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

Introduction

Plaintiff, Pueblo of Sandia, has moved for summary judgment seeking an administrative correction to the boundary between two parcels of property -- one of which is administered by the Department of the Interior for the benefit of the Pueblo and the other of which is administered by the Department of Agriculture. Intervenor-defendant Bernalillo County (the "intervenor") has now filed a belated memorandum in opposition to plaintiff's motion for summary judgment, as well as its own cross-motion for summary judgment.[1]

[1] Plaintiff filed its motion for summary judgment on June 26, 1996 -- well over a year ago. The intervenor, which was allowed into this case in February 1997, should, at very latest, have filed its opposition brief at the same time as the government in June 1997. Instead, the intervenor waited to file its response until after both the plaintiff and the defendant had fully briefed their respective motions for summary judgment. This belated filing says a great deal about the lack of merit in the County's attempt to inject irrelevant factual "issues" at the last moment in an effort to avoid the force of the legal issues on which the Pueblo and the government largely agree -- most notably, the legal extent of the Interior Department's trust responsibility to effect the words of a government translator that was used by the Congress as the proper boundaries of the grant area.

The Pueblo's claim stems from a 1748 land grant from the King of Spain.

Even the intervenor concedes that the official translation of that grant by David Whiting, of the United States Surveyor General's office, which was subsequently adopted by Congress in confirming the grant, plainly states that the Pueblo's eastern boundary of its reservation should extend to the "main ridge," rather than the foothills, of the Sandia Peak. *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)*. In 1859, however, a surveyor erroneously meandered the eastern boundary of the grant at the foothills of the Sandia Peak. That survey 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.

After the Department of Agriculture began to interfere with the Pueblo's use of the claim area, the Pueblo asked the Department of the Interior, its trustee in such matters, to 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. Plaintiff's Statement of Undisputed Facts Nos. 12-25. But in December 1988, Solicitor Ralph Tarr issued a new opinion that reversed those findings and rejected the Pueblo's claim. That erroneous opinion was then adopted, without further comment, by then Secretary Hodel. Plaintiff subsequently brought this action, seeking declaratory relief that the eastern boundary of its reservation extends to the main ridge of the Sandia Peak and a transfer of title of the claim area from the Department of Agriculture to the Department of the Interior, which would then hold the property in trust for the Pueblo.

In its motion for summary judgment and supporting memorandum, plaintiff 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

government itself. 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." See, e.g., Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.) (en banc), modified on other grounds, 793 F.2d 1171 (10th Cir.), cert. denied, 479 U.S. 970 (1986); Navajo Tribe of Indians v. United States, 364 F.2d 320, 322-34 (Ct. Cl. 1966). As found by the number of high-ranking Interior officials, who repeatedly concluded that the Pueblo had presented an entirely valid claim, the Pueblo's position was far more than "reasonable." Plaintiff's Reply Mem. at 12-14. Accordingly, the Department's refusal to correct the survey constituted a breach of fiduciary duty owed by the Department to its Indian wards.

In response, the intervenor raises three arguments. First, the intervenor contends that the original 1748 land grant somehow intended to convey a "formal pueblo" -- a "custom" sometimes followed (but more often disregarded) of granting one league in each direction from the pueblo plaza. Second, the intervenor attempts to distinguish Pueblo of Taos v. Andrus, 475 F. Supp. 359 (D.D.C. 1979), a case that confirms that the Secretary of the Interior must order a corrected survey here. The intervenor erroneously suggests that the instant case is different because the rights of private parties would somehow be affected by a transfer in title from the Department of Agriculture to the Interior Department. Finally, the intervenor asks this Court to ignore the government's fiduciary obligation to its Indian wards because of the Pueblo's supposed excessive delay in seeking to vindicate its rights.

As shown below, each of these three arguments is meritless. Like the government, the intervenor is simply unable to refute the Pueblo's claim, and plaintiff's motion for summary judgment should be granted.

