanish grant, it improperly "failed to follow 'that eminently sound and vital canon"' of construction favoring Indians. Id. at 10-l1 (quoting Bryan v. Itasca County, 426 U.S. 373, 392 (1976)).

In a non-Indian context, the Supreme Court had this to say about questioning patents:

> [T]he respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, [and] the immense importance and necessity of the stability of titles dependent upon those official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof.

United States v. Maxwell Land Grant Co., 121 U.S. 325, 381 (1887). I know of no decision or practice which holds that the presumption of correctness is different where Indian lands are involved. For the reasons expressed in Maxwell, the Tarr Opinion was correct in placing the burden on the Pueblo of Sandia to demonstrate that its patent is incorrect.

I believe, however, that the Tarr Opinion may have erred in concluding that the Pueblo was required to establish fraud or gross error in order to overcome this presumption of correctness. The "fraud or gross error" standard cited in the Opinion was extrapolated from Departmental decisions involving public lands, where the standard has been consistently applied to claims that challenge the accuracy of a governmental survey of public lands. See Peter Paul Groth, 99 IBLA 104, 111 (1987); see also Albrecht v. United States, 831 F.2d 196 (10th Cir. 1987).

I have found no situation other than the Tarr Opinion where this "fraud or gross error" standard has been applied to claims that involve the interpretation and application of a private land grant. Although federal lands are involved here, in the sense that they are affected by where the grant boundary is located, the basic survey question involves the exact boundary of a preexisting grant of title to a private party. Because surveys of private land grants, and the patents which give them effect, merely recognize such preexisting private rights, the Supreme Court has required only that the claimant demonstrate by a preponderance of the evidence the basis for the claim of prior title. See United States v. Ortiz, 176 U.S. 422, 425-26 (1900).

It is not completely clear what burden of proof the Pueblo has to carry, but the better view would be that the Pueblo faces the same burden of proof we would impose upon any private land grant claimant who has alleged an erroneous survey - to establish by a preponderance of the evidence that the Clements survey conflicts with the language of the Spanish land grant; i.e., fraud or gross error need not be shown. As discussed further below, however, I believe the Pueblo has sustained even the higher burden of showing "gross error" in that survey.

An important issue in resolving this dispute is what Congress meant when it enacted legislation in 1858 confirming the Pueblo's grant as reported to Congress by the Surveyor General in 1856. I agree with the District Court that, in interpreting that legislation, the canon of construction governing statutes which benefit Indians applies.

IV. The Scope of the 1748 Spanish Land Grant

Like numerous other Spanish land grants which have been the subject of litigation and controversy in New Mexico since the Treaty of Guadalupe Hidalgo, the language of the 1748 grant documents is not very precise. There are multiple translations, interpretations, and theories for examining these documents. Numerous thoughtful works of experts have been submitted to the Department on this issue (see list attached as Appendix C). The question discussed in this section is what lands were included in the area set aside for the exclusive use of the people of the Pueblo by Spanish officials in 1748.

A. The language of the grant documents

The best evidence of the intent of Spanish officials would presumably be the language of the Sandia Pueblo Grant document itself. Specifically, the boundaries of the grant are set out in a document known as the Act of Possession, which was signed by Lieutenant General Bernardo Antonio de Bustamante Tagle (hereafter, Bustamante).[1] Historian Stanley Hordes, whose report,

[1] The grant documents, as found in Exec. Doc. No. 36, supra, are: (1) Friar Juan Miguel Melchor's petition, dated April 3, 1748, for a royal land grant for the Pueblo of Sandia; (2) Governor Joachin Codallas y Rabal's royal decree, dated April 5, 1748, authorizing the rebuilding and resettling of the Pueblo of Sandia; (3) Lieutenant General Bustamante's letter, dated May 14, 1748, noting that private landowners immediately west of the Pueblo agreed to

History of the Boundaries of the Pueblo of Sandia. 1748-1860 (March 1, 1996), was submitted by the Department of Agriculture, and other historians generally agree that there is evidence the original document was altered some decades after 1748. Those alterations did not, however, change the single Spanish phrase referring to the eastern boundary. The Surveyor General's 1856 report utilized a translation by David V. Whiting of a document which included this altered language; it also included what Dr. Hordes views as a mistranslation of the critical eastern boundary phrase.

The Tarr Opinion utilized a translation of the Act of Possession offered by Dr. Myra Ellen Jenkins, one of the Pueblo's experts at that time. 96 I.D. at 348. That translation does not include the language which Dr. Hordes contends was added, perhaps fraudulently, some time after 1748. The Jenkins translation contains no evident substantive differences from what Dr. Hordes has submitted in his report. See Hordes Report, at pp. 17-18. Consequently, I will use the Jenkins translation here:

> The leagues conceded for a formal pueblo were measured, and the cordels [measuring cords] extended to the west wind as far as the Rio del Norte, which is the boundary, having no more than 12 cordels of 120 Castillian varas each one which consisted of 1,440 varas, and in order to complete those which were lacking in this direction it was necessary to increase the leagues which pertain to the north and south winds equally so that the Spanish settler grantees would not be injure, some more than others. The land which is encompassed in these three winds [directions] is all for raising wheat with the conveniences of water for the purpose of the land. And in order to perpetuate the memories and the designations I ordered them to place monument markers, mounds of mud and stone of the height of a man. with wooden crosses on top, these being on the north facing the point of the cañada which is commonly called "de1 Agua", and on the south facing the mouth of the Cañada de Juan Tabovo, and on the east the sierra madre called Sandia, [[2]] within which limits are the conveniences of pastures, woods. waters and watering places in abundance in order to maintain their stock. both large and small and a horse herd . . . .

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permit the Pueblo to pasture their stock on land west of the Rio Grande River; (4) Bustamante's letter, dated May 16, 1748, noting that private landowners immediately north and south of the Pueblo consented to cooperate with the Pueblo; and (5) Bustamante's Act of Possession, dated May 20, 1748, which described the boundaries of the Pueblo of Sandia.

[2] The Whiting translation in the Surveyor's General's report to Congress used the phrase "and on the east, the main ridge called Sandia." As noted in the text, there is no evidence that this phrase in the original Spanish document was subsequently altered. For purposes of discussion in this section we will use the original Spanish phrase "Sierra Madre". The significance of the use of "the main ridge" as a translation of that phrase is discussed further below in this subsection.

96 I.D. at 348 (emphasis added.)[3]

Most of the debate surrounding the meaning of this document has focused on the eastern call, "and on the east the sierra madre [or 'mountains,' 'mountain range' or 'main ridge'] called Sandia." The positions asserted by various interests are that the eastern boundary is

> --the crest or highest north-south ridge of the Sandia Mountains (the Pueblo's position) (hereafter, the mountain crest), which rises to about 10,600 feet above sea level;
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> --the top of what some have called the "western foothill of the Sandia Mountains" (see Tarr Opinion, 96 I.D. at 340), a razorback ridge with an elevation of roughly between 6,500 and 8,000 feet above sea level that extends 5 miles north-south, and lies approximately 2-3 miles to the west of, and roughly parallel with, the mountain crest (this was the eastern boundary located by the Clements survey) (hereafter, the western foothill); or
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> --a north-south line 1.7 miles further to the west of the western foothill, based on Dr. Hordes' theory that the Pueblo was limited to one league in each direction, including to the east (discussed in more detail below) (hereafter, the one-league line). This line is at an elevation of approximately 5,400 feet above sea level, and is about 3.35 miles east of, and about 400 feet in elevation above the Rio Grande River, which forms the Pueblo's western boundary. The Rio Grande River is approximately 5,000 feet above sea level in this area.

The references to the northern and southern boundaries in the Act of Possession help to put the phrase describing the eastern boundary in some context. For example, regarding the southern boundary, the Whiting translation gives the reference to the boundary on the south as "the Maygua hill opposite the spring of the Carrisito".[4] Dr. Hordes believes the description here is an

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[3] As noted by Solicitor Tarr, there has been debate whether the Spanish Archives of New Mexico possesses two sets of official documents. 96 I.D. at 333 n. 2. However, most of the historians who submitted reports about Sandia agree that Sandia's original grant is probably SANM I #848. See W. Minge, The Pueblo of Sandia: Issues and Encroachments, Appendix C 114 (January 1983); M. Jenkins, E. Brandt, The Sandia Eastern Boundary 9-10 (October, 1988) (hereafter "Jenkins-Brandt"); Hordes Report, at 16. All historians offering translations of the Sandia Grant- Dr. Hordes, Dr. Jenkins, and Dr. Minge- relied on SANM I #848. Therefore this opinion, like the Tarr Opinion, will assume that SANM I #848 is the original copy of the Pueblo's 1748 grant.

