

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUEBLO OF SANDIA,

Plaintiff

v.

BRUCE H. BABBITT, ET AL.,

Defendants.

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CIV. NO. 1:94CV02624HHG

**BERNALILLO COUNTY'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant-Intervenor Bernalillo County, New Mexico ("Bernalillo County") adopts and incorporates by reference Federal Defendants' Cross-motion for Summary Judgment and Memorandum in Support (filed June 27, 1997), and agrees that pursuant to the Court's holding that "[t]his suit is ... properly governed by the Administrative Procedure Act...", Opinion at 20 (Dec. 10, 1996), review should be limited to the administrative record. As set out in the Federal Defendants' Memorandum in Support, the administrative record demonstrates that Secretary Hodel's decision not to grant the Pueblo's claim was fully supported by the record and was neither arbitrary nor capricious, and that Secretary Babbitt's inaction on the Pueblo's claim does not constitute reviewable final agency action and/or was not arbitrary and capricious.

The extra-record materials referenced in support of the present opposition and cross-motion are submitted in the first instance as post-hoc confirmation of the basis for Secretary Hodel's decision. *See, e.g., Environmental Def. Fund v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("If the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information"); *Inland Empire Pub. Lands Coun. v. Forest Serv.*, 88 F.3d 754, 760 (9th Cir. 1996) (court may consider

substantive evidence on merits where necessary as background on sufficiency of agency consideration of issues). With regard to the record review proceeding, however, any disputes on the basis of extra-record facts adduced by, respectively, the County and the Pueblo, should not be considered *material* for purposes of Rule 56. See, e.g., *Kalekristos v. CTF Hotel Management Corp.*, 958 F.Supp. 641 (D.D.C. 1997) (“A material dispute of fact ‘is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth’”). Further, no trial of issues is appropriate to the Administrative Procedure Act record review proceeding. E.g., *Town of Fallsburg v. United States*, 22 Cl. Ct. 633, 642 (1991) (no *de novo* review in record review case).

In the alternative, in view of Plaintiff’s heavy reliance in its Summary Judgment Motion and in its Reply to Defendants’ Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment... (Aug. 22, 1997) on extra-record materials, if the Court agrees to consider such extra-record materials, then Bernalillo County requests consideration of its referenced extra-record materials in support of its Opposition to Plaintiff’s Motion for Summary Judgment and of its Cross-Motion for Summary Judgment Against Plaintiff.

As demonstrated in the County’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of the Defendant’s Cross-Motion for Summary Judgment and the therein-referenced documentary support,

1. The 1748 Decree establishing the Pueblo of Sandia demonstrated the intent to grant a “formal pueblo;”
2. The Pueblo has already received more land than it was entitled to under the 1748 Decree;

3. There is no basis in the 1748 land grant to the Pueblo to support its claim to the Claim Area;
4. Solicitor Tarr's Opinion on the Pueblo's claim was fully supported by the administrative record and neither arbitrary or capricious nor otherwise not in accord with law.
5. The significant private and local governmental interests that must be considered before any resurvey distinguish this case from *Pueblo of Taos*; and
6. The Pueblo's dramatic delay in challenging the survey should weigh against granting it relief.

For these reasons, Defendant's Cross-Motion for Summary Judgment against Plaintiff should be granted.

Dated: September 16, 1997

Respectfully submitted,



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