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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PUEBLO OF JEMEZ, a federally)
recognized Indian tribe,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant,)
)
and)
)
NEW MEXICO GAS COMPANY,)
)
Defendant-in Intervention.)
_____)

Case No. 1:12-cv-800 (JB)(JHR)

**PUEBLO OF JEMEZ’S OPPOSED MOTION AND MEMORANDUM IN
SUPPORT OF ITS MOTION TO RECONSIDER AND ALTER FINAL
DECISION**

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MOTION

The Pueblo of Jemez asks the Court to reconsider its Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order issued on August 31, 2019, ECF No. 398 (“Order”), to address Jemez Pueblo’s exclusive and dominate use of discrete areas within the Valles Caldera.

MEMORANDUM IN SUPPORT OF MOTION

LEGAL STANDARD

A motion for reconsideration “may be construed in one of two ways: if filed within [28] days of the district court's entry of judgment, it is treated as a motion to alter or amend the judgment under Rule 59(e); if filed more than [28] days after entry of judgment, it is treated as a motion for relief from judgment under Rule 60(b).” *Anderson Living Tr. v. WPX Energy Prod., LLC*, 308 F.R.D. 410, 427 (D.N.M. 2015) (Browning, J.) (motion granted in part and denied in part) (citing and quoting *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir.2005)).¹

Under Federal Rule of Civil Procedure 59(e), “the Court is not restricted to rule 50(b)’s remedies and may alter the judgment when there is: . . . (3) the need to correct clear error or prevent manifest injustice.” *Nelson v. City of Albuquerque*, 283 F. Supp. 3d 1048, 1099 (D.N.M. 2017) (Browning, J.) (altering judgment). Under Rule 59(e)’s framework:

The Tenth Circuit has noted that motions to alter, amend, or reconsider should not rehash old arguments, or advance new arguments or facts that could have been raised earlier. . . . *Servants of Paraclete v. Does*, 204 F.3d at 1012 (“Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party’s position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.”). . . . *Servants of Paraclete v. Does* does not force the Court to deny a motion to amend or alter, simply because it raises identical issues If, on the other hand, a party raises an identical issue on a motion to alter, and, upon the district judge’s reflection, perhaps after passions have cooled, he or she concludes that he or she erred previously, *Servants of Paraclete v. Does* does not chain that district judge to an erroneous legal conclusion. There is no sound reason for a

¹ “The time limit in Rule 59(e) is now twenty-eight days rather than ten days.” *Anderson*, 308 F.R.D. at 427.

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district judge to be unable to change a ruling he or she has made if he or she has become concerned that he or she is wrong.

Nelson, 283 F. Supp. 3d at 1099 (internal citation omitted).

Under Rule 60(b), the court may relieve a party from final judgment on the basis of “mistake” or “any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b)(1)-(6).

This Court has identified three factors applied to analyze motions to reconsider. First, the Court should look at how thoroughly the point was addressed in the earlier ruling:

The Court should look, not to the overall thoroughness of the prior ruling, but to the thoroughness with which the Court addressed the exact point or points that the motion to reconsider challenges. A movant for reconsideration thus faces an easier task when he or she files a targeted, narrow-in-scope motion asking the Court to reconsider a small, discrete portion of its prior ruling than when he or she files a broad motion to reconsider that rehashes the same arguments

Anderson, 308 F.R.D. at 434. Second, reconsideration should be “on terms that protect against reliance on the earlier ruling.” *Id.* at 437.² Third, courts are more inclined to grant motions for reconsideration if the movant presents a clear indication that the court erred. *Id.* at 434-35.

ARGUMENT

I. Introduction.

The Order concludes as a matter of law that a “tribe’s non-exclusive use of one segment of the claim area is not automatically imputed to the whole claim area.” Order COLs ¶ 371, at 453. Consistent with this conclusion, Jemez Pueblo asks that the Court consider the evidence and its findings confirming Jemez Pueblo uses in four discrete subareas, and in doing so consider the lack of geographically specific findings or record evidence showing other tribal uses in these

² Because the United States is a party to this action, the period in which to file an appeal is sixty days from entry of the Order. Fed. R. App. P. 4(a)(1)(B).