[4] This alteration appears to be the primary basis for the petition submitted on November 21, 2000, by the attorney for the Sandia Mountain Coalition and the County of Bernalillo to correct the grant survey to exclude the southeastern wedge of land, and perhaps other lands on the east, which the petition asserts were fraudulently included within the grant.

alteration not found in the original Spanish document. The phrase which Dr. Hordes would substitute for this altered language for the southern boundary call is found in the original Spanish document: "y por el Sur afrontada a la voca de la Cañada de Juan Tabovo" or "And on the south, facing the mouth of the Cañada de Juan Tabovo." What today is called Juan Tabo Canyon lies between the western foothill and the mountain crest. The mouth of Juan Tabo Canyon lies about a half mile north of the southern edge of the western foothill.

The northern boundary call is similar: "por el Norte afrontada con la Punta de la Cañada que comunmente llaman de la Agua", translated as "on the north facing the point of the Cañada which is commonly called 'de1 Agua'."[5] This canyon also lies between the western foothill and the mountain crest, intersecting with a point approximately at the northern edge of that ridge. (See Exhibit B.)

These southern and northern references provide some evidence that the eastern boundary could not lie to the west of the western foothill (cutting against the position of Dr. Hordes) because the southern and northern markers referred to would then lie outside of the grant boundaries. On the other hand, they do not directly address where the eastern boundary should lie. The only language directly pertaining to the eastern boundary is "y por el Oriente la Zierra Madre llamada de Sandia."

The crucial point of dispute recognized by practically all who have examined the matter is, as the Tarr Opinion put it, "whether the reference to the mountains" on the east in the Act of Possession is "a call to a natural feature as a boundary," or is instead "a directional reference to a natural feature facing which the monument was to be placed." 96 I.D. at 349-50. The Tar-r Opinion treated this eastern call as a directional reference, not a boundary monument, 96 I.D. at 350, as does Dr. Hordes. Dr. Jenkins, while not embracing Whiting's "the main ridge" in her translation, nevertheless viewed the reference to the "sierra madre" as denoting the eastern extent of the Pueblo's grant, consistent with other Spanish usage and consistent with Whiting's translation.[6] M. Jenkins, The Pueblo of Sandia and its Lands, at 59 (1988) (hereafter "Jenkins Report".)

The principal argument against the Pueblo's claim is what I will call the "formal Pueblo" argument, discussed in the next subsection. Other than that argument, the most straightforward reading of the grant supports the Pueblo.

As the Tarr Opinion conceded, the term "afrontada" (translated "facing" or "opposite") appears in the southern and northern calls in the grant in describing monument locations (with reference to nearby canyons), yet is absent from the description of the eastern call. See 96 I.D. at 349. If it

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[5] The Whiting translation includes the phrase "an old tower" after "on the north". Dr. Hordes views that as an alteration, and the Jenkins translation also does not include that phrase.

[6] Both Dr. Hordes (1981-1985) and Dr. Jenkins (1967-1980) served as New Mexico State Historians. Dr. Jenkins died in 1993.

had been included in the eastern call, it would have provided powerful evidence that the reference to the mountain crest was intended to be a directional reference, and not a natural boundary monument. The Tarr Opinion gave no weight to this omission. It found the word "facing" could be implied in the third clause by a parallel construction from the first two clauses in the sentence. It concluded that the quoted sentence was "not seeking to describe the boundaries, but rather to memorialize the setting of monuments," and suggested that if the reference to the east were intended to be to the mountain as a boundary, "a clearer expression of [such] an intent . . . would have been provided." 96 I.D. at 350.

I believe this construction is quite strained. On the west the boundary was a natural feature (the River). On the north and south, the boundary was a measured distance. The question is whether the eastern boundary was a natural feature or a measured distance. The language of the Act of Possession, at least viewed in isolation, strongly suggests the eastern boundary was a natural feature - the mountain crest - and not a measured distance. Dr. Jenkins' examination of Spanish land grants showed that the Spanish authorities used other phrases for grants in mountainous terrain to set a boundary other than at the crest, such as "el pie de la sierra" (the foot of the mountain) and "la falda de la sierra" (the skirt of the mountain). Jenkins Report, at 59.[7]

In my view, the Act of Possession provides a persuasive rationale for treating the other three boundaries differently from the eastern boundary. The distance to the west is shorter than a league because it stops at the River. As the Tarr Opinion pointed out, the Spanish landowners across the river to the west were put at ease by the Spanish authorities' assurance that the Pueblo would not receive a full league in that direction. 96 I.D. at 347. To compensate the Pueblo, according to the grant document, the distances to the northern and southern boundaries were increased. There were later disputes during the Spanish and Mexican periods over where the southern and northern boundaries should be placed, and the ostensible alterations to one of the original documents may have been an attempt to manipulate those two boundaries. Hordes Report, at 16.

These disputes all involved the irrigated and populated lands along the river. These would have been, of course, the most desirable lands. Therefore, if the Pueblo was not to secure lands along the western bank of the Rio Grande, it is only natural that it would secure lands beyond one league to the north and south along the eastern side of the River. Even if the intent was to start with the presumption that the Pueblo would receive a grant of four square leagues (the "formal Pueblo" argument, discussed in detail in the next subsection), it is not clear that this would result in setting the eastern boundary at just one league from the center of the Pueblo, as Dr. Hordes contends. The Spanish authorities might easily have made a judgment that the Pueblo should

[7] Intervenors have submitted a more recent memorandum from Dr. Hordes, dated September 14, 1999, which recounts a 1697 report by Lorenzo de Misquía where the term "sierra" is used to refer to an entire mountain, not just the ridge. I do not believe, however, that this calls into serious question the Pueblo's position that the entire western face of the mountain, up to its crest, is included in its grant.

receive valuable lands along one side of the River equivalent to what it would have received if its grant had included lands on the west side of the River (and so should be compensated with more of such lands to the north and south). This would not necessarily suggest, however, a reluctance to give the Pueblo an eastern boundary that conformed to a natural feature rather than being measured by distance. This reading is strongly supported by the fact that the Act of Possession states that the lands within the west, north and south boundaries-- conspicuously not including the east-- were adapted to the raising of wheat, and the various distances in those directions were apparently calculated in reference to one another. In other words, they were treated as a unit in the grant document. Jenkins Report, at 33.

The reference to the eastern boundary in the Act of Possession call recites no distance. The Tarr Opinion acknowledged that the "western boundary, being a natural feature [the river], needed no reference monument. Likewise, if the Sandia Mountains were the eastern boundary, no manmade monuments would be necessary . . . ." 96 I.D. at 350. That truth provides a sufficient explanation why Bustamante did not order monuments on the west or east: The river and the mountain provide adequate markers. But the Tarr Opinion made an inferential leap at this point which I believe is not supported by a fair reading of the documents, or anything approaching the weight of the available evidence:

> The clear inference, then, is that the reference to the east in the third sentence was not to a natural boundary, but to the direction for measurement of the 1 league upon which manmade monuments were to be established, because there was no natural feature to cite as the boundary.

Id. There is no statement in the Act of Possession that the eastern boundary shall lie one league to the east of the village. Nor is there evidence that a manmade monument was established one league to the east. The only explanation the Tarr Opinion provided for why the mountain crest was not a "natural feature" that was an appropriate boundary is to start with, and find controlling, the "formal Pueblo" argument discussed in the next subsection. Apart from this argument, what evidence there is of the eastern boundary in the language of the Act of Possession points to the mountain crest as the boundary on the east.

Other language in the grant document also supports reading the mountain crest as the eastern boundary. The clause following the eastern call states, "within which limits are the conveniences of pastures, woods, waters and watering places in abundance" to support their stock. Land grant lawyer and expert Malcolm Ebright notes that the resources denoted by the word "montes" (translated "woods" here but also translated as "timber" and "mountains") are found in abundance- "en abundancía" in the words of the Sandia Grant-- only in the disputed area between the foothill crest and the mountain crest.[8] M. Ebright, "What history has to say", The

[8] Dr. Guillermo Margadant, a Mexican professor of colonial law, has noted the common use of the term "montes" in land grant documents, defining it as "wasteland, covered by a grant to a settlement, and at the disposal of the members of the community for hunting, collecting

Albuquerque Tribune (October 13, 1998) p. D1.

The Pueblo has pointed to resources existing in the disputed area between the western foothill and the mountain crest - the abundance of springs and the availability of pine boughs and vigas in the mountain forest for construction and ceremonial needs - as further evidence that the grant boundary was intended to be the mountain crest. The Tarr Opinion dismissed the argument on the grounds that it could find no "intention to extend boundaries . . . beyond the customary 1 league to the east to seek additional resources," and that "there appears to be little question that the resources recited in the Act of Possession are contained within the existing boundaries of the Pueblo." 96 I.D. at 352. The Tarr Opinion also offered a third reason, which seems at least somewhat inconsistent with the second; namely, that the Spanish authorities negotiated with the Spanish settlers on the west bank of the Rio Grande to permit the new pueblo to use west bank land to water and pasture their cattle, so there was no need to "continue expanding the grant to the east until waters and pastures were located." Id. at 353.

