MEMORANDUM

To: Secretary
From: Solicitor
Subject: Pueblo of Sandia Boundary

You have asked this Office to review the claim by the Pueblo of Sandia (the "Pueblo") that it is entitled to certain lands approximately 13 miles north of Albuquerque, New Mexico. The Pueblo claims that approximately 10,000 acres of land were incorrectly excluded from a patent issued to the Pueblo by the United States in 1864 because the surveyor erred in not including all of the land originally granted the Pueblo by the Spanish in 1748. The major portion of the land claimed is managed by the United States Forest Service as parts of the Cibola National Forest and the Sandia Mountain Wilderness. The claimed area includes 665 acres of private inholdings (the "inholdings", the "private inholders", or the "inholders"), as well as the Juan Tabo Recreation Area.

The Pueblo requests that the Secretary recognize that an error was made in the survey, order a resurvey and issue a corrected patent encompassing the additional acreage claimed (the "claimed area"). (A map of the Pueblo showing its current boundaries and the claimed area is attached as Appendix I.) The Pueblo has indicated that it does not seek to divest the private inholders of their title and would not seek to assert civil or criminal jurisdiction over the inholders or the private lands.

We conclude that the Pueblo's claim is without merit and that the Secretary has no authority to take the type of action requested by the Pueblo.

I. BACKGROUND

A. Historical Context

The United States acquired the territory that is now the State of New Mexico through the Treaty of Guadalupe Hidalgo on February 2, 1848, ending the war with Mexico. Although the pueblos were not specifically mentioned in the Treaty, Articles VIII and IX
generally guaranteed the liberty and property of those residing in the territories acquired under the Treaty. 9 Stat. 922, 929-30. In 1854, Congress acted to implement that guarantee by establishing the Office of Surveyor-General of New Mexico. 10 Stat. 308. One duty of that Office was to prepare and submit to Congress reports on all claims to land acquired by the United States under the Treaty of Guadalupe Hidalgo, and to "ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." With respect to the pueblos, the Surveyor-General was to report "the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land . . . which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants and give full effect to the treaty . . . between the United States and Mexico. . . ." Id. The Commissioner of the General Land Office (hereinafter "Commissioner") wrote to the Surveyor-General of New Mexico in 1854 to advise him that the Government is obligated to address private land titles and the "Pueblos", as Mexico would have done had sovereignty not been changed. Wilson to Pelham, August 31, 1854, Senate Misc. Doc. No. 12, 42d Congress, 1st Sess. 1-7 (1854).

Pursuant to the direction of Congress, the Surveyor-General appears to have accepted Spanish documents relevant to the claim of the Pueblo of Sandia and transmitted these (the documents referred to in footnote 2 as SANM II) to the Commissioner. We can find no independent report from the Surveyor-General concerning the Pueblo and the Pueblo has come forward with no such report. The Pueblo was unique in that it was the only one which still had its official grant documents to evidence ownership.1 The Secretary of the Interior in turn submitted the Spanish documents, translated by one David Whiting, to Congress. These were included in 1748 Pueblo of Sandia Grant, H.R. Executive Document No. 36, 3d Cong., 3d Sess. (1857) ("H.R. Exec. Doc. No. 36.").

1 The Pueblos of Isleta, Nambe, Pojoaque, San Ildefonso, Santa Ana, Santa Clara, Taos, and Tesuque did not have their original grant papers. Their officers appeared before the Surveyor-General and testified that their communities had been living upon their lands within the memories of their eldest members. Department of the Interior, Pueblo of Sandia Land Status, 3 (April 1, 1940).

2 There is a significant factual dispute as to whether there are two sets of official grant documents in the Spanish Archives of New Mexico, referred to by researchers as SANM I, #848, and SANM II, #484. The documents included in the latter set were those used by Congress and the Surveyor General to confirm the grant to the Pueblo of Sandia, being included within H.R. Exec. Doc. No. 36. The Pueblo's experts contend only the documents in SANM I,
Congress confirmed the Pueblo’s claim on December 22, 1858, in “[a]n Act to Confirm the Land Claims of Certain Pueblos and Towns in the Territory of New Mexico.” 11 Stat. 374. To implement that confirmation, Congress directed that “the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all said claims, as recommended for confirmation by the said surveyor-general, and shall cause a patent to issue therefor as in ordinary cases to private individuals.” Id. The Commissioner reiterated these instructions when he directed the Surveyor-General to:

Let your instructions, founded upon the original title as confirmed, and the date of fixing the locality of the confirmed claims, be drawn with such particularity and care that each survey shall embrace the precise tract included in the confirmation. . . . Hendricks to Pelham, April 23, 1859, NA, RG 49, GLO, Div. E., I, p. 219.

The Surveyor-General let the surveying contracts to John Garretson. The Surveyor-General forwarded the grant documents to Garretson and instructed him to survey the areas “in such a manner as to embrace in each survey the precise size tract included in the confirmation.” Pelham to Garretson, June 10, 1859, Surveyor-General Records, Letters Sent, Vol. I, pp. 193-195, State Records Center and Archives. The Surveyor-General further instructed Garretson on the proper drawing of leagues from a center church when the grants called for “one league from each corner of the church. . . .” He was told to report and await further instructions “(w)henever natural boundaries are mentioned in the grant as boundaries” and whenever he had any doubt about the location of the boundary. Id. In a separate letter the Surveyor-General requested that an agent of the Indian Department accompany Garretson in the surveys to explain the surveys to the Indians, to protect their rights while the boundaries were being drawn and to settle any disputes that might arise during the course of the surveys. Collins to Archuleta, June 11, 1859, NA, RG 75, BIA, Letters Received by the New Mexico

§848 are official and the documents translated by the Surveyor-General of New Mexico and submitted to Congress inexplicably were altered copies of the original documents. One of the Pueblo’s experts believes that there are three sets of documents, the two mentioned above and an original translation of David Whiting, which was altered before it was sent to Congress and included in H.R. Exec. Doc. No. 36. “The Pueblo of Sandia Grant Boundary Issues and Encroachments,” Ward Alan Minge, January, 1983, at 33-36. The Pueblo holds that the duplicate originals in its possession are the same as the documents in SANM I. We will focus on the SANM I documents as translated by the Pueblo’s expert, Dr. Myra Ellen Jenkins, however, as these are the documents and the translation proffered by the Pueblo in its arguments as being the official documents.
Superintendency [M 234], Roll 549. In addition, the Surveyor-General received an admonition from the Commissioner that it was the duty of the surveyor to have claimants point out boundary calls on the ground:

Thus fortified, in repairing to the field, it is their business when on the spot, to call upon claimants to point out and establish by satisfactory showing the calls, which they claim of their confirmed grant and to see that the official data and such evidence agree, and unmistakably fix the true boundaries of the title as confirmed. Wilson to Pelham, September 16, 1859, NA, RG 49, GLO, Div. E, Letters Sent, p. 164.

In September of 1859, Garretson informed the Surveyor-General that he could not finish the surveys of several pueblos, including Sandia, and requested that he be allowed to relinquish those surveys. Garretson to Pelham, September 20, 1859, NA, RG 49, GLO, Div. E, Letters Received from the Surveyor-General of New Mexico. The reason for the delay in surveying the pueblos was given as "a difficulty having arisen concerning the boundaries of the Indian Pueblos of Santa Domingo, San Felipe, and Sandia which requires the interposition of the Indian Department." Id. The Surveyor-General then entered into a contract with R.E. Clements, a deputy surveyor, to survey the three pueblos.

The only correspondence or instructions from the Surveyor-General to Clements found in the records is his contract, which does not provide instructions on how to lay out a Pueblo grant. Contract of Reuben E. Clements, September 21, 1859, NA, GLO, Div. E, Contracts and Bonds Files, New Mexico. Thus, we have no information of record as to the precise instructions Clements received.

The field notes of the survey made by Clements indicate that he started his survey of the Pueblo of Sandia at "a rock, about fifty feet in height, and marked with a large cross (+) near the top, in a canon commonly called de la Agua, it being the N.E. corner of the Grant." Reuben E. Clements, Field Notes of the 1859 Survey Plat of the Pueblo of Sandia Grant, Bureau of Land Management, Santa Fe, New Mexico. He appears then to have proceeded west to the Rio Grande River, setting stones along the way. He then meandered the Rio Grande River south to the southwest corner of the grant. Clements then travelled east, again setting stone mounds along the way, until he reached "a rock one hundred feet in height marked with a large cross (+) the S.E. corner of Grant." Clements indicated that "This rock stands in the canon near the Carrisito Springs in the mountains of Sandia." Clements then indicated that he meandered the Sandia Mountains "being the east boundary of the Sandia Grant" to close back to the rock at the northeast corner of the grant.
In total, the survey indicated a grant of slightly more than 24,000 acres. Clements indicated that "about one third of this grant is-first rate bottom land easily irrigated and cultivated," and further "there is considerable cottonwood timber along the Rio Grande" and "the hill land produces fine grass."

