

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUEBLO OF SANDIA,)
)
 Plaintiff,)
)
 v.)
)
 BRUCE H. BABBITT and)
 MIKE ESPY,)
)
 Defendants.)

Civil No. 1:94CV02624
Hon. Harold H. Greene

AFFIDAVIT OF L. LAMAR PARRISH

COUNTY OF BERNALILLO)
) ss.
 STATE OF NEW MEXICO)

L. LAMAR PARRISH, being duly sworn, deposes and states:

1. My name is L. Lamar Parrish. I am co-counsel to the Pueblo of Sandia in this matter and have served as the Pueblo's general counsel since 1973. I am assisting principal counsel to the Pueblo in this matter.

2. For most of this century, as in centuries past, the Pueblo used the area now in question as its own. Some conflicts arose in the 1930's and 40's. However, these did not begin to significantly interfere with the Pueblo's religious and ceremonial use of the area until the 1970's, when conflicts became exacerbated, leaving the Pueblo no alternative but to make a formal claim.

3. The Pueblo then filed its claim for a correction of the survey documents with the Secretary of the Interior through the Department's Office of Trust Responsibility. In 1983, that office issued a memorandum endorsing the

Pueblo's claim. A true and exact copy of that memorandum is attached as Exhibit A.

4. Thereafter, at the request of the Department, the Pueblo provided additional information in the form of expert historical and surveying reports further demonstrating its clear right to the claim area. A number of these reports were authored by the late Dr. Myra Ellen Jenkins, then state historian for New Mexico, who was far and away the most respected authority in the nation on Pueblo history. Dr. Jenkins' analysis consistently supported Sandia's claim.

5. In 1986, after reviewing these reports, 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 within the Department for the necessary legal work to correct the erroneous survey.

6. In April 1987, Timothy Vollmann, then Associate Solicitor for Indian Affairs, completed a formal opinion concerning Sandia's claim. Associate Solicitor Vollmann -- the responsible authority within the Department on Indian legal issues -- concluded "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-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." See Vollmann Opinion at 1-2. A true and exact copy of Associate Solicitor Vollmann's opinion is attached as Exhibit B.

7. Associate Solicitor Vollmann supported his analysis with a history of the rationale behind the Spanish royal grant. His opinion also emphasized Congress' express intent to follow the Spanish land grant, as well as the explicit order

of the Surveyor-General that the eastern boundary of the Sandia patent should reflect the meander line of the Sandia Mountains. The Associate Solicitor concluded that the Clements survey had followed the mere foothills rather than "the main ridge" as stated in all of the grant documents. Mr. Vollmann further relied upon the finding of the Division of Cadastral Survey of the Bureau of Land Management that this was erroneous. Id. at 5 & n.4.

8. Associate Solicitor Vollmann then further reviewed both the specific merits of Sandia's claim and the duty of the Secretary of the Interior to correct prior errors in such land surveys. His opinion discussed the well-established law demonstrating that "the confirmation by Congress constituted an absolute and unconditional recognition of the Pueblo's title to all of the land described in the grant." Id. at 7.

9. Mr. Vollmann's opinion then turned to the intervening history of the area, noting that any subsequent actions by the government could not nullify this unconditional grant:

The actions taken subsequent to the confirmation (i.e., the survey and issuance of the patent) were merely ministerial, and could not legally alter the boundaries of the Pueblo established by the grant. Therefore, the meander line shown on the plat map and reflected in the patent, . . . does not constitute the operative legal description of the eastern boundary of the Pueblo. Id. at 7-8.

10. - Associate Solicitor Vollmann buttressed his conclusion that Sandia was entitled to the claim area with prior judicial and administrative determinations involving similar land claims. He described the rulings concerning adjacent grants which had construed grant documents similarly describing its boundary "on the east side of the Sandia Mountains." As the Associate Solicitor

noted, the Court of Private Land Claims in one of those cases had determined that "the grant could only have meant that the claimants were entitled to all of the land to the crest of the Sandia Mountains. " Id. at 8.

11. Associate Solicitor Vollmann considered the scope of the Secretary of the Interior's authority to order a corrected survey. He noted that "the courts have long held that the Secretary has broad authority to make determinations concerning the disposition of public lands. " Id. at 9.

