IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUEBLO OF SANDIA,

Plaintiff,

v.

BRUCE H. BABBITT, et al.,

Defendants.

Civ. No. 1:94CV02524
Judge Harold H. Greene

PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, Pueblo of Sandia, has moved for summary judgment declaring that the eastern boundary of its reservation extends to the "main ridge," rather than the foothills, of Sandia Peak -- the most prominent land feature in the area. The Pueblo's claim stems from a 1748 land grant from the King of Spain -- one of the few such written grants still extant -- which expressly provides that the Pueblo's land extends to that "main ridge." In 1858 Congress confirmed that grant and ordered a conforming survey.

In 1859, however, a government surveyor erroneously meandered the eastern boundary of the grant as the foothills of Sandia Peak. That error, buried in surveying jargon, went undetected for years, while the Pueblo continued to use the area as its own -- principally for its religious ceremonies.

The survey error became apparent after the federal government, in the form of the Department of Agriculture, the owner of the adjacent eastern half of Sandia Peak, began to interfere with the Pueblo's use of the claim area. The Pueblo then asked that the

Department of the Interior, which holds lands for the benefit of the Pueblo and has jurisdiction over such claims, correct the boundary. Over a period of five years, the relevant officials at the Interior Department, including its highest ranking legal authority on Indian matters, concluded that the Pueblo's claim to the area in question was valid and that the erroneous survey should be corrected. But in December 1988, Solicitor Ralph Tarr issued a new opinion which reversed the findings of every Interior official who had previously considered the matter and which rejected the Pueblo's claim. That erroneous opinion was then adopted, without further comment, by then Secretary Hodel.

In its opening motion for summary judgment, the Pueblo described the well-settled law that the Interior Department has a fiduciary obligation to its Indian wards such as the Pueblo and that that duty is especially great in this case, where the error was that of a government surveyor and the beneficiary of that error, if not corrected, will be the federal government itself.[1] Given that fiduciary duty, the Interior Department was required to order a corrected survey, so long as the Pueblo's claim to the disputed area was "reasonable." As found by the high-ranking Interior officials who concluded that the Pueblo had presented an entirely valid claim, the Pueblo's position was far more than "reasonable." Accordingly, the Department's refusal to correct the survey constituted a breach of the fiduciary duty owed by the Department to its Indian wards.

The Pueblo's claims and legal arguments stand unrebutted -- even after the government's response. The government effectively concedes that the Interior Department owed a fiduciary duty to the Pueblo and that this duty required the Secretary to correct the survey so long as the tribe's position was reasonable. The government does not even

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[1] The Pueblo has waived any right to recover the small portion of the claim area that has been transferred to private parties. It seeks only to transfer title to the lands wrongfully held by the Agriculture Department to the Interior Department, where they may rightfully be held in trust and administered for the benefit of the Pueblo.

attempt to dispute those propositions. Instead, the government seeks to avoid summary judgment by repeating the same arguments it previously raised in its motion to dismiss. Those arguments are no more valid today than they were last year when they were rejected by this Court. Opinion and Order of December 10, 1996 (hereinafter "Dec. 10, 1996 Opinion").

In short, the undisputed facts demonstrate that the Pueblo presented the Interior Department with a reasonable -- indeed valid -- claim to the area in question and thus the Secretary had a fiduciary duty to order the corrected survey. Summary judgment in favor of the Pueblo is thus appropriate.[2]

I. The Government Does Not Even Attempt to Respond to the Pueblo's Arguments for Summary Judgment

In its motion and memorandum in support, the Pueblo established that it was entitled to summary judgment because (1) the Interior Department has a fiduciary duty to correct erroneous government surveys that are adverse to the interests of its Indian wards; (2) the Pueblo's claim to the disputed area was not only reasonable, but in fact meritorious, as the Department's highest ranking officials on Indian matters recognized on a number of occasions; and (3) the Tarr opinion, refusing to correct the erroneous survey, was both legally and factually flawed. The government's decision to ignore the Pueblo's demonstration of these three propositions in no way distracts from their decisive effect.

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[2] This combined memorandum replies to the government's opposition to the Pueblo's motion for summary judgment and responds to the government's cross-motion for summary judgment as well. As shown below, the government's cross-motion should be denied for essentially the same reasons that the Pueblo's motion should be granted.

A. The Government Does Not Dispute that the Interior Department Owes a Fiduciary Duty to the Pueblo

The government does not -- and cannot -- dispute that the Secretary of the Interior owes a fiduciary duty to the Pueblo. As discussed in detail in the Pueblo's memorandum in support of its motion for summary judgment (Memorandum (June 26, 1996) at 10-16), the Supreme Court has repeatedly held that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians." United States v. Mitchell, 463 U.S. 206, 225 (1983). See also Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Prieto v. United States, 655 F. Supp. 1187, 1193 (D.D.C. 1987); People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979). That fiduciary relationship

> "`exists with respect to such . . . properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.'" Mitchell, 463 U.S. at 225 (citation omitted) (emphasis added).

The government does not dispute that fiduciary duty.

The government likewise does not dispute that, by surveying the Pueblo's grant, the Interior Department exercised just "such elaborate control" over the Pueblo's property in this case. Indeed, the act of establishing the tribe's boundaries through the congressional confirmation of the original Spanish grant, and then the subsequent erroneous survey by a government surveyor, constitute the ultimate control over Indian lands. As the government implicitly concedes, the Interior Department was thus obligated to "act as a fiduciary towards those lands." White Mountain Apache Tribe of Arizona v. United States, 11 Cl. Ct. 614, 650 (1987), aff'd, 5 F.3d 1506 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 1538 (1994).

