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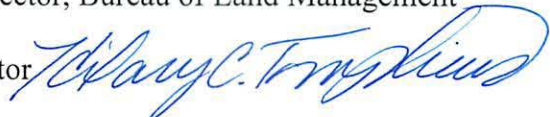
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Memorandum

To: Kevin K. Washburn, Assistant Secretary for Indian Affairs
Michael S. Black, Director, Bureau of Indian Affairs
Neil G. Kornze, Acting Director, Bureau of Land Management

From: Hilary C. Tompkins, Solicitor 

Subject: Boundary Dispute: Pueblo of Santa Ana Petition for Correction of the Survey of the South Boundary of the Pueblo of San Felipe Grant

This memorandum examines the merits of the petition filed on December 22, 1989, by the Pueblo of Santa Ana (Santa Ana) with the Secretary of the Interior to correct the 1909 General Land Office (GLO) resurvey of the south boundary of the Pueblo of San Felipe (San Felipe) in Sandoval County, New Mexico, to the extent the boundary overlaps with a tract of land owned by Santa Ana.

Disagreement over the location of the disputed boundary has been an issue for the Department for many years. In 1980, the Secretary of the Interior approved a right-of-way agreement with the New Mexico Highway Department through the disputed area for the construction of the Interstate Highway (I-25) between Albuquerque and Santa Fe. The right-of-way compensation was put in escrow until the ownership of the lands at issue could be resolved. The Secretary's decision to establish the escrow account was challenged by the Pueblo of San Felipe and upheld. *Pueblo of San Felipe v. Hodel*, 770 F.2d 915 (10th Cir. 1985).

On December 5, 2000, Solicitor John Leshy issued an Opinion, with the concurrence of the Secretary, concluding that the Secretary retains the authority to resurvey the boundaries of Indian reservations and make the necessary corrections when errors were made in identifying those boundaries.¹ Specifically, the Opinion states that the Secretary has the authority to entertain Santa Ana's petition to correct the southern boundary of the San Felipe Pueblo Grant to the extent that it overlaps the El Ranchito Tract owned by Santa Ana. The Opinion also overruled a portion of a previous Opinion of the Solicitor² insofar as that previous Opinion concluded that the Secretary no longer had the authority to consider Indian reservation boundary claims.

¹ Solicitor's Opinion M-37000, *Boundary Dispute Between Santa Ana Pueblo and San Felipe Pueblo: The Secretary's Authority to Correct Erroneous Surveys, Revisiting Part IV of Solicitor's Opinion on 'Pueblo of Sandia Boundary'* (Dec. 5, 2000).

² Solicitor's Opinion M-36963, *Pueblo of Sandia Boundary* (Dec. 9, 1988), 96 I.D. 331 (1988).

On December 5, 2000, the Acting Associate Solicitor, Division of Indian Affairs, requested the Pueblos' respective views on several questions regarding the history of the Pueblos' claims of title. In early January 2001, the Office of the Solicitor received the two Pueblos' submissions.³ On January 19, 2001, Solicitor John Leshy wrote to Governor Bruce Sanchez and Governor Lawrence C. Troncosa, recommending that rather than continuing an adversarial posture, "the Pueblos commit themselves to seriously exploring a negotiated settlement that can be ratified by federal legislation, noting that the Department stands ready to assist the two Pueblos in pursuing a negotiated resolution."⁴

Over twelve years have passed since that recommendation was made and the boundary issue has not been resolved. The ownership of the lands involved in this dispute continues to be of great significance to both Pueblos. In addition, disputes continue to arise regarding use of and access to the lands. Meanwhile, the escrow account holding the payments for the I-25 right-of-way continues to grow.

Because the Solicitor's Office has already confirmed the Secretary's authority to correct erroneous surveys in circumstances such as these, this Opinion addresses whether there is a need to resurvey the disputed boundary. To evaluate this question, we have met with representatives of the two Pueblos and reviewed numerous historical documents and arguments referenced or submitted by the two Pueblos, as well as other records available to us. Also, we have considered the views of the Tenth Circuit Court of Appeals as expressed in *Pueblo of Santa Ana v. Baca*, 844 F.2d 708 (10th Cir. 1988) and the Findings of Facts and Conclusions of Law of the District Court in its slip opinion in *Pueblo of Santa Ana v. Baca*, No. Civ-81-303 C (D.N.M. 1985) (*Baca*). Although an argument could be made that the decision in *Baca* is not binding on San Felipe, the evidence presented and the legal analysis of the Tenth Circuit and the district court is persuasive.

Our research and analysis has led us to conclude that the boundaries of the lands patented to the respective Pueblos conflict, that a resurvey of the disputed boundary is necessary, and that the boundary between Santa Ana's El Ranchito Tract and the Pueblo of San Felipe lies north of the southern boundary line of the San Felipe patent. Therefore, the Bureau of Land Management (BLM), in coordination with the Bureau of Indian Affairs (BIA), needs to address this overlap and undertake a resurvey of the disputed boundary based on this Opinion.⁵

³ Additional submissions have been made by both Pueblos since January 2001.

⁴ Letter from John D. Leshy, Solicitor of the Department of the Interior, to Governor Bruce Sanchez and Governor Lawrence C. Troncosa (January 19, 2001).