The evidence reveals a great deal of question about the availability of resources within the boundaries as depicted in the Tarr Opinion. East of the irrigation ditches there may have been no springs or woodlands -- certainly none "in abundance" -- except east of the western foothill. Jenkins-Brandt, at 24-26. Moreover, the circumstances surrounding the making of the Sandia Grant in 1748 suggest a desire that the Pueblo be rebuilt, since it was destroyed during the Pueblo-Spanish war and lay vacate for decades. In 1762, Governor Tomas Velez Cachupin ordered the Sandia Indians to "cut the wood necessary for their houses and the completion of their quarters." Surveyor General Records, file P, Pueblo of Sandia. Building timber was found only in the disputed area east of the western foothill, as the cottonwoods on the river and scattered piñon and juniper did not provide adequate building material to reconstruct the village.[9]

Thus, the language of the grant document provides an understandable rationale for extending the eastern portion of the Sandia Pueblo grant up to the mountain crest (and certainly well beyond the single league from the church which Dr. Hordes posits to have been a legal limitation on grants to Indian Pueblos)." The Tarr Opinion disregards this evidence, interpreting the grant documents as merely certifying that these resources were contained within the grant boundaries.

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wood for the fire, reeds for weaving, etc." G. Margadant, Mexican Colonial Land Law, in Spanish and Mexican Land Grants and the Law 85, 93 (M. Ebright, ed.,1989).

[9] Clements' field notes of November 11, 1859, speak to the resources available within the grant boundaries: "About one third of this grant is first rate bottom land easily irrigated and cultivated. There is considerable cotton wood timber along the Rio Grande. The Hill land produces fine grass. The Sandia Mountains grow an abundance of good pine timber." The Tarr Opinion quoted the first three sentences of this passage, but not the last. See 96 I.D. at 335.

[10] As discussed in Section V, below, a later adjudication of similar land grant language arrived at the same conclusion.

B. The Formal Pueblo Argument

The lynchpin of the reasoning of the Tarr Opinion was that the "Spanish intended to grant a formal pueblo of as close to 4 square leagues as possible to the Sandia Pueblo." 96 I.D. at 348. As the Tarr Opinion noted, "[a]ll of the authorities appear to agree that a 'formal' or 'regular' pueblo was generally a grant of 4 leagues square, that is, a league in each direction from the center (usually a church) of the pueblo." Id. at 347. The Tarr Opinion called the "concept of a formal pueblo . . . well settled in the practice of the day." Id. at 351. In effect, the Tarr Opinion viewed four square leagues as being tantamount to a legal standard for what an Indian Pueblo could receive in a grant from the Crown, and that this standard controlled in setting the boundaries for the Sandia Grant. Dr. Hordes' 1996 report supports this approach, advancing the view that four square leagues was the standard Spanish measurement for a pueblo.

The term 'pueblo' itself denotes a Spanish community and is not limited to Indian Pueblos. A little more than a century ago the U.S. Supreme Court examined Spanish colonial law on this subject, specifically the Recopilación de las Leyes de los Reynos de las Indias (Recompilation of the Laws of the Kingdoms of the Indies), dating from 1680, and addressed the suggestion that four leagues square was a standard measurement for a pueblo grant:

> Plainly, from the provisions of the Recopilación the quantity varied with the condition of the respective settlements; and to imply a grant of land to the extent of four square leagues in every case would be to suppose that every settlement was alike, while the law itself contemplated that they would be different, and subject to different allowances. This consequence is shown by a statement in the treatise of Hall on Mexican Law, where it is said (section 117, p. 51):
>
> > "Limits of Pueblos.-- There never existed any general law fixing four square leagues as the extent of pueblos or towns. . . . Those [pueblos] formed by the government . . . were only limited by the discretion of the governors of the provinces and viceroys, subject to approval or disapproval of the king. There are numerous pueblos in Mexico which have less and many that have more than four square leagues."

United States v. City of Santa Fe, 165 U.S. 675, 690-91 (1897).

In the Sandia Pueblo grant, the instructions from the Spanish Governor were to carry out an allotment of land "which should pertain to a formal pueblo of Indians, in accordance as the royal regulations prescribed for this matter as to the statement of their boundaries." Jenkins translation, quoted in the Tarr Opinion, 96 I.D. at 347. The Whiting translation of the same instruction referred to "sufficient for a regular Indian pueblo, as required by the royal orders concerning the matter, setting forth the boundaries thereof." Id. at 347 n. 9. The Act of Possession reported that the "leagues conceded for a formal pueblo were measured." Id. at 348.

There are indeed many references to four square leagues in the documents associated with both Indian Pueblo and non-Indian community grants. Of the twenty-two Indian Pueblos in New Mexico, twelve are approximately (within 300 acres) of that size (17,360 acres). See 96 I.D. at 351; see also United States v. Conway, 175 U.S. 60, 68-69 (1899). But the weight of historical evidence does not support Dr. Hordes' theory that four square leagues was a legal limit on Indian Pueblo grants, and no Spanish law has been cited for that proposition. Along with other historians who have researched this issue, Dr. Jenkins was of the view that 18th century "documentation is clear that this league [distance measurement in each direction from the center of the Pueblo], applied throughout the viceroyalty for Indian communities, was but a minimum right which each Indian Pueblo was recognized as possessing." Jenkins Report, at 26 (emphasis added).[11] Dr. William A. Morgan, whose report was submitted on behalf of the Department of Agriculture in 1988, stated that "there never has been a general law fixing the area of a pueblo at four square leagues or at any other rigid and unequivocal magnitude." W. Morgan, "And on the East . . .": The Sandia Eastern Boundary Issue and the Land Policies of Three Nations 6 (1988) (citing the Recopilación); see also January 5, 200l Memorandum of Dr. Elizabeth Brandt and Dr. Rick Hendricks, submitted on behalf of the Pueblo.

Dr. Hordes offers two historical episodes in support of the proposition that the intention was to grant the Sandia Pueblo a "formal pueblo" limited to four leagues square. The first involved a Spanish settler named Salvador Martinez who lived close to Sandia Pueblo at the time of the 1748 Grant and complained to the Governor that the Pueblo's Grant encroached on his land. The Governor ruled that because Martinez' property was within one league of the mission church, he must move. Hordes Report, at 8. This does not provide meaningful evidence of the location of the eastern boundary, for it merely comports with the views of other historians that one league was a minimum for the protection of Indian Pueblos, but not necessarily the maximum.[12] Dr. Hordes' other account relates to a lengthy dispute in the first half of the 19th century involving a family by the name of Rael de Aguilar who contended that the Pueblo was limited to a league to the south of the church. In 1825 local authorities did resurvey, limiting the Pueblo to a league, but the Pueblo appealed to Mexican authorities. This dispute dragged on for years without a clear final result. Hordes Report, at 9-13. Of course, the Pueblo was correct in its position that it should not be limited to a league to the south, as the distance to the south measured by

[11] Bustamante's letter regarding his conversation with the Spanish settlers on the west bank of the Rio Grande stated that he made "them understand that they were exonerated from giving the league to said Indians on the west according to the royal mandate, which provides for one league towards each of the four cardinal points, which will be increased in other directions ...." Exec. Doc. No. 36, at p. 9. This is consistent with the treatment of a league as a minimum or entitlement for the Indian Pueblos, and is also consistent with our interpretation of the meaning of the Act of Possession in Part IV.A.

[12] As there are no primary source Spanish documents imposing a four league limit on the size of Indian Pueblo grants, there also appear to be no Spanish documents which state expressly that four leagues is a minimum.

Bustamante in 1748 was decidedly farther than a league. Again, this is thin evidence of a legal limit with respect to the eastern boundary, for which the Act of Possession states no distance and requires no monument.

The Tarr Opinion acknowledged that seven of the twenty-two Indian Pueblos in New Mexico, including Sandia, were recognized as having considerably more land than four square leagues. See 96 I.D. at 351. The original grant of the Pueblo of Acoma measured 95,791.66 acres, which is over five times the area of four square leagues; the Pueblo of Isleta measured over 110,000 acres, six times the area of four square leagues; the Pueblo of Santo Domingo measured over 74,000 acres, four times the area of four square leagues; the Pueblo of San Felipe measured almost 35,000 acres, or twice as large as four square leagues; and the Pueblo of Cochiti measured over 24,000 acres, which is almost 40% greater than four square leagues.[13] The existence of so many larger-than-four-square-league pueblos plainly belies something approaching a legal limitation or slavishly followed standard. Dr. Jenkins viewed the actions taken at Sandia as consistent with numerous other exceptions to the standard: "In placing the east boundary as 'the sierra known as Sandia,' which was more than a league distant, [the Spanish Governor] exercised his prerogative to make a grant conform to the needs of its holders." Jenkins Report, at 26.