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four discrete areas: Banco Bonito (map attached as Exhibit A);³ Redondo Meadows (map attached as Exhibit B); the western two-thirds of Valle San Antonio (map attached as Exhibit C); and discrete subareas on Redondo Mountain (identified in Exhibit D).⁴ The Court’s Findings of Fact and Conclusions of Law, and the record evidence, confirm that Jemez Pueblo’s uses in these areas was continuous and also exclusive and dominant of uses by other tribes.

II. The Law of Aboriginal Title.**A. The Law of Exclusive Use and Occupancy.****1. Evidence of Use by Other Tribes Sufficient to Defeat a Showing of Exclusive Use and Occupancy Must be Specific to the Relevant Time Period.**

To establish aboriginal Indian title, a tribe must show actual, exclusive, and continuous use and occupancy for a long time. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1165 (10th Cir. 2015). Implicit in this formulation of the law is that an existence of some identifiable period of time during which the Tribe continuously maintained exclusive use and occupancy –i.e the “relevant period.” Use of a claim area by other tribes **outside** of this relevant period does not eliminate a showing of exclusive or dominant use by a claimant tribe **during** the relevant period.

The issue here is whether Jemez Pueblo used and occupied discrete subareas within the Valles Caldera during a relevant period in which Jemez Pueblo’s use was dominant as to other Indians. Courts have found relevant periods of seven years (*Cramer v. United States*, 261 U.S.

³ All of these discrete areas were identified and discussed by Jemez witnesses and they also are included in Plaintiff’s proposed findings of fact. ECF No. 388, at 90, 92, and 93.

⁴ Although the Court made findings of use of the Valles Caldera as a whole by other tribes, those findings limit other tribal use to the Claim Area’s eastern half and Redondo Mountain as a whole (but not as to specific subareas on Redondo Mountain). For example, the Court limited other tribes’ collection of obsidian to Cerro del Medio in the eastern half of the Claim Area, and Cerro Toledo, an obsidian source that extends beyond the Claim Area’s eastern boundary. Order FOFs ¶¶ 94, 97, 100, 103, 105, 106, at 52-57. And but for Redondo Mountain as a whole, the Court’s findings of a joint use area based on William Whatley’s ancestral domain maps also are confined to the eastern part of the Claim Area. Order FOFs ¶¶ 121-122, at 63.

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219 (1923)), less than 25 years (*Sac & Fox Tribe of Indians of Okl. v. United States*, 383 F.2d 991, 999 (Ct.Cl. 1963)) and 50 years (*United States v. Seminole Indians of State of Fla.*, 180 Ct.Cl. 375, 387 (1967)) to be sufficient.⁵ Once established, Jemez Pueblo's aboriginal title to these discrete areas could not be lost except through tribal abandonment, conquest (not mere use) by another tribe, or extinguishment by Congress. *Lipan Apache Tribe v. United States*, 180 Ct.Cl. 487, 492; *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345, 347 (1941).

Sac & Fox Tribe addressed whether the Sac & Fox had established aboriginal title to Royce Area 69 prior to 1824 rather than prior to 1803 (Louisiana Purchase), and between 1803 and 1824. *Sac & Fox*, 383 F.2d at 991. The Indian Claims Commission held that no evidence of aboriginal title acquired after 1803 could be considered. *Id.* at 992. On appeal, the Court of Claims stated that “[i]t appears from all the facts that there was some basis for the claim of the Sac and Fox Nation that it had actual exclusive and continuous use and possession of the east and south portions of Cession 69 for a long time prior to the Treaty of 1824.” *Id.* at 996. The court remanded to the ICC to determine whether the Sac & Fox established Indian title after 1803. *Id.* at 1002.