⁵ The correction of an existing boundary is called a "resurvey," and is generally conducted in a multi-step process. First, a resurvey is conducted in accordance with BLM's survey manual. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, MANUAL OF SURVEYING INSTRUCTIONS 129-145 (2009). Second, the results of the survey are accepted by the Director of the BLM. See 43 C.F.R. § 9180.0-3. The acceptance of a resurvey establishes a new boundary except where the resurveyed boundary conflicts with private property rights. The Secretary's authority to conduct surveys and resurveys of public lands and Indian reservations is found in 25 U.S.C. § 176 (surveys of Indian or other reservations), 43 U.S.C. § 772 (retracements and resurveys of public lands), 16 U.S.C. § 488 (establishment of exterior boundaries of national forest), and 43 U.S.C. § 1746 (correction of patents and conveyance documents).

I. Introduction

In its petition, Santa Ana claims that approximately 700 acres of its lands were incorrectly included within the boundary adopted in the 1909 GLO resurvey and now are incorrectly recorded as San Felipe lands.⁶ Santa Ana requests that the Secretary (1) recognize that an error was made in the 1909 resurvey, (2) order a BLM corrective resurvey, and (3) correctly locate the southern boundary of the San Felipe Grant to eliminate the overlap with Santa Ana's lands. The petition filed by Santa Ana in 1989 was precipitated by the Tenth Circuit's *Baca* decision. This decision affirmed the District Court ruling that an 1813-1819 Spanish adjudication of the boundary of Santa Ana's El Ranchito Tract governed the Santa Ana claim of title.⁷ The Tenth Circuit also affirmed the lower court's holding that any interest San Felipe may have obtained in the disputed area from the United States' confirmation, patenting, and survey of the San Felipe Grant is subject to and inferior to the title of Santa Ana.⁸

San Felipe opposes Santa Ana's petition. San Felipe argues that the Secretary is without authority to alter its patent boundaries, even if there was an error in the original survey establishing those boundaries. San Felipe also contends that, in any event, the southern boundary line of the San Felipe Grant, as determined by the 1860 original survey and the 1909 GLO resurvey and contained in the present patent to the Pueblo, is correct.

II. Contentions of the Pueblos⁹

The arguments presented to the Department by the Pueblos address issues that can be divided into two categories: (1) the authority of the Secretary to correct a survey with respect to a boundary line separating two Indian reservations; and (2) whether the information provided indicates the need for a resurvey. As noted earlier, the Solicitor's Office previously resolved the question of whether the Secretary has the authority to correct such erroneous surveys, confirming her authority to do so. We further conclude, in this Opinion, that a resurvey is needed to correct the boundary.

A. Pueblo of Santa Ana

Santa Ana contends that both the 1860 original survey of the San Felipe Grant by Rueben E. Clements and the 1909 GLO resurvey performed by Wendell V. Hall incorrectly included an area that is part of the El Ranchito Tract purchased by the Pueblo in 1763. Specifically, Santa

⁶ As currently recorded, the disputed area includes Pueblo restricted fee land, *i.e.*, subject to protections and restrictions against alienation without the consent of the Secretary.

⁷ 844 F.2d at 709.

⁸ *Baca*, slip op. at 9.

⁹ The two Pueblos have met on numerous occasions and have attempted to negotiate a settlement with the assistance of the BIA. According to BIA records, the two Pueblos were close to settling this matter in the fall of 1989. At that time, the Pueblos had a tentative agreement on the following terms: San Felipe would quitclaim its interest in the overlap area to Santa Ana; Santa Ana would relinquish its claim to the funds in the right-of-way escrow account; and Santa Ana would actively support San Felipe's efforts to obtain from the federal government, "replacement lands," adjacent to the San Felipe Reservation, for the acreage it would quitclaim to Santa Ana. Negotiations broke down, however, over the question of ownership of a small parcel of land within the area in dispute. Attempts to re-engage the Pueblos in settlement discussions since that time have been unsuccessful.

Ana argues that the patent issued on the basis of the Clements survey is incorrect in that it described the southern boundary of the San Felipe Grant in a way that creates a one-half mile overlap with the El Ranchito Tract. Santa Ana's principal arguments are as follows: there is no support in the historical documentation for the location of the southern boundary of the San Felipe Grant as located by Clements and repeated by both the 1864 patent and 1909 GLO resurvey; Clements' field notes fail to mention the main southern boundary call in the Grant; and Clements' notes otherwise are internally inconsistent. In this regard, Santa Ana argues that natural monuments generally take precedence over courses and distances, and any inconsistencies in Clements' field notes should have been resolved by the GLO resurvey consistent with this general rule, rather than as provided for in the Surveyor General's special instructions issued to Hall for the 1909 resurvey.

B. Pueblo of San Felipe

San Felipe takes the position that the southern boundary line of the San Felipe Grant, as determined by Clements' survey and Hall's 1909 resurvey and contained in the present patent to the Pueblo, is correctly located. San Felipe contends that the Secretary has no authority to subordinate San Felipe's interests in the disputed area to those of Santa Ana. In this regard, San Felipe argues that granting the relief sought by Santa Ana would subject the United States to a claim for damages for breach of trust. San Felipe also asserts that the Secretary lacks the requisite authority to alter its boundaries as expressed in the confirmation patent, even if there was an original surveyor error in measuring those boundaries. Moreover, San Felipe contends that Santa Ana's claim is time barred by the special statute of limitations set out in section 4 of the Pueblo Lands Act of 1924¹⁰ (PLA) and, further, that the Indian Claims Commission Act of 1946¹¹ (ICCA) and the Quiet Title Act¹² (QTA) precludes both Santa Ana and the Secretary from challenging San Felipe's title to the disputed area. In addition, San Felipe argues that the relief requested by Santa Ana would result in a one-half mile "gap" between the northern edge of the disputed area and the southern boundary of the San Felipe Grant, creating more uncertainties as to the status of the land within the "gap."¹³