I believe the interpretation that is clearly supported by the evidence - indeed, the only interpretation that really fits practically all the available evidence - is that the formal pueblo concept was a factor in setting the distances for the northern and southern boundaries (where the most desirable and valuable land was located). As the Act of Possession put it: "The land which is encompassed in these three winds [directions] is all for raising wheat with the conveniences of water for the purpose of the land." This helps explain the care with which the northern and southern boundaries were measured, and fits the references to the formal pueblo in the instructions and especially the Act of Possession.

But the evidence does not dictate, nor even strongly suggest, that the formal pueblo area was controlling in setting the eastern boundary. In this direction there were no conflicts with non-Indian settlers for land along and water from the River. In this direction, the Indians had (according to oral tradition) ceremonial and traditional uses and need for other resources found mainly there. In this direction, the natural boundary of the mountain crest would have been a logical boundary. The language in the Act of Possession supports this view, as discussed earlier. And this view is consonant with the opinion of a number of historians that the Spanish term used in the Sandia Grant, "pueblo formal", does not necessarily dictate a limitation on the size of a Pueblo grant. Instead, the one-league-in-each-direction dimensions of the formal pueblo was often used as a minimum buffer between the Indian Pueblo communities and their non-Indian neighbors.

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[13] In a 1998 supplement to his 1996 Report to the Forest Service, Dr. Hordes states, without citing evidence, that the Santo Domingo, Isleta, and Cochiti Pueblos were intended to receive grants of only four square leagues.

V. Other Nearby Spanish Land Grants.

To the immediate south of the Sandia Pueblo Grant is the Elena Gallegos Land Grant, which was made by the Spanish authorities in 1694. The language of its eastern boundary call reads "por el oriente con la sierra de Sandia", very similar to the Sandia Grant's "por el oriente la Zierra Madre llamada de Sandia." The exact location of this boundary was the subject of a decision of the Court of Private Land Claims in 1893 in Gurule v. United States, No. 51 (C.P.L.C.). The Court's decision, by Justice Wilbur Stone, confirmed that the eastern boundary of that grant was the Sandia mountain crest, observing, among other things (Opinion filed Dec. 1, 1893, p. 2):

> In all this region of the country, with its peculiar physical and climatic conditions, wood, water and grass are the most desirable and requisite qualities of a rancho or land grant. That mountains, from the snow which lodges upon their summits, furnish water, timber and more abundant and nutritious grasses upon their slopes than are to be found on the plains below, and often the only water, timber and grass to be had[,] is so notorious as to compel judicial cognizance.

The Tarr Opinion discounted this argument on a variety of grounds. It called the language of the Elena Gallegos Grant "much clearer," focusing on the preposition "con" in the Gallegos Grant as providing more specificity than the Sandia Grant. 96 I.D. at 355. It would seem, however, that a more powerful argument can be made for the opposite position; that is, "on the east by [or with] the Sandia mountain" suggests a less direct call than "the mountain range called Sandia" (Dr. Hordes' preferred translation of the phrase in the Sandia Grant). The Tarr Opinion also dismissed Justice Stone's decision, along with other determinations that the eastern boundaries of Spanish land grants in the Rio Grande valley extended to the mountain crests, as weak circumstantial evidence "more idiosyncratic than thematic" with little relevance to the Sandia Grant. Id. at 354.

In the report he submitted after the Tarr Opinion was issued, Dr. Hordes calls Justice Stone's ruling a "curious one". Hordes Report, at 33. He suggests that because the Court's opinion drew a distinction between the word "sierra" and the phrase "sierra madre", it had no bearing on the Sandia Grant. Id. at p. 34. Justice Stone had noted that the "primary meaning of the word 'sierra' is a saw," and went on to observe:

> As applied to the mountains its figurative, general meaning is a range; as 'La sierra Madre', 'La sierra Nevada", the Mother Range and the snowy range of the Rocky Mountains. In a special application of the term to a single mountain or mountains not properly constituting a range, the word Sierra especially refers to and denotes the serrated crest, comb, ridge, or summit. The term may be applied, in common parlance, to entire mountains, smoothly rounded, as to those with rugged ridges, but when employed in relation to a boundary point or line, there can be no room for doubt that the 'cumbres', apex, or summit is intended as the true and precise definition of the land-mark.

Gurule at p. 4 (emphasis added.). Thus Justice Stone's reference to "La sierra Madre" was to the mountain range of that name, like the Sierra Nevada or the Sangre de Cristo, and his point was quite clearly that the term 'sierra' as applied to a specific mountain or mountains necessarily denotes, "when employed in relation to a boundary point or line," a landmark at the summit.

In 1987, the Department of Agriculture suggested that, because the western foothill facing the mountain at Sandia Pueblo is a razorback ridge which is more prominent than the foothills on the Elena Gallegos grant lands, it was logical to draw the eastern boundary along that razorback rather than along the mountain crest, thus distinguishing the Sandia Pueblo grant from what was done by the Court of Private Land Claims for the Gallegos grant. On this point, the possible intent behind the phrase "sierra madre" actually becomes more clear. The Spanish grantors may well have sought to clarify that the mountain crest was the boundary, and not the subordinate western foothill. The casual observer would find nothing "madre" about the subordinate, barren razorback ridge where Clements located the Pueblo's eastern boundary.

The eastern boundary of another nearby land claim, the "Lo de Padilla Tract," came before the Court of Private Land Claims in 1896 in Case No. 273, Pueblo of Isleta v. United States. It lies about 20 miles south of Albuquerque. The original grant had been given to Diego de Padilla in 1718 and was purchased by the Pueblo of Isleta in 1750. As in the case of the Elena Gallegos Grant, federal officials alleged that the eastern boundary of the grant extended only to the foothills of the Sandia Mountain. (Today these mountains are considered part of the Manzano range.) The Pueblo of Isleta invoked the Court's ruling in the Elena Gallegos case as support for its contention that the eastern boundary went to the crest of the Mountain. The language of the grant referred to "por el oriente la Sierra de Sandia," which is even closer to the language of the Sandia Grant than the Elena Gallegos language. Chief Justice Joseph R. Reed of the Court of Private Land Claims ruled that the language should be interpreted as treating Sandia Mountain as the eastern boundary.

In 1910, some years after its success in the Court of Private Land Claims on the eastern boundary of the Lo de Padilla Grant, the Pueblo of Isleta raised the issue of boundary language with regard to the eastern boundary of its original Spanish land grant, which lies between the Elena Gallegos Grant and the Lo de Padilla Grant. The Pueblo complained to the Commissioner of Indian Affairs that the Supervisor of the new Manzano Forest Reserve denied the people of Isleta the right to take firewood from the mountain and would not permit them to graze their animals. The dispute over the eastern boundary was submitted to the Attorney General in 1914, who suggested that the Department of the Interior conduct a resurvey, if it believed that the Pueblo was correct in its assertion that the eastern boundary was the crest. After further review, the Secretary issued a decision ordering the General Land Office to resurvey the grant, making the eastern boundary the crest of the Mountain. See D-29675 (July 11, 1918).

Thus, the eastern boundaries of each of the three Spanish grants which lie immediately to the south of Sandia Pueblo were recognized as reaching to the mountain crest. The Tarr Opinion essentially dismissed this evidence, finding that it "speak[s] to the wrong issue." 96 I.D. at 354.

That is, the Pueblo of Sandia is the only Pueblo still in possession of its original granting documents, and the Tarr Opinion concluded that these documents evidence an intent to establish a formal pueblo (an issue addressed in the previous section). Because the other grants each had "its own history" and were made at different times, they did not "provide circumstantial evidence that the pueblo grants in the area customarily went to the crest of the Sandia mountains." Ibid.

I agree that each grant must be examined carefully and independently for evidence of the intent of the grantor. But I also believe that what is known about the language and circumstances of these other grants, and their eventual uniform interpretation as having an eastern boundary that extends to the crest of the Sandia mountains, provides strong evidentiary support for the proposition that eastern boundary described in the Sandia Pueblo grant Act of Possession should also reach the crest of the mountain.

VI. The 1859 Clements Survey

The Clements survey located the Pueblo's eastern boundary on the western foothill. As noted above, both the Pueblo of Sandia, on the one hand, and the County of Bernalillo and Sandia Mountain Coalition, on the other, seem to agree that the Clements survey was mistaken in so doing, and should be corrected. Not surprisingly, they disagree on how it should be corrected. The U.S. Forest Service has consistently taken the view that the Sandia Pueblo Grant eastern boundary is correct, and should not be disturbed. It offered the Hordes Report in 1996, not to petition for a change in the boundary, but to confirm the accuracy of the decision of the Tarr Opinion.