I. The Intervenor is Unable to Refute that the Pueblo has Presented Far More than a "Reasonable Claim" to the Claim Area

The intervenor first contends that the 1748 land grant somehow intended to convey a formal pueblo -- a "custom" inconsistently followed at the time of granting one square league in

each direction from the pueblo plaza.[2] Yet the official Whiting translation, adopted by Congress in confirming the Spanish land grant, sets the eastern boundary of the Pueblo's reservation as the "Sierra Madre de Sandia," i.e., the "main ridge called Sandia." The intervenor attempts to explain away the clear mandate of this translation by claiming that that translation is error. The intervenor contends that Whiting erred in translating "Sierra Madre" as "main ridge" rather than merely the "mountain range." The intervenor then argues that if "Sierra Madre" had been translated as "mountain range," it would somehow be clear that the Spanish land grant implicitly intended to convey only a formal pueblo. The intervenor's strained argument fails for a number of reasons.

First, the intervenor is simply wrong in contending that the official 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 to extend to the crest of the Sandia Mountains. Opinion in Donanciano Gurule v. United States of America, Case No. 51, Court of Private Land Claims, December 1, 1893 (000494-000504).[3]

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[2] The intervenor's citation to the principles of statutory construction articulated in United States v. Rosenblum Truck Lines, 315 U.S. 50, 53 (1941) and other cases is irrelevant. This is not a case turning on an issue of statutory interpretation. Rather, the question presented here is whether the Secretary of the Interior could ignore his trust responsibility and refuse to correct the erroneous government survey. As even the intervenor concedes, the government's fiduciary responsibilities to the Pueblo mandates that all ambiguities be resolved in favor of the tribe. Intervenors Mem. at 4. In fact, as plaintiff has previously established, the Secretary's fiduciary duty requires him to adopt the Pueblo's position so long as it is reasonable. See Plaintiff's Mem. at 12-14; Plaintiff's Reply Mem. at 5-8.

[3] The intervenor suggests that the Elana Gallegos grant is somehow distinguishable because that grant refers to the eastern boundary as "Sierra de Sandia," rather than "Sierra Madre de Sandia." In fact, the court's opinion makes clear that its decision is of general applicability to the number of land grants in the area, such as the Pueblo's, that refer to the Sandia Mountains as an eastern boundary. Op. at 1 (000496), 4 (000499) ("This construction must be approved as the most rational one in all such cases.") In concluding that the eastern boundary could only be read as the summit of the mountains, the court first emphasized that in that region, far better

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Moreover, the intervenor's reliance on the four square league "custom" ignores the clear evidence presented by the Pueblo 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. For example, it is undisputed by the intervenor and government alike 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 that Sandia now seeks. Similarly, 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 the formal pueblo "custom" was hardly an immutable rule that could overcome the specific language of the 1748 Spanish grant later endorsed by Congress. Furthermore, it is well-settled that extrinsic evidence, such as evidence of "custom," can not be used to place a construction on a deed that is inconsistent with its plain wording. See, e.g., Duffield v. Duffield, 127 N.E. 709, 710 (Ill. 1920). See generally 26 C.J.S. Deeds § 92, at 850.

In any event, the intervenor's attempt to raise a disputed issue of fact as to the meaning of the 1748 grant document is legally irrelevant given the reliance on that translation by Congress. Even if the original land grant were open to more than one interpretation, Whiting's translation -- as the official translation of the United States government -- is controlling in this case.

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natural resources, including water, timber, and grass, are found on the slope of the mountain rather than the plains below. Op. at 2 (000497). Second, the court noted that the Elana Gallegos had consistently acted as if their property reached to the summit of the mountains. Op. at 3 (000498). Third, the court reasoned that it is far easier to use the peak of the mountain for purposes of establishing a certain boundary as opposed to its base. Op. at 3 (000498). As the Interior Department attorney responsible for Indian land claims found, each of these three factors is equally applicable to Sandia's claim here. Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs at 8-9 (000764-000765). In fact, in establishing Sandia's boundaries, the 1748 land grant explicitly refers to the "convenient pastures, timber, water, and watering places in abundance" that should be contained within the reservation.