As for the issue of whether the 1909 resurvey should have focused on calls to natural monuments rather than to distances, San Felipe contends that the issuance of final instructions to Hall effectively resolved the issue in favor of calls to distances. In this regard, San Felipe submits that Hall's 1909 resurvey endorsed Clements' work, rather than impeached his work as claimed by Santa Ana. Finally, San Felipe claims that the 1819 decision of the Real Audiencia de Guadalajara, affirming the 1813 adjudication of San Felipe/Santa Ana boundary dispute in favor of Santa Ana, was reversed by the Comandante Generale (a high Spanish, and later Mexican, official, stationed in Durango or Chihuahua, Mexico) in 1822.

¹⁰ Pub. Law No. 68-253, 43 Stat. 636.

¹¹ Pub. Law No. 79-726, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. § 70—70v-2).

¹² Pub. Law No. 92-562, § 3(a), 86 Stat. 1176 (codified as amended at 28 U.S.C. § 2409a).

¹³ The BLM does not believe a gap will be revealed as a result of a resurvey. In light of this, we do not further analyze this assertion.

III. Historical Background

Santa Ana and San Felipe Pueblos are situated in Sandoval County, New Mexico. Santa Ana's Pueblo Grant lies just to the north of the City of Bernalillo; San Felipe's Pueblo Grant is situated just north of Santa Ana's El Ranchito Tract. The overlap area has been in dispute since Santa Ana purchased the El Ranchito Tract in 1763 and the dispute continued when the lands came under the jurisdiction of the United States.

A. Santa Ana's El Ranchito Tract

1. Santa Ana's Purchase of the El Ranchito Tract

The traditional village of the Pueblo of Santa Ana is located on the north bank of the Rio Jemez, approximately six miles west from that river's confluence with the Rio Grande. Santa Ana traditionally has used the lands along the east side of the Rio Grande for farming and other purposes. Following Spain's reconquest of New Mexico in the 1690s after the Pueblo Revolt of 1680, Spanish colonists began to resettle this territory. Due to Spanish colonization of the area, Santa Ana began purchasing its traditional lands from the Spanish in the early 1700s.

In 1763, Santa Ana purchased a tract of land, known as the El Ranchito Tract, which encompasses the area in dispute today. The deed to the El Ranchito tract describes the tract as being bounded on the north by the lands of the Pueblo of San Felipe.¹⁴

Soon after Santa Ana acquired the El Ranchito Tract, tensions developed over the placement of the northern boundary. San Felipe claimed certain areas of the northern portion of the tract deeded to Santa Ana and began selling parts of this land to Spanish settlers.¹⁵ In 1813, the Spanish Governor interceded and resolved the dispute in favor of Santa Ana, and thereby established the northern boundary along the line described in the deed to Santa Ana.¹⁶ Dissatisfied with this determination, San Felipe appealed its case to the Real Audiencia in Guadalajara, which sat as the supreme court of the Territory. Ultimately, the Audiencia ruled in Santa Ana's favor. As a consequence, San Felipe was required to give some of its own lands to the Spanish settlers to whom it had sold Santa Ana's lands in the El Ranchito Tract.¹⁷

2. Treaty of Guadalupe Hidalgo

The sovereign power of Spain over the territory of New Mexico passed to the Republic of Mexico in 1821, and then to the United States in 1848 pursuant to the Treaty of Guadalupe

¹⁴ *Baca* slip op. at 2.

¹⁵ *Baca*, 844 F.2d at 710.

¹⁶ *Id.*

¹⁷ *Baca*, slip op. at 3. Documentation of the 1813-1818 Audiencia adjudication was submitted as exhibits and testified to in the Tenth Circuit *Baca* litigation, discussed in greater detail in Section IV. The *Baca* District Court and the Court of Appeals found this evidence convincing. As the Tenth Circuit stated, "because of their thorough review of this matter, substantial weight should be given to the findings of the Spanish authorities. Accordingly, we uphold the District Court's findings that this adjudication conclusively determined the dispute in favor of Santa Ana." *Baca*, 844 F.2d at 712.

Hidalgo.¹⁸ Article VIII of that Treaty established the right of “Mexicans” to retain the property they possessed in the ceded area.¹⁹ Pueblo Indians had been treated as Mexican citizens²⁰ and were considered entitled to this protection when Congress passed the Surveyor-General Act of 1854.²¹ Section 8 of that Act directed the Surveyor-General of New Mexico, a presidential appointee under instructions from the Secretary, to make a “full report” to the Congress on the validity of all claims under the laws, customs, and usages of Spain and Mexico, plus a report on the nature of the titles to the land held by “all pueblos.”²² Such a 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. . . .”²³ The Surveyor-General filed his report with the Secretary, who transmitted it to Congress. The Act of December 22, 1858, in turn, confirmed the Spanish land grants of several Pueblos, including that of San Felipe.²⁴ The 1858 Act confirmed the original grants to the Pueblos, but did not specifically address privately acquired lands such as Santa Ana’s El Ranchito Tract.²⁵

B. Surveys of the San Felipe Pueblo Grant Boundary

Since the United States took possession of New Mexico in 1848, the boundary of the San Felipe Pueblo Grant has been the subject of survey, examination, and resurvey.