On December 18, 1859, the Indian agent assigned to accompany the surveying party wrote to the Superintendent of Indian Affairs to report that the surveys of the pueblos of Santa Domingo, San Felipe and Sandia were complete. Archuleta to Collins, December 18, 1859 (translation) included in Collins to Greenwood, December 28, 1859, NA, RG 75, Office of Indian Affairs, New Mexico Superintendency, Letters Received, 1849-1880, [M 234], Roll 550, transcription by Dr. Myra Ellen Jenkins. The agent indicated that the Indians of Santa Domingo and San Felipe were not satisfied with the drawing of their boundary lines, a fact the agent states was communicated by the Indians previously to the Superintendent. The agent mentioned the Pueblo of Sandia only to indicate that there were several non-Indian settlements and houses contained within the Pueblo's boundaries. On the matter of boundary disputes, the surveyor remained silent. However, a report submitted by one of the Pueblo's experts seems to suggest that the Pueblo did play some role in setting out its boundaries. The report states that the Pueblo specifically claimed non-Indian settlements, specifically, portions of Corrales and Bernalillo, as well as the house of a non-Indian. Minge Report at 37. The Indian agent assigned to accompany the surveying party made no indication that the Pueblo of Sandia disagreed with or was otherwise unhappy with the completed survey.

His work completed, Deputy Surveyor Clements then signed his solemn pledge at the close of his surveying notes:

I R.E. Clements, Deputy Surveyor do solemnly swear that in pursuant of a contract with Mr. Pelham Surveyor of the Public lands of the U.S. in the Territory of New Mexico being date 21st September 1859 in strict conformity to the laws of the U.S. & instructions of said Surveyor General I have faithfully surveyed the Pueblo of Sandia & do further solemnly swear the foregoing are the true & original field Notes of said survey.

Reuben C. Clements, Field Notes and Survey plat of Pueblo of Sandia Grant, Bureau of Land Management, Santa Fe, New Mexico.

Clements certifies that he followed his instructions from the Surveyor-General. The fact that after more than 120 years no one can locate a document reflecting those instructions does not establish that he received no instructions or the instructions were not the same as those issued to Garretson.
The contemporaneous expert apparently approved this solemn pledge: Clements' field notes were notarized by David V. Whiting—the translator of the Sandia grant documents.

The field notes were then examined and approved by the Surveyor-General on January 12, 1860:

The foregoing field notes of the Survey of the Indian Pueblo of Sandia, being in Townships 11.12.13 North of the Base line and Ranges 3 and 4 East of the Principal Meridian in New Mexico executed by R.E. Clements, under his Contract, bearing date 21st of September 1859 in the month of November 1859, having been critically examined, the necessary corrections and explanations made, the Said Field Notes and the Survey they describe, are hereby approved.

On October 15, 1860, the Surveyor-General approved the plat of the survey of the grant (copy attached as Appendix II).

The survey having been completed and approved, President Abraham Lincoln issued a patent on November 4, 1864 to the Pueblo of Sandia. The patent identified the parcel as "Survey No. 14 containing 24,187.29 Acres in Township 11 and 12 North of Ranges 3 and 4 East of the New Mexico Meridian. . . ." A detailed metes and bounds description was also set forth in the patent document.

Subsequently, the essential accuracy of the survey was upheld. Although not contemporary, another survey closer in time to the disputed events than we are today was done by one E. G. Harrington. Harrington re-surveyed the Sandia Pueblo in 1914-1915 at the joint request of the Bureau of Indian Affairs and the Pueblo because of several boundary disputes. This survey required a retracing of the Clements survey. Brass caps were placed at the northeast and southeast corners conforming to the boundary as surveyed by Clements. Harrington was able to relocate the rock marked with a cross which Clements had indicated stood at the southeast corner in the canyon near Carrisito Springs. However, the springs themselves could not be found. He was also able to relocate the rock, marked with a cross, at the northeast corner in the canyon referred to as "de la Agua" by Deputy Surveyor Clements. Harrington Survey and Field Notes, NA, RG 75, Surveying and Alloting Records, Entry 313, Vol. 271. Both rocks still exist and have been viewed by the various interested parties.

For the next 120 years, there was considerable activity in the area to the east of the Pueblo. The federal, state and local governments and the local citizens have treated the claimed area as federal non-Indian property, except for eventual private inholdings, since 1864.
After the 1864 patent to the Pueblo of Sandia, the claimed area continued to be in public land status, and ultimately jurisdiction to manage the area was transferred from the Interior Department to the Department of Agriculture ("USDA"). On November 6, 1906, President Theodore Roosevelt reserved most of the claimed area as part of the Manzano Forest Reserve. It, in turn, was enlarged and renamed the Cibola National Forest on December 3, 1931. Executive Order No. 5752. Included are the Juan Tabo and La Cueva picnic sites and the La Luz and Piedra Lis Trails. In 1978 Congress passed the Endangered American Wilderness Act, 92 Stat. 42, which designated most of the claimed area, including a large portion of the west face of the Sandia Mountains, to be managed by the Forest Service as part of the Sandia Mountain Wilderness area. The claimed area constitutes about 19% of that wilderness area.

The State of New Mexico has regulated hunting in most of the claimed area since as early as the 1920's and has made special provisions for Indian hunting on several occasions since that time. In 1940, for example, the Pueblo engaged in extensive negotiations with the State of New Mexico to resolve issues relating to the taking of animals for ceremonial purposes on the claimed area, which was then run as a state game reserve. Hinge Report at 100-03. In 1942, the Pueblo again requested permission to hunt on the Sandia Game Range. Id. The authority for such state regulation is currently the "Sikes Act," 43 U.S.C. §670h(c)(4) which provides that "... hunting, fishing and trapping shall be permitted ... in accordance with applicable laws and regulations of the State in which such land is located on public land ... subject to a conservation and rehabilitation program ..." pursuant to a cooperative agreement between the State and the appropriate land managing Department. The State has designated the Sandia Mountains as a Wildlife Refuge. Administration of the Refuge is the responsibility of the U.S. Forest Service, which consults with the New Mexico Department of Game and Fish concerning activities within the area.

In addition, over six hundred acres of the claimed area eventually came into private ownership. These inholdings were generally acquired over the years through land exchanges with the Forest Service. The claimed area now includes subdivided and developed lands, including the subdivisions of Sandia Heights, Sandia Heights North, and Tierra Monte in which over 100 families reside. It also includes a Bernalillo County dedicated right-of-way.

B. Forums for Pueblo Title Disputes

In the more than 120 years since the patent to the Pueblo, Congress has established several forums for resolving pueblo and general Indian claims. First, Congress established the Court of Private Land Claims by Act of March 3, 1891, 26 Stat. 854, providing it with jurisdiction to adjudicate all private claims
to lands ceded from Mexico which had not been confirmed by Congress prior to passage of the Act. The Pueblo did not file a claim in this court.

Next, Congress established the Pueblo Lands Board by the Act of June 7, 1924, 43 Stat. 636, to settle claims of third parties to Pueblo lands in light of a change in caselaw concerning the ability of the pueblos to alienate their lands. United States v. Sandoval, 231 U.S. 28 (1913). The Court’s decision in Sandoval cast a cloud over the title of approximately 3,000 non-Indians who had acquired putative ownership of land located within the boundaries of the pueblo land grants. The Pueblo Lands Act of 1924 was designed to settle the consequences of these past transactions. (For an in depth discussion of the Act, see Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985).)

Showing both inclination and ability to participate in administrative land claims dispute resolution, the Pueblo of Sandia asked the United States to bring suit before the Pueblo Lands Board against several private claimants to parts of their grant as patented. During this process and at the request of the United States, the Pueblo Lands Board conducted an extensive study of the Pueblo, recalculating the entire grant area. The Board’s 461 page report, issued January 10, 1928, fully adjudicated at least 369 separate land claims. Significantly, the Board, at page 461, found that after adding a little over 500 acres to adjust for the meandering of the Rio Grande River, “no lands other than said Pueblo Grant acquired by said Indians as a community by grant, purchase or otherwise” were properly part of the Pueblo’s lands. In reaching this conclusion, the Board carefully reviewed the 1914-15 resurvey, found that it did not essentially change the Clements survey, and ratified the 1914-15 survey as correct. U.S. v. Abouselman, No. 1839 (D.N.M. Dec. 16, 1929) slip op. at 1. Sandia Pueblo, Report of Title to Lands Granted or Confirmed to Pueblo Indians not Extinguished. The Pueblo was apparently satisfied with this ratification and did not question the survey as to the eastern boundary as it does today over sixty years later.

Finally, the Indian Claims Commission was established by the Act of August 13, 1946, 60 Stat. 1049, to compensate Indian tribes through the payment of money damages for past wrongdoings by the United States. Until 1946, Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress. The Commission was authorized to hear all tribal claims against the United States that existed before August 13, 1946. The Pueblo did not participate in any proceedings before the Commission in reference to the lands involved here.
C. This Proceeding

The Sandia Pueblo appears to have first approached the Department of the Interior regarding its eastern boundary in 1983. The Pueblo asked the Department to review the boundary of its land in light of a January 1983 report of Ward Alan Minge, Ph.D. The Bureau of Indian Affairs ("BIA") subsequently provided funding for the Pueblo to hire additional experts to study the matter. Based on that additional work, the Pueblo approached the central office of BIA in February of 1986 to request that the Department review and act on the claim.