Cramer v. United States, 261 U.S. 219 (1923) dealt with the establishment of individual aboriginal Indian title. The *Cramer* Court found that individual Indians settled a certain tract in 1859 and established individual aboriginal Indian title by 1866. The “relevant period” was critical because a railroad grant act gave the railroad the subject lands as of 1866 except for the individual Indian occupancy. Similarly, the Court in *Miller v. United States*, 159 F.2d 997, 1005

⁵ “For a long time,” cannot be fixed at a specific number of years. *Confederated Tribes of the Warm Springs Reservation v. United States*, 177 Ct.Cl. 184, 194 (1966). “The courts have consistently approached the question . . . as an ad hoc determination based on the particular facts and circumstances of each case.” *Alabama-Coushatta Tribe of Texas v. United States*, Congressional Reference No. 3-83, 2000 WL 1013532, at *30 (Fed. Cl. 2000).

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(9th Cir.1947) determined that individual Tlingit Indians established the equivalent of individual aboriginal Indian title by exclusive use and occupancy of certain lands between 1884 and 1942.

Here, relevant periods exist from Jemez settlement in the Jemez Mountains in the 13th Century to the Spanish Entrada of 1542, and during the Spanish colonial and Mexican periods. The Court need not find that Jemez exclusively used any of the subareas at issue in this motion during the entirety of any of these time frames. *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1381 (Fed. Cir. 1983) (“such use and occupancy undoubtedly continued ‘for a long time’ in numerous instances”). On reconsideration, the Court need only find that there was a relevant period in which Jemez use dominated in the four subareas identified in this motion. *Id.* at 1385 (“the evidence supporting mutual use of this land is not specific enough to justify a finding of a lack of exclusive use of all the Texas lands,”). As demonstrated in Section II below and as concluded by the Court, the record evidence confirms that Jemez Pueblo continuously used the Banco Bonito, discrete areas on Redondo Mountain, Redondo Meadows, the western portion of the Valle San Antonio and discrete sections of Redondo Mountain for a long time. And as the United States agrees, and this Court has confirmed, evidence of Jemez Pueblo’s traditional use alone can support its exclusive use during the relevant period. Order on Jemez Mot. in Lim., ECF No. 317 at 112. (“evidence of Jemez Pueblo’s traditional use alone, or, theoretically, in amicable and exclusive accord with other Pueblos, could support its claim to aboriginal title by inference that such practices began many years before 1848.”). Because the record contains little or no evidence of uses by other tribes in these subareas, and dominant use by Jemez Pueblo, Jemez has and continues to hold aboriginal title at least as to these discrete locations.

2. Evidence of Use by Other Tribes Sufficient to Defeat Exclusive Use and Occupancy Requires Some Physical Presence in the Discrete Area at Issue.

The evidentiary requirement for proof of aboriginal Indian title is: “actual, exclusive, and

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continuous use and occupancy ‘for a long time.’” *Sac & Fox Tribe of Indians of Okl. v. United States*, 315 F.2d 896, 903 (Ct.Cl. 1963). This test requires an actual physical presence on the subject lands. Conversely, to defeat a claimant tribe’s “exclusive use and occupancy,” there must be evidence of actual physical presence by other Indians, not merely a religious or spiritual interest. *Pueblo of Jemez*, 790 F.3d at 1166 (quoting *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1385-86, (Ct.Cl. 1975)) (defining exclusivity as against other Indian tribes); see also *Zuni Tribe of New Mexico v. United States*, 12 Cl.Ct. 607, 608-609, 617-620, & nn.13-15 (1987) (finding exclusive use where there was no evidence use by other tribes).

Case law describes various indices of establishment of aboriginal title. No case relied on a spiritual connection to the land alone. Evidence of these same or similar uses by other tribes must be in the record to defeat a showing of Jemez exclusive use and occupancy: again, spiritual connection alone is not enough.⁶ As shown in Section II below, Jemez Pueblo’s aboriginal title to the four discrete subareas satisfies all relevant elements of proof of exclusive or dominant use and occupancy for the purpose of establishing aboriginal title. Evidence that other tribes had a spiritual connection to these areas, or general use by other tribes of areas away from these subareas, without a physical presence in these subareas during the relevant time period, is irrelevant to the question of whether Jemez Pueblo exclusively used or dominated use in those Valles Caldera locations.