1. 1860 Clements Survey

Pursuant to the 1858 confirmation of title to the San Felipe Pueblo land grant that had been recognized by the Spanish and Mexican Governments, in 1859 the Department contracted with Rueben E. Clements to survey the San Felipe Grant in accordance with the sparse boundary descriptions in the 1689 Spanish grant document. In part, the Grant’s boundaries were described as being on the east “one league”²⁶ (a call of course and distance) and bounded on the south by a “little grove, which is in front of a hill called Culcurra, opposite the fields of the Santa Ana Indians” (a call to natural monuments).²⁷

Clements commenced his survey by “running” one league due east from the front door of the San Felipe Mission to find the east boundary of the Pueblo.²⁸ He then turned south along the east boundary monumenting the boundary as he progressed. Clements located the southeastern corner of the Grant at “one of the old established corners of this Pueblo,” describing the vicinity of the corner as being characterized by “much sign of old gold mines, 3d rate broken land,

¹⁸ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico art. VIII, Feb. 2, 1848, 9 Stat. 922 (Treaty of Guadalupe Hidalgo).

¹⁹ *Id.* at 929-30.

²⁰ See *United States v. Sandoval*, 231 U.S. 28, 45 (1913).

²¹ Act of July 22, 1854, Ch. 103, 10 Stat. 308 (1854).

²² *Id.* at 309.

²³ *Id.*

²⁴ Act of December 22, 1858, 11 Stat. 374 (1858).

²⁵ *Id.*

²⁶ A league was a principal Spanish measurement of distance being equal to 5000 “varas”; a vara has been determined to be equal to 33 inches, thus a league equals 13,750 feet, or approximately 2.6 miles.

²⁷ *Report of the Surveyor General’s Office, New Mexico, as recorded in The Annual Report of the United States Department of Interior*, 504 (1856).

²⁸ Rueben E. Clements, *Field Notes of the Pueblo de San Felipe* 1 (Jan. 1860).

scattering pinon & cedar.”²⁹ He measured this point to be 440 chains, or 5.5 miles, south of the beginning point, ten chains (660 feet) south of a spring, and five chains (330 feet) south of where he crossed San Francisco Creek.³⁰ From the southeast corner, Clements ran the southern boundary of the Grant on a line N. 87° W.³¹ There is no mention in his field notes of any “little grove” on the southern boundary. The survey eventually was approved by the GLO, and a patent was issued in 1864.

2. 1900 Examination of Survey Conducted after Clements Survey

Soon after Clements’ survey was concluded, surveys of public domain lands and private land claims along the eastern and southern boundaries of the San Felipe Grant raised questions about the location of the southeast corner of the Grant as described by Clements. Efforts to identify and locate with certainty the southeast corner of the Grant, *i.e.*, “one of the old established corners of this Pueblo,”³² as well as other Clements monuments, were unsuccessful. In 1900, the GLO retained Thomas Hurlburt to conduct an examination of surveys of the “Pueblo de San Felipe” Grant.³³

The object of Hurlburt’s field examination of portions of the south, east and west boundaries of the San Felipe Grant was to “ascertain if certain known objects noted by [Clements] in his field notes on the east [boundary] and near the S.E. corner could be found and identified, and if found, whether or not the corners and ‘boundaries’ of the said grant could be determined and identified as established by [Clements].”³⁴ The principal object that Hurlburt sought was a spring located on the north side of San Francisco Creek since he believed that if he could find and identify the spring it would lead to finding the original southeast corner of the Grant “and perhaps to a solution of the survey of the whole grant as executed by [Clements].”³⁵

While Hurlburt found what he believed to be the spring described by Clements and possibly the southeast corner of the grant as determined by Clements, his findings were inconclusive. For example, he could not find any sign of mining in the area as described by Clements. Furthermore, when he proceeded to the southwest corner of the Grant as established by Clements from what he assumed to be Clements’ southeast corner, Hurlburt found the southwest corner did not agree with the topography described in Clements’ field notes.³⁶ As a result of his examination, Hurlburt posed the question whether “courses and distances reproduced on the ground without regard to natural objects or monuments define the true [boundaries] of this grant, or, will the lines and the monuments as established by Deputy Clement[s] in his original survey define the proper boundaries.”³⁷

²⁹ *Id.* at 2-3.

³⁰ *Id.*, at 2-3.

³¹ *Id.*, at 3.

³² *Id.*, at 2.

³³ Instructions from Chief Clark, U.S. Surveyor General, to Thomas M. Hurlburt, Special Examiner (Feb. 24, 1900).

³⁴ Thomas M. Hurlburt, Field Notes of the Examination of Surveys of New Mexico at 1 (May 1900).

³⁵ *Id.* at 2.

³⁶ *Id.* at 2-4.

³⁷ *Id.* at 5.