The Pueblo's claim was referred to this Office by the BIA shortly after they received the Pueblo's request. On April 8, 1987, we submitted a staff draft opinion to the General Counsel of USDA for comment. We subsequently received written comments from Agriculture on June 4, 1987 and an oral presentation from USDA on its position on October 15, 1987. USDA made our draft widely available to the public at that time. USDA also released its June 4 response to the public, sending a summary of the response to all residents in the claimed area, newspapers, groups who use the claimed area, and local, state, and federal elected officials. USDA supplemented its earlier response with a historical study commissioned by USDA and submitted to us on September 29, 1988.

As a result, all affected parties received actual notice of the Pueblo's request and our initial position. We have received dozens of written comments both in support and opposition to the Pueblo's claim from the private inholders, other pueblos, local governments, state officials, private groups and individuals in the form of reports, letters, telegrams and petitions to the Secretary and the Solicitor, mostly in the spring and summer of this year. We also met on more than one occasion with representatives of the Pueblo and of the private inholders and other interested members of the public to receive oral presentations on their respective positions. The major submissions, aside from those from USDA and the Pueblo, have been from or on the behalf of an informal group of private landowners in the claimed area, the Sandia Mountain Coalition ("the Coalition"). They submitted their experts' report at a meeting with the Under Secretary and the Solicitor on July 20, 1988. The Coalition supplemented that report on August 17, 1988, with the results of a field inspection and a line-by-line review of the three expert reports submitted by the Pueblo. The Pueblo, in turn, responded in writing in whole or in part to each of the Coalition reports and the USDA submissions. (See Appendix III.)

4 We had requested that the draft not be made publicly available at that stage so as not to alarm potentially interested parties with very early and premature discussions and conclusions. We regret that USDA violated our confidence.
There also has been considerable interest shown in this matter by the New Mexico Congressional delegation. Members of the delegation have expressed their concern—in writing to and through telephone calls and meetings with the Secretary and the Solicitor—that this matter be given full and fair consideration to all involved. For example, in a June 28, 1988, letter, Congressmen Lujan, Skeen and Richardson, and Senators Domenici and Bingaman, urged the Department to issue an opinion on the Pueblo’s claim as soon as possible, but did not support the position of any of the various parties.

II. CONTENTIONS OF INTERESTED PARTIES

A. Pueblo of Sandia

The Pueblo contends that the survey conducted by Clements incorrectly excluded areas that were included in the original Spanish grant to the Pueblo. Specifically, the Pueblo argues that the patent issued on the basis of that survey is incorrect in drawing the Pueblo’s eastern boundary at the western foothill of the Sandia Mountains, rather than on the crest of the mountains. The Pueblo’s principal argument is that the plain meaning of the grant language specifically designates the “main ridge” of the Sandia Mountains as the eastern boundary and that the “main ridge” refers to the crest of the mountains.

The Pueblo’s expert argues that this interpretation is supported by the meaning given to similar Spanish phrases in other pueblo grants; the boundaries of other pueblo grants in the area, as surveyed or later readjusted; the fact that the natural resources to be included in the grant are found in the claimed area; and certain other circumstantial evidence.

B. The Department of Agriculture

The Department of Agriculture takes the position that the eastern boundary line of the Pueblo of Sandia, as determined by the Clements survey and contained in the present patent to the Pueblo, is correct. USDA apparently supports the position that the Sandia Mountains are the eastern boundary of the Pueblo, but argues that, for several reasons, it is logical to conclude that the western foothill of the range was the intended eastern boundary. The reasons for this conclusion include, among others, the facts that the acreage of the Pueblo as granted in the patent is more consistent with a “formal pueblo” than if the boundary were set at the crest of the mountains, and that the resources the grant was to include are found in the patented area and not in the claimed area.

USDA takes the further position that even if the survey varied from the original Spanish grant, the surveyor had the authority to adjust the grant in performing his survey. It then seeks to
support Clements' determination of the current boundary with an expert's report asserting that it was reasonable for Clements to have meandered the foothill.

The Department of Agriculture also raises several technical defenses to the Pueblo's claim. First, USDA argues that the Pueblo has waived or otherwise lost any new claims by failing to raise them for over 100 years, especially by failing to raise them in several forums for the adjudication of pueblo and other Indian land claims established by Congress since the Pueblo's land was patented in 1864. Second, the USDA argues that any Indian title that may have existed in the claimed area was extinguished by Congressional action after 1864 in reserving the claimed area as a national forest, and later designating it as a wilderness area.

Finally, USDA argues that even if the claim were valid and not barred by any of the technical defenses, the Secretary of the Interior has no legal authority to correct the Pueblo's patent administratively.

C. The Private Inholders

As previously noted, the private landowners within the claimed area have established an informal coalition, the Sandia Mountain Coalition, to oppose the Pueblo's claim. The Coalition has submitted various reports to the Department to support its contention that the crest of the Sandia Mountains is not the eastern boundary of the grant confirmed by Congress in 1858.

The Coalition advances as its principal argument that the Pueblo was granted a "formal pueblo." That term, the Coalition argues, was well understood to mean that area contained within the extension of one league from the Pueblo's church in each of the four cardinal directions. The reference to the Sandia Mountains on the east, the Coalition avers, is not a call to the mountains as a boundary, but specifies the direction of the measurement of one league to the east. To the Coalition, the meaning of the "main ridge" of the mountains, whether the foothills or the crest, is irrelevant to proper placement of the eastern boundary of the grant. Thus, the Coalition argues that the Pueblo has been treated more than fairly because the Pueblo's patent probably contains more acreage (slightly more than 24,000 acres) than was included in the original grant from the Spanish (a formal pueblo usually contained slightly more than 17,000 acres). Although the Coalition makes no claim that the Pueblo does not now have a right to the land described in its patent, it does oppose the Pueblo's claim now to have its eastern boundary extended farther to the east (for a total land area of approximately 34,000 acres).

5 Indeed, any legal action by the U.S. to challenge the patent would be barred by the statute of limitations.
D. State and Local Governments

The City of Albuquerque and the County of Bernalillo have both passed resolutions expressing grave concerns about the claim of the Pueblo and requesting public hearings on the claim. The County expresses doubts about the validity of the Pueblo’s claim and the authority of the Secretary to grant the relief the Pueblo requests.

Similarly, the Attorney General of New Mexico has written to express agreement with the position taken by USDA.

III. LEGAL ISSUES

In response to the claim of the Pueblo of Sandia, the Department in general, and this Office in particular, has devoted an enormous amount of time to collecting and studying the relevant facts and law. In our review of the claim, we focused upon the issue of whether the Pueblo has met the legal standard for overcoming the presumption that surveys of the United States are correct.

A. Legal Standard for Overcoming Presumption of Correct Survey

The Pueblo claims that the United States has failed to provide it title to all of the land originally granted to the Pueblo by the Spanish in 1748. The Pueblo contends that this failure was the result of an erroneous survey that resulted in a patent that placed the eastern boundary on the ridge of a foothill as opposed to the summit of the Sandia Mountains, some 2.5 miles farther to the east. The issue presented, then, is whether the patent issued to the Pueblo based on the survey done by Clements in 1859 accurately represented the grant of land given the Pueblo when it was established in 1748. In evaluating this issue we have exhaustively reviewed numerous documents and written arguments referenced or submitted by the Pueblo and other interested parties. These documents and written arguments are listed in Appendix III hereto.

We begin with the usual presumption that surveys of the United States are correct and in compliance with statutory requirements. 11 C.J.S. § 104; Nina R. B. Levinson, 1 IBLA 252 (February 2, 1971). The burden is on the claimant arguing survey error to establish by a preponderance of the evidence that the survey was fraudulent or grossly erroneous. Peter Paul Groth, 99 IBLA 104 (September 24, 1987), citing Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984). Therefore, the Pueblo must establish by a preponderance of the evidence that the Clements survey of its 1748 grant was either fraudulent or grossly erroneous. If it fails to do this, the Secretary has no grounds upon which to issue a new survey.

6 In fact, the Secretary would be prohibited from issuing a new patent in that situation by several statutes, including 16 U.S.C.
The Pueblo attempts to meet its burden of persuasion by first challenging the conduct of the survey and the qualifications of the surveyor. Second, the Pueblo contends that regardless of any questions as to the conduct of the survey, it misinterprets or misapplies the language of the original Spanish grant.

The Pueblo asserts there are several indications the survey as conducted by Clements in 1859 does not merit the usual presumption. Among these are: (1) the lack of any reference in the surveyor's notes to being accompanied by an Indian agent or having consulted the inhabitants of the Pueblo; (2) the failure of the surveyor to measure the Pueblo from the four corners of the church; (3) a number of alleged technical errors in the surveyor's measurements; and (4) allegations that the surveyor's work on other surveys has been criticized for its inaccuracy. Jenkins and Brandt, "The Sandia Eastern Boundary: A Response to Morgan," October 1988, p. 14.