Moreover, subsequent statutory and judicial considerations of the trust relationship between the United States and the New Mexico pueblos have confirmed that the federal government's powers with respect to pueblo lands creates a corresponding fiduciary duty to act as a trustee toward its Indian wards. In 1910, for example, the restraints against alienation and protection of Indian lands in the Trade and Intercourse Act, 25 U.S.C. § 177,[3] were made directly applicable to pueblo lands through the New Mexico Enabling (Statehood) Act. That Act provides that "the terms `Indian' and `Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558. A few years later, the Supreme Court in United States v. Sandoval, 231 U.S. 28, 47 (1913), confirmed that the people and land of the New Mexico pueblos are subject to the guardianship of the United States: "[B]y a uniform course of action beginning as early as the 1854 and continued up to the present time, the legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection . . . ."

Accordingly, the federal government in general, and the Interior Department in particular, unquestionably owe a fiduciary duty to the Pueblo Indians and their lands. See Alonzo v. United States, 249 F.2d 189, 197 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958). Again, the government effectively concedes this point; it does not even attempt to contest the existence of a fiduciary relationship between the Interior Department and Sandia.

Nor does the government dispute the nature or scope of that fiduciary relationship. As the Pueblo discussed in its opening motion, the courts have repeatedly held that, "When

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[3] "No purchase, grant, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

the Federal Government undertakes an `obligation of trust' toward an Indian tribe or group, . . . the obligation is `one of the highest responsibility and trust,' not that of `a mere contracting party' . . . ." Joint Tribal Council of the Passamoquoddy Tribe v. Morton, 388 F. Supp. 649, 662 (D. Me.), aff'd, 528 F.2d 370 (1st Cir. 1975) (emphasis added). See also Coast Indian Community v. United States, 550 F.2d 639, 652 (Ct. Cl. 1977) ("The United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards") (emphasis added).

The consequences of that fiduciary relationship for this case are clear: Where the Pueblo presents a reasonable claim to disputed land, the Secretary of the Interior must resolve the issue in favor of his Indian wards. See Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.) (en banc) (adopting as the majority opinion the opinion of Judge Seymour reported at 728 F.2d 1555 (10th Cir. 1984)), modified on other grounds, 793 F.2d 1171 (10th Cir.), cert. denied, 479 U.S. 970 (1986).

In Jicarilla Apache Tribe, for example, the issue was the Interior Secretary's accounting based on an interpretation of regulations dealing with royalties from oil and gas resources owned by the Jicarilla Apache. The tribe had filed suit claiming that the Secretary had breached his fiduciary duty by failing to interpret the royalty terms in the manner that worked to the tribe's best interests. On appeal, the Tenth Circuit focused on whether the interpretation of the royalty terms proposed by the tribe was "reasonable":

> "[T]he true issue in this case is not whether the Secretary's earlier application of the royalty terms was reasonable; rather, it is whether the alternative interpretation requiring dual accounting is also reasonable and better promotes the Tribe's interest. If so, dual accounting should have been required from the beginning." 728 F.2d at 1567 (emphasis added)

The court of appeals explained that the Interior Department's fiduciary responsibilities to its Indian wards require the Department to adopt any "reasonable" interpretation that most favored a tribe:

> "When the Secretary is acting in his fiduciary role . . . and is faced with a decision for which there is more than one 'reasonable choice' as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe." Id. (emphasis added).

Because the construction that most favored the Jicarilla Apache was reasonable, the court of appeals ruled that the Secretary had breached his fiduciary obligations by failing to adopt that construction: "Given two reasonable interpretations, Interior's trust responsibilities require it to apply whichever accounting method . . . yields the Tribe the greatest royalties." Id. at 1569.[4]

The breach of the government's fiduciary duty in this case is even more egregious than the one in Jicarilla Apache Tribe. Here, the party adverse to the claims of the Pueblo is not a private party, but rather the government itself. As the Pueblo argued in its opening motion for summary judgment, and as this Court recognized in its decision denying the government's prior motion to dismiss, "the fiduciary duty is most compelling where . . . the adverse party to the claims of a tribe is the government itself." Dec. 10, 1996 Opinion at 24.

Indeed, the courts have repeatedly held that, in such cases, the government must subordinate its own interests to those of its Indian wards. For example, in Navajo Tribe of Indians v. United States, 364 F.2d 320, 322-34 (Ct. Cl. 1966), the court found that the government had violated its fiduciary duty when it allowed a private party to transfer a lease interest in certain Indian lands to the government to enable the government to drill for

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[4] Similarly, in Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972), this Court (Gesell, J.) held that the government had failed to fulfill its "most exacting fiduciary standard" when it made a "judgment call" in a land dispute against the interests of an Indian tribe. The court emphasized that, in resolving Indian land claims, all government officials must "liberally" construe relevant legal documents "to the benefit of the Indians." Id.

helium rather than allowing the tribe to renegotiate for a higher rent. The court ruled that

> "[s]ince the Department of 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 Indians. . . . Because of this and because of the Government's special duty toward the Indians, the various dealings must be carefully scrutinized." Id. at 322-23 (emphasis added).

Applying those "fiduciary standards," the court in Navajo Tribe held that, although the action of the government may have been in the "national interest" because the assignment of the lease allowed the government to secure essential wartime helium, the government's failure to advise the tribe of the additional value of the lease was "not consistent with the government's duty to the Navajos." Id. at 323-24.