3. 1909 GLO (Hall) resurvey

In 1907, the GLO contracted with Wendell V. Hall to conduct a resurvey of the San Felipe Grant. Hall was instructed to reestablish the southeastern corner by following Clements' courses and distances. Thus, with respect to the eastern boundary line, Hall was instructed to:

continue due south on a true line [from the point of beginning, one league east of the San Felipe mission church] with a new series of half mile and mile corners, for a distance of 5 miles and 40 chains [five and one half miles], where you will establish the southeast corner of the San Felipe grant. . . .³⁸

In other words, Hall was instructed to resurvey the San Felipe Grant according to the distances and measures contained in the confirmation patent derived from the Clements survey, ignoring the few calls to natural monuments contained in those notes, including Clements' description of the location of San Francisco Creek. On the basis of Hall's resurvey, the southeastern corner of the Grant was placed at its present location. Extending the southern boundary westward from the southeast corner established by Hall, but using the bearing that Clements prescribed, created a one-half mile overlap with Santa Ana's previously surveyed El Ranchito Tract, which is the area in dispute.

IV. Examination of Previous Legal Proceedings

A. Court of Private Land Claims Proceedings

Santa Ana's El Ranchito Tract, including the overlap area, was confirmed by the Court of Private Land Claims (CPLC) on May 31, 1897. The CPLC was established by the Act of March 3, 1891 to hear claims in specific states and territories, including the Territory of New Mexico.³⁹ In *Pueblo of Santa Ana v. United States*, the CPLC concluded:

Sixteenth: This confirmation shall not pass to the confirmees [the Pueblo of Santa Ana and its inhabitants] any right or title to any lands heretofore sold or granted by the United States to any other parties; and should a survey of the tract herein confirmed develop that a part of the same lies within the lands heretofore patented to the Indians of San Felipe pursuant to or purporting to be pursuant to the act of Congress approved December 22, 1858, then and in that event such conflict shall create no liability as against the United States, to the confirmees herein or to any other parties for damages for the land thus patented, any such claim for damages for land so patented by the United States to said Pueblo of San Felipe having been expressly waived on the hearing of this cause by the claimants herein.⁴⁰

³⁸ Office of U.S. Surveyor General, *Special Instructions issued to Wendell V. Hall, D.S., in connection with contract No. 403, dated February 1, 1907, providing for the resurvey of the San Felipe grant, New Mexico* (Feb. 1907).

³⁹ 26 Stat. 854 (1891).

⁴⁰ See *Pueblo of Santa Ana v. United States*, Case No. 157. The legislation establishing the CPLC states, in relevant part, that titles confirmed by the CPLC shall not "have any effect other or further than as a release of all claims of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby." § 8, 26 Stat. 854, 857-58 (1891). In *Baca*, the district court concluded that this clause "merely acknowledged that the United States would not quitclaim the same

From this judicial confirmation, the Department contracted with John H. Walker in 1898 to survey the El Ranchito Tract, and the nearby Angostura Grant, and to resurvey the east and south boundaries of the Pueblo of San Felipe Grant. This survey eventually was accepted, and a patent was issued to the Santa Ana on October 16, 1909.⁴¹ Prior to the issuance of the patent to Santa Ana, however, the 1909 resurvey by Hall resulted in a conflict between the boundaries of the El Ranchito Tract and the southern-most lands of San Felipe as patented.

B. Pueblo Lands Board Proceedings

The conflict with the El Ranchito Tract boundaries again was highlighted in the proceedings before the Pueblo Lands Board (PLB). Beginning in 1925, the PLB, established pursuant to the PLA, began to investigate and determine title to lands within the exterior boundaries of lands belonging to the Pueblo Indians of New Mexico (whether granted or purchased). Initially, the PLB recognized that the “‘El Ranchito Grant’ . . . had been excluded from the Santa Ana purchase by the Court of Private Land Claims as shown by its decree of May 31, 1897. . . .”⁴²

In 1931, the PLB noted in a supplemental report that the area in conflict had been patented to San Felipe Pueblo in 1861 and to the Santa Ana Pueblo in 1909.⁴³ The PLB went on to note that “[i]t does not appear from the evidence that the Indians of San Felipe have ever, in the memory of any living Indian been in actual possession of the tract. * * * On the contrary, it has been demonstrated to the satisfaction of the Board that this area in conflict was included in land purchased by the Santa Ana Indians, known as the Ranchitos tract, which was patented to the Santa Ana Pueblo in 1909.”⁴⁴ In order to resolve the conflict, the PLB recommended a “friendly suit” between the two Pueblos, with Santa Ana being the plaintiff and San Felipe the defendant.⁴⁵ This suggested judicial resolution has never been pursued because neither Santa Ana nor San Felipe has been willing to consent to the limited waiver of their sovereign immunity required to bring such a suit.

C. Tenth Circuit Proceedings Involving the Boundary Dispute

1. Pueblo of San Felipe v. Hodel (10th Cir. 1985)

Conflicting claims of ownership of the overlap area arose again in 1978-1979 when San Felipe negotiated a right-of-way agreement with the New Mexico State Highway Department to permit the State to make improvements to I-25. A portion of the right-of-way crossed the area in dispute. The Secretary ultimately approved the right-of-way subject to the condition that the compensation attributable to the overlap area would be placed into escrow pending resolution of

land twice, and has no bearing on Santa Ana’s rights as against San Felipe in the area of overlap.” *Baca – District Court*, slip op. at 8 (Conclusions of Law).

⁴¹ Pueblo Lands Board, Report on Santa Ana Pueblo / El Ranchito Grant or Purchase 1 (July 19, 1927).

⁴² Pueblo Lands Board, Report on Santa Ana Pueblo / El Ranchito Grant or Purchase 2 (July 19, 1927).