We are unpersuaded by these arguments. The Pueblo's basic argument that its members were not consulted or considered in performing the survey is speculation at best. The Pueblo argues that Clements' notes do not contain any references to having consulted with the Pueblo or an Indian agent. We cannot view the absence of specific references in Clements' notes as conclusive evidence that he did not follow his instructions in having an Indian agent accompany him in the survey and in consulting with the members of the Pueblo in setting out the boundaries of Sandia Pueblo. We believe that we must presume the regularity of his activities in the absence of evidence to the contrary. In fact, the surveyor certified that he did follow his instructions and his superiors similarly certified they reviewed, corrected and found the survey consistent with their instructions.

Furthermore, the preponderance of the evidence indicates that an Indian agent did accompany the surveyor to the extent necessary, as reflected in the correspondence between the assigned Indian agent and the Superintendent. Archuleta to Collins, December 18, 1859, supra. In addition, the fact that Clements began his survey at a stone marked with a cross which he identified as the northeast corner of the grant, as opposed to starting at the church, strongly suggests that he did consult the inhabitants as he was supposed to do. We doubt he would have found this stone and the one at the southeast corner had he not done so. See Keene Report at 17. There is no indication in his notes that he

§§ 472, 488, 1131(a), 1132(e), and 43 U.S.C. §§ 2, 52, and 150 and 25 U.S.C. §§ 211 and 398d. The importance of this standard of proof is illustrated by these provisions. Even under the narrowest readings of these statutes, the Secretary would have no authority to act, unless he found that the United States never owned the disputed lands. Under such narrow readings, the Secretary's factual determination thus determines whether he has any legal authority.
worked backward to arrive at this point. Further, the Indian agent was aware of the Pueblo's claim to certain inholdings and had the Pueblo's permission to enter the land. Thus, some consultation with the Pueblo apparently occurred. See Minge Report at 37; Archuleta to Collins, December 18, 1859, supra.

The failure of the surveyor to measure the Pueblo from the four corners of the church may indicate a failure to follow specific instructions. However, it is more probable that the failure to measure from the church indicates a conflict in instructions. As noted in the preceding paragraph, one might assume that the surveyor started at a large stone because he was directed there by the inhabitants of the Pueblo. Thus the instruction to measure from the four corners of the church gave way to the instruction to consult with the inhabitants of the pueblos in setting out their boundaries. Further, the failure to measure from the church is irrelevant to the Pueblo's argument because the Pueblo does not dispute the measurements to the east made by Clements but, rather, argues that he erred in not utilizing the mountain crest as a natural boundary call. Nor does the Pueblo question the measurements to the north or the south, accepting the boundary lines on which rest the two large stones cited by Clements.

None of the technical errors in the survey's measurements alleged by the Pueblo involves the eastern boundary of the grant, and we are unconvinced that the allegations of inaccuracy in other respects are sufficient to overcome the presumption of the regularity of Clements survey. In fact, the Pueblo Lands Board carefully reviewed the Harrington resurvey of the Clements' survey completed in 1914-15 and declared that it did not essentially change the 1859 survey. Abouselman, supra.

The Pueblo's principal contention, however, is that Clements survey is in error not because he did not measure from the church, but because the surveyor misperceived the appropriate location of the east boundary of the grant by misinterpreting the grant language. USDA suggests that it is unnecessary to ascertain the proper interpretation of the grant because Clements enjoyed considerable discretion in setting the boundaries of the grant. USDA's argument is simply without foundation.

Specifically, the Pueblo argues that Harrington found many errors in the Clements survey. They also cite a U.S. Forest Service surveyor's report on the Clements and Harrington surveys which they posit evidences several inconsistencies: (1) a difference in the size of the boulders marking the corners of the grant; (2) a misclosure of over 30 chains (about 2,000 feet) when Harrington traced the original survey; and (3) a difference of 7.79 chains along the south boundary. Brandt, "Comments on Wozniak 'Reviews of Four Documents,'" September 2, 1988, pp. 14-15.
The 1854 Act makes it clear that Congress intended to grant the Pueblo title to all lands held by the Pueblo while it was under Spanish dominion. The Treaty of Guadalupe Hidalgo, as previously mentioned, guaranteed the liberty and property of those residing in the newly acquired territory. 9 Stat. 922, 929-30. Further, cases decided around the time of the Sandia grant confirm that the United States was not granting a new right to property in issuing patents to the pueblos. Rather, the United States was recognizing the legitimacy of a pre-existing right.

In United States v. Joseph, 94 U.S. 614 (1877), the Court said at 618-19:

The pueblo Indians . . . hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution,--a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hildago . . . .

[T]his was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right.

Congress’ confirmation, then, was a recognition of the Pueblo’s title to all of the land described in the grant. Id. at 663. See also, Tameling v. United States Freehold, Etc. Co., 93 U.S. 644, 661 (1877) ("... [I]ndividual rights of property in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction.").

There is no indication that Congress intended to authorize the surveyor or the Commissioner to exercise discretion in determining the amount of land that would be granted to the Pueblo. As quoted previously, the Land Commissioner’s instructions to the Surveyor-General support the conclusion that the surveyor’s task was to describe precisely the tract embraced in the confirmation act of Congress. See p. 3, supra.

Therefore, it is necessary to ascertain the proper interpretation of the original grant to the Pueblo in order to determine whether or not Clements placed the eastern boundary of the grant where it was intended to be placed by the Spanish rulers of the time. The Pueblo’s principal argument rests on one sentence in David Whiting’s English translation of the grant forwarded to Congress to support passage of the confirmatory legislation:

And, in order to perpetuate their boundaries, I directed them to establish landmarks, or mounds of mud and stone the height of a man with wooden crosses on their summits, the boundaries being on the north an old tower opposite the point of a
The Pueblo argues that the reference to the Sandia Mountains is a call to a boundary and that the Whiting translation specifies that the eastern boundary is the "main ridge" of the mountains, rather than the foothill erroneously specified in the Clements survey. A review of the documents leading to the establishment and grant of the Pueblo reveals that the issue of the correct placement of the eastern boundary is not as simple as the Pueblo argues based upon this excerpt from the Whiting translation. The grant must be viewed as a whole, and as so viewed, we do not believe the Pueblo has adequately established the main ridge as the eastern boundary.

Dr. Myra Ellen Jenkins, retired State Historian for the State of New Mexico, upon whose work the Pueblo in part relies in making its claim, believes that the Whiting translation is of an altered and unofficial copy of the grant. Dr. Jenkins proffers the following English translation of the grant document provided to the Pueblo in 1748, which she believes is the official document:

And in order to perpetuate the memories and the designations I ordered them to place monument markers, mounds of mud and stone of the height of a man, with wooden crosses on top, these being on the north facing the point of the canada which is commonly called "del Agua," and on the south facing the mouth of the canada de Juan Tabovo, and on the east the sierra madre called Sandia . . . .

We believe that Dr. Jenkins' opinion as a Spanish expert should be accorded considerable weight. For this reason, and because the Pueblo proffers it as the correct translation, we utilize the documents of SANM I as translated by Dr. Jenkins in our analysis, although we believe our conclusion would be the same whether we use that document and that translation or the document translated by Whiting. Although Dr. Jenkins concludes that this language specifies the eastern boundary as the main ridge of the Sandia Mountains, we believe that the language, in the context of the grant documents as a whole, presents more evidence than not that the proper boundary is not on the main ridge of the Sandia Mountains. Of course, Dr. Jenkins' construction of the Pueblo's eastern boundary is not definitive. We must review the basis for her opinion, including her interpretation of the grant language as translated, and make an independent decision as to its credibility.

The Pueblo's documents indicate that the original petition for

footnote 8: The documents referred to are from SANM I #848, see note 2, supra, Jenkins, Ph.D., Former Historian of New Mexico. Attached
the establishment of the Pueblo of Sandia was made by Friar Juan Miguel Menchero, Procurator General and Delegate General Commissary, to Don Joachin Codallos y Rabal, Governor and Captain General of New Mexico, in April of 1748. The Friar requested the establishment of a formal pueblo to be the home of 70 families of converts, 350 total, that he had made among the peoples of the Moqui (Hopi) pueblos. As a site for the Moqui converts, the Friar proposed an area that had been abandoned during the Pueblo Revolts of 1680-1696. Friar Menchero believed the site was appropriate because it would close the door to the more hostile tribes who had a habit of entering from that direction to attack the Spanish settlers to the west of the Rio Grande in and around the City of Albuquerque. The transplanted residents of the new pueblo could be expected to combine with the Spanish soldiers stationed in that area to halt such invasions by the hostile tribes.