Once again, the government has not even attempted to contest the Pueblo's contentions or any of the cases the Pueblo cited on this point.[5] The government thus concedes that it owes the "highest responsibility and trust" to the Pueblo, and that it is a clear breach of that trust for the government to benefit itself by refusing to grant a reasonable claim presented by its ward. Accordingly, the Pueblo must prevail on summary judgment if it presented the Interior Department with a "reasonable" claim to the land. As shown in our opening motion and as summarized below, the undisputed facts make clear that the Pueblo's claim in this case was far stronger than just "reasonable".

B. The Undisputed Facts Demonstrate that the Pueblo Presented the Government with a Meritorious Claim

The government barely contests the Pueblo's claim that its eastern boundary should extend to the "main ridge" of Sandia Peak. And the government certainly fails to

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[5] The cases the government cites on pages 7-8 and 16 of its memorandum for the general proposition of administrative discretion are inapposite given the special fiduciary relationship between the government and Indian tribes; not one of them involves review of a government decision with respect to an Indian claim.

establish that that claim was not at least "reasonable". The relevant facts underlying the Pueblo's claim are thus virtually undisputed and require only brief review:

In 1748, the King of Spain formally established the Pueblo. A royal grant document was prepared that set the eastern boundary of the Pueblo's land as: "y por el oriente la Sierra Madre que llaman de Sandia," i.e., "on the east the main ridge called Sandia." *Letter from the Secretary of the Interior Communicating Supplemental Reports from the Surveyor General of New Mexico in Regard to Certain Land Claims in that Territory (001807).*[6]

When New Mexico was incorporated as a territory of the United States in 1848 following the Mexican-American War, the Treaty of Guadalupe-Hidalgo ratified all such grants that had been made by the Spanish sovereigns. Pursuant to that treaty, on December 22, 1858, Congress confirmed the Pueblo's 1748 grant and commissioned a survey to record its boundaries. Plaintiff's Statement of Undisputed Facts No. 4. In confirming the Spanish royal grant, Congress considered the same grant language as stated in the official translation by David Whiting (the "Whiting translation"). That translation, quoted above, set the eastern boundary of the Pueblo's land as the "main ridge called Sandia." *Letter from the Secretary of the Interior Communicating Supplemental Reports from the Surveyor General of New Mexico in Regard to Certain Land Claims in that Territory (001804).*

Following Congress' directive, the Surveyor General of the Interior Department instructed his staff to reconcile a survey with the documentary evidence of the grant boundaries. John Garretson, the original surveyor, received those instructions, directing that the boundaries were to confirm the "original grant files" and incorporate all natural

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[6] Unless otherwise indicated, the Bates numbers refer to the documents submitted by the government as the "administrative record" in the case.

markers. Plaintiff's Statement of Undisputed Facts No. 7. Those instructions, however, were not followed by Reuben Clements -- a replacement for Garretson who eventually surveyed the boundaries of the Pueblo in November 1859. Despite the fact that the Whiting translation, which had been incorporated by the 1858 congressional confirmation, set the eastern boundary of the grant as the "main ridge called Sandia," Clements surveyed the eastern boundary as the foothills of the mountain. Plaintiff's Statement of Undisputed Facts No. 9.[7]

The government does not dispute that the Whiting translation set the eastern boundary of the grant as the "main ridge" of the Sandia mountains. Nor does the government dispute that Clements instead surveyed the eastern boundary as the foothills. Rather, the government seeks to avoid the mandate of the Whiting translation -- the translation used by Congress -- by contending, some 140 years later, that that translation is erroneous. Specifically, the government contends that Whiting erred in translating "Sierra Madre" as "main ridge" rather than merely the "mountain range." The government then argues that if "Sierra Madre" had been translated as "mountain range," it would somehow

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[7] As the Pueblo noted in its opening motion, at least one other court has questioned Mr. Clements' competence and overturned another erroneous survey he conducted affecting two other New Mexico pueblos. Pueblo of Santa Ana v. Baca, 844 F.2d 708, 712 (10th Cir. 1988).

Contrary to the government's view, the Pueblo does not contend that Pueblo of Santa Ana establishes conclusively that Clements was always "incompetent." But, as this Court has recognized (Dec. 10, 1996 Opinion at 4, n.1), the decision in Santa Ana makes clear that Clements made mistakes in the same geographic area. Specifically, in Santa Ana the court found that Clements had "strayed off course" and that his field notes "inconsistently located the southeast corner" of the grant -- an "inconsistency [that] calls into question the validity of the survey." 844 F.2d at 712. The court then characterized Clements' survey as "inept." Id.

Indeed, anyone familiar with Sandia Peak -- which rises from an elevation of about 7000 feet above sea level at the foothills meandered by Clements to the main ridge some 10,700 feet above sea level -- can perhaps understand why Clements (working with a mule and surveying chains over a few days in November 1859) chose the far easier (but clearly improper) way out.

be clear that the Spanish land grant implicitly intended to convey only a "formal pueblo" -- a "custom" sometimes followed of granting one league in each direction from the pueblo plaza. This halfhearted attempt to challenge the merits of the Pueblo's claim fails for a number of reasons.

First, the government is simply wrong in contending that the Whiting translation is erroneous. Indeed, in a similar case involving the Elena Gallegos grant, which is immediately south of Sandia, the Court of Private Land Claims ruled that by establishing the boundary with even the more general language, "on the east the Sandia Mountains," the grant could only be interpreted as extending to the crest of the Sandia Mountains. Final Decree in Donanciano Gurule v. United States of America, Case No. 51, Court of Private Land Claims, November 1893 (000417-000419).[8]

Second, and more importantly, even if the phrase "sierra madre" were open to more than one interpretation, Whiting's translation is controlling in this case. Whiting was acting in his official capacity as the government translator for the Surveyor General's Office when he translated the Sandia grant. W. Minge, *The Pueblo of Sandia Grant Boundary Issues and Encroachments of Sandia Land Claim* (Jan. 1983), at 33 (000001-000180). Robert McClelland, then Secretary of the Interior, transmitted the Whiting translation to Congress as the official translation for its use in confirming the grant. *Letter from the Secretary of the Interior Communicating Supplemental Reports from the Surveyor General of New Mexico in Regard to Certain Land Claims in that Territory. 001799-1810).* And Congress then adopted the Whiting translation in confirming the grant. "An Act to Confirm the Land Claims of Certain Pueblos and Towns in the Territory of New Mexico" (Dec.