The facts leading up to the Clements survey were described in detail in the Tarr Opinion, 96 I.D. at 333-36. Briefly, they are these: In June 1859 the Surveyor General of the General Land Office, William Pelham, awarded a contract to John W. Garretson, an experienced surveyor, to survey the land grants of the Pueblos that were confirmed by Congress in the Act of December 22, 1858 (11 Stat. 374), including the grant to the Sandia Pueblo. The June 13, 1859 letter Pelham sent Garretson included the following instructions:

> In surveying such of Pueblo grants as call for one league from each comer of the church you will assume the church to be a square and run a base by extending a correction, range or township line and correcting it with the boundary line of the claim or meandering to it from the nearest line of public survey, the object being to show precisely the township and range in which the claim is situated in order that it may be embraced in the patent.
>
> Whenever natural objects are contained in the grant as boundaries and they cannot be pointed out to your entire satisfaction, or should there be the least doubt in identifying the particular locality wanted you will report that fact to this office and await further

instructions before proceeding any farther in the survey of that particular grant.[14]

A little more than three months later, however, Garretson informed Pelham that he would not be able to complete his contract before the beginning of winter and asked to be relieved of the responsibility for conducting the surveys of Sandia, San Felipe, Santo Domingo, and the Town of Chilili.[15] On September 21, 1859 Surveyor General Pelham contracted with Reuben E. Clements to perform those four surveys, requiring they be completed by January 1, 1860.[16] As the Tarr Opinion noted, this is the only record of communications between Pelham and Clements, and therefore "we have no information of record as to the precise instructions Clements received." 96 I.D. at 334-35.

Clements' field notes indicate that he surveyed the Pueblo of Sandia in the five days between November 8 and November 12, 1859. As the Tarr Opinion recounted, Clements' field notes state that he began at a 50-foot tall rock in the "canon del agua" which was marked with a cross, "it being the N.E. corner of the Grant." See 96 I.D. at 335. It is not clear from the notes he filed whether he marked the cross, or whether it was preexisting. More important, it is not clear why he treated this point as the northeast corner, as the various translations of the Act of Possession (including the Surveyor General's official translation by David Whiting) do not mention corners.

In any event, he then proceeded westward to the Rio Grande, then turned south and meandered the river down to the southwest comer. He then proceeded east to "a rock, one hundred feet in height marked with a large cross (+) the S.E. corner of the Grant." He added that the rock "stands in a cañon near the Carrisito Springs in the mountains of Sandia." Again, it is not clear whether he marked the cross or whether it was preexisting. On November 11, Clements' field notes state that he then "meandered Sandia Mountains being the east boundary of the Sandia Grant" to return to the northeast corner. Based on his survey calls, his trip northward along the eastern boundary to his point of beginning took him along the western foothill, not the Sandia Mountain crest.

It is not clear how or why Clements decided to meander the western foothill ridge (assuming that is what he did) as the eastern boundary of the Pueblo, rather than the main crest of the Sandia Mountains. The spot where Clements identified a monument as being the northeast comer is described only as a northern boundary marker in the Act of Possession; indeed, neither the Act of

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[14] Pelham to Garretson, June 13, 1859, NA, RG 49, GLO Div. E., I, pp. 193-195 (emphasis added).

[15] Garretson to Pelham, September 20, 1859, NA, RG 49, GLO, Div. E, Letters Received from the Surveyor-General of New Mexico.

[16] Contract of Reuben E. Clements, September 21, 1859, NA, GLO, Div. E, Contracts and Bonds Files, New Mexico.

Possession nor the Surveyor General's report clearly identifies the northern and southern boundary markers as "corners", northeast, southeast, or otherwise. The subordinate western foothill ridge is not mentioned in any translation of the Act of Possession.

Clements' field notes add to the confusion. For example, they referred to the land grant as being bounded on the east by the Sandia Mountains (this is consistent with the Whiting translation; see Exec. Doc. No. 36, at 11). They also recited that Clements found "about one third of this grant is first rate bottom land easily irrigated and cultivated" and that "there is considerable cottonwood timber along the Rio Grande [and] the hill land produces fine grass." See 96 I.D. at 335. As noted earlier, the quotation of the field notes in the Tarr Opinion omitted without explanation the following sentence from Clements' account: "The Sandia Mountains grow an abundance of good pine timber." R.E. Clements, Field Notes of the Pueblo of Sandia Survey, Microcopy, BLM, Santa Fe, at p. 12. The evidence is that "good pine timber" in the mountains was found east, but not west, of the western foothill. Jenkins-Brandt at 24.

The Clements survey was approved by the Surveyor General of New Mexico on January 12, 1860, after being notarized by translator David Whiting. The patent was issued on November 1, 1864, and recites a metes and bounds description of Clements' survey. The description of the eastern boundary starts at what Clements identified as the southeast comer at Carrisito Springs and states "[t]hence meander the Sandia Mountains for the East Boundary of the Grant" and then makes six directional calls "[t]o the Northeast Corner of the Sandia Grant and place of beginning." It is not clear simply from this description that the line is the foothill ridge rather than the mountain crest; that fact emerges only when the locations of the northeast and southeast comers are examined, and the boundary traced between them.

There is ample evidence that Clements was not a skilled surveyor. Each of the other three surveys he performed under his contract -- of the Pueblo of San Felipe, Pueblo of Santo Domingo, and the Town of Chilili -- contained significant errors. The U.S. Court of Appeals described his survey of San Felipe as "suspect" and "inept". Santa Ana v. Baca, 844 F.2d 708, 712 (10th Cir. 1988). His survey of the Town of Chilili grant was set aside as defective in 1875 by the Commissioner of the General Land Office. See Town of Chilili, 1 Pub. Lands Dec. 285 (188 1). His survey of the Santo Domingo Pueblo Grant omitted over 20,000 acres of Pueblo lands, which was corrected by a re-survey in 1907, and later became the subject of protracted litigation. See United States v. Thompson, 941 F.2d 1074 (10th Cir. 1991).[17]

In 1914, Earl G. Harrington, a surveyor for the General Land Office, attempted to do a retracement of the Sandia Grant in accordance with Clements' field notes. This dependent

[17] This controversy was only very recently finally settled. See Pub. L. 106-425, Santo Domingo Pueblo Land Claims Settlement Act of 2000, 114 Stat. 1890 (2000).

resurvey[18] was part of an effort by the Office of Indian Affairs to confirm the boundaries of all the Pueblo reservations and is commonly referred to as the Joy Survey. Harrington was not able to duplicate Clements' survey. In fact, his resurvey indicated that in following Clements' eastern boundary calls, he found that the lines did not close, leaving a 2,000 foot gap. He also could not find "Carrisito Springs", which Clements had called the southeast corner, but he did find a rock about 30 feet high that was marked with a cross. The Harrington (or "Joy") survey was relied on by the Pueblo Lands Board in its 1928 report.

The Tarr Opinion concluded that Clements' survey is entitled to a presumption of regularity, 96 I.D. at 343, but it firmly rejected the argument of the U.S. Forest Service that Clements had "considerable discretion" in the setting of the boundaries, on the ground that the purpose of his survey was not to demarcate the boundaries of public lands or even a public land patent, but to identify property whose ownership under Spanish law had already been confirmed by Congress. Id. at 345.

Given all the troubling circumstances surrounding the Clement's survey -- his apparent ineptitude, the vagueness of his explanations for selecting the cornering locations he did, and the ambiguity and ultimately the absence of any reasoned explanation for his identification of the eastern boundary as the foothill ridge instead of the mountain crest -- I believe this presumption is solidly rebutted by the evidence before me.

VII. Should the Southeastern Wedge of Land Be Included in the Grant?

The November 21, 2000 letter from the attorney for the Sandia Mountain Coalition and the County of Bernalillo, Thomas R. Bartman, requests that the Secretary correct the erroneous survey of the Sandia Pueblo Grant along the lines suggested by Dr. Hordes in his 1996 report to the U.S. Forest Service. The objective is apparently to redraw the eastern boundary to exclude a narrow wedge that extends the southern boundary considerably further east than the rest of the eastern boundary (see map, Exhibit B), and perhaps also to redraw the eastern boundary to extend only one league to the east of the center of the Pueblo's eighteenth century village.[19]

Whether the eastern boundary should be drawn one league east of where the church was located

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[18] A "dependent resurvey" is a "retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners." Bureau of Land Management, Manual of Instructions for the Survey of the Public Lands of the United States § 6-4 (1973). An "independent survey," in contrast, establishes new section lines "independent of and without reference to the corners of the original survey." Id. at 6-5.

[19] Mr. Bartman's subsequent letter of January 5, 200l states that his clients will not seek to enforce any resurvey of the Pueblo's boundary if the status quo, namely the boundary as currently drawn, is maintained.

in the 18th century, along formal pueblo lines, has already been discussed. See Section IV(B), supra. On the former point, regarding the wedge along the southeastern edge, there is evidence that the Surveyor General relied on a grant document that was altered during the period of Spanish sovereignty to increase the distance from the village to the southern boundary, and to change the southern boundary marker from the mouth of Juan Tabo Canyon to Carrisito Springs in the mountains. Hordes Report, at 16-20. How this happened, and who if anyone may have perpetrated a fraud, is not known.