3. Absence of Evidence that Other Tribes Used a Discrete Area in the Valles Caldera Confirms Jemez Pueblo Aboriginal Title.

Where there is no evidence of use or occupancy by other tribes within one of the discrete

⁶ *Alabama-Coushatta*, 2000 WL at *31, 32; *Seminole*, 180 Ct.Cl. at 385; *Confederated Tribes of Warm Springs*, 177 Ct.Cl. at 194; *Spokane Tribe v. United States*, 163 Ct.Cl. 58, 66 (1963); *Delaware Tribe of Indians v. United States*, 130 Ct.Cl. 782 (1955); *Iowa Tribe v. United States*, 6 Ind. Cl. Comm. 464 (1958); *Pueblo of San Ildefonso*, 513 F.2d at 1394.

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areas during the relevant time period, Jemez Pueblo need only show its own use and occupancy during the relevant time period. *Zuni Tribe*, 12 Cl.Ct. at 617-20 & nn.13-15; *Caddo Tribe of Okla. v. United States*, 35 Ind. Cl. Comm. 321, 358-60 (1975) (finding exclusivity where “[t]here is no evidence indicating that other tribes of Indians were using and occupying this [claimed] area *at the same time*” (emphasis added)); *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 627-28 (9th Cir. 2012).

4. Use by Other Tribes after Establishment of Jemez Pueblo’s Aboriginal Title Only is Relevant to Allegations of Conquest by that Tribe or Abandonment by Jemez Pueblo.

Use by other tribes after Jemez established its aboriginal title to the four discrete subareas is not sufficient to support a finding that Jemez Pueblo’s aboriginal title was extinguished or abandoned as a result of the other tribes use. As this Court has confirmed, “according to the Tenth Circuit, the ‘exclusive’ prong of the test is relevant only to the exclusion of other Indian groups.” See *Pueblo of Jemez*, 790 F.3d at 1166. As to the “actual and continuous use” requirement, . . . the cases make clear, if there was actually **substantial** interference by others with these traditional uses before 1946, the Jemez Pueblo will not be able **to establish** aboriginal title.” *Pueblo of Jemez v. United States*, No. 13-2181 (10th Cir. June 26, 2015) (emphasis added).

5. The Court May Award Title to Discrete Areas within the Valles Caldera.

As this Court confirmed in its Order:

The Court of Federal Claims has noted that “a claimant tribe’s non-exclusive use of one segment of the claim area is not automatically imputed to the whole claim area.” *Alabama-Coushatta Tribe of Texas v. United States*, 2000 WL 1013532, at *14. See *Wichita Indian Tribe v. United States*, 696 F.2d at 1385 (finding that the “sphere of Osage influence capable of disrupting the Wichitas’ exclusivity of use . . . did not extend to the southern border of Oklahoma.”). Thus, a court may find that a claimant Tribe had exclusive use of certain portions of the claim area, but failed to prove exclusive use of other portions. See e.g., *Sac & Fox Tribe of Indians of Okl. v. United States*, 315 F.2d at 901-06; *Strong v. United States*, 518 F.2d at 565-69.

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ECF 398, COLs ¶ 371, at 453. The Court similarly held in its order on Jemez Pueblo's Motion in Limine that, "a court may find that a claimant Tribe had exclusive use of certain portions of the claim area, but failed to prove exclusive use of other portions." ECF No. 317 at 86. Indeed, during closing argument, the Court asked the United States whether it was within the Court's discretion to confirm that Jemez Pueblo had aboriginal title to parts of the Valles Caldera, and the United States agreed that it was. Closing Argument Tr. at 80:18-81:16. The Court's findings and the record evidence demonstrate that only Jemez has exclusively used and occupied these subareas, and it did so during the relevant time period in a manner sufficient to establish its aboriginal title. The Court's findings further demonstrate that Jemez Pueblo's aboriginal title in these discrete subareas has never been extinguished through conquest or abandoned.