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[8] The government concedes that the proper translation of the grant language is a matter of law, not fact. Gov't Mem. at 25, n.15.

1858) in *The Statutes at Large and Treaties of the United States of America*, (Boston: Little, Brown & Company, 1859), XI, 374.

Thus, throughout the entire period in which Congress considered and confirmed the Sandia grant, the federal government consistently treated the Whiting translation as the correct articulation of the Pueblo's boundaries. The government thus cannot avoid its own official translation 140 years after the fact.

Third, the government's related reliance on the four square league "custom" ignores the indisputable evidence presented by the Pueblo in its opening motion (Memorandum in Support at 20-22) that that "custom" was at best inconsistently followed and cannot overcome the express words of the Whiting translation. See Dec. 10, 1996 Opinion at 7, n.3. The government does not dispute, for example, that Spanish authorities granted nearby Acoma Pueblo a total area of 95,791 acres -- more than five times the area of four square leagues (which is about 18,000 acres) and nearly three times the corrected grant area Sandia now seeks. Nor does the government dispute that Santo Domingo Pueblo was granted an area of 74,741 acres -- more than four times the four square league "limit", and more than twice the area Sandia will have after the correction. It is thus clear (and not seriously disputed by the government) that the formal pueblo "custom" was hardly an immutable rule that could override the specific language of the 1748 Spanish grant later endorsed by Congress. In any event, it is well-settled -- and also not contested by the government -- that extrinsic evidence, such as evidence of "custom", can not be used to place a construction on a deed that is inconsistent with its own terms. See, e.g., Duffield v. Duffield, 127 N.E. 709, 710 (Ill. 1920). See generally 26 C.J.S. Deeds § 92, at 850.

Finally, it must again be noted that the Pueblo does not need to establish that the grant language can only be construed as setting the eastern boundary at the "main ridge" of Sandia Peak in order to prevail in this action. Rather, as shown above and as never

disputed by the government, given the federal government's fiduciary obligation to the New Mexico pueblos, Sandia need only show that it presented the Interior Department with a reasonable claim to the disputed area. That much at least is established by the undisputed fact that every Interior official who examined the issue up until Mr. Tarr's revised opinion agreed with the Pueblo's position:

-- In 1983, the Department's Office of Trust Responsibility issued a memorandum endorsing the Pueblo's claim. *Memorandum from the Director of the Office of Trust Responsibilities, BIA, to the Superintendent, Southern Pueblos Agency, BIA*, (July 8, 1993) (000194-000197).

-- In 1986, after reviewing additional reports provided by the Pueblo, then Assistant Secretary of the Interior Ross Swimmer endorsed the Pueblo's request for a survey correction and sent it on to the Solicitor's Office for the necessary legal work to correct the erroneous survey. Plaintiff's Statement of Undisputed Facts No. 14.

-- In April 1987, Timothy Vollman, then Associate Solicitor for Indian Affairs, completed a formal opinion concluding that the Pueblo had presented a valid claim and that the erroneous survey should be corrected. *Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs* (000757-000769).

-- Even Mr. Tarr himself initially endorsed the Vollman opinion and sent it on to the Agriculture Department with a notation that he was "inclined to adopt" it. *Letter from Solicitor Tarr to Mr. Hicks* (April 8, 1987) (000771-000783).

The three opinions in favor of the Pueblo's claim by the most relevant Department officials charged with Indian and claim issues stand unrebutted. Not once during this litigation has the government challenged any of those opinions as unreasonable in any way.

The government simply says that Mr. Tarr's later, contrary view was also a "reasonable explanation." Gov't Mem. at 19. But that rather tepid assertion is insufficient given the undisputed fiduciary law described above: Where the Secretary is confronted by the Department staff with two "reasonable" conclusions, the Secretary has a fiduciary duty to adopt the one favoring the government's Indian wards -- especially where, as here, the only adverse party is the government itself. See Jicarilla Apache Tribe, supra, 728 F.2d at 1567.

That well-settled fiduciary law does not, of course, mean that the Secretary must always grant an Indian claim. There may be cases where a claim has so little merit that the Department consistently rejects it. But where, as here, official after official who has studied an Indian claim has found that the claim is valid -- where even the Solicitor himself indicated that he intended to adopt that view prior to political objections of another government agency that wanted to retain the land for itself -- that more than "reasonable" Indian claim can not be rejected. Clearly, the prior Interior opinions concluding that the Pueblo had a valid claim confirm the "reasonableness" of the Pueblo's position -- and that is all that is necessary.

C. The Government Does Not Dispute that Surveying Measurements are Subordinate to Natural Boundaries

Not only did the Pueblo establish in its opening papers that it had presented the government with a "reasonable" claim, it also established that the revised Tarr opinion rejecting the Pueblo's position was incorrect as a matter of law. Memorandum in Support at 16-22. Again, the government has precious little to say in response.