Regardless of whether there was error in locating this wedge as part of the Sandia Pueblo Grant, applicable law prevents the United States from now challenging the patent to the Pueblo. That is, only the United States has a potential adverse claim against the Pueblo for the lands within the southeastern wedge. The claim that the United States, and not the Pueblo, owns this area would be based on the Surveyor General's use of an altered grant document. Long ago the Supreme Court concluded that the United States cannot challenge the validity of a Spanish grant subsequently confirmed by Congress and patented. See United States v. Conway, 175 U.S. 60, 69-71 (1899). We also note that the United States was a party to earlier quiet title litigation to confirm the Pueblo's title to these lands. United States v. Abousleman, No. 1839 (D.N.M. 1928). The Pueblo Lands Act directed the Attorney General to file such a suit on behalf of Sandia Pueblo following the report of the Pueblo Lands Board. 43 Stat. 636 (1924). Thus, it appears that the U.S. is also barred from challenging the Pueblo's title by the doctrine of res judicata. See Nevada v. United States, 463 U.S. 110 (1983).[20]

VIII. The Significance of Congressional Confirmation of the Grant in 1858

The Pueblo asserts that the 1858 Congressional confirmation of its grant, as it was reported to Congress by the Surveyor General in 1856, is determinative of its rights. This assertion was not addressed in the Tarr Opinion, perhaps because it was not pressed by the Pueblo in the mid-1980s but it merits discussion here.

The Act of December 22, 1858, 11 Stat. 374, confirmed the land grant claims of various Indian Pueblos and Spanish towns. It provided that the designated Pueblo land claims in the Territory of New Mexico, including that of the Pueblo of Sandia,

> [as r]eported upon favorably by the said surveyor-general, on the thirtieth of November, eighteen hundred and fifty-six . . . are hereby confirmed; and the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and shall cause a patent to issue therefor as in ordinary cases to private individuals: *Provided,* That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to

[20] The area claimed by the Pueblo between the western foothill and the mountain crest has not been the subject of quiet title litigation. The Attorney General did not include that area in the Abousleman suit because it was considered part of the Manzano Forest Reserve.

any of said lands, and shall not affect any adverse valid rights, should such exist.

11 Stat. 374. The November 30, 1856 report of the Surveyor General was submitted to Congress by the Secretary of the Interior on January 16, 1857. Exec. Doc. No. 36, H. Rep., 34th Cong., 3d Sess. That report contains both the original Spanish and the English translations of various Spanish documents, including those pertaining to "Claim No. 16-Pueblo of Sandia." The Spanish restatement of the Act of Possession signed by Bustamante, and its English translation, as they appear in the report, contain a metes and bounds description of the Sandia Pueblo Grant which Dr. Hordes reports had been altered from the original, although the alterations did not change the phrase denoting the eastern boundary of the grant. As noted earlier, Hordes does dispute Whiting's translation "and on the east the main ridge called Sandia."[21]

The Pueblo argues that Congress' 1858 confirmation of its land grant, as reported by the Surveyor General, established its vested property right in those lands, including an eastern boundary located on the mountain crest. Thus, the Pueblo argues, the debates among historians on the proper interpretation and translation of the Spanish grant documents are irrelevant. The Pueblo relies on Tameling v. United States Freehold & Emigration Co., 93 U.S. 644 (1876), and United States v. Conway, 175 U.S. 60 (1899). In Tameling, the Court discussed the Surveyor-General Act of 1854 and the subsequent confirmation by Congress at great length, stating that:

> The final action on each claim reserved to Congress is, of course, conclusive, and therefore not subject to review in this or any other forum. . . .
>
> It is obviously not the duty of this court to sit in judgment upon either the recital of the matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action . . .
>
> Congress acted upon the claim "as recommended for confirmation by the surveyor-general." The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract . . .
>
> The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal.

93 U.S. at 662-63. See also Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80, 82 (1893); Ainsa v. New Mexico & A.R. Co., 175 U.S. 76, 86 (1899); Russell v. Maxwell Land

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[21] None of the interested parties who made their views known before the Tarr Opinon was issued raised a question about the proper translation of the eastern boundary call. The Sandia Mountain Coalition did dispute the relevance of the Pueblo's reliance on the phrase, "main ridge", viewing it as a mere directional reference. 96 I.D. at 340-41. This was addressed above in Section IV.A.

Grant Co., 158 U.S. 253, 255 (1895).

The proposition that confirmation acts by Congress are not subject to judicial review extends even to circumstances suggesting errors were made in surveys of the grant being confirmed. In Conway the Court noted:

> It is possible that the surveyor general, in recommending the grant of four square leagues to each pueblo, measured from the church as a centre, allowed more than was proper; yet, as he acted according to the opinion at one time prevailing, and as Congress confirmed the grant to that amount, the propriety of such grant cannot be attacked here upon that or any other ground.

175 U.S. at 68-69. Modern Tenth Circuit precedent has recognized and followed this line of Supreme Court cases. See, e.g., Sanchez v. Taylor, 377 F.2d 733, 737 (10th Cir. 1967); Mondragon v. Tenorio, 554 F.2d 423, 424 (10th Cir. 1977) ("the act of confirmation . . . was a final pronouncement as to title and the nature of the Grant").

It is not entirely clear what Congress was confirming in 1858 regarding the eastern boundary. In light of (a) the existing evidence that alterations were made to the original grant and (b) disagreements among historians regarding both the accuracy of the translation used in the report, and the intent of the Spanish authorities in making the original grant, I am uncomfortable simply accepting the Pueblo's argument that Congress' intent was clear regarding the extent of the original grant. At the same time, as noted in Section III, above, my analysis of the 1858 statute and related legislation must be informed by the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed, with doubtful expressions to be resolved in their favor.

The purpose of Congress in 1858 was to confirm the private property rights granted to the various Pueblos by the Spanish government, thereby giving them the interests to which they were entitled under both Spanish and American law. See, e.g., Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. at 81-82; Sanchez v. Taylor, 377 F.2d at 736-737. To give effect to such congressional intent, I must investigate all the evidence that has been accumulated pertaining to the original Spanish grant to Sandia Pueblo in order to determine exactly what the Pueblo received. That is what I have done in the earlier parts of this Opinion. I believe, based on that examination, that the preponderance of the evidence shows that the grant of the Spanish Crown to the Pueblo extended to the mountain crest on the east.

Considering all the evidence in this very large record, I conclude that Congress intended to confirm that boundary when it enacted the 1858 statute confirming the Pueblo's claim in reliance on the Surveyor General's report. I find the language of the Whiting translation referring to the main ridge to be substantial evidence of such Congressional intent, but I do not rely solely on that language. Rather, I rely on my thorough reevaluation of the historical record, bolstered by application of the canon of construction that ambiguities or doubts regarding such intent are to be

resolved in favor of the Pueblo.

IX. The Pueblo's Inaction

In its "Background' section, the Tarr Opinion noted that the Pueblo has not taken advantage of several opportunities provided by Congress over the past century to resolve its claim to this area. See 96 I.D. at 338-39. Later on, the Opinion said that the Pueblo's failure to assert its claim in any of these forums or, apparently, anywhere else until 1983 weighed heavily in the Opinion's conclusion to reject the claim. Id. at 355-57. Specifically: "The silence of the Pueblo in light of this considerable activity and active dispute concerning pueblo lands is a rather troubling and significant piece of circumstantial evidence that the Pueblo did not historically believe that an error had been made in the Clements survey." Id. at 357; see also id. at 355 (the Pueblo's "failure to challenge the patent until 1983 . . . is the most troubling circumstantial evidence involving this claim").

Upon reexamination, I believe the Tarr Opinion somewhat overstated the availability of other fora to resolve these claims. The Court of Private Land Claims created by Congress in 1891 (26 Stat. 854) was authorized to hear petitions from persons in New Mexico (among other areas) who claimed lands "by virtue of any Spanish or Mexican grant . . . which . . . have [sic] not been confirmed by act of Congress . . . ." Id. at 856. Some Indian Pueblos filed claims in this Court based on land grant purchases which had not been previously confirmed by Congress, see, e.g., Pueblo of Santa Ana v. United States, No. 157 (claim to the El Ranchito Grant). The Sandia Pueblo's grant had been previously confirmed by Congress, however; the only question is where its eastern boundary is located. Therefore, it is not at all clear that the Court would have had jurisdiction to entertain a Sandia Pueblo claim that the boundary had been improperly located.

More important, there is room for considerable doubt whether the Indians of the Sandia Pueblo were on notice by the 1890s that a claim existed as to the location of its eastern boundary. The statement in the Tarr Opinion that after the issuance of the 1864 patent to the Pueblo "the claimed area continued to be in public land status" (96 I.D. at 337) is best interpreted as a legal conclusion rather than a statement of fact. I am aware of no homesteads or mining claims being filed between the western foothill and the mountain crest in the 19th century. The Indians continued to use that area in their traditional manner, and there is no evidence of any conflict on the ground with any other land use at that time. Unlike many other parts of New Mexico, there were no other competing Spanish or Mexican land grants in this area. See United States v. Thompson, 941 F.2d 1074, 1076 (10th Cir. 1991), cert. denied 503 U.S. 984 (1992).

