UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUEBLO OF SANDIA,

Plaintiffs,

v.

BRUCE H. BABBITT, et al.,

Defendants.

Civil Action No. 94-2624
(HHG)

ORDER

Upon consideration of defendants' motion to dismiss, the opposition and reply thereto, the oral argument on the motion, and the record herein; in accordance with the Opinion issued contemporaneously herewith, it is this 10th day of December, 1996

ORDERED that defendants' motion to dismiss be and it is hereby denied.

Harold H. Greene

HAROLD H. GREENE
United States District Judge

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OPINION

Plaintiff Pueblo of Sandia seeks review of the refusal of the Secretary of the Interior to correct a government survey of the Pueblo's lands. That decision reversed the recommendations of all but one of the many Interior Department officials who had evaluated the Pueblo's claim over a twelve year period and who had repeatedly assured the Pueblo that a corrected survey was forthcoming. In this action, plaintiff asks the Court to declare that the act of Congress confirming the Spanish land grant to the Pueblo provided for an eastern boundary at the main ridge of Sandia Peak; to order the Secretary of the Interior to issue a

corrected land survey; and to enjoin defendant Department of Agriculture from taking any action inconsistent with the corrected boundary. The Secretary has moved to dismiss.

I

Background

The disputed claim area consists of about 10,000 acres of rugged wilderness on the western slope of Sandia Peak near Albuquerque, New Mexico. The vast majority of the disputed parcel is owned by the United States government and is currently managed by the United States Forest Service of the Department of Agriculture. A small percentage of the government-owned parcel has been developed for recreational use, in the form of hiking trails, picnic areas, and through a U.S. Forest Service special use permit issued to Sandia Peak Ski Company and Sandia Peak Tram Company. About 600 acres of the disputed claim have been transferred by the government to private owners and developed for single-family homes. The Pueblo has specifically disclaimed any interest in or claim to these private lands and interests.

The Pueblo of Sandia has occupied its present location since about 1300 A.D. In 1748, the King of Spain issued a royal grant to the Pueblo of Sandia which, in setting out the Pueblo's boundaries, stated: "por el Oueste La Sierra Madre llàmada de San Día," i.e., "on the east the main ridge called Sandia." The plaintiff alleges that this language set the Pueblo's eastern boundary at Sandia Peak. In the 1848 Treaty of Guadalupe Hidalgo, the United States recognized the pre-existing property rights conferred upon the Pueblo Indians by Spain. See United States v. Joseph, 94 U.S. 614, 618-19 (1877). Pursuant to the Treaty of Guadalupe Hidalgo, in 1858 Congress officially confirmed the 1748 Spanish grant to the Pueblo and ordered a survey to be made of the Pueblo's boundary.

The Surveyor-General, an Interior Department official, ordered one Reuben Clements to survey the Pueblo lands according to the boundaries specified in the royal grant confirmed by Congress. Clements did not survey the eastern boundary at the crest of Sandia Peak, but at the foothills

to the west of the mountain, a difference of about 10,000 acres--the land at issue.[1]

The disputed claim area is of religious significance to the people of Sandia. Their religion attaches value to various plants, animals, and sites within the claim area. For over a hundred years after the Clements' survey, the people of Sandia have continued to worship at the shrines and sacred areas within the claim area. The Sandia religious tradition requires that this worship be both secret and private, but recently, as a result of activity by the Forest Service in this area, it became more difficult for the Sandia to worship in privacy.

To address these interferences with its religious practices, the Pueblo of Sandia presented a formal claim to the Secretary of the Interior in 1983 for a clarification of the eastern boundary of their grant. Since then, Interior Department officials have repeatedly taken the position that

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[1] Another survey by Reuben Clements, of the Pueblo of Santa Ana, was labeled "suspect" and "inept" for its inconsistency in the location of that Pueblo's boundary. Pueblo of Santa Ana v. Baca, 844 F.2d 708, 712 (10th Cir. 1988).

the United States would correct the Pueblo boundary. After reviewing evidence presented by a historian, Ward Alan Minge, Ph.D.,[2] the Director of the Office of Trust Responsibility, concluded that the Clements survey was inaccurate: "'[t]he boundaries, as defined by Clements in his survey notes, deviated from the grant in almost every respect.'" Amended Complaint, Exhibit E at 3 (quoting Minge report). In 1986, Ross Swimmer, an Assistant Secretary of the Interior, also endorsed the Pueblo's claim. Swimmer reached this decision after reviewing writings of New Mexico's state historian, Dr. Myra Ellen Jenkins. The Pueblo's claim was then referred to the Solicitor's Office within the Department of the Interior.