The government does not even attempt to dispute the fact that the revised Tarr opinion disregarded the well-established rule that Clements' meander lines are subordinate to the call for the natural boundary of the "main ridge" of Sandia Peak. As the Pueblo

discussed in detail in its opening motion, where there is such a conflict in the description of land boundaries, references to natural monuments control over references to mere surveying distances. See, e.g., United States v. Lane, 260 U.S. 662, 664-67 (1923); Pueblo of Santa Ana v. Baca, 844 F.2d 708, 712 (10th Cir. 1988); Metropolitan Water Dis. of Southern California v. United States, 628 F. Supp. 1018, 1025 (S.D. Cal. 1986); United States v. McConnell, 612 F.2d 640, 643 (W.D. Va. 1985). This superiority of natural monuments in determining boundaries requires that errors in meander lines be disregarded in favor of the natural boundary. See, e.g., Red Hook Marina Corp. v. Antilles Yachting Corp., 478 F.2d 1273, 1275 (3d Cir. 1973).

Nor does the government attempt to distinguish (or even mention) this Court's decision in Pueblo of Taos v. Andrus, 475 F. Supp. 359 (D.D.C. 1979) (Gasch, J.) -- a case on all fours with the instant facts, which confirms that the revised Tarr opinion was wrong. Like Sandia, Taos had sought declaratory and injunctive relief acknowledging the correct boundary between the Pueblo and adjacent land administered by the Forest Service. In that case, an earlier court decree confirming the land grant had defined the eastern boundary as "the current of [the] Rio Lucero to its source." However, an erroneous government survey had failed to follow that natural boundary, thereby excluding about 300 acres. When the Forest Service, which held the neighboring tract, began encroaching on the area in question, Taos requested that the Interior Department ascertain the precise location of the eastern boundary. The Interior Department initially agreed with Taos that the river itself was the proper boundary and ordered a corrected survey. The Secretary of Agriculture, however, then asked the Attorney General to review the authority of Interior to issue such an order. Reversing the Interior Department, the Attorney General concluded that the land at issue properly belonged to the Forest Service. 475 F. Supp. at 363.

In rejecting the Attorney General's opinion, Judge Gasch correctly held that "[t]he general rule is that where a surveyor intended to meander the contours of a body of water forming the boundary of a tract of land, the true boundary is the body of water and not the boundary lines." 475 F. Supp. at 366. Because the relevant documents specified that the boundary was the Rio Lucero, that natural boundary prevailed over the surveyor's erroneous meander line, which had failed to follow the river all the way to its source.[9]

In short, Pueblo of Taos makes clear that an erroneous government survey cannot take precedence over a grant document that sets forth a natural boundary. By choosing not to challenge Taos in its brief, the government effectively concedes that point as well.

Moreover, the government does not dispute that Mr. Tarr disregarded the well-established principle, also applied in Taos, that the terms of a land grant "should be liberally construed in favor of the Indian beneficiaries." 475 F. Supp. at 366. As the Supreme Court has stated:

> "The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice . . . . `The construction . . . instead of being resolved in favor of the United States, is to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependant wholly upon its protection and good faith.'" Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (citations omitted).

As Sandia discussed in its opening brief, this principle has been consistently applied to construe any ambiguity in documents relating to Indian lands in favor of the Indian claim. See, e.g., County of Oneida, New York v. Oneida Indian Nation of New York

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[9] The same rule of precedence applies to lines that meander mountain ranges. See, e.g., North Carolina v. Tennessee, 240 U.S. 652 (1916).

Indeed, when one considers that the rule adopting natural boundaries over mere surveying measurements is founded on the common sense notion that the natural monuments are more permanent and easier to recognize, the river bed in Taos (which was a mere stream near its source) was not even as permanent as the ridge line of Sandia Peak which, of course, is quite prominent and has never moved.

State, 470 U.S. 226, 247 (1985); Keweenaw Bay Indian Community v. State of Michigan, 784 F. Supp. 418, 424 (W.D. Mich. 1991). Yet Mr. Tarr did just the opposite, contorting himself to favor the government's own interests over the Pueblo's reasonable -- indeed, valid -- claim.

In sum, the Pueblo presented the Interior Department with a reasonable claim to the land in question -- so reasonable that every Interior official who considered the issue up until December 1988 agreed with the Pueblo's position. In reversing those prior opinions, Mr. Tarr disregarded a number of clear principles of law and breached the Department's fiduciary responsibilities to the Pueblo. As shown below, none of the government's arguments can refute these points.

II. The Government Simply Repeats the Arguments It Lost on the Motion to Dismiss

The government attempts to avoid summary judgment by simply rearguing many of the contentions it raised -- and lost -- on its prior motion to dismiss. There the Court correctly ruled that the Department's actions on the Sandia's claim are reviewable by this Court -- under the Administrative Procedure Act, 5 U.S.C. § 702, et seq. (the "APA"). For the same reasons, the Court should reject the government's arguments once again, and enter summary judgment in favor of the Pueblo.

A. This Court Has Already Ruled That the Secretary's Refusal to Correct the Erroneous Survey is Reviewable

In denying the government's motion to dismiss, this Court ruled that the Secretary Hodel's refusal to order a corrected survey is a reviewable agency action: "This Court has jurisdiction to review the refusal of the Secretary of the Interior to correct an inaccurate survey of public lands." Dec. 10, 1996 Opinion at 20. Disregarding that clear ruling, the government once again argues that this Court lacks jurisdiction to review Secretary Hodel's

decision. The law has not changed in the nine months since the Court ruled; and the government's arguments must fail yet again.