The Tarr Opinion's characterization of the Pueblo Lands Board under the Pueblo Lands Act of 1924, 43 Stat. 636, is incorrect. It asserted that "the Pueblo of Sandia asked the United States to bring suit before the Pueblo Lands Board against several private claimants . . . ." 96 I.D. at 338; see also 96 I.D. at 356. The Act did not authorize the Indian Pueblos to bring claims before the board, but rather "was intended only to oblige non-Indians to prove claims to Pueblo land," and provided that "Pueblos could only file suit in response to claims made against them by non-

Indians." Pueblo of Santa Ana v. Baca, 844 F.2d 708, 709 (10th Cir. 1988). The process -- involving an investigation and report by the Pueblo Lands Board and subsequent quiet title litigation brought by the United States in its capacity of trustee for the Indians - was intended to resolve all claims of non-Indians within a Pueblo's land grant.

All of the non-Indian claims to land in the Sandia Pueblo grant filed under this Act involved irrigated lands near the Rio Grande adjacent to the Towns of Bernalillo and Alameda. No claims were filed by non-Indians in the eastern part of the grant, either in the disputed area between the western foothill and the mountain crest, or in the southeastern wedge. As a result, the Pueblo Lands Board's report on the Sandia Pueblo Grant focused on the bottomlands along the river. The 1924 Act provided no process or remedy for the Pueblo to assert a claim against the United States for the lands it now claims were unlawfully excluded from its grant.

The Tarr Opinion correctly pointed out that the Indian Claims Commission Act of 1946 (ICCA) authorized suits by tribes against the United States before the Indian Claims Commission (ICC), and that the Pueblo of Sandia did not file a claim before the ICC regarding its eastern boundary. 96 I.D. at 338-39. A possible explanation for the Pueblo's failure is that the ICCA's limited waiver of sovereign immunity gave the ICC authority only to award damages against the United States, and not to adjudicate title to lands claimed by federal agencies. I have recently described how other tribes seeking to recover land they thought had been improperly excluded from their reservations ultimately sought relief directly from the executive branch. See Boundary Dispute between Santa Ana Pueblo and San Felipe Pueblo, M-37000 (Dec. 5, 2000) at p. 11 (recounting how the Yakima (now Yakama) Tribe obtained relief from the U.S. Attorney General to resurvey lands in a national forest to regain lands unlawfully treated as public lands as a result of an erroneous survey); see also 42 Op.Atty.Gen. 441 (1972).

Although it is unclear when the Pueblo was put on actual notice of the adverse claim of the federal government to this area,[22] it seems highly probable that the proclamation of the Manzano Forest Reserve in 1906 (which included in the national forest the area between the western foothill and the mountain crest), the dependent resurvey in 1914, and the Pueblo Lands Board process in the 1920s all individually or collectively provided the Pueblo with notice that the United States believed the Pueblo's eastern boundary was along the western foothill, not the mountain crest. The Tarr Opinion discussed evidence of Pueblo knowledge of, and apparent acquiescence in, the assertion of title by the United States to this area. See 96 I.D. at 355-56.

This kind of evidence would seem adequate to bar assertion of a claim that is subject to a typical statute of limitations triggered by knowledge of the existence of a claim. But statutes of

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[22] The Tarr Opinion concluded the evidence "suggests strongly" that the Pueblo had notice since the 1860s because the stones with the crosses etched into them that Clements used to mark what became the northeast and southeast boundaries are still in existence. 96 I.D. at 355. The adverb "strongly" seems to put too much freight on relatively slight evidence, given the ambiguities recounted earlier about the Clements survey.

limitations on the filing of Indian claims before adjudicatory bodies are not applicable to the exercise of the Secretary's survey authority over Indian reservations. See Boundary Dispute, M-37000 (December 5 ,2000).

The Tarr Opinion viewed this inaction and "apparent acquiescence" by the Pueblo as "the most troubling circumstantial evidence" undermining the factual merits of the Pueblo's claim, considering, among other things, "the fact that the Pueblo revered that area as one of deep cultural and religious significance to its members." 96 I.D. at 355.

Using the Pueblo's inaction as a ground for rejecting its legal claim in these circumstances seems questionable at best. For one thing, the Tarr Opinion implicitly suggested that it is appropriate for the United States as trustee to fault the trust beneficiary (the Pueblo) for failing to petition the trustee to recover property the beneficiary now believes the trustee wrongfully took from it. I believe the better approach is found in Attorney General Bell's observation, in addressing a boundary issue involving the U.S. Forest Service and the Pueblo of Taos, that the United States as trustee has the responsibility to "determin[e] the geographical extent of that trust." 43 Op.Atty.Gen. 130, 137 (I 978).

Equally important, the Pueblo's claim here is not based primarily on long-term customary and traditional use of this area, as are some other Indian claims. If it were, then the Tarr Opinion would be on much more solid ground in relying on the Tribe's inaction or acquiescence. Here, by contrast, the Pueblo's claim is more conventionally legal, rather than factual, in character. That is, it is based on the language of the Spanish land grant documents, and the record surrounding congressional confirmation of the Pueblo's claim in 1858.

In these circumstances, the cooperation of the Pueblo with federal officials over past decades to insure that its members had access to the mountain for traditional and ceremonial uses is not an informed, legally significant admission of lack of ownership. Indeed, the Pueblo's continued use of the area between the western foothill and the mountain crest for such purposes is evidence of its continued propriety interest in the area.

X. The National Forest Reservation and Wilderness Designation

As noted earlier, the area between the western foothill and the mountain crest has for nearly a century been administered as part of the national forest system. Moreover, most of it was included in the Sandia Mountain Wilderness designated by Section 2(g) of the Endangered Wilderness Act of 1978. 92 Stat. 40. This section addresses the legal significance of these actions.

In 1906, President Theodore Roosevelt included the entire area between the western foothill and the mountain crest in the Manzano Forest Preserve (now Cibola National Forest). The President exercised authority given him by Congress in Section 24 of the Act of March 3, 1891, 26 Stat. 1103, which authorized the President to reserve "public lands" as forest reservations. According

to section 10 of that Act, its provisions did not apply to Indian lands. 26 Stat. 1099. As discussed earlier, Congress in 1858 confirmed the title of the Pueblo of Sandia to its 1748 Spanish land grant. The dispute is over the exact meaning of this congressional action. If it is determined that Congress confirmed the eastern boundary of that grant as the mountain crest and not the western foothill, then the land was Indian land in 1906 and could not lawfully have been included in the forest reservation by the President. This distinguishes this case from United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976) where an Indian unsuccessfully claimed that aboriginal Indian occupancy rights had been unlawfully taken by inclusion of the lands in the national forest system. Aboriginal Indian occupancy rights are not what is called recognized Indian title, and are not protected by the Fifth Amendment. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), Gemmill, 535 F.2d at 1147. By contrast, the Sandia Pueblo claim involving the location of its eastern boundary is, if established, a vested property right.

The Sandia Mountain Wilderness designated by Congress in 1978 referred to a Forest Service map which clearly included most of the claim area within its boundaries. The legislation states:

> In furtherance of the purposes of the Wilderness Act, the following lands (. . .), as generally depicted on maps appropriately referenced, dated January 1978, are hereby designated as wilderness and therefore, as components of the National Wilderness Preservation System . . .
>
> (g) certain lands in Cibola National Forest, New Mexico, which comprise about thirty thousand nine hundred and thirty acres, are generally depicted on a map entitled "Sandia Mountain Wilderness Area (North and South Units)-- Proposed", and shall be known as the Sandia Mountain Wilderness . . . .

92 Stat. 42. The map on which Congress relied was a small-scale Forest Service depiction of the general area. S.Rep. No. 95-490 (95th Cong. 1st. Sess.) at 40 (1978). It provides an insufficient basis for laying a survey line, but the designated area unquestionably overlaps approximately 80 percent of the acreage which I have concluded is part of the Sandia Pueblo grant.

Section 6 of the Act provides:

> As soon as practicable after the enactment of this Act, a map and a legal description of each wilderness area shall be filed with the Committee on Energy and Natural Resources of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives, and each such map and description shall have the same force and effect as if included in this Act: *Provided,* That correction of clerical and typographical errors in each such legal description and map may be made. . . .

92 Stat. 44. Because there is little doubt that the Congress knowingly included the claim area in the Sandia Mountains Wilderness, the proviso in Section 6 authorizing the correction of "clerical and typographical errors" cannot be stretched to justify excluding the 8000 acres of land between

the western foothill and the mountain crest.