⁴³ Pueblo Lands Board, Supplemental Report Upon a Conflict Between San Felipe Pueblo and Ranchitos Purchase of the Santa Ana Pueblo at 2-3 (June 30, 1931).

⁴⁴ *Id.*

⁴⁵ *Id.* at 3-4.

the conflicting claims to ownership.⁴⁶

After the escrow account was established, San Felipe brought an action claiming that it was entitled to disbursement of the escrow funds. San Felipe contended that it had never consented to the escrow arrangement and that the right-of-way covered only its interest in the overlap area, not any interest held by Santa Ana in the disputed area. The District Court ruled that the right-of-way was valid and that the Secretary had acted within his discretion in approving the transaction and San Felipe appealed.⁴⁷ The Tenth Circuit approved the escrow arrangement in *Pueblo de San Felipe v. Hodel*.⁴⁸

2. *Pueblo of Santa Ana v. Baca* (10th Cir. 1988)

The *Baca* case arose out of an action by the Pueblo of Santa Ana to eject defendants Alfredo Baca and Mary Lou Baca from a 131-acre parcel in the El Ranchito Tract and to recover damages caused by the trespass.⁴⁹ The defendants argued that the district court erred in relying on boundaries established in the 1813-1819 Spanish adjudication, rather than the boundaries set forth in the official GLO survey.⁵⁰ The district court held, among other things that: the 1813-1819 adjudication by the Spanish authorities of the boundary dispute between Santa Ana and San Felipe conclusively determined that dispute in favor of Santa Ana; Congress' confirmation of the San Felipe Pueblo Grant was made subject to valid adverse rights and conveyed no rights that San Felipe did not have as of 1848; and, to the extent that San Felipe's Pueblo Grant purported to convey any interest in lands owned by Santa Ana, "the patent is subject to and inferior to Santa Ana's title."⁵¹ The Tenth Circuit Court of Appeals agreed with the district court, finding that "the boundaries of the grant are more accurately determined by the adjudication than by the United States survey."⁵²

In affirming the District Court's reliance on the 1813-1819 Spanish adjudication, the court found that Santa Ana's expert "convincingly established that the adjudication settled the ownership of the disputed parcel between Santa Ana and San Felipe."⁵³ The court noted that the "multi-tiered judicial system served as a full-scale boundary adjudication with a trial, appeal de novo, and further appeal. The decision-makers evaluated a relative wealth of evidence over a considerable period of time. Because of their thorough review of this matter, substantial weight should be given to the findings of the Spanish authorities."⁵⁴ As the Tenth Circuit explained:

In May 1813, Santa Ana complained to local officials that San Felipe had sold farmland within [Santa Ana's] boundaries. An official discussed the dispute with both parties and viewed the area before deciding the issue in favor of Santa Ana. San Felipe successfully petitioned for review. Jose Maria de Arze, the First Lieutenant of the Presidial Company

⁴⁶ *Pueblo de San Felipe v. Hodel*, 770 F.2d 915, 916 (10th Cir. 1985).

⁴⁷ *Id.* (discussing the district court ruling).

⁴⁸ *Id.* at 916-17.

⁴⁹ *Baca*, 844 F.2d at 709.

⁵⁰ *Id.*

⁵¹ *Baca*, slip op. at 8.

⁵² *Baca*, at 709.

⁵³ *Id.* at 711.

⁵⁴ *Id.* at 711-12.

of Santa Fe, held three days of hearings during which both parties submitted documents describing the boundaries of their land. At the conclusion of these hearings, De Arze found that the San Felipe had trespassed on lands owned by Santa Ana. Still dissatisfied, San Felipe appealed to the Real Audiencia in Guadalajara. In March 1818, the Audiencia ruled in favor of Santa Ana and ordered San Felipe to return lands it had sold in the disputed parcel.⁵⁵

V. Legal Analysis

The origins of this dispute date at least to the early eighteenth century. The record is a complex one, consisting both of land transactions and respective official acts of three sovereigns (Spain, Mexico, and the United States) pertaining to this area.

We have reviewed numerous historical documents and written arguments referenced or submitted by the two Pueblos as well as other records at our disposal. We also have considered the views of the Tenth Circuit as expressed in *Baca*. It is relevant to note that although the *Baca* decision did not involve the Pueblo of San Felipe, the evidence presented in *Baca* and the legal analysis of the courts is persuasive and confirms the factual evidence in the record before the Department. In addition, proceedings before the Real Audiencia, the Court of Private Land Claims, and the Pueblo Lands Board clearly support the need for a resurvey by BLM to define more accurately what the boundaries are for the two Pueblos. Thus, based upon our examination of the record before us, including both Pueblos' factual and legal arguments, we conclude that the boundaries of the lands patented to the respective Pueblos conflict, that resolution of the resulting overlap would favor Santa Ana, and that a resurvey of the disputed boundary is necessary. The arguments presented by San Felipe, discussed in the remainder of this section, do not alter this conclusion.

A. *The Audiencia Proceedings*

San Felipe claims that the 1819 decision of the Audiencia affirming the 1813 adjudication of the boundary dispute in favor of Santa Ana had been set aside or reversed. We find, however, that the documents and evidence submitted by San Felipe are insufficient to support their claim. Significantly, San Felipe has failed to produce any document that states specifically that the decision of the Audiencia had been reversed or set aside. Rather, the documents submitted by San Felipe are secondary sources which, at best, pertain to "lands of the Santa Ana" but are otherwise inconclusive as to the identity or disposition of these lands.