12. The Associate Solicitor relied upon the almost identical claim and remedy in the case of Isleta Pueblo to demonstrate how this authority must be used in this case:

Such Secretarial authority was exercised in 1918 in response to a petition by the Pueblo of Isleta, whose claim was markedly similar to the one now presented by the Pueblo of Sandia. The Isleta claim involved an allegation that an area four to six miles wide had been omitted from the patent. The grant to the Pueblo of Isleta, which was also confirmed by the Act of December 22, 1858, 11 Stat. 374, described the eastern boundary as the 'backbone' of the Sandia Mountains. The patent, however, as in Sandia, described the boundary as the meander of the Sandia Mountains. As is the case here, the disputed land was controlled by the United States Forest Service. In resolving the dispute, the Secretary determined that the grant did include all of the land to the summit of the Sandia Mountains, and that the patent was incorrect. A new survey and issuance of a supplemental patent for the excluded lands was ordered. The Pueblo agreed to waive any claims to existing holdings of non-Indians."

Id. at 10, citing Interior Document D-29675, July 18, 1918.

13. The Associate Solicitor concluded that there was additional statutory authority for the Secretary to correct such patents under Section 316 of the Federal Land Policy Management Act. That act provides that:

The Secretary may correct patents or documents of conveyance issued pursuant to section 1718 of this title or to other acts relating to the disposal of public lands where necessary to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the federal government to dispose of public lands.

43 U.S.C. 1746.

14. The Associate Solicitor carefully reviewed any possible impediments to such an administrative correction and concluded that none was valid. *Id.* at 11-13. Of particular importance, the Associate Solicitor noted that "[t]here is no statutory limitation on when a petition for correction of an error must be presented for administrative action." *Id.* at 12. The Associate Solicitor then concluded that "[t]he Pueblo of Sandia has presented a meritorious claim and the matter is within the scope of the Secretary's authority to effect an administrative remedy, namely to revise erroneous language of the 1864 patent and to effect a new survey in accordance with the revised language." *Id.* at 13.

15. Shortly after he received this opinion, then Interior Solicitor Ralph Tarr sent it to the General Counsel of the Department of Agriculture to get any comments. Mr. Tarr indicated that he intended to issue the opinion within a few days. He further requested that Agriculture maintain the matter in confidence until the paperwork was completed.

16. - Breaking that promise, Agriculture officials in the Albuquerque area released the Vollmann opinion together with a press package which asserted that the Pueblo intended to oust the few private landowners of their title. That assertion by Agriculture was not only false but also contrary to the express position of the Pueblo which would have respected and, in fact, cleared the title of the private

landowners. Nevertheless, this tactic resulted in some opposition to the proposed correction and political pressure on Mr. Tarr to reverse Mr. Vollmann's opinion.

17. On December 9, 1988, Mr. Tarr transmitted an opinion reversing the prior opinion of Associate Solicitor Vollmann, as well the conclusions of Assistant Secretary Swimmer and every other Interior official who had considered this issue. A true and exact copy of the Tarr opinion is attached as Exhibit C.

18. Mr. Tarr's opinion was replete with factual and legal errors. Yet even he recognized the obligation of the Department of the Interior to correct erroneous boundaries. Specifically, Mr. Tarr found that the Agriculture Department's contrary contention that the surveyor enjoyed "considerable discretion in setting the boundaries of the grant" was "simply without foundation." Id. at 14. Rather, as even Mr. Tarr recognized, "the 1858 Act makes it clear that congress intended to grant the Pueblo title to aU lands held by the Pueblo while it was under Spanish dominion." Id. at 15.

19. Having made this critical concession, Mr. Tarr then proceeded to engage in various post hoc rationalizations in an attempt to argue away the existence of Sandia Peak -- that is, to pretend that the Clements survey was somehow correct in meandering the foothills, when the Spanish grant, as confirmed by Congress, called for the eastern boundary to be set at the "main ridge" of the mountain.

20. Central to Mr. Tarr's "analysis" was his conclusion that the Spanish land grant intended to confine the Pueblo to a grant one league in each direction from the pueblo plaza which was a "custom" employed in some, but not all, Pueblo grants. That argument, however, was invalid for a number of reasons. First, given he location of the Rio Grande and other landholders near the western edge of the

Sandia settlement, it was not possible for the Spanish officials to convey an area as large as one league to the west in the case of the Sandia grant. Therefore, consistent with their actions at other pueblos such as Isleta, the Spanish authorities made up for this difference by going farther than one league in the opposite, easterly direction.

21. Second, Mr. Tarr's argument ignored the fact that the four square league "custom" was often not followed. For example, the Spanish authorities granted 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 area of the corrected grant area that Sandia now seeks (a total of 34,000 acres). Similarly, Santo Domingo Pueblo was granted an area of 74,741 acres -- more than four times the four square league "limit" relied upon by Mr. Tarr and more than twice the area the Sandia Pueblo will have after the correction.