B. The Law of Dominant Use.

For purposes of establishment of aboriginal title, the dominant use exception requires that a tribe demonstrate physical control or dominion over the claim area. *Seminole*, 180 Ct.Cl. at 386.; *Alabama-Coushatta*, 2000 WL at *62 (dissent). An extreme burden of proof is not legally required, particularly in light of the canons of construction which require that the court construe the evidence and deducible inferences in favor of the Tribe. *Alabama-Coushatta*, 2000 WL at *62 (dissent).

Evidence of use and occupancy by other Indians "must be specific" to overcome dominant use by a claimant tribe. *Alabama-Coushatta*, at *17; *Wichita*, 696 F.2d at 1385; *Native Vill.*, 688 F.3d at 628. Contrary to the Order's conclusion in this regard, simply because other tribes may exist that are larger and more militarily capable is not alone sufficient to show those tribes exercised that capability in a claim area. Order ¶ 457. *Alabama-Coushatta*, 2000 WL at *62 (dissent) (no overt challenges by other tribes to control of the area by the dominant tribe); *Wichita*, 696 F.2d at 1381. Indeed, where there is no evidence of use or occupancy by others

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within the claimed area, the claimant tribe need only show its own use and occupancy. In such a case, a court “must conclude,” without more, that the plaintiff tribe used and occupied the area exclusively. *Zuni Tribe*, 12 Cl.Ct. at 617-20 & nn.13-15; *Native Vill.*, 688 F.3d at 627-28.

Physical control or dominion can be shown through minimal evidence of use by other tribes. *Zuni Tribe*, 12 Cl.Ct. at 617-20 & nn.13-15; *Caddo*, 35 Ind. Cl. Comm. at 358-60 (“[t]here is no evidence indicating that other tribes of Indians were using and occupying this [claimed] area at the same time”).

III. The Record Evidence Confirms that Jemez Established Aboriginal Title to Certain Discrete Areas Within the Valles Caldera.

A. Jemez Has Proved Aboriginal Title to Banco Bonito.

1. Architecture and Agricultural Fieldhouse Use in Banco Bonito Subarea Establishes Exclusive Use by Jemez.

i. The Order’s Findings About Jemez Use in Banco Bonito Demonstrates Exclusive, Dominant Use.

The Order supports Jemez Pueblo’s exclusive or dominant use of the eight square miles of the Banco Bonito subarea for agricultural purposes, hunting, gathering and to demarcate their territory. Order COLs ¶ 406, at 485; and attached Exhibit A. The Court’s Order specifically identifies Jemez’s Pueblo’s use of the Banco Bonito location by finding:

Jemez Pueblo showed at trial that it actually and continuously used and occupied the Valles Caldera for a long time in its traditional Indian ways. Ancestral Jemez Pueblo members migrated to the Jemez Mountains in the 1200s and, between 1300 and 1700 C.E. built within the northern Rio Jemez watershed thirty-five villages and thousands of fieldhouses – primarily for agricultural purposes – approximately 100 of which were on the Banco Bonito in the Valles Caldera’s southwest quadrant.

Order COLs ¶ 406, at 485, citing FOFs ¶¶ 52, 64, 66, at 25, 36. The Court found that “Jemez Pueblo occupied the 100 fieldhouses on the Banco Bonito through a 400 year period, most of which Jemez Pueblo occupied between 1500-1650 C.E.” Order FOFs ¶ 69, at 38. It found, “[a]ncestral Jemez people typically occupied their fieldhouses for at least ninety days during

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growing season, although they also used these fieldhouses to hunt game, to gather medicinal plants, to move about the landscape, and to demarcate territory.” Order COLs ¶ 406, at 485, citing FOFs ¶¶ 67-68, at 36-37. Also, the Court found that “[t]he Valles Caldera Trust and the National Park Service have consulted with Jemez Pueblo regarding Jemez Pueblo’s architectural and archaeological interests in the Banco Bonito ... and, on at least one occasion, conducted a field visit with Jemez Pueblo to inspect proposed sites for scientific device.” Order COLs ¶435, at 507-508, citing FOFs ¶¶ 484, 514, at 221-22, 228-29. The Order acknowledges that the fieldhouses in Banco Bonito are significantly closer to ancestral Jemez villages than any other tribal village. “The only large pueblos located within a 6.5 km radius of the Banco Bonito fieldhouses are the ancestral Jemez pueblos known as Hot Springs Pueblo ██████████ Unshagi ██████████ and Nanishagi ██████████ occupied between 1300-1630 C.E.” Order FOFs n.38, at 42.