As a matter of fairness and due process, a court of the United States will not recognize a foreign judgment that was rendered by a "judicial system that does not provide impartial tribunals or procedures compatible with due process of law[,] or . . . rendered [by a court that] did not have jurisdiction over the defendant in accordance with the law of the rendering state"⁵⁶ Accordingly, if the Audiencia proceedings were not impartial or denied an interested party, either San Felipe or Santa Ana, the opportunity to be heard, the doctrine of comity cannot provide the basis for recognition of these proceedings in our consideration of Santa Ana's

⁵⁵*Id.* at 711.

⁵⁶ Restatement (Third) of Foreign Relations Law § 482(1)(1987).

petition. The question of whether to rely upon evidence taken from the Audiencia proceedings in reaching a determination on the merits of the petition before us, we believe, been resolved by both the District Court⁵⁷ and the Tenth Circuit,⁵⁸ which relied on evidence from the Audiencia proceedings. If the evidence of such proceedings indicated that they were biased, then neither federal court could or would have relied on the proceedings. In fact, the Tenth Circuit stated:

[T]he adjudication settled the ownership of the disputed parcel between Santa Ana and San Felipe. This multi-tiered judicial system served as a full-scale boundary adjudication with a trial, appeal *de novo*, and further appeal. The decision-makers evaluated a relative weight of evidence over a considerable period of time. Because of their thorough review of this matter, substantial weight should be given to the findings of the Spanish authorities. Accordingly, we uphold the district court's findings that this adjudication conclusively determined the dispute in favor of Santa Ana.⁵⁹

In light of the Tenth Circuit's reasoning, it is appropriate to give due consideration and weight to the Audiencia proceedings in reaching our conclusion that BLM needs to undertake a resurvey of the boundary.

B. Significance of Congressional Confirmation of San Felipe Grant in 1858

San Felipe asserts that the boundaries as expressed in the confirmation patent, even if there was an original surveyor error in measuring those boundaries, cannot be altered to "take away" San Felipe's lands.

The Surveyor General Act of 1854 Act makes it clear that Congress intended to confirm title to the pueblos of the Spanish land grants that were made to them while they were under Spanish dominion. The Treaty of Guadalupe Hidalgo, as previously stated, guaranteed the liberty and property of those residing in the newly acquired territory.⁶⁰ Further, cases decided around the time of the 1858 confirmation of the San Felipe Grant confirm that the United States was not granting a new right to property in confirming these grants and issuing patents to the pueblos. Rather, the United States was recognizing the legitimacy of a preexisting right. In *United States v. Joseph*⁶¹ the Court stated:

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 [T]reaty of Guadalupe Hidalgo

[Congress' confirmation of title] 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

⁵⁷ *Baca*, slip op. at 8.

⁵⁸ *Baca*, 844 F.2d at 711-12.

⁵⁹ *Id.*

⁶⁰ 9 Stat. 922, 929-30.

⁶¹ 94 U.S. 614 (1877).

competent and perfect title in his individual right.⁶²

Congress' confirmation of the San Felipe title, then, was a recognition of the Pueblo's title to all of the land described in the grant.⁶³ A resurvey would not adjust the quantity of lands set aside for the Pueblos, as San Felipe argues, but rather, would define more accurately the location of the original boundaries.

C. Applicability of the Pueblo Lands Act, the Indian Claims Commission Act, and the Quiet Title Act

San Felipe argues that Santa Ana ought to have brought its claim before the Pueblo Lands Board, and, to the extent that it failed to do so within the one year statute of limitations period provided for in the 1933 amendments to the PLA, Santa Ana is barred from raising it now. San Felipe also argues that a claim before the Indian Claims Commission (ICC) would have provided a remedy, but that Santa Ana has fatally failed to pursue such a remedy. Finally, San Felipe argues that an additional forum would have been a quiet title action under the QTA but, because the twelve year statute of limitations has run, Santa Ana cannot avail itself of the QTA. As previously noted, neither Santa Ana nor San Felipe has been willing to consent to a limited waiver of their sovereign immunity.

The PLA, enacted by Congress in 1924, provided no remedy for boundary disputes of the sort at issue here. The PLA created the Pueblo Lands Board to examine and resolve non-Indian claims to Pueblo lands.⁶⁴ Under the PLA, non-Indians who believed they met the criteria of section 4 of the Act filed claims with the Board and the Board determined whether the claims in fact met the criteria.⁶⁵ Section 4 also authorized the Pueblo to file suit on their own behalf to protect their title from claimants who succeeded before the Board.⁶⁶ However, as noted by the Tenth Circuit, the Pueblo Lands Board could not adjudicate claims by one Pueblo against another.⁶⁷ Consequently, a Pueblo could not bring suit against another Pueblo under section 4.⁶⁸ Accordingly, San Felipe's claim that Santa Ana could have presented its claim to the disputed area to the Board for resolution is incorrect, and the Act's statute of limitations is not applicable.

As for San Felipe's ICCA and QTA arguments, we believe these to have been resolved in the Leshy Opinion. Nonetheless, each argument warrants brief discussion. First, citing the Tenth Circuit's 1987 decision in *Navajo Tribe v. State of New Mexico*,⁶⁹ San Felipe asserts that Santa Ana could have brought a claim under the ICCA and because it did not, Santa Ana's requested relief is barred.⁷⁰ The ICCA established the Indian Claims Commission to adjudicate

⁶² *Id.* at 618-19.