In April 1987, the Associate Solicitor for Indian Affairs, Timothy Vollmann, concluded in a thirteen page opinion that:

> the patent [based on the Clements survey] does not correctly reflect the boundary provided for by the 1748 Spanish grant, nor by the report of the Surveyor-

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[2] At least one other federal court has relied on the expert testimony of Dr. Minge for establishing the history of land disputed between the United States and a Pueblo. Pueblo of Santa Ana v. Baca, 844 F.2d at 711.

> General of New Mexico which was confirmed by Congress on December 22, 1858. Thus, it is our opinion that the Pueblo has presented a valid claim.

Amended Complaint, Exhibit F at 2-3. As evidence that the survey was incorrect, Vollmann cited a prior ruling involving an error in a grant contiguous to and south of the Pueblo of Sändia, which described the boundary as "on the east the Sandia Mountains." The Court of Private Land Claims had determined that this "grant could only have meant that the claimants were entitled to all the land to the crest of the Sandia Mountains." Id. at 9. Vollmann noted that the authority of the Secretary of the Interior to correct a surveying error had previously been exercised to benefit another Pueblo abutting Sandia Peak, the Pueblo of Isleta.

Interior Solicitor Ralph Tarr sent the draft opinion by Vollmann to the General Counsel of the Department of Agriculture for comment, noting that "my office is inclined to adopt [the opinion]" and "we intend to move expeditiously and finalize this opinion by April 16,"--eight days from the date of the letter. Id. at 1. In addition, Solicitor Tarr

asked the General Counsel to distribute the draft opinion "only to the extent necessary to review it adequately." Id. However, Agriculture Department officials released the Vollmann opinion to the press and asserted falsely that the Pueblo sought to dispossess the private landowners from the disputed claim area.

The result was that Tarr did not finalize the opinion by April 16. Instead, over a year and a half later, on December 9, 1988, he issued an opinion reversing the opinion of Associate Solicitor Vollmann and the recommendations of the Assistant Secretary of Interior and of the Director of the Office of Trust Responsibility. Tarr found the Clements survey accurate in setting the Pueblo's boundary at the foothills of Sandia Peak, reasoning that the Spanish intended to grant a "formal pueblo".[3]

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[3] A "formal pueblo" was a grant of four square leagues of land, the area within the extension of one league measured from the Pueblo's church to the north, south, east, and west. This so-called "custom" was used in some Pueblo grants, but frequently ignored in others. To cite but two examples, the Spanish grant to the Acoma Pueblo was of an area more than five times the area of four square leagues and the grant to the Santa Domingo Pueblo was more than four times the area of four square leagues.

On December 13, 1988, four years later, Secretary of the Interior Donald Hodel endorsed the Tarr opinion. Subsequent to the election of President Clinton, Interior Department officials repeatedly assured the Pueblo that the new Secretary of the Interior, Bruce Babbitt, intended to withdraw the Tarr opinion. Ada Deer, the new Assistant Secretary for Indian Affairs, concluded that Tarr's opinion was invalid. The new Solicitor of the Interior Department, John Leshy, likewise found Tarr's opinion invalid in a number of respects, especially Tarr's conclusion that, even if the survey were erroneous, the Secretary of the Interior did not have the authority to correct it. Leshy indicated that he was not yet prepared to reverse the Tarr opinion officially, but he informed the Pueblo that he intended to withdraw the Tarr opinion before December 9, 1994, six years from the date it had been issued, in order to allow the Interior Department to complete the administrative correction without requiring the Pueblo to risk being barred by the six year limitations period of the Administrative Procedure Act.

However, within days of Leshy's assurances, Secretary Babbitt engaged in the second about-face by an Interior Department Secretary regarding the Sandia claim. Babbitt apparently "was ready" to endorse the withdrawal order but "backed off" when "New Mexico congressmen [Senator Pete Domenici and Representative Steven Schiff] lobbied against it." The Albuquerque Tribune, Dec. 7, 1994 ed. at 1.