It is undisputed that Whiting was acting in his official capacity as the government translator for the Surveyor General's Office when he translated the Sandia grant. Walter Alan Minge, *The Pueblo of Sandia Grant Boundary Issues and Encroachments of Sandia Land Claim* (Jan. 1983), at 33 (000001-000180). And, Robert McClelland, then Secretary of the Interior, transmitted the Whiting translation as the official translation to Congress for its use in confirming the Spanish land 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.* Congress then adopted the Whiting translation in confirming the Sandia land grant. An Act to Confirm the Land Claims of Certain Pueblos and Towns in the Territory of New Mexico (Dec. 1858) in *The Statutes at Large and Treaties of the United States of America*, (Boston: Little, Brown & Company, 1859), XI, 374.

Even a century later, government officials continued to treat the Whiting translation as the official translation and, as such, the correct articulation of the Pueblo's boundaries. For example, Associate Solicitor Vollman relied upon the Whiting translation in concluding that the Pueblo's eastern boundary should extend to the main ridge of the Sandia mountains. Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs at 4, 6 (000757-000769).

Significantly, the intervenor does not even attempt to dispute these points. To the contrary, the expert on whom it relies so heavily, Dr. Stanley Hordes, concedes that Whiting's translation was the basis for "the official establishment of the boundaries of the Pueblo of Sandia" and that based on the Whiting translation, "Congress confirmed the grant to the Sandia Pueblo." Hordes Report at 23.

Moreover, as plaintiff explained in its opening memorandum and in its opposition brief, 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. See Plaintiff's Mem. at 10-16; Plaintiff's Reply Mem. at 4-8. Rather, given the federal

government's fiduciary obligation to the New Mexico pueblos, Sandia need only show that it presented the government with a reasonable claim to the disputed land. See, e.g., Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.) (en banc) (adopting as the majority opinion the concurring and dissenting 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); Navajo Tribe of Indians v. United States, 364 F.2d 320, 322-34 (Ct. Cl. 1966).

The intervenor does not dispute this law nor suggest that plaintiff's interpretation of the grant document is not at least "reasonable." How could it? 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).

-- Indeed, 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).

In short, where, as here, official after official who has studied an Indian claim has held 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 department that wanted to retain the land for itself -- that more than "reasonable" Indian claim can not be rejected. Clearly, the three Department opinions concluding that the Pueblo had a valid claim confirm the "reasonableness" of the Pueblo's position -- and that is all that is necessary.[4]

II. As in Pueblo of Taos v. Andrus, Plaintiff's Claim Will Not Deprive Any Third Party of an Interest in Land

As plaintiff has noted repeatedly, Pueblo of Taos v. Andrus, 475 F. Supp. 359 (D.D.C. 1979), is on all fours with the case at bar and makes clear that an erroneous government survey cannot take precedence over Spanish grant documents that set forth a natural boundary. See, e.g., Plaintiff's Mem. at 17-18; Plaintiff's Reply Mem. at 15-16. Seeking to avoid the clear mandate of Pueblo of Taos, the intervenor contends that that decision should be disregarded because ordering a corrected survey there did not infringe upon the property rights of private parties.

The intervenor is wrong. Here, just as in Pueblo of Taos, ordering a corrected survey will not deprive any third party of an interest in land.[5] While a small portion of the claim area

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[4] For the reasons stated above, plaintiff asserts that the intervenor's misplaced reliance on the Hordes opinion is insufficient to defeat plaintiff's motion for summary judgment. It is also inappropriate for intervenor to seek summary judgment at this late date based on the novel, and erroneous, findings in the Hordes opinion. Again, the only official translation of the land grant is the Whiting translation, and that translation should be controlling.

[5] For the same reason, the intervenor's reliance on Foust v. Lujan, 942 F.2d 712 (10th Cir. 1991), cert. denied, 503 U.S. 984 (1992), is misplaced. There, as will be explained in greater detail infra at page 12, accepting the Indian tribe's position would have deprived a private party of an interest in land.

The intervenor's reliance on De Guyer v. Banning, 167 U.S. 723 (1897) and United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908) is similarly misplaced. Both those cases involve attempts by non-Indians to obtain title to land. By contrast, as this Court has recognized, plaintiff is not seeking to divest the United States of ownership in land, but rather is seeking judicial review of an adverse agency action. Dec. 10, 1996 Opinion at 20.