⁶³ *Id.* See also *Tameling v. United States Freehold & Freehold 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.”).

⁶⁴ See *United States v. Thompson*, 941 F.2d 1074, 1075 (10th Cir. 1991).

⁶⁵ *Id.* at 1075-77; *Baca*, 844 F.2d at 709 n.1.

⁶⁶ *Thompson*, 941 F.2d at 1077; *Baca*, 844 F.2d at 709 n.1.

⁶⁷ *Baca*, 844 F.2d at 709 n.1.

⁶⁸ *Id.* (stating “Pueblos could only file suit in response to claims made against them by non-Indians.”).

⁶⁹ 809 F.2d 1455 (10th Cir. 1987)

⁷⁰ Pub. Law No. 79-726, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. § 70—70v-2). The Commission

claims by Indian tribes against the United States for past unfair treatment. In relevant part, the Act provides:

[t]he Commission shall receive claims for a period of five years after the date of the approval of this Act [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.

60 Stat. 1052.

We are not persuaded by San Felipe’s arguments. In *Navajo Tribe*, the court held that the Tribe’s claim, that the federal government had never effectively extinguished the Tribe’s title to lands that had been added to the reservation by executive order, was barred by the Tribe’s failure to pursue an ICCA claim. Unlike the issue before us, *Navajo Tribe* was a case involving an effort to secure title to land under federal control, not a boundary dispute between two tribes. As a result, we do not believe that Santa Ana is barred by the ICCA from petitioning the Department to address a boundary dispute. Nor, as explained in the Leshy Opinion, do we believe the Secretary is barred from considering that petition.

Similarly, San Felipe argues that Santa Ana should have brought a claim to quiet title to the disputed area under the QTA, but has fatally failed to do so. The QTA waives the United States’ sovereign immunity from “a particular type of action, known as a quiet title suit: a suit by a plaintiff asserting a right, title, or interest in real property that conflicts with a right, title, or interest the United States claims.”⁷¹ However, this limited waiver of sovereign immunity expressly “does not apply to trust or restricted Indian lands.”⁷² The lands at issue, as with the majority of pueblo lands, are held in restricted fee in which the United States has a discernible interest, *i.e.*, restriction on alienation.⁷³ The Act’s express exclusion of “trust or restricted Indian lands” is applicable here, and thus, would not have provided Santa Ana a remedy.⁷⁴ Accordingly, it is our opinion that the QTA has no bearing on this proceeding.

D. Granting the Relief Requested by Santa Ana Does Not Give Rise to a Breach of Trust

San Felipe asserts that should the Secretary grant the relief requested by Santa Ana, such action would amount to a breach of the United States’ trust obligation toward San Felipe on the basis that it has been the policy and practice of the United States to adhere to the San Felipe

terminated in 1978.

⁷¹ *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012) (internal quotation marks and citation omitted).

⁷² Pub. Law No. 92-562, § 3(a), 86 Stat. 1176 (codified as amended at 28 U.S.C. § 2409a(a)).

⁷³ See *United States v. Candelaria*, 271 U.S. 432, 442-43 (1926) (pueblo Indians hold their land with restriction on alienation).

⁷⁴ In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Supreme Court held that the QTA’s “trust or restricted Indian lands” exception did not bar an APA challenge to the Department’s decision to take land into trust for a tribe where the claimant did not also claim a “right, title, or interest” to the property at issue. 132 S. Ct. at 2205-06. Here, however, because a challenge to title by Santa Ana would fall squarely within the scope of the QTA, the Act’s “trust or restricted Indian lands” exception to the waiver of sovereign immunity would have prevented such a suit.

patent. In our opinion, San Felipe's assertion is unfounded. Based on our analysis and the review of relevant case law, we do not believe that the record, as it stands now, indicates that San Felipe's "interest" in the overlap area rises to the level of a property interest that would warrant finding a breach of trust should a resurvey resolve the boundary dispute in Santa Ana's favor.

A determination that Santa Ana's title to the overlap area is superior and warrants a correction of the San Felipe Grant survey does not amount to a "taking" of San Felipe lands. Further, every indication in the record before us suggests that San Felipe never had a compensable interest in the overlap area. At the time of the Treaty of Guadalupe Hidalgo, Santa Ana's rights were not to be affected in any respect by the change in sovereignty in New Mexico.⁷⁵ As Justice Holmes stated in *Boquillas Land and Cattle Company v. Curtis*: "It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant."⁷⁶

VI. Conclusion

The time has come to bring resolution to this longstanding boundary dispute. Our research and analysis has led us to conclude that the boundaries of the lands patented to the respective Pueblos conflict, that a resurvey of the disputed boundary is necessary, and that the boundary between Santa Ana's El Ranchito Tract and the Pueblo of San Felipe lies north of the southern boundary line of the San Felipe patent. Therefore, the BLM, in coordination with the BIA, needs to address this overlap and undertake a resurvey of the disputed boundary based on this Opinion.

⁷⁵ *Astiazaran v. Santa Rita Land & Mining Co.*, 148 U.S. 80, 81 (1893); *Tameling v. United States Freehold & Emigration Co.*, 93 U.S. 644, 661 (1876); See also Treaty of Guadalupe Hidalgo.

⁷⁶ 213 U.S. 339, 344 (1909).