The United States’ experts consistently refer to Banco Bonito as belonging to Jemez. Dr. Anschuetz’s confirms “Jemez farmers planted on Banco Bonito during the Classic period (A.D. 1350-1600).” DX-KX-0028 and 0071. Dr. Steffen’s rebuttal report accepts that Banco Bonito is a Jemez area, although she questions how Jemez’s use on Banco Bonito should affect analysis on the rest of the Valles Caldera. DX-RZ-0002-0007.

ii. The Court’s Findings and Conclusions as to Possible Use by Other Indians on Banco Bonito based on Archeological Evidence are Not Specific and Some Conflict with the Evidence in the Record.

Some of the Court’s findings and conclusions suggest that the Court may be concerned that there is evidence of non-Jemez architecture in the Valles Caldera generally or maybe concerned about Tewa ceramics on Banco Bonito. Order FOFs n.34, at 37. However, this evidence is contradicted by other findings of fact, questioned by the United States’ own expert and is so minimal that it cannot defeat other overwhelming findings regarding Jemez’s exclusive or dominate uses.

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Particularly, Footnote 34 of the Order rejects Jemez Pueblo's proposed finding that "no archeological evidence of architecture . . . would indicate another tribe lived in the Claim Area, and the Jemez people were the only tribal people to occupy the Claim Area." Order FOFs n.34, at 37. Although Jemez Pueblo disagrees that the evidence amassed at trial indicates otherwise, none of the purported evidence cited to in the Order addressing architecture supports any such occupation by other tribes or pueblos is **within Banco Bonito**. See attached Exhibit E references to architecture. The only architectural evidence of occupation that Footnote 34 of the Order refers to is a possible Navajo hogan "boarding the Valle Toledo in the Valles Caldera's northeast section" would not prevent a finding of Jemez's exclusive or dominant use of Banco Bonito in the **southwest**. As noted by the Court, the Valle Toledo is in the **northeast section** of the Valles Caldera and is well outside of Banco Bonito. Footnote 34's finding of a Navajo hogan also contradicts the Court's later finding in Footnote 85 that the "Navajo Nation has never built a permanent settlement within the Jemez Mountains." Order FOFs n.85, at 80. See attached Exhibit E reference to architecture.

Footnote 34 further implies that there may be other architecture not discovered because surveying of the Valles Caldera has not been completed; but the Court, supported by witnesses of the United States, has also found that ninety-five percent of the Banco Bonito has been surveyed and finding other evidence of architecture is very unlikely. Order FOFs ¶ 287, at 382-383 ("[A]rcheologists found most Jemez Pueblo pottery on the Banco Bonito, of which archeologists have surveyed ninety-five percent as compared to a mere thirty-one percent of the Valles Caldera's remaining areas . . ."); Nov. 13 Tr. at 3023:11-3024:4 (Marinelli, Steffen)(calculating about 95% of Banco Bonito has been surveyed); DX-SE; DX-RZ-0002 ("The Banco Bonito has been exceptionally well-surveyed inside the Preserve, with over 95% survey coverage: it is

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highly unlikely that additional fieldhouses will be located there.”).