In response to the Friar’s petition, Governor and Captain General Don Joachin Codallas y Rabal on April 5, 1748, commissioned Lieutenant General Don Bernardo du Bustamante to establish the Pueblo, “partly so that the said pueblo will be a barrier to halt the invasions from the enemy Gentile who are accustomed to come into the said kingdom by entrance through the said site,” and in recognition of the request from the Moqui Nation that a pueblo be founded for them in which they could reside and establish their abode. He directed Lieutenant General Bustamante to “scrutinize and examine the said site, carrying out the allotment of lands, waters, pastures and watering places which should pertain to a formal pueblo of Indians, in accordance as the royal regulations prescribed for this matter as to the statement of their boundaries.” Jenkins translation, Appendix IV. All of the authorities appear to agree that a “formal” or “regular” pueblo was generally a grant of four leagues square, that is, a league in each direction from the center (usually a church) of the pueblo. Minge Report at 28.

In response to these directions, Lieutenant General Bustamante on May 14, 1748, went to the site chosen for the Pueblo where he called the landowners on the west side of the river together and had them sign statements that acknowledged the granting of the site to the Moqui converts. Because the Pueblo could not stretch a league to the west, that is, could not cross the Rio Grande,

as Appendix IV is a set of these translated documents.

9 The similar portion of the Whiting Translation of the documents in H.R. Exec. Doc. No. 36 (1857) reads as follows:

“distribute the lands, waters, pastures, and watering places, sufficient for a regular Indian pueblo, as required by the royal orders concerning the matter, setting forth the boundaries thereof.”
Bustamante also had the landowners agree as a compromise to permit the residents of the new pueblo to pasture their livestock on the lands of these Spanish settlers. In the words of Lieutenant General Bustamante:

... I made aware of the commission which I hold for the royal possession which I am to give to the said sons of the said pueblo and their minister, and having made them aware that I am relieved from giving to the said Indians the league to the west wind, as the law provides shall be one [league] to each one [wind: direction] that there must be a compromise so that the said Moquino sons of this new resettlement for all time can and will be able (because of the many dangers which their stock have on this bank) to pass in order to pasture on the said lands of the said Spaniards, of which I notified them before witnesses for complete compliance. And I asked them once and several times more if they would comply or not, and they gave their consent to what was asked by the said Indians and by their minister to which they stated, all together and each one for himself insolidum, that they gave and did give full and sufficient consent so that at this time and forever they can pass and will be able to pass to pasture their said stock with confidence and safety, that for themselves, their children and their successors they [the Spaniards] do not place any impediment against that which the said Indians have petitioned, that they do so notwithstanding any damage. Jenkins translation, Appendix IV (emphasis added).

Finally, on May 16, 1748, Lieutenant General Bustamante performed the rituals then associated with a grant from Spain as memorialized in a document known as the Act of Possession. He first called together the neighboring residents to the north and the south and advised them of his commission and that they may be affected by his carrying it out. These inhabitants understood that the pueblo would encompass some of their granted and purchased lands but indicated they would not object. He next named the Pueblo "Nuestra Senora de los Delores y San Antonio de Sandia," and proceeded to give royal and personal possession through a livery of seisin ritual, as described in the Act of Possession:

... all of the recently converted Indians of the said nation as resettlers gathered together and their father minister who is the Reverend Father Preacher Fray Juan Joseph Hernandez, whom I led by the hand and in the name of his Majesty (may God guard him) I proceeded over the said land, I shouted and they shouted, threw rocks and pulled up grass and in a loud voice shouted many times "Long live the King, our Lord," and they received the royal possession without opposition.
The leagues conceded for a formal pueblo were measured and the cordels (measuring cords) extended to the west wind as far as the Rio del Norte, which is the boundary, having no more than 12 cordels of 120 Castillian varas each one which consisted of 1,440 varas, and in order to complete those which were lacking in this direction it was necessary to increase the leagues which pertain to the north and south winds equally so that the Spanish settler grantees would not be injured, some more than others. The land which is encompassed in these three winds (directions) is all for raising wheat with the conveniences of water for the purpose of the land. And in order to perpetuate the memories and the designations I ordered them to place monument markers, mounds of mud and stone of the height of a man, with wooden crosses on top, these being on the north facing the point of the canada which is commonly called "del Agua," and on the south facing the mouth of the Canada de Juan Tabovo, and on the east the sierra madre called Sandia, within which limits are the conveniences of pastures, woods, waters and watering places in abundance in order to maintain their stock, both large and small and a horse herd, all of which Moquino Indian neophytes who are congregated as stated, so that they may enjoy them for themselves, their children, heirs and successors. Jenkins translation, Appendix IV (emphasis added).

These documents, therefore, leave little doubt that the Spanish intended to grant a formal pueblo of as close to four square leagues as possible to the Sandia Pueblo. The instructions from the Spanish Governor of New Mexico to General Bustamante specified that lands "... sufficient for a formal Indian Pueblo" be granted to Sandia. Bustamante characterized his instructions from the Governor as dealing with a "royal mandate, which provides for one league towards each of the four cardinal points ...." (Emphasis added.) The area of four square leagues is approximately 17,360 acres, considerably smaller than the 24,000 acres encompassed within the current boundaries.

General Bustamante reported his compliance with these instructions: "the leagues conceded for a formal Pueblo were measured...." (Emphasis added.) The first sentence of the quoted excerpt from the Act of Possession then proceeds in great detail to address those measurements. The line drawn to the River on the west was 4,760 varas less than a league. Leagues "toward the north and south equally" were increased to compensate exactly for that part of the league lost on the west. Thus, the grant measured 240 varas or 0.5 leagues from the church to the Rio Grande River, the western boundary of the grant, and 7380 varas or 1.48 leagues to the north and south from the church.

10 A league is approximately 2.6 miles.
As described in the Act of Possession “the leagues conceded for a formal pueblo were measured” the logical inference being that one league was measured to the east without any difficulty requiring further discussion. One league to the east, or 2.6 miles, would be far short of the current boundary, the first foothill of the Sandias, some 4.3 miles from the church, or of the proposed boundary, nearly 2.6 leagues or 6.8 miles from the church. Further inference in support of the boundary being one league to the east comes from the careful extension of boundaries to the north and south to compensate exactly for the shortfall in distance toward the west. This precision in the measurements to the other three winds would make no sense if the intendment was to extend the boundary some 2.6 leagues to the east, to the crest of the Sandia Mountains. It makes sense only if Bustamante was attempting to maintain the overall size of a formal pueblo. It would seem that an expansion of nearly 2.6 leagues to the east would have resolved any need to adjust the north and south measurements and the resulting need to contact and obtain approval from the Spanish inhabitants of the neighboring lands whose property rights were to be adversely affected.

Rather than reading as a whole the Act of Possession laying out the Pueblo, the Pueblo focuses entirely on the third sentence of the quoted paragraph of the Act of Possession. Reviewing the paragraph as a whole, the first sentence, as just discussed, describes the measurements that were performed in physically laying out the Pueblo on the ground. The third sentence memorializes Bustamante’s direction to place markers of mud and stone the height of a man to perpetuate the memories and designations as he had already laid them out on the ground. Bustamante ordered that these markers be placed “on the north facing the point of the Canada which is commonly called ‘del Agua,’ and on the south facing the mouth of the Canada de Juan Tabovo, and on the east the sierra madre called Sandia.” (Emphasis added.)

The omission of the word “facing” in the last phrase is what has created the controversy. Thus, the issue in this matter is not over the meaning of the phrase “the sierra madre called Sandia,” that is, whether the Spanish term translated “main ridge” by Whiting refers to the foothill or the crest of the mountains. Rather, the issue is whether the reference to the mountains is a call to a natural feature as a boundary or is a directional reference to a natural feature facing which the monument was to be placed.

11 It is thus apparent that, even if Clements had measured from the church, either the boundary set by the surveyor, or that proposed by the Pueblo at present would be considerably farther from the church than the establishment of a regular pueblo would dictate. Thus, the Pueblo’s criticism of the Clements survey for not measuring from the church is without relevance to its claim.
The logical inference from a review of the entire document is that the mountains mentioned in the third sentence are not themselves the eastern boundary. Grammatically, the sentence itself suggests a parallel construction was intended for the last clause. It would certainly not be uncommon to omit the word "facing" in the last of the three parallel clauses.

More importantly, this third sentence of the quoted material from the Act of Possession is not seeking to describe the boundaries, but rather to memorialize the setting of monuments. One would expect that if a departure from this approach in the first part of the sentence were intended in the third clause, a clearer expression of an intent to call to a natural feature as a boundary would have been provided. Significantly, the sentence is not even an exhaustive reference to the boundaries. It makes no reference to the western boundary, which is clearly stated earlier in the Act of Possession to be a natural feature, the Rio Grande River.

In the context of the entire document, the sentence provides for the placement of monuments in each of the measured directions, 1.48 leagues to the north and south and 1 league to the east. The western boundary, being a natural feature, needed no reference monument. Likewise, if the Sandia Mountains were the eastern boundary, no man-made monuments would be necessary, as evidenced from the fact Bustamante did not order the natural west boundary, the Rio Grande, be monumented. The clear inference, then, is that the reference to the east in the third sentence was not to a natural boundary, but to the direction for measurement of the one league upon which man-made monuments were to be established, because there was no natural feature to cite as the boundary.