The Pueblo filed this action December 7, 1994, within six years of the date of the Tarr opinion and Hodel's subsequent endorsement. The administrative actions under review in this case are the refusal by Secretary Hodel to order a corrected survey of the boundary and the subsequent decision of Secretary Babbitt to adhere to Hodel's decision.

II

Standard of Review

Defendants have moved to dismiss this action for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), and for failure to state a claim for relief, pursuant to Fed.R.Civ.P. 12(b)(6). In reviewing a motion to

dismiss, a Court must of course presume the factual allegations of the complaint as true, and on a motion to dismiss under Rule 12(b)(6), the Court must draw all inferences in plaintiff's favor. Doe v. U.S. Department of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985). However, even under a motion pursuant to Rule 12(b)(1), the burden is on the plaintiff to establish jurisdiction. McGarry v. Secretary of the Treasury, 656 F.Supp. 1034, 1037 (D.D.C. 1987) (citing KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936)). In reviewing a motion to dismiss under Rule 12(b)(1), "[t]he factual allegations of the complaint thus will bear closer scrutiny than under a Rule 12(b)(6) motion, and the Court may consider material outside the pleadings," McGarry, 656 F.Supp. at 1037, without converting the motion to dismiss into a motion for summary judgment. See e.g., Haase v. Sessions, 835 F.2d 902, 905-06 (D.C. Cir. 1987). The Court now applies these principles to the motion to dismiss.

III

Quiet Title Act

The government argues that there are several interrelated bars to the Court's subject matter jurisdiction, all revolving around the claim of sovereign immunity. More specifically, the government asserts that, inasmuch as the action here allegedly is one to divest it of ownership of land, it is barred directly by the doctrine of sovereign immunity. Alternatively, the argument is that, inasmuch as the statute of limitations under the Quiet Title Act, 28 U.S.C. § 2409, is twelve years and the action here was not brought until much later, there again, the requisite consent of the sovereign is missing, and the suit may not be entertained by the Court. The basic problem with these contentions is that the action before the Court is not one contesting the government's ownership of the land in question, and it therefore should not be judged under the Quiet Title Act.

In a similar claim brought by another Pueblo, this Court rejected arguments similar to those advanced by the government here. Pueblo of Taos v. Andrus, 475 F.Supp. 359 (D.D.C. 1979). In Taos, as in this case, the Pueblo sought

correction of a boundary between lands held by the Forest Service and the Pueblo; the Pueblo asserted that the boundary was the subject of an erroneous survey conducted in the nineteenth century by a government surveyor; the Department of Interior initially concluded that the Pueblo claim was valid and that a corrected survey would be ordered; and, after political opposition from the Department of Agriculture, the Interior Department retreated from that position and refused to correct the survey. The Court concluded that:

> This is a classic case seeking review of administrative action, and sovereign immunity is thus no bar to the action. Cases cited by defendant for the proposition that actions which affect government ownership of land are barred by sovereign immunity are inapposite. The relief requested in this case affects no ownership interest; it would merely adjust the boundaries between two parcels of government-owned land. . . ."

Id. at 364-65 (citations omitted).[4]

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[4] There is one difference between this case and Taos, but it is not a sufficient distinction to cause a grant of the motion to dismiss. In Taos, the administrative action under review was the opinion of the Attorney General suspending the correction of a resurvey. Here, the administrative action under review is the "act" of refusing to order a corrected survey--a rejection of the reports and recommendations of all of the Interior Department officials who evaluated the claim prior to the media's attention.

For similar reasons, the twelve year statute of limitations of the Quiet Title Act does not bar this suit because, as stated above, this is not a suit to quiet title. As indicated by the relief sought in the amended complaint,[5] the Pueblo does not seek title to the disputed claim area; title would remain in the United States government. The Pueblo seeks merely to have the property at issue transferred from the control of one federal agency, the Department of Agriculture, to another, the Department of Interior, which, unlike Agriculture, would manage the property in trust for the Pueblo Indians.[6]

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[5] The Pueblo's amended complaint--seeking a corrected survey and a declaration that the corrected boundary is the true boundary--of course supersedes the original complaint and therefore controls the dispute over the nature of this action: "A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies. . . . Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading." CHARLES A. WRIGHT et al., 4 Federal Practice and Procedure § 1476 (1990).