1. This Court Has Jurisdiction to Review the Secretary's Decision

The government first contends that the Pueblo's claim is not cognizable under the APA because the statute granting Secretary Hodel the authority to correct the survey provides no law for reviewing courts to apply. This argument is not new; it was specifically rejected by this Court in ruling on the motion to dismiss. Dec. 10, 1996 Opinion at 22. As the Court correctly held, "there are two grounds for reviewability of this claim under the APA." Id.

First, the refusal of Secretary Hodel to correct the erroneous survey is reviewable given his fiduciary obligation to the Pueblo. The courts have properly insisted that the Secretary's decisions with respect to the government's Indian wards must "not merely meet the minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary." Jicarilla Apache Tribe, 728 F.2d at 1563. See also Cheyenne-Arapaho Tribes of Okla. v. United States, 966 F.2d 583, 590-91 (10th Cir. 1992), cert. denied, 507 U.S. 1003 (1993).

Accordingly, the courts have consistently held the Secretary's usual discretion in administrative matters is severely limited in a case such as this by those heightened fiduciary responsibilities. See, e.g., Kenai Oil and Gas, Inc. v. Dep't of Interior, 671 F.2d 383, 386 (10th Cir. 1982) (rejecting discretion argument because the Secretary's "actions nevertheless are limited by the fiduciary responsibilities vested in the United States as trustee of Indian lands"); United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co., 616 F. Supp. 1200, 1208 (D. Minn. 1985), appeal dismissed, 789 F.2d 632 (8th Cir. 1986) ("As a fiduciary, the Secretary is responsible for

acting in the best interest of the Indians and his actions may therefore be reviewed") (emphasis added).

Second, this Court has jurisdiction to review the Pueblo's alternative claim that the Department's refusal to correct the survey was influenced by improper political pressure. Even those actions specifically committed to agency's discretion by statute are reviewable on the ground the agency's decision in a particular case was occasioned by such "impermissible influences." Hondros v. United States Civil Service, 720 F.2d 278, 293 (3d Cir. 1983).

In short, the government's contention that Secretary Hodel was entitled to breach his fiduciary duty to the Pueblo because of "administrative discretion" -- and that this Court can do nothing about it -- is no more valid now than it was last December when it was squarely (and quite correctly) rejected by this Court.

2. Secretary Hodel's Decision to Adopt the Tarr Opinion is a Final Agency Action Subject to Review

The government next contends that this Court has no jurisdiction to review the Pueblo's claim because Solicitor Leshy and Secretary Babbitt, as the successors to Solicitor Tarr and Secretary Hodel, took no "final agency action." The government's argument misses the point.

The Pueblo has not argued that the refusal of Solicitor Leshy and Secretary Babbitt to correct the Pueblo's boundary (despite their promises to withdraw the Tarr opinion) constituted the administrative decision at issue in this case. To the contrary, as the government itself concedes (Gov't Mem. at 10, n.7), it was Secretary Hodel's decision to adopt the Tarr opinion that was the "complete" and final administrative action Sandia contests. The subsequent inaction of the Interior Department is relevant simply to show the continuing breach of the Department's trust responsibilities to the Pueblo.

In any event, Secretary Babbitt's refusal to reverse the erroneous Tarr opinion is also a final, reviewable administrative action. An agency need not undertake an affirmative act for there to be finality. Rather, the courts have held that finality is a pragmatic and flexible concept, "focusing on whether judicial review at the time will disrupt the administrative process." Maryland Dep't of Human Resources v. Dep't of Health and Human Services, 763 F.2d 1441, 1459 (D.C. Cir. 1985) (quoting Bell v. New Jersey, 461 U.S. 773, 779 (1983)). Where, as here, administrative inaction has precisely the same adverse impact on the rights of a party as a denial of relief, that inaction is tantamount to a final action and permits judicial review. Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987).

Here, Secretary Babbitt's refusal to correct the erroneous boundary continues to deny the Pueblo its right to conduct its religious ceremonies on land it was granted by the King of Spain and Congress -- and that refusal has the same legal consequences for the tribe as any express denial of the Pueblo's claim. Judicial review at this point would not disrupt the administrative process because that process ended in December 1994, when Secretary Babbitt refused to correct the survey. Thus, although the Pueblo's claim is based on Secretary Hodel's adoption of the Tarr opinion, Secretary Babbitt's decision not to withdraw that opinion constitutes final agency action as well.

B. The Secretary's Fiduciary Obligations Subject His Decision to a Heightened Standard of Review

In yet another refrain from the same song of "administrative discretion," the government next contends that the Pueblo's claim fails because Secretary Hodel's decision must be reviewed under an "arbitrary and capricious" standard. In so arguing, the government once again tries to ignore the consequences of its fiduciary obligation to the Pueblo.

In Jicarilla Apache Tribe, discussed above, the Tenth Circuit specifically rejected just such an attempt to uphold a decision by the Interior Secretary with respect to an Indian tribe on the theory that the decision was not "arbitrary and capricious." The court in Jicarilla Apache Tribe made clear that where, as here, the Secretary owes a fiduciary duty to an Indian tribe, his decisions are not reviewed under the arbitrary and capricious standard. To the contrary, the Secretary's decisions "must also pass scrutiny under the more stringent standards demanded of a fiduciary." 728 F.2d at 1563 (emphasis added). See also Cheyenne-Araphao Tribes of Okla., supra, 966 F.2d at 590-91.

As discussed above, this fiduciary duty requires the Secretary to adopt the position most favorable to the interests of the Pueblo, so long as that position is reasonable. Thus, even if the Secretary's decision would ordinarily be reviewed under an arbitrary and capricious standard, the fiduciary context of this case requires an additional, heightened standard of review. As the Court stated in Jicarilla Apache Tribe, the Secretary "cannot escape his role as trustee by donning the mantle of administrator . . . ." 728 F.2d at 1567. Significantly, the government does not even attempt to argue, nor cite a case to suggest, that Secretary Hodel's decision passes muster under such heightened scrutiny.