Thus, the construction advanced by the Pueblo would require us to view the language of the document as internally inconsistent and to ignore the remainder of the key documents. Specifically, we would have to ignore: (1) several references to the intent to establish a formal Pueblo, (2) reference to the leagues for a formal Pueblo actually having been measured, and (3) references to the careful adjustment or "netting out" of distances from the church to the western, northern and southern boundaries.

Furthermore, one would have expected that if Bustamante had intended to grant the land between the river and the foothill of the mountains, the current boundary, a total distance of about 2.2 leagues, provided by the current patent, he would have clearly announced that intention from the outset, and simply measured one league to each of the north and south directions. That would have resulted in an acreage very close to that of a formal pueblo, and would not have required consultation with and effect to the neighbors on the north and south. The Pueblo argues, though, for an even less plausible position, that the intent was to grant to the crest of the mountains, some 2.6 leagues from the church and some 3.1 leagues from the river.
The Pueblo seeks to diminish the importance of the formal pueblo language in the documents by arguing that the size of a formal pueblo, four square leagues or about 17,360 acres, was only a minimum and should not be given much significance. In support of this argument, the Pueblo submitted a list of the pueblos in New Mexico showing the acreage of each. A copy of this list is attached as Appendix V. A review of this list, rather than supporting the Pueblo's argument, seems to establish that the concept of a formal pueblo was well settled in the practice of the day. Twelve of the twenty-two pueblos listed have an acreage that is exactly, or within about 300 acres of 17,360. Four of the pueblos are smaller than 17,360 acres. The remaining seven pueblos, including Sandia, are larger. Thus, although not every pueblo received the standard acreage, it is clear that the size of a formal pueblo was well settled in the practice of the time. Even one of the Pueblo's principal experts, the author of the report apparently initiating its present claim, agrees that a four league square was the accepted size for an Indian Pueblo in 1748. Minge Report at 28.

In any event, the Pueblo suggests two reasons why its grant was intended to exceed the size of a formal pueblo. First, although the Pueblo argues the point somewhat obliquely, in the work of its experts there is a suggestion that the Pueblo was established to approximate the pueblo that had been in the area prior to the pueblo revolts. As a result of this suggestion, there is a great deal of dispute as to whether the current inhabitants of the Pueblo are the direct descendants of the original inhabitants, or whether they are Moquis (Hopi) people who were totally transplanted to the area.

This factual dispute is of little moment to the disposition of the Pueblo's claim. Neither the documents seeking establishment of the Pueblo, nor those memorializing its approval and physical establishment, evidence any intent to expand the size of a formal pueblo in an effort to approximate the territory inhabited by the residents of the previous pueblo. There is no suggestion in the documents that the purpose of the establishment of the pueblo on that site was to replicate the earlier pueblo in its entirety. More significantly, the documents contain no discussion of the extent of the territory occupied by the previous pueblo or any effort to ascertain it.

12 The various pueblos in the area of New Mexico revolted against Spanish rule in 1680 and fled from their homes. Jenkins, "The Pueblo of Sandia and its Land," pp. 16-24.

13 The site was selected in part because it had previously been the site of a pueblo, and because of its strategic position as a block to less friendly tribes in the area.
Second, the Pueblo suggests that the boundary was expanded to the east in order to encompass within the grant the kinds of resources that were customarily settled to a pueblo. More specifically, the argument has been advanced that the Act of Possession refers to the resources within the three winds--north, south, and west--, as follows:

The land which is encompassed in these three winds is all for raising wheat with the conveniences of water for the purpose of the land.

The third sentence then refers to the resources within the limits of the entire grant as follows:

within which limits are the conveniences of pastures, woods, waters and watering places in abundance in order to maintain their stock.

The Pueblo’s argument is completed by the assertion that these additional resources were added by the expansion of the grant to the east, and that only by expansion of the grant to the crest of the mountains would these resources be included within the grant boundaries. USDA seems to accept the premise of the argument, but argues that as a factual matter the resources referenced are found within the limits of the current grant and expansion of the boundary to the crest of the mountains would do nothing to add the resources to which the Act of Possession refers.

As interesting as these arguments are, the Act of Possession evidences no such intention to extend boundaries to encompass certain resources in establishment of the grant. One would have expected that if the grant had been extended beyond the customary one league to the east to seek additional resources, Bustamante, instead of simply reciting that the leagues in each direction were measured, starting with the west and adjusting the north and south, would have articulated the process of expansion beyond the one league to the east, instead of remaining silent on the specifics of the eastern measurement. We must assume from the lack of such a description that the language regarding the resources encompassed within the limits of the grant was intended to certify that Bustamante had fulfilled his charge to "... scrutinize and examine the said site, carrying out the allotment of lands, waters, pastures, and watering places which should pertain to a formal pueblo of Indians." Jenkins translation, Appendix IV.

There appears to be little question the resources recited in the Act of Possession are contained within the existing boundaries of the Pueblo. Clements, in his notes, indicated that the area surveyed contained considerable "first rate bottom land easily irrigated and cultivated", cottonwood timber and fine grass.

The Pueblo’s expert argues that the wood found at the river is cottonwood and is not well suited for construction. The expert
In addition, Bustamante went to great lengths to reach a compromise, acknowledged in writing, with the Spanish settlers on the west bank of the river to permit the new pueblo to utilize the Spaniards' land to water and pasture their cattle. Again, this fact belies any effort to continue expanding the grant to the east until waters and pastures were located. Both the arguments of USDA and the Pueblo in this regard are not well founded.

We also note the lack of circumstantial evidence available to support the Pueblo's claim. The Pueblo's expert notes the possible discovery on the crest of the mountains of the remnants of the kind of markers Bustamante directed to be placed. He does not, however, make the argument that these are in fact the markers left by Bustamante. An expert for the inholders points out that the markers, created some 240 years ago of mud and stone with a wooden cross, could not be expected to have survived to this date. Rather, the expert posits, the remnants discovered by the Pueblo's expert are more likely the remains of the campfires of the numerous hikers who frequent the area. We find that the Pueblo has not established that these "finds" are the remnants of Bustamante's markers.

Similarly unhelpful are the sketch maps of the Surveyor-General of New Mexico of 1859 and 1860. The Pueblo asserts that these maps show the eastern boundary of the Pueblo as being on the crest of the mountains, while the sketch maps in 1862 and following reflect the Clements survey showing the east boundary as the foothill. It is our understanding that the level of detail in the maps is not intended to enable one to distinguish between the crest of the mountains and the foothills, nor that these maps were intended to be in any way definitive on such a question prior to completion of a survey.

Also unpersuasive is the 1776 report of Fray Francisco Atansio Domínguez describing the missions, which makes references to the Sandia Mountains in describing the Pueblo of Sandia. We cannot agree with the Pueblo's expert, who asserts that Domínguez was describing the boundary of the Pueblo. The reference is merely to the fact that the Sandia Mountains are to the east and describes the Pueblo as being in the middle of the plain.

argues that the custom was to include in a pueblo sufficient wood for fires and constructions, and that only the pines and other trees found in the claimed area fit this description. Whether or not such a custom existed, based upon the documents we have reviewed, we can find no evidence of any effort to categorize the resources and expand the grant to include specific resources. Further, there was no reference to woods in the order to Bustamante directing him to create the Pueblo, only lands, waters, and pastures. The description of Bustamante of the grant as containing woods is accurate.
The Pueblo also points out that in three other situations involving grants in the same area whose descriptions included references to a "sierra" as a boundary, the Court of Private Land Claims found that boundary to be the crest of a mountain. In the Elena Gallegos grant, the eastern boundary is indicated as "la sierra de Sandia." The Cristobal de la Sierra grant in the Taos area states as its eastern boundary "la sierra." The Lo de Padilla grant had "la sierra de Sandia" as its eastern boundary. The Pueblo also points to the resurvey done on the Pueblo of Isleta grant whereby the Department of the Interior found the eastern boundary of the pueblo, described in patent documents as "el espinazo de la sierrea", to be the crest of the mountains. The Pueblo of Sandia argues that similar language in its grant, "...y por el oriente la Sierra Madre que llaman de Sandia" should be interpreted as setting its eastern boundary on the crest of the Sandia Mountains, relying largely on language in the case of the Gallegos property, which reads as follows:

The Spanish words in the original text of the Archive document are, 'por el oriente con la sierra de Sandia', a proper translation of which, into requisite English, is: 'On the east by the crest of Sandia Mountain.' The primary meaning of the word 'sierra' is a saw.

As applied to mountains its figurative, general meaning is a range; as 'La sierra Madre', 'La sierra Nevada', the Mother range and the snowy range of the Rocky Mountains. In a special application of the term to a single mountain or mountains not properly constituting a range, the word Sierra especially refers to and denotes the serrated crest, comb, ridge or summit. The word may be applied, in common parlance, to entire mountain, a smoothly rounded (sic), as to those with rugged ridges, but when employed in relation to a boundary point of land, there can be no room for doubt that the cumbres, apex or summit is intended as the true and precise definition of the land mark. Decree attached as Appendix VI (emphasis added).