The Order’s findings as to fieldhouses and farming by Tewa and Keres tribes also do not defeat Jemez’s exclusivity with regards to Banco Bonito because those findings geographically occur not only outside of the Banco Bonito location, but are outside the boundaries of the land at issue. The Court’s Facts 72 and 73 rely on Dr. Anschuetz’s testimony regarding non-Jemez sites and fieldhouses located outside of the Valles Caldera’s **eastern** boundary, not near Banco Bonito on the **western** boundary. Order FOFs ¶¶ 72 and 73, at 39-40 and Nov. 30 Tr. at 4724:23-4727:5 (Marinelli, Anschuetz)(establishing that ██████ “1 point miles away” from the VCNP’s boundary with Bandelier National Monument (southeast of the Valles Caldera) and ██████ ██████ 3.4 miles from the VCNP’s southeast boundary); Nov. 29 Tr. 4554:23-4562:8 (Marinelli, Anschuetz)(Tewa settlements in the Northern Pajarito archeological district which is on the “east flanks” of the Jemez Mountains not within the boundaries of the Valles Caldera). Dr. Steffen, another expert for the United States, included maps in her rebuttal report clearly showing the Tewa fieldhouses in Bandelier National Monument southeast, and far outside the boundaries of the VCNP. DX-FZ-0004-005. Fieldhouse and farming outside and to the southeast of the Valles Caldera on the Pajarito Plateau is also not specific evidence of non-Jemez tribal use of Banco Bonito. This is particularly true because of the Order’s finding that use beyond the fieldhouses extends approximately four miles from the fieldhouses. Order FOFs ¶ 73, at 39.

2. The Court Should Reconsider its Findings that Any Non-Jemez Ceramic Sherds Identified from Banco Bonito are “Substantial” in Number.

With regards to evidence of ceramics on Banco Bonito, the Order contains contradictory statements. The Order states that, “Even within the Banco Bonito, where Jemez Pueblo pottery **dominates**, archeologists have discovered Tewa pottery in **substantial** quantities . . .”. Order COLs ¶ 442, at 513-514, citing to Order FOFs ¶¶ 69, 73, 86, at 38-40, 48. It is unclear if the

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court is finding that Jemez ceramics on the Banco Bonito dominates other pottery or if the Court is finding that Tewa ceramics are substantial enough to defeat Jemez's claim of dominant use.

Either way, as demonstrated below, this conclusion must be reconsidered.

The Court relies on one primary factual finding, Fact 86, to support its conclusion that ceramics indicate non-Jemez tribal use at Banco Bonito, as follows:

Although archeologists predominately have found Tewa-affiliated sherds in the Valles Caldera's southeast and south-central areas, archeologists have found such sherds as far west [as] the Banco Bonito and Redondo Meadows. See e.g., Nov. 8 Tr. at 2231:12-2332:2 (Leonard, Gauthier)(affirming that archeologists found sherd 3962 [REDACTED] id. at 2391:12-2393:5 (Leonard, Gauthier)(discussing Jemez and Tewa sherds found on the Banco Bonito and Keres and Tewa sherds found near [REDACTED] Log 3962: Site Non; VCNP Artifact: A12-7508-001 (undated), admitted November 8, 2018, at trial at United States' Ex. DX-TG (image depicting "pajarito utility" sherd 3962).

Order FOFs ¶ 86, at 48. Fact 86 is problematic because it: 1) contradicts Court findings and admissions by the United States and its experts that Jemez ceramics in Banco Bonito dominated; 2) fails to make a dominate use analysis; 3) relies on evidence regarding Cerro del Medio, which is far to the east of Banco Bonito; and 4) relies heavily upon Mr. Gauthier, whose methodology is flawed. (See attached Exhibit F on Footnote 158).

Fact 86 overlooks other findings made by the Court and admissions by the United States attorneys, and admissions by the United States' own expert, Mr. Gauthier, that Jemez black-on-white ceramics dominates other ceramics in Banco Bonito such as:

- The Order notes that the United States agrees that "archeologists associate most Banco Bonito sites with Jemez Pueblo's ancestors." Order COLs ¶ 125, at 315, citing to United States' Proposed Findings ¶¶ 532-34, at 160-61.
- Likewise, the Court notes that the United States concedes that ceramic evidence supports exclusive use of Banco Bonito. Order COLs, ¶ 243, at 368-69 ("The Court asked the United States to address Jemez Pueblo's contention that experts predominately associate the ceramic evidence with Jemez Pueblo, and the United States responded that such evidence is almost exclusively confined to Banco Bonito.")
- The Court also indicates that the United States' own expert finds that "ancestral Jemez

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Pueblo members predominately used the Valles Caldera’s extreme southwestern corner,” and found “The United States discussed the Valles Caldera ceramic sherd collection and argued that most Jemez Pueblo sherds are located on the Banco Bonito.” Order COLs ¶¶ 211, 283, at 358, 381.