C. This Court Has Correctly Ruled That the Quiet Title Act Does Not Apply

In what is nothing more, nor less, than a motion for reconsideration filed well after the appropriate time, the government once again cites the Quiet Title Act, 28 U.S.C. § 2409a (1976) as a bar to this action. Again, the government's position has no more merit now than it did nine months ago when it was squarely rejected by this Court (Dec. 10, 1996 Opinion at 11) or, for that matter, in 1979 when the same theory was rejected by Judge Gasch in Pueblo of Taos, supra, 475 F. Supp. at 365. As Judge Gasch held:

> "This action . . . is not a Quiet Title Action; title to both parcels of land involve rests with the United States, and has since the lands were acquired

> from private parties several decades ago. This is an action seeking review of administrative action, and therefore [the government's] reliance on section 2409a is erroneous." 475 F. Supp. at 365.

As this Court recognized, Taos is good law. As more recently held in Dunbar Corp. v. Lindsey, "any challenge to a non-ownership interest in real property is not precluded by the QTA." 905 F.2d, 754 759 (4th Cir. 1990).

In short, as this Court ruled last December, the Pueblo does not seek to transfer title away from the United States. It seeks only to have that title administered by the Interior Department, in trust for the Pueblo and its people, rather than by the Agriculture Department solely for the government's own interests. The government can no longer ignore that distinction, the Taos case, or the decision of this Court in this very case.[10]

D. The Pueblo Has Stated a Valid Cause of Action Based on Improper Political Influence

The government also disregards the Court's ruling last December in once again arguing that the Pueblo has not stated a claim that the Interior Department's decision was impermissible because it was the result of improper political pressure. In denying the government's prior motion to dismiss, this Court ruled that the Pueblo has stated a valid claim under the APA that "political pressure from two members of the legislative branch

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10. The government also implicitly raises the Quiet Title Act yet again in contending that the Pueblo's claim is barred because it allegedly has other potential remedies, i.e., the government's refusal to correct the erroneous survey might be construed as a taking. The government, however, made the identical argument in its motion to dismiss, and it was necessarily rejected by this Court in concluding that the Pueblo has stated a cause of action under the APA.

As we have stated time and again, the Pueblo is not seeking -- and the government most certainly is not offering -- compensation for the erroneous survey. Instead, the Pueblo simply asks for declaratory relief correcting the erroneous survey in light of the government's breach of its fiduciary duty. As such, the Pueblo's claim -- as this Court ruled on the motion to dismiss -- states a valid cause of action under the APA.

may have been the sole reason for the refusal of Hodel and Babbitt to order a corrected survey." Dec. 10, 1996 Opinion at 22. The courts have similarly ruled that administrative decisions may be improper where they are the result of political pressure. See, e.g., D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971) ("Even if the Secretary had taken every formal step required by every applicable statutory provision, reversal would be required in my opinion, because extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based") (majority opinion), cert. denied, 405 U.S. 1030 (1972); Texas Medical Assoc. v. Mathews, 408 F. Supp. 303, 306 (W.D. Tex. 1976) ("[A]gency action is invalid if based, even in part, on pressures emanating from Congressional sources").[11]

Contrary to the government's assertions, the Pueblo is not moving for summary judgment on the political pressure theory. The Pueblo recognizes that whether the Department's refusal to correct the erroneous survey was improper because it was influenced outside the record by members of Congress is a factual question that is not-suited for resolution on summary judgment. For that reason, the Pueblo's instant motion is based on its claim that the government's clear breach of its fiduciary duty to its Indian ward is established by the undisputed facts that (1) the government has such a duty to the Pueblo to make survey corrections that are reasonable, especially where the only adverse claimant is

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[11] The government's reliance in this regard on Sokaogon Chippewa Community v. Babbitt, 929 F. Supp. 1165 (W.D. Wis. 1996), rev'd on reconsideration in part, 961 F. Supp. 1276 (W.D. Wis. 1997) is misplaced. That decision does not hold that it always permissible for members of Congress to attempt to influence agency decisions. To the contrary, the court there noted that "[s]ome congressional or presidential staff pressure on agency decisionmakers is plainly impermissible and can invalidate an agency's administrative decision." 929 F. Supp. at 1174. The decision cited by the government only held that the plaintiff had not made a sufficient showing of improper political pressure to entitle it to discovery outside the administrative record. Id. at 1178. (On reconsideration, the court reversed even that limited ruling and concluded that the plaintiff had made a sufficient threshold showing. 961 F. Supp. at 1280.)

the government itself, and (2) in this case, the responsible Department officials have previously held that the Pueblo's claim was, at very least, reasonable -- indeed valid.[12]

In any event, there is clear evidence that Secretary Babbitt and Hodel's decisions were improperly influenced, and thus that theory must survive the government's cross-motion for summary judgment. For example, the government never disputes the account in The Albuquerque Tribune that Secretary Babbitt "was ready" to endorse a withdrawal notice of the Tarr opinion that had been prepared by Solicitor Leshy but "backed off" after "New Mexico congressmen lobbied against it." Dec. 7, 1994 ed. at 1. That article specifically referred to Senator Peter Domenici (R-N.M.) and Representative Steven Schiff (R-N.M.). Such evidence is sufficient to raise a question of disputed fact which is fatal to the government's cross-motion for summary judgment on the political pressure claim.[13]

E. This Court's Review is Not Limited to the Administrative Record Provided By the Government

Finally, the government seeks to distract the Court by arguing that its review should be limited to the "administrative record," and that the affidavits filed by the Pueblo with its

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[12] Obviously, if the Court were to rule favorably on the Pueblo's fiduciary duty theory, the alternative claim of improper political influence need not be pursued at all. The point, which the government tries to obscure, is that the Interior Department may not treat its Indian wards as if they were just any other claimant who might be ignored in favor of "political" considerations.