As we have already indicated, to the extent these arguments speak to the issue of whether the reference to the mountains places the boundary on the foothill or the crest of the mountains, they speak to the wrong issue. The Pueblo of Sandia is the only pueblo to actually have its original documents, see n. 1, supra. As we have indicated, those documents suggest another approach entirely, i.e., establishment of a formal pueblo. The issue presented by the Sandia grant documents is whether Bustamante established a "regular" pueblo, extending only one league to the east from the Pueblo’s center, or went against custom to extend that boundary to the mountains. The issue presented in the other cases was truly whether the boundary went to the crest of the mountains, or just to the base.
To the extent the use of other grants are designed to provide circumstantial evidence that the pueblo grants in the area customarily went to the crest of the Sandia Mountains, we are unpersuaded. Each of these grants has its own history and the grants were not all made at the same time. They are therefore more idiosyncratic than thematic. For example, in the case of the Isleta Pueblo, the evidence of the extent of the grant was not a specific writing, but, rather, was oral history and tradition which was used to support the issuance of a patent. That oral history was supported by strong evidence of actual use and possession of the face of the mountain. Furthermore, the issue there was whether the base or the crest of the single mountain to the east was the boundary. In the case of the Gallegos grant, likewise, there was evidence of actual use and possession of the claimed area. In addition, the Gallegos grant did not, of course, deal with establishment of a formal pueblo as the grant was originally made to non-Indians. Finally, the language used in the Gallegos grant was much clearer with regard to the mountain being a call to a natural boundary, the word "con", translated "by" or "with", being used in the grant.

The failure to challenge the patent until 1983, some 120 years after its issuance, is the most troubling circumstantial evidence involving this claim. The Pueblo apparently asserted no claim to the 10,000 disputed acres prior to 1983. As a consequence, the Pueblo's eastern boundary remained essentially unquestioned for over 120 years, with the federal, state and local governments, as well as private citizens, treating the boundary as drawn in the Clements survey as entirely accurate. This apparent acquiescence in the eastern boundary must be considered in light of the fact that the Pueblo revered that area as one of deep cultural and religious significance to its members. In fact, the Pueblo's religious reverence for the area existed comfortably with respect to the eastern boundary as patented for at least a half-century.

The evidence suggests strongly that the Pueblo has been on notice of what it now calls the erroneous placement of its eastern boundary for the past 120 years. When Clements performed his survey, he began at a stone with a cross etched into it, which Clements believed to be the northeast corner of the grant. The surveyor then proceeded to another such stone he believed to be the southeast corner of the grant, and then closed the eastern boundary by meandering the foothill connecting the two stones.

These stones were in place at the time of the survey and are still in existence. Therefore, the Pueblo must have been on notice as to the eastern boundary of the grant as determined by Clements. Furthermore, the Pueblo must be deemed to have known the difference between this boundary, the foothill, and the crest of the mountains. Yet, unlike the two other pueblos whose lands

15 These stones clearly do not resemble the markers Bustamante directed to be set.
were surveyed at the same time, the Pueblo of Sandia raised no objection to the Clements survey either in the administrative determination, or the patent process.

In addition, although a great deal of tension existed as to the correctness of the lands settled to the pueblos in New Mexico, the Pueblo of Sandia made no claim. This tension led to the resurvey of pueblo lands in the second decade of this century, with a dependent resurvey of the Pueblo of Sandia being completed in 1915 because of lingering boundary disputes. Again, there is no indication that the Pueblo asserted any claim to the area now in dispute during that resurvey.

Neither did the Pueblo raise a claim when a similar grant to a neighboring pueblo was questioned, resulting in a resurvey and new patent. Unlike the Pueblo of Sandia, Isleta made a claim to additional area, in 1918, as soon as they learned that it had been excluded from their patent. Like the Pueblo of Sandia, the grant to the Pueblo of Isleta was confirmed by the Act of December 22, 1858. That grant described the eastern boundary of the pueblo as the "backbone" of the Sandia Mountains. The patent described the boundary as a meander of the base of the Sandia Mountains. As in this case, the disputed land was controlled by the United States Forest Service. In resolving the dispute, the Secretary did entertain the Isleta claim, determined that the grant did include all of the land to the summit of the Sandia Mountains, and found that the patent was incorrect. A new survey and issuance of a supplemental patent for the excluded lands were ordered. The Pueblo agreed to waive any claims to existing inholdings of non-Indians and executed quitclaim deeds for those claims. Interior Document D-29675, July 18, 1918.

As we have previously discussed, when the ferment over pueblo lands continued, especially as a result of private encroachments upon these lands, Congress provided the Pueblo Lands Board to settle once and for all the boundaries of pueblo lands and the claims of private inholders. As discussed earlier, the Board was given the authority and the duty of "investigating, determining, and reporting the status of land within the exterior boundary of all lands claimed by the Pueblo Indians." Pueblo of Sandia Land Status, at 8 (1940). Although the Pueblo of Sandia engaged the government to sue a number of private claimants to parts of the grant as currently patented, no claim was made by the Pueblo that the eastern boundary was incorrect. As noted, the Board did conduct an extensive study of the Pueblo, recalculated the entire grant area, and found, after adding a little over 500 acres to adjust for the meandering of the Rio Grande River, that "no lands other than said Pueblo Grant acquired by said Indians as a community by grant, purchase or otherwise" were properly part of the Pueblo's lands. See Abouselman, supra.

16 As late as 1933, in a letter from the Superintendent of the Southern Pueblos Agency of the BIA to Commissioner John Collier of the General Land Office, the Superintendent indicated that he
Similarly, the Pueblo made no claim as the Forest Service acceded to management of the area as a National Forest and later as a wilderness area. Apparently, the Pueblo had several occasions to have dealings with the Forest Service, being forced to obtain permits to hunt for ceremonial and religious purposes within the claimed area. Yet, the Pueblo made no assertion of ownership over the area.

In addition, there is no indication the Pueblo made any claim when the private inholdings were developed in the claimed area, bringing additional people and activity to the area. Despite the fact that this development involved ingress and egress over the Pueblo's current patented area, the Pueblo apparently did not object.

The silence of the Pueblo in light of this considerable activity and active dispute concerning pueblo lands is a rather troubling and significant piece of circumstantial evidence that the Pueblo did not historically believe that an error had been made in the Clements survey. It is equally troubling to consider the fact that, after 120 years, the Pueblo is not making a claim to an additional 10,000 acres on the basis of newly discovered evidence. Rather, the Pueblo is basing its claim on documents which it has either had in its possession or had access to for all of those 120 years, that is, the original grant documents, the survey documents, and the Pueblo's patent.

We are mindful of the general canon of construction that legal ambiguities in treaties and statutes passed for the benefit of Indians should be resolved to the Indians' benefit. Handbook of Federal Indian Law, Felix Cohen (1982), at 221. The canon, however, is not a license to disregard congressional intent. DeCoteau v. District County Court, 420 U.S. 425, 447; see also, Rosebud Sioux Tribe v. Kleppe, 430 U.S. 584 (1977). We must first seek to derive the intent of Congress and the original Spanish grantors from the record they themselves made, as reflected in the legislative history of the Act. As Cohen states at 223, "... the weight of authority indicates that such an intent can also be found ... from clear and reliable evidence in the legislative history of a statute." Here, the intent of Congress is clear--to confirm Spanish and Mexican land grants under the customs of Spain and Mexico. There was no evidence that Congress intended to confer a benefit other than to recognize existing title. See discussion at pp. 2-3. Thus, it is questionable that the canon is applicable. Even if it does

had been advised by the Sandia Pueblo Council that the Pueblo was not interested in using Pueblo Lands Board Funds to purchase additional lands:

"The Sandia Indians decided that they had sufficient lands for their needs . . . ." Towers to Collier, June 27, 1933, NA, Denver, RG 75, BIA, Southern Pueblo Agency, Box 82, CCF 381.
apply, given the foregoing analysis of the documents relating to the grant, we do not believe that the Pueblo has provided sufficient evidence to support their claim or to demonstrate sufficient ambiguity to trigger the canon of construction.

IV. ADDITIONAL LEGAL CONSIDERATIONS

The parties have raised two broad groups of additional legal issues that have yet to be addressed. The first group of issues, raised by USDA, involves defenses of laches, abandonment, acknowledgment of the survey boundaries, and congressional extinguishment of whatever title to the claimed lands the Pueblo may at one time have had. The second group of issues involves the extent of this Department's administrative authority to entertain this claim and to take the action requested by the Pueblo. In view of our conclusion that the Pueblo never owned the claimed land, there is no need for discussion of the first group of issues. We proceed to discuss the second group, as it goes to the fundamental authority of the Department to consider and act upon such a claim and will undoubtedly arise in the future.