[6] As indicated above, the Pueblo does not seek any rights to the property held by private landowners within the disputed claim area.

The government notes that title to the land is currently held by the Pueblo, not by the federal government in trust for the tribe, but while this is true it is also misleading. As articulated in the leading treatise on federal Indian law,

> [t]he precise title granted to the tribe makes little difference since, absent contrary congressional action, the restrictions on alienation and other unique attributes of Indian trust land apply equally to lands held in trust for the tribes by the United States and to lands held in fee title by tribes with which the federal government maintains a trust relationship.

Felix S. Cohen's Handbook of Federal Indian Law 480 n.73 (1982 ed.).

In general, title to Indian reservation land is held by the federal government in trust for the tribe. The status of the Pueblo Indians is unique: because of the confirmation of Spanish grants by Congress, the Sandia and some other Pueblo tribes technically hold title to their land. However, the Sandia Pueblo does not hold "title" in the traditional sense of fee simple absolute. This land is significantly encumbered by the requirement that the Pueblos may not convey property without the consent of the Secretary

of the Interior. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) (construing Pueblo Lands Act of 1924). Moreover, the special trust responsibility applies to the New Mexico Pueblos with equal validity as to reservation Indians. Felix S. Cohen's Handbook of Federal Indian Law 95 (1982 ed.).

Supreme Court decisions since Taos relied upon by the government have not limited this Court's jurisdiction to review the Secretary's refusal to correct an erroneous survey of the boundary between United States land and an Indian reservation. Cases the government cites for the proposition that this action is barred by the QTA (Block v. North Dakota, 461 U.S. 273 (1983) and United States v. Mottaz, 476 U.S. 834 (1986)) are inapposite.

In Block, the Supreme Court held North Dakota's attempt to prevent the United States from "develop[ing] or otherwise exercising privileges of ownership upon the bed of the Little Missouri River," 461 U.S. at 278 (quoting complaint), subject to the Quiet Title Act. Had this attempt succeeded, North Dakota would have had the right to bar the United

States from every valuable right of ownership in the riverbed, such as dredging and development. By contrast, as explained above, the Pueblo of Sandia has not sought to prevent the Department of Interior from developing the land, or exercising other property rights in the Sandia Peak region. In fact, the correction of the Pueblo's eastern boundary does not challenge the government's title to the disputed lands and "any challenge to a non-ownership interest in real property is not precluded by the QTA." Durbar Corp. v. Lindsey, 905 F.2d 754, 759 (4th Cir. 1990).

Similarly in Mottaz, a private individual sought to divest the United States of title. Plaintiff's claim arose from the government's 1905 allotment of Indian reservation land pursuant to the General Allotment Act of 1887, 24 Stat. 388, as amended 25 U.S.C. § 331 (1982). Mottaz challenged the government's sale of her ancestor's allotted land to the United States Forest Service. As the Court noted: "What respondent seeks is a declaration that she alone possesses valid title to her interests in the allotments and that the title asserted by the United States is defective. . . ." 476

U.S. at 842. Unlike in Mottaz, the Pueblo of Sandia has not sought title in its amended complaint, nor has it any time asserted that the United States' title is defective.

Decisions interpreting Block and Mottaz further support the proposition that the Quiet Title Act does not govern claims which do not seek to divest the government of title. See, e.g., Navajo Tribe v. New Mexico, 809 F.2d 1455 (10th Cir. 1987). There the Navajo tribe sued to reclaim title to unallotted Navajo reservation land which had been given to the state of New Mexico and to private landowners pursuant to executive orders providing that any unallotted lands be returned to the public domain. The government's reliance on this precedent for the proposition that the Navajos' claim was time-barred under the QTA is undercut by the court's clear admonition that, "[i]f the Tribe wishes to pursue continued reservation status, as opposed to title, of the subject lands, it is not precluded from filing a declaratory judgment action to determine its reservation boundary lines. . . . " 809 F.2d at 1475, n. 29. The Court of Appeals for this Circuit has also recognized that an action to clarify

reservation boundaries is distinct from a quiet title action, and is therefore not barred by the statute of limitations in the QTA. New Mexico v. Department of Interior, 820 F.2d 441, 447 (D.C. Cir. 1987).