[13] The government's contention that the Pueblo has failed to pursue discovery on the disputed factual issue of improper political influence is without merit. As the Court is well aware, shortly after the complaint was filed in December 1994, the government moved to dismiss and persuaded the Court to decide that motion prior to all other matters. That road-block by the government was not removed until December 1996. From that time until June 1997, the parties focused on finally obtaining an answer from the government (filed in April 1997) and its response to the Pueblo's motion (June 1997).

If the Court were to deny Sandia's motion for summary judgment on its fiduciary duty theory, that would be the time to permit plaintiff to take discovery on its alternative theory that the Interior Department succumbed to the political pressure which has been reported in the press and has never been denied by the government.

motion are somehow improper. That is a red herring. Even if this Court's review were limited to the administrative record, it is clear from that very record that the Secretary breached his fiduciary duty by failing to order a corrected survey.[14]

In any event, it is well-settled that the Court has the discretion under the APA to look at evidence outside the administrative record. In fact, the very case cited by the government, ASARCO v. EPA, 616 F.2d 1153 (9th Cir 1980), confirms that discretion:

> "The Supreme Court recognized in Overton Park . . . that even where the agency has employed adequate fact-finding procedures, the courts may find it necessary to go outside the agency record to evaluate agency action properly. . . . [I]t is both unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record." Id. at 1159-60 (emphases added).

Specifically, a reviewing court may consider materials outside the administrative record where such evidence helps to explain or clarify the information that was before the agency. See, e.g., Carlton v. Babbitt, 900 F. Supp. 526, 531 (D.D.C. 1995) (ruling that a letter that explicated the agency's findings, and did not make new arguments, could be considered by the court in evaluating the agency's decision). See generally Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (summarizing a number of exceptions permitting use of extra-record evidence).

Here the material facts concerning the merits of the Pueblo's underlying claim are essentially undisputed. The affidavits submitted with the Pueblo's motion did not introduce any new evidence or arguments that were not presented to Secretary Hodel and Solicitor Tarr. Rather, as even the government concedes (Gov't Mem. at 24), those affidavits merely summarized the materials that had been placed before the Department and put the contrary decisions of the other Interior Department officials in favor of the Pueblo's claim in context. As such, consideration of the affidavits -- and more importantly, the undisputed

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[14] The administrative record here at very least consists of the materials submitted to the Interior Department for its consideration of the Pueblo's claim.

materials they cite -- is entirely proper. But, again, the real point is that this case can be decided in favor of the Pueblo's claim based solely on the grant document, congressional confirmation, and agency decisions which even the government concedes are properly part of the undisputed record in this case.

III. This Court Should Grant the Pueblo's Request for Declaratory Relief

At the end of the day, the Pueblo's motion for summary judgment stands unrebutted. The government does not dispute that Clements disregarded the clear words of the Whiting translation which set the eastern boundary at the "main ridge called Sandia." Nor does the government dispute that it owed a fiduciary duty to the Pueblo, and that it would be a breach of that duty to fail to correct the erroneous survey.

Accordingly, the Pueblo respectfully requests that this Court grant its motion for summary judgment. Specifically, the Pueblo asks that this Court grant declaratory relief that the eastern boundary of the Pueblo extends to "main ridge" of Sandia Peak, order the Secretary of the Interior to issue a corrected survey reflecting that natural boundary, and enjoin the Department of Agriculture from taking any action inconsistent with this Court's judgment.

Contrary to the government's assertions, the Court need not remand the matter to the Secretary for reconsideration in the event that the Court grants plaintiff's motion. The Court's powers under the APA are not so limited. Indeed, given that it was a breach of fiduciary duty for the Secretary to refuse to a corrected survey, remanding here would be fruitless. See, e.g., NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) ("It would be meaningless to remand" where "[t]here is not the slightest uncertainty as to the

outcome of a[n] [agency] proceeding."); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1489 (D.C. Cir. 1995) (same).[15]

In short, Sandia asks for the same type of relief granted by the Court in Pueblo of Taos. There Judge Gasch granted declaratory judgment that the eastern boundary was the natural boundary specified in the grant document and enjoined the government from taking action inconsistent with the judgment of the Court. 475 F. Supp. at 367-68. We respectfully submit that this Court should do the same.

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[15] Contrary to the government's assertions, Camp v. Pitts, 411 U.S. 138 (1973) and Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) do not require that this Court remand after a ruling that Secretary Hodel's decision was improper. Those cases merely hold that a court should remand where the administrative record is not clear enough to permit judicial review. 411 U.S. at 143; 587 F.2d at 1247. Here, by contrast, the administrative record is clear that Secretary Hodel breached his fiduciary duty by refusing to order a corrected survey.

Conclusion

For the reasons stated above, Sandia's motion for summary judgment should be granted and the government's cross-motion for summary judgment should be denied.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of August 1997 copies of the foregoing Plaintiff's Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion or Summary Judgment, and Plaintiff's Response to Defendants' Cross-Motion for Summary Judgment and Plaintiff's Response to Federal Defendants' Proposed Uncontroverted Facts were delivered by hand to:

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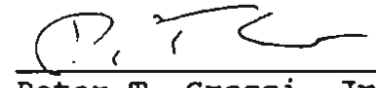

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