22. Third, in the same manner, Congress itself patented 110,000 acres to Isleta Pueblo, even though that pueblo had no formal grant document but only an oral tradition of the 17th century grant from the King of Spain. The Isleta grant -- more than three times the total grant Sandia now seeks to have reconfirmed -- was upheld by the courts because, just as here, the language in the congressional confirmation defined dimensions of approximately one league to the north, south and west, but then called for a greater distance to the east -- to the "spine" of Sandia Mountain. . . .

23. Lastly, but by no means least, Mr. Tarr's "four square league" argument exalted what was at most a mere "custom" inconsistently observed above the explicit language of the Spanish grant to Sandia and the subsequent confirmation of that grant by Congress. As even Mr. Tarr conceded, both of those documents

expressly place the eastern boundary of the grant area at the "main ridge called Sandia." Mr. Tarr's suggestion that the express language of the grant documents could be ignored in favor of a "custom" that was only irregularly followed was thus unsound as a matter of law as well as a matter of fact.

24. Mr. Tarr's other principal argument focused on his assumption that Sandia had failed to contest the erroneous survey for a substantial time. Again, Mr. Tarr's "analysis" was both factually and legally flawed. Mr. Tarr ignored the fact that, for almost all of the time between the erroneous survey and the formal claim by Sandia to the Interior Department, the area was uninhabited and under the dominion of no one other than Sandia itself.

25. Finally, Mr. Tarr attempted to suggest that the Secretary of the Interior lacked the authority to correct erroneous surveys. In this regard, Mr. Tarr ignored other statutory authorities, and the specific precedent of this district, which clearly establish that the Secretary of the Interior not only has the authority to make such corrections, but also that the Secretary of the Interior must exercise that authority to fulfill the government's special trust responsibility to its Indian wards -- without any interference from any other department.

26. Mr. Tarr's opinion was completed on December 9, 1988 and was endorsed a few days later by the then Secretary of the Interior.

27.- From December 1988 to December 1994, representatives of the Pueblo and I attempted to convince the succeeding Secretaries of the Interior, and their appointed representatives, to reverse the Tarr opinion and to issue the corrected land survey as provided in the Vollmann opinion. While Sandia was successful in convincing representatives of the Department of the Interior, up to and including the

current Solicitor, that Mr. Tarr's opinion was erroneous and that Sandia's claim is valid, the Department has not issued a corrected survey.

28. From 1989 through 1992, representatives of the Pueblo and I met with officials of the Interior Department in an effort to convince them to withdraw Mr. Tarr's erroneous opinion and proceed with the correction outlined by Assistant Solicitor Vollmann. We had no significant success.

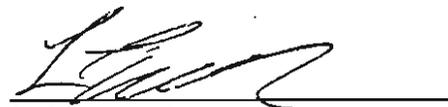
29. In August 1993, Pueblo representatives and I met with Ms. Ada Deer, the new Assistant Secretary for Indian Affairs. We provided Ms. Deer with detailed documents demonstrating the Pueblo's right to the claim area and substantial legal analysis demonstrating that Mr. Tarr's opinion was invalid. Following her review of these materials, Ms. Deer advised me that she believed the Pueblo's claim was valid and that the claim area should be returned.

30. At the request of Assistant Secretary Deer, we then made formal presentations to Solicitor John Leshy and members of his staff on a number of occasions in 1993 and 1994 in an effort to persuade him to issue the survey correction. After several months of review, Mr. Leshy and others in the Solicitor's office advised the Pueblo that they too had concluded that (a) the Tarr opinion was invalid in its construction of the relevant statutory authority of the Secretary of the Interior to correct erroneous land surveys and (b) the Pueblo had presented at least a colorable, and very possibly entirely valid, claim for relief.

31. On November 30, 1994, Pueblo representatives and I met with Solicitor Leshy to determine the status of his progress on a reexamination and reversal of Mr. Tarr's opinion. Solicitor Leshy indicated that he had actively been engaged in a reexamination of Mr. Tarr's opinion; that he continued to believe that Mr.

Tarr's opinion was invalid in a number of respects; that he was not yet ready to issue a new opinion officially reversing the opinion and granting the Pueblo the relief it has sought; but that he was planning to withdraw the Tarr opinion prior to December 8, 1994 so that he could complete the correction process without requiring the Pueblo to run any risk that its claims would be barred by any statute of limitations calculated from the date of the Tarr opinion.

32. On December 6, 1994, however, we learned that Department officials had been advised that one or more elected officials from New Mexico did not favor the withdrawal of the Tarr opinion or the ultimate correction of the erroneous Clements survey. Despite my further pleas on behalf of the Pueblo, the Interior officials then refused to proceed with the Sandia claim and advised the Pueblo that the Tarr opinion would not be withdrawn.


L. Lamar Parrish

Sworn and subscribed to before me this 17th day of June , 1996.

(SEAL)


Notary Public

My commission expires:

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