IV

Indian Claims Commission Act

The government's alternative argument that this action is barred by the Indian Claims Commission Act (ICCA) is likewise in error. The ICCA bars claims against the government existing as of 1946. However, as explained above, the Pueblo's claim seeks to review administrative actions taken decades after the ICCA's cut-off date. In Catawba Indian Tribe of South Carolina v. United States, 982 F.2d 1564 (Fed. Cir. 1993), cert. denied, 113 S.Ct. 2995 (1993), the state of South Carolina, in violation of the Nonintercourse Act, 25 U.S.C. § 177 (1992), purchased the Catawba Tribe's ancestral lands in 1840 for $16,000 and a promise that the State would give the tribe a new reservation. In the 1950s, pursuant to the Termination Act, 25 U.S.C. § 935 (1992), Congress terminated the trustee

relationship with the Catawba tribe. The tribe alleged that it was assured by the government that termination would not affect the tribe's rights to its historic land claim. The Federal Circuit held that the claims based on the government's historical failure to restore the ancestral land to the tribe were barred, but that the post-1946 claims based on the government's misrepresentations concerning the effect of the Termination Act were not:

> While all seven claims may stem at some general level from the allegation of a unitary disregard by the Government for the Tribe's land claim, this is not enough to have brought claims 3-7 under ICC jurisdiction.
>
> . . . the Government . . . err[s] in equating the Government's passive failure to act to restore the land with the Government's alleged active representations that the Termination Act, effective in 1962, would not affect the Tribe's historic claim to the land.

Id. at 1569. Similarly, in this case, although the Pueblo's claim "stems" in some sense from inaccuracies in Clements' survey, that official's failure correctly to survey the Sandia Pueblo cannot be equated with the refusal of Secretaries Hodel and Babbitt to order a corrected survey, which is what plaintiff is challenging. Such an action

would not be in accordance with law nor would it be fair on any view of the controversy.

V

Administrative Procedure Act

This Court has jurisdiction to review the refusal of the Secretary of the Interior to correct an inaccurate survey of public lands. Despite the government's attempts to characterize this action as a suit to quiet title or to redress a nineteenth century land claim, what the Pueblo really seeks is judicial review of adverse agency action. This suit is therefore properly governed by the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1992), which operates as a waiver of sovereign immunity in a suit seeking relief other than money damages:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States.

Id.

The facts alleged in the Pueblo's amended complaint set forth such a claim under the APA. Specifically, the Pueblo claims that Secretary Hodel and Secretary Babbitt had a duty to correct an erroneous survey of Indian land, and that they violated that duty. The Secretary of the Interior has supervisory authority over all public lands, 43 U.S.C. § 2 (1992), including the authority to survey Indian lands, 25 U.S.C. § 176 (1992); to establish the boundaries of national forests, 16 U.S.C. § 488 (1992); to correct erroneous land surveys, 43 U.S.C. § 772 (1992); and to correct patents of conveyances to eliminate such errors, 43 U.S.C. § 176 (1992). As this Court concluded in Pueblo of Taos, the Secretary of the Interior has "authority to correct what might even be characterized as gross errors in boundaries between public lands." 475 F. Supp. at 366.

There is accordingly no question that Secretaries Hodel and Babbitt had the authority to order a corrected survey. The more difficult question is whether they had a duty to do so. 43 U.S.C. § 772 places the decision to order a corrected survey within the discretion of the Secretary of

the Interior: "The Secretary of the Interior may . . . in his discretion, cause to be made, as he may deem wise . . . 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. . . ." The government argues from this statutory provision that the administrative action in question is presumptively unreviewable because it is agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1992). However, the Court notes two grounds for the reviewability of this claim under the APA.

First, as the government itself conceded at the hearing on the motion to dismiss, under some circumstances a failure to order a corrected survey could constitute an abuse of discretion--which would be judicially reviewable. Where the facts alleged in plaintiff's amended complaint indicate that political pressure from two members of the legislative branch may have been the sole reason for the refusal of Hodel and Babbitt to order a corrected survey, plaintiff Sandia has stated a colorable claim under the APA that Hodel

and Babbitt abused their discretion in not ordering a corrected survey.