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has been subsequently conveyed to private parties, the Pueblo has repeatedly waived any right to this land. See, e.g., Amended Compl. ¶ 2 ("The Pueblo of Sandia expressly excludes from the area claimed in this action all lands held in private ownership and all leases, permits, rights-of-way, or other encumbrances in favor of private parties.") The Pueblo seeks only to transfer title to the remainder of the area wrongfully held by the Agriculture Department to the Interior Department, where it may rightfully be held in trust and administered for the benefit of the Pueblo.

The intervenor acknowledges that the Pueblo has repeatedly disclaimed any interest in the property held by private parties. Nevertheless, the intervenor contends the Pueblo's waiver is insufficient for two reasons: (1) the Pueblo cannot alienate property without the approval of the Secretary of the Interior, and (2) the intervenor's interests might somehow be indirectly affected if title to the claim area is transferred to Interior.

The intervenor's argument that the Pueblo's repeated waiver is somehow ineffective because it requires the approval of the Secretary of Interior has no basis in fact or law. First, in meetings with both the Sandia Mountain Coalition and the Pueblo, the relevant Interior officials have stated that they do approve the Pueblo's renunciation of any rights to any of the privately-held parcels. Hence, the professed fear that Interior will disapprove that arrangement is baseless.

Furthermore, Interior could not legally order a resurvey that would adversely affect the private inholders. The very statute that requires Interior to resurvey the Pueblo's boundaries and issue a corrected survey expressly provides that "no such resurvey or retracement shall be so executed as to impair the bona fide rights of any . . . owner of lands affected by such

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Indeed, even the intervenor concedes that plaintiff's amended complaint is not brought pursuant to the Quiet Title Act. Intervenor's Mem. at 10 n.11.

resurvey or retracement." 43 U.S.C. § 772. As the Supreme Court explained many years ago, in a holding that is just as valid today,

> "So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns to establish and reestablish boundaries, as well one boundary as another, 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." Lane v. Darlington, 249 U.S. 331, 333 (1918) (emphasis added).

In short, the intervenor is attempting to avoid by clear holding of Pueblo of Taos by raising a tenuous chain of assumptions -- that this Court will ignore the clear statutory language of Section 772, that this Court will further ignore the Pueblo's repeated waiver of any right to land held by private inholders, and that Interior thereafter will ignore those same statutes and waivers. The Court need not entertain such strained speculation.

The intervenor's second contention that ordering a corrected survey would have an alleged indirect impact on third parties is equally specious. Its argument is based on one case, Metropolitan Water Dist. of S. California v. United States, 628 F. Supp. 1018, 1021 (S.D. Cal. 1986), remanded on other grounds, 830 F.2d 139 (9th Cir. 1987), aff'd, 109 S. Ct. 2273 (1989), which held that the Secretary of the Interior could not resurvey an Indian reservation where the resurvey would deprive a third party of a tangible interest in property -- water rights in the Colorado river. By contrast, the intervenor does not suggest that transferring title from Agriculture to Interior would deprive it of any tangible interest in any land. Instead, the intervenor merely asserts that the title transfer would somehow infringe upon the County's open space management plan (i.e., recreational trails running through the area) and the exercise of the County's police powers.

As explained fully in Response of Plaintiff, Pueblo of Sandia, to Motion of Bernalillo County, New Mexico's to Intervene (dated July 21, 1995) at pages 12-15, such alleged interests are not legally sufficient to permit the Secretary to ignore his fiduciary duty to the Pueblo.

Short of some recognized claims such as nuisance (and none is alleged here), a party has no legally protectable interest in neighboring land. See, e.g., Bachman v. Hecht, 659 F. Supp. 308, 312 (D.V.I. 1986) (landowners' concerns about activity in adjacent property were not legally protectable to justify intervention), aff'd, 849 F.2d 599 (3d Cir. 1988). Similarly, a party's supposed recreational or aesthetic interests in land that it neither owns nor claims is not legally protectable. See, e.g., Lac Courte Oreilles Bank of Lake Superior Chippewa Indians v. Wisconsin, 116 F.R.D. 608, 610 (W.D. Wis. 1987) (denying motion of sport fishing organization to intervene in lawsuit between Indian tribe and state of Wisconsin because organization's recreational interests were not legally protectable).