A. The Quiet Title Act and the Indian Claims Commission Act


(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).

The waiver of sovereign immunity included in the Quiet Title Act is limited, and the twelve-year statute of limitations is jurisdictional. Thus, no subject matter jurisdiction vests in any federal district court to consider the Pueblo's claim. See, e.g., United States v. Mottaz, 476 U.S. 834, 851 (1986) ("The limitations provision of the Quiet Title Act reflects a clear congressional judgment that the national public interest requires barring stale challenges to the United States' claim to real property, whatever the merits of those challenges.") Moreover, because the Quiet Title Act involves only a limited waiver of sovereign immunity, it is
possible that administrative consideration of the Pueblo’s claim would also be precluded by the twelve-year statute of limitations. As the following discussion makes clear, however, we need not resolve this issue inasmuch as the Indian’s claim is barred by a much more specific statute.

The second and more definitive barrier to consideration of the Pueblo’s claim is included in the Indian Claims Commission Act ("ICCA") of August 13, 1946, as amended, 60 Stat. 1049, formerly codified as 25 U.S.C. § 70. The ICCA gave the Commission jurisdiction to hear all claims of Indian tribes against the United States existing prior to August 13, 1946. The breadth of claims which the Commission had jurisdiction to consider included any "claim[] in law or equity arising under the Constitution, laws, treaties of the United States and Executive Orders of the President." But, the Commission’s sweeping jurisdiction did not stop there. Congress, apparently tired of the frequent requests for special jurisdictional legislation to enable Indian aboriginal claims to be heard on a piecemeal basis, decided to throw open the Commission’s jurisdiction, literally, to any claim, even claims "not recognized by any existing rule of law or equity." 60 Stat. 1049. Moreover, in order to invite the tribes to bring any and every claim, no matter how stale, the Act expressly waived the United States’ defenses of statute of limitations and laches.

Thus, the Act was designed to provide a forum for consideration of any and all Indian claims existing prior to August 13, 1946. In return for this extraordinary waiver of sovereign immunity, Congress expressed its intent to dispose of Indian claims once and for all. The "chief purpose of the [ICCA was] to dispose of the Indian Claims problem with finality." United States v. Dann, 470 U.S. 39, 45 (1985) (quoting H.R. Rep. No. 1446, 79th Cong., 2d Sess. 10 (1945)). Thus, in section 12 of the Act, Congress barred any subsequent consideration of any historical claim not timely presented to the Commission. Section 12, 60 Stat. 1052, said:

17 The five categories of jurisdiction authorized the Commission to consider any "(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."
The Commission shall receive claims for a period of 
five years after August 13, 1946, and no claim existing 
before such date but not presented within such period 
may thereafter be submitted to any court or 
administrative agency for consideration, nor will such 
claim thereafter be entertained by the Congress. 
(Emphasis added.)

The Pueblo’s claim in this matter is based on an alleged mistake in 
a patent that President Lincoln issued in 1864. The decision of the 
Tenth Circuit in Navajo Tribe v. State of New Mexico, 809 F.2d 1455 
(10th Cir. 1987) (Navajo Tribe), dispositively puts to rest all 
stale historical claims such as the Sandia Pueblo’s Civil War era 
claim. Navajo Tribe involved the issuance by President Theodore 
Roosevelt of several Executive Orders adding large acreages of land 
to the Navajo Reservation in New Mexico and Arizona. The Executive 
Orders were revoked in 1908 and 1911. Prior to 1946 much of the 
land was patented to private parties, and to the State of New 
Mexico, with substantial portions remaining in federal ownership. 
In 1982, the Navajo Tribe brought suit claiming it still owned the 
lands subject to the 1907 Executive Orders, maintaining that the 
subsequently issued orders were invalid.

The Tenth Circuit concluded that the claim was forever barred 
because the Navajo Tribe had failed to raise it before the Indian 
Claims Commission. As the Pueblo is doing here, the Navajo Tribe 
had contended that it was seeking to establish its title to the 
land, rather than to recover money for its loss, and that a claim to 
land ownership was outside the jurisdiction of the Commission. The 
Tenth Circuit disagreed, holding that the Navajo’s argument confused 
the question of the ICCA’s jurisdiction over a substantive right 
with the question of appropriate remedy for violation of the right. 
The court reasoned that the ICCA had jurisdiction to entertain a 
broad range of claims existing prior to 1946 while the sole 
available remedy it could grant was money damages. Because the 
Tribe had not pursued this remedy, the Tenth Circuit held the claim 
barred by section 12 of the ICCA. It stated:

18 To the extent that Congress is barred from considering pre-
1946 claims this, of course, is merely an expression of intent 
that such claims will not be cognizable by any branch of the 
United States government. Congress may pass a new law; 
administrative agencies and federal courts do not have that 
authority or option. As to the administrative bar, we would have 
doubt about the constitutionality of this provision if read to 
preclude the President from making recommendations to Congress 
respecting Indian claims legislation. The Constitution expressly 
provides that the President shall have that authority. U.S. 
Const. art. III, § 3. In any event, there is no constitutional 
implication in Congress’ complete preclusion of administrative 
authority to act on pre-1946 claims.
The Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid. This restriction as to remedy represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity that, although any and all accrued claims could be heard before the Commission, land title in 1946 could not be disturbed because of the sorry injustices suffered by native Americans in the eighteenth, nineteenth, and early twentieth centuries. Those injustices would have to be recompensed through monetary awards.

809 F.2d 1455, 1467.

The Tenth Circuit also held that the Navajo Tribe's claim would be barred by the twelve-year statute of limitations period of the Quiet Title Act even if the claim were not barred by the ICCA. It reasoned that "Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property", 809 F.2d 1455, 1468, quoting Block v. North Dakota, 461 U.S. 273, 286 (1983); and it concluded that "the Tribe cannot bring a quiet title action for these lands against the Government." 809 F.2d 1455, 1469.

Thus, even if the Pueblo's claim to the 10,000 acres had any plausibility or color of merit, this Department would, in our view, indisputably be barred by the Indian Claims Commission Act from taking administrative action on it and possibly by the Quiet Title Act as well. This is particularly true in view of the availability to the Pueblo as early as the 1859 survey of all of the facts and circumstances upon which it now relies. Cf. Oglala Sioux Tribe v. United States, 650 F.2d 140, 143 (8th Cir. 1981) ("This precise statutory language [section 12 ICCA] reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.") 19

19 Counsel for the Pueblo in its submissions to this Department stated that "Sandia has never brought any claim for the tract on the western slope of the mountain because the Land Board and Indian Claims Commission offered only monetary compensation. The people of Sandia believe that nothing could adequately compensate them for the loss of their most sacred land and the extinction of their religion. Instead they now seek to regain clear title to the land." Arnold & Porter submission of March 14, 1986, pp. 6-7.

20 We are aware of only one questionably reasoned district court decision which offers even tangential support to the Pueblo's claim. The case, Pueblo of Taos v. United States, 475 F.Supp. 359 (D.D.C. 1979), is inapposite because the Taos Pueblo's claim was not a pre-1946 claim. Neither is the oft-cited Attorney General's Opinion respecting the Yakima Indian Reservation relevant. 42 Op. Att'y. Gen. 441 (1972). In that instance, the Yakima Tribe had timely filed an action under the ICCA.
B. The Federal Land Policy and Management Act

The Pueblo has tried to characterize its claim as predicated simply on the Secretary's authority to survey public lands and to correct errors in patents. All of the Secretary's general authorities in this regard were codified in statutes at the time of the passage of the ICCA. Section 316 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1746, was passed in 1976 and authorizes the Secretary to "correct patents or documents of conveyance . . . relating to the disposal of public lands where necessary in order to eliminate errors." Such authority to make factual corrections cannot be used, however, to revive stale historical claims which Congress has expressly barred in section 12 of the ICCA. See discussion above. This would be true even if the claim were meritorious, which we have concluded it is not. There is no indication in the legislative history or the statute itself indicating an intent to disrupt the strong policy of repose embodied in the ICCA as to pre-1946 claims.

In addition, under the Department's implementing regulations, 43 C.F.R. § 1865.0-5(b), the authority to correct patents under section 316 of FLPMA, 43 U.S.C. § 1746, extends only to the correction of erroneous factual descriptions, terms, conditions, covenants, reservations, and names. These corrections of errors would not include errors predicated upon a claimed misreading of the scope of a grant, as is involved in the matter before us.

CONCLUSION

In conclusion, we find that the Pueblo of Sandia has not met its burden of demonstrating by a preponderance of the evidence that the survey done in 1858 was fraudulent or grossly erroneous. Quite the opposite, our review indicates that the Pueblo received in its 1864 patent at least as much land as was intended in the 1748 Spanish grant, and most likely, more. Even if the Pueblo had shown that the survey was in error, this Department is now precluded by the Indian Claims Commission Act, and perhaps by the Quiet Title Act as well, from acting upon the Pueblo's claim to additional lands.

Ralph W. Tarr

I concur: Ronald Paul Kellogg

12/13/88