In the alternative, the Court concludes that plaintiff has stated a colorable claim under the APA that Secretaries Hodel and Babbitt not only had the authority, but the duty to correct an erroneous survey, because the rights of Native Americans are at stake. In the context of the special relationship between the federal government and the Indian peoples, the United States cannot in this context ignore its fiduciary duties toward Indian tribes. See, e.g., People of Togiak v. United States, 470 F.Supp. 423, 428 (D.D.C. 1979).

The Supreme Court has "previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" United States v. Mitchell, 463 U.S. 206, 225 (1983)(citation omitted). The trust relationship between the government and a tribe or pueblo

> is obviously one of full fiduciary responsibility, not solely of traditional market-place morals. When the Federal Government undertakes an 'obligation of trust' toward an Indian tribe or group . . . the obligation is 'of the highest responsibility and trust,' not that of 'a mere contracting party' . . . .

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 662 (D. Me.), aff'd, 528 F.2d 370 (1st Cir. 1975) (citation omitted).[7]

If the Secretary of the Interior's failure to order a new survey is let stand, the government would benefit from a government error in a government survey--surely a violation of a trustee's responsibility toward its beneficiary. The Court is persuaded, as plaintiff has argued, that the fiduciary duty is most compelling where, as here, the adverse party to the claims of a tribe is the government itself.

In an analogous situation, where the government failed to advise a tribe of the additional value of its property after helium had been discovered on the land, and the government subsequently sanctioned a transfer of the land from a private party to the government without allowing the tribe to renegotiate for a higher rent, the Court of Claims

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[7] As indicated above, although some pueblos hold title to some land, that land is subject to similar restrictions on alienation as other lands held in trust by the United States for Indian tribes. Therefore, the federal trust relationship applies equally to pueblos.

found these actions "were not consistent with the government's duty to the Navajos." Navajo Tribe v. United States, 364 F.2d 320, 323-24 (Ct. Cl. 1966). The court emphasized that "[s]ince the Department of the Interior had an obligation to safeguard the property of the Navajos when they were dealing with third parties, it is clear that an even greater duty existed when the Department itself entered into transactions with the Indians." Id. at 322-23.

In sum, the Pueblo's complaint states a colorable claim under the APA that Secretary Hodel and Secretary Babbitt violated their duty to correct the Clements survey. To be sure, the APA itself is not a basis for jurisdiction. See Califano v. Sanders, 430 U.S. 99 (1977). But the Pueblo's complaint clearly references general federal question jurisdiction, 28 U.S.C. § 1331; the special jurisdiction over claims by an Indian tribe arising under federal laws and treaties, 28 U.S.C. § 1362; the declaratory judgment statute, 28 U.S.C. §§ 2201-02; and the mandamus statute, 28 U.S.C. § 1361. As the Court of Appeals for this Circuit has noted, "[u]nder settled law, for claims permitted under the

APA's waiver of sovereign immunity, jurisdiction is proper in the federal district court under the federal-question statute, the declaratory-judgment statute, the declaratory-judgment statute, or the mandamus statute." Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607 (D.C. Cir. 1992) (citations omitted). This suit is not barred on the technical ground that the amended complaint did not refer to the APA in the jurisdictional sections; as indicated above, the APA is not itself a basis for jurisdiction. Moreover, the facts alleged in the amended complaint, on their face, indicate that the Pueblo is seeking review of administrative action.

Accordingly, because this action is governed by the APA, not the Quiet Title Act or the Indian Claims Commission Act, a six year statute of limitations determines the timeliness of this action. 28 U.S.C. § 2401(a). This suit is timely, as it was brought within the APA's six year limitations period. The Pueblo's claim arose on December 13, 1988, when Secretary Hodel endorsed Solicitor Tarr's opinion reversing all of the previous opinions which had

concluded that a corrected survey was merited. The Pueblo of Sandia has sufficiently established the timeliness of its claim: Secretary Hodel's refusal to order a corrected survey and Secretary Babbitt's like refusal occurred less that six years prior to the filing of the Pueblo's original complaint.

Accordingly, the government's motion to dismiss is DENIED.

Harold L. Greene

HAROLD H. GREENE
United States District Judge