In fact, in Pueblo in Taos, the government argued that the claim area included a recreational trail and was frequented by campers. Defendants' Response to Plaintiff's Statement of Facts as to Which There is No Genuine Issue, and Statement of Additional Facts as to Which There is No Genuine Issue at 2 (attached). Nevertheless, the court there concluded that the plaintiff's boundaries should be extended to include the claim area. 475 F. Supp. at 367.

Nor is the intervenor able to explain how the transfer of title will impair the exercise of its police powers. The federal government will continue, as before, to hold title in the property. And the record in this case is undisputed that the Pueblo has never interfered with the County's assertion of jurisdiction over private inholders who live within the current boundaries of the Pueblo. See Response of Plaintiff, Pueblo of Sandia, to Motion of Bernalillo County, New Mexico's to Intervene, Attachment A, Affidavit of L. Lamar Parrish (March 17, 1995).

Simply put, plaintiff's claim seeks only a declaration of the proper boundary between land held for the Pueblo and the adjacent lands held as part of a national forest. That boundary, as set forth in the original Spanish grant and corresponding congressional enactments, exists separate and apart from the desires any third party.

III. There is No Excessive Delay that Could Authorize This Court to Ignore the Government's Fiduciary Duty

Finally, the intervenor asks this Court to ignore the government's fiduciary duty to the Pueblo because of the tribe's supposed excessive delay in seeking to vindicate its rights. Notably, this argument is not even raised by the government -- the party subject to the Court's equitable powers.

Once again, the intervenor's argument is based solely on one case, Foust v. Lujan, 942 F.2d 712 (10th Cir. 1991), cert. denied, 503 U.S. 984 (1992), and that case is inapposite. At issue in Foust was a private party's attempt to correct a patent that, because of an erroneous survey, had excluded land that both he and his predecessor in interest had used continuously for sixty years. As a result of the error, title to the disputed land was held by an adjacent Indian tribe, who had been conveyed the surrounding property after the patent had been issued. The tribe had taken no action with respect to the land and had consistently behaved as if the land was included in its neighbor's patent. Id. at 713, 717. The court concluded that the Secretary of the Interior had the authority to issue a corrected patent. Id. at 715.

By contrast, here the Pueblo has consistently acted as if the eastern boundary of its reservation extended to the main ridge of the Sandia peak -- the tribe has used the claim area for religious purposes for centuries. Moreover, unlike in Foust, the Pueblo's action would not deprive any private person of their interest in land. As discussed above, the Pueblo has repeatedly renounced any interest in land held by private parties and seek only a transfer of title to Interior to be held in trust for the tribe.

In any event, the length of time between the erroneous survey and the Pueblo's formal claim should not prevent this Court from ruling that the Secretary of the Interior must adhere to his fiduciary duty and order a corrected survey. The Pueblo's delay in seeking redress with the Interior Department is not surprising, given that the error was buried in surveying jargon in a document that could not be read, much less understood, by the Pueblo members. Moreover, for

almost all of the time between the erroneous survey and the formal claim by the Pueblo, the area was completely uninhabited and under the dominion of no one other than the Pueblo itself. Accordingly, the Pueblo had no reason to suspect that survey was erroneous until the 1970s, when the Forest Service began take actions on the land that were adverse to the Pueblo's rights. Soon thereafter, the Pueblo made a formal claim asking the Secretary of the Interior to order a corrected survey.

In short, the intervenor has done nothing to dispute the existence of a fiduciary relationship between the government and the Pueblo or the consequences of that relationship. As set out fully in plaintiff's previous papers, that duty requires the Secretary to order a corrected survey so long as the Pueblo's claim is reasonable. While the intervenor suggests (erroneously) that the underlying Spanish land grant may be read in more than one way, it has been unable to refute the reasonableness of the Pueblo's claim. Nor can it, given the numerous high-ranking Interior officials who agreed with the Pueblo's claim and the fact that the official Whiting translation, adopted by Congress in confirming the land grant, sets the eastern boundary as the "main ridge called Sandia." Accordingly, summary judgment for plaintiff is appropriate.

Conclusion

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

Respectfully submitted,

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