On the other hand, I think it is not appropriate to treat this congressional designation as intending to effect a taking of the Pueblo's property rights. While it is clear that Congress in 1978 assumed that these lands were national forest lands, it is a central tenet of federal Indian law that "congressional intent to extinguish Indian title must be 'plain and unambiguous' and will not be 'lightly implied. '" County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985) citing United States v. Santa Fe Pac. R.Co., 314 U.S. 339, 346, 354 (1941). Here such a plain intent to extinguish Indian title cannot be found. For one thing, wilderness designation generally refers to land use, not title, and rather frequently non-federal inholdings are found within the boundaries of wilderness areas Congress has designated. Further, section 5 of the Wilderness Act subjects administration of wilderness areas to "valid existing rights."

The U.S. Attorney General has previously had occasion to address the authority of the executive in similar circumstances. Specifically, in 1972 Attorney General Mitchell addressed a boundary claim of the Yakima (now Yakama) Tribe in Washington State to part of what was a national forest. As with Sandia, the area had been designated by Congress as part of a wilderness area (the Mount Adams Wilderness Area) pursuant to the Wilderness Act. The Attorney General observed:

> Since the land in question here has not been 'taken' by the United States within the meaning of the Fifth Amendment, it can be restored to the Tribe by Executive action. This can be accomplished by Executive order, pursuant to 16 U.S.C. 473. Alternatively, the Secretary of Agriculture can direct the Forest Service to surrender possession to the Tribe. The fact that a portion of the land is now treated as a wilderness area does not affect the question of restoration. Although validly designated wilderness areas can only be changed with Congressional consent (16 U.S.C. § 113l), the foregoing principles [disfavoring unintentional takings of property rights] preclude application of that limitation here, where the land should never have been designated a wilderness area in the first place.

42 Op.Atty.Gen. 441, 452 (1972).

XI. Rights of Third Parties

In its Federal Register notice of December 5, 2000, the Department noted that its reconsideration of the Sandia boundary matter would not affect the title to any land held by private landowners in the area. The Secretary's resurvey authority is expressly limited by statute so that it may not be used to impair the rights and titles of good faith purchasers of public lands who may be affected by any resurvey:

> The Secretary of the Interior may . . . in his discretion cause to be made. . . such resurveys or retracements of the surveys of public lands as, after full investigation,

> he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

43 U.S.C. § 772 (emphasis added); see also Cragin v. Powell, 128 U.S. 691 (1888). Thus, it is clear that this decision cannot affect any "rights . . . of any . . . owner of lands" within the Pueblo's claim area.

The discussion in this subsection is limited to the particular situation of the Tram Company's Special Use Permit (SUP) within the area between the western foothill and the mountain crest. The attorney for the Sandia Peak Tram Company responded to the Federal Register notice by providing a legal analysis of this issue by letter dated January 4, 2001. The U.S. Forest Service issued the SUP to the Tram Company on December 1, 1993. The SUP covers 991 acres (although we have no information on how many of those acres are within the claim area) and expires on December 1, 2033. It was issued under the authority of the National Ski Area Permit Act of 1986, 16 U.S.C. § 497b, for "the use and occupancy of suitable lands within the National Forest System for nordic and alpine skiing operations and purposes." 16 U.S.C. § 497b(b) (emphasis added). The SUP is a "term permit" under the Forest Service's regulations. See 36 C.F.R. § 251.51. A "term permit" is defined as "a special use authorization to occupy and use National Forest System land, other than rights-of-way . . . for a special period which is both revocable and compensable according to its terms." Id. The SUP is also subject "to all outstanding valid rights," see 36 C.F.R. § 251.55(c), which qualification is also found in the SUP itself.

The Tram Company contends that the lands encompassed by the SUP should: (1) be excluded from any resurvey, (2) remain subject to Forest Service administration, and (3) be considered outside the boundaries of the Pueblo of Sandia for all purposes. It argues it is protected by 43 U.S.C. § 772 because, as the holder of the SUP, it should be considered as a "claimant, entryman, or owner of lands." It cites Metropolitan Water Dist. of Southern California v. United States, 628 F. Supp. 1018 (S.D. Cal. 1986), remanded on jurisdictional grounds, 830 F.2d 139 (9th Cir. 1987) aff'd by an equally divided Court, 490 U.S. 920 (1989) (MWD), in support of its position. In MWD the district court found the words "any claimant" in 43 U.S.C. § 772 indicated that "Congress intended to protect the entire spectrum of rights of claimants that might be affected by a land resurvey." Id. at 1022. The court held the language to encompass water rights which might be affected by a resurvey, including those held by MWD in a contract with the Department of the Interior. Id. at 1022-23.

The Tram Company's argument that the rights it holds in its SUP may well be in line with the statute. I am, however, reluctant to resolve the question, because the issue of what rights a SUP conveys is a question for the U.S. Forest Service and its lawyers in the Department of Agriculture to resolve, in accordance with the laws and regulations that it is charged with administering.

While a resurvey may not affect the rights enumerated in the statute, and the Tram Company's SUP may be included in those rights, the Tram Company goes too far in suggesting that because its rights may be affected, the lands encompassed by its permit should be excluded from the resurvey. A resurvey is merely an administrative action. In the event the Department resurveys the eastern boundary of the Sandia Pueblo Grant, it would do so in the same manner discussed in Boundary Dispute Between Santa Ana and San Felipe Pueblos (December 5, 2000), p. 4, n.7 ("The acceptance of a resurvey establishes a new boundary except where the resurveyed boundary conflicts with private property rights."); p. 8 (quoting Lane v. Darlington, 249 U.S. 331, 333 (1919) ("So long as United States has not conveyed its land it is entitled to survey and resurvey what it owns . . . the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law."); p. 13 (noting that Department is not seeking to redraw boundaries of Indian reservations, but merely to use its survey authority to define more accurately what the boundaries are); see also 65 Fed. Reg. at 77386.

In other words, a mere resurvey pursuant to 43 U.S.C. § 772 cannot affect permittees such as the Tram Company. This conclusion is compelled by the plain language of the statute. See also United States v. Doyle, 468 F.2d 633, 636 (10th Cir. 1972); Greene v. United States, 274 F. 145, 151-52 (5th Cir. 1921), aff'd, 260 U.S. 662 (1923). The fact that a private party has a claim or interest in lands in the area does not prevent the Secretary from conducting a survey. See Lane v Darlington, 249 U.S. 331, 333 (1919); United States v. Reimann, 504 F.2d 135, 138 (10th Cir. 1974) (citing Lane); but see MWD, supra, 628 F. Supp. 1018, 1023 (S.D. Cal. 1986) remanded on other grounds, 8309 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court, 490 U.S. 920 (1989).

I note that the Pueblo of Sandia, by Resolution No. 97-44, has agreed not to claim any right to the interests owned by the Tram Company or to assert taxation authority over these interests, should the resurvey extend the eastern boundary to the crest of the Sandia Mountains. However, this action by the Pueblo does not resolve how the Department and the Forest Service will decide to handle the myriad issues that might arise after a resurvey. I expect that, before a resurvey is performed consistent with this Opinion, the Forest Service, the Bureau of Indian Affairs, and the Pueblo will address these issues, and if necessary, consult this Office further if they have any questions.

XII. Conclusion and Implementation of this Opinion

For the reasons expressed above, I conclude that the evidence clearly shows that the Clements survey of the eastern boundary of the Pueblo of Sandia's land grant was erroneous and should be set aside and, if necessary, a resurvey should be conducted.

As noted at the beginning of this Opinion, the United States has negotiated and executed a settlement of the Pueblo's claim regarding its eastern boundary with the Pueblo and the Tram Company. That settlement binds all three parties (with a limited opt-out clause) until November

15, 2002, during which time Congress will have an opportunity to legislate the settlement and make it permanent.

Because the possibility is at hand to achieve a permanent settlement that would avoid the need for a resurvey and further protracted litigation, there is no reason to move forward now with the resurvey of the Pueblo's eastern boundary. Until further notice, therefore, the Division of Cadastral Survey of the Bureau of Land Management will not be asked to implement the conclusion of this Opinion.

In the meantime, until such time as a resurvey is initiated, completed, and further decisions are made as result of it, the management authorities and responsibilities of the Forest Service and the Bureau of Indian Affairs should continue unaffected by this Opinion.

This Opinion was prepared with the substantial assistance of Tim Vollmann, Acting Associate Solicitor for Indian Affairs, Suzanne Schaeffer, Assistant Solicitor for Environment, Land & Minerals, Angela Kelsey and David Moran, attorneys in the Branch of Environment, Land & Minerals in the Division of Indian Affairs, Honors Program attorneys Kevin Tanaka and Jennifer Frozena, and Southwest Region attorneys Michael Schoessler and Melanie Patten.

John D. Leshy
Solicitor

I concur in this Opinion

JAN 19 2001

Secretary of the Interior

Date