Jemez dominance also is confirmed by Mr. Gauthier’s initial expert report and testimony:

- His report specifically states, “Towa⁷ ceramic types are the most common type found in the southwest portions of the VCNP in the Banco Bonito area. Here, the ceramic data indicates Towa populations utilized this area.” DX-RR-0018.
- “Towa sites are most common in the Banco Bonito area of the VCNP,” in contrast to other areas that he found to be common areas. DX-RR-0018.
- Also, Mr. Gauthier testified numerous times that the ceramic evidence found on Banco Bonito were primarily Jemez. Nov. 8 Tr. at 2370:4-7 (Leonard, Gauthier)(discussing his conclusions on Banco Bonito, that “the pottery types found on the Banco Bonito were primarily Jemez-affiliated pottery”);
- Nov. 8 Tr. at 2372:1-10, 2372:22-2373:2 (Leonard, Gauthier)(“[Y]ou can see that the great majority of Jemez sherds – Towa sherds – are located in the extreme south[west] corner. That is where these pottery types are most common.”);
- Nov. 8 Tr. at 2374:11-15 (Leonard, Gauthier)(“The Banco Bonito – it’s a very small area of the Valles Caldera National Preserve. And it seems that it’s seasonal activity of farming is the primary reason for the existence of these Jemez sites.”);
- Nov. 8 Tr. at 2391:17-20 (Leonard, Gauthier)(“To me, this is very important. Because over here in the Banco Bonito, yes, we do see the isolated Jemez sherds, and we also see the concentration of Towa sherds.”);
- Nov. 8 Tr. at 2393:2-3 (Leonard, Gauthier)(“Banco Bonito, Towa sites; Banco Bonito, Towa sites”);
- Nov. 8 Tr. at 2393:6-13 (Leonard, Gauthier)(discussing the time period that Jemez utilized the Banco Bonito sites, “Most of them 1600, 1600 plus, 1650. I believe that’s common denominator in the literature. Most people agree on those dates for Banco Bonito.”);
- Nov. 8 Tr. at 2431:13-23 (West, Gauthier)(agreeing that there are Jemez sites within Banco Bonito that demonstrate that Jemez was farming in the 1500s and 1600s and that no other tribe farmed within the VCNP); and
- Nov. 8 Tr. at 2484:16-18 (Leonard, Gauthier)(“Towa sites are most common in Banco

⁷ Towa is the language spoken only by Jemez members and is used by archeologists to describe ceramics belonging only to the Jemez Pueblo. Nov. 8 Tr. 2362:8-20 (Leonard, Gauthier).

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Bonito”).

The Court found that Jemez was not the dominant user of Banco Bonito based on “substantial quantities” of Tewa ceramics, citing testimony by United States expert Mr. Gauthier. But Mr. Gauthier identified only three sherds in Banco Bonito as Tewa. Order FOFs ¶ 86, at 48; Nov. 8 Tr. at 2391:21-2392:1 (Leonard, Gauthier). Specifically, Mr. Gauthier testified, “[b]ut what’s interesting is that we have three⁸ other Tewa sherds over in the Banco Bonito, also. And based on what we know, those really shouldn’t be over there. And I’m really at a loss to explain why those would be over there as isolated sherds. . .” Nov. 8 Tr. at 2391:21-2392:1 (Leonard, Gauthier).⁹ This finding also fails to weigh problems with Mr. Gauthier’s methodology which: 1) excluded hundreds of Jemez black-on-white sherds found on Banco Bonito; 2) failed to take into account trade during the Pueblo Revolt; and 3) failed to consider that Jemez started producing non-Jemez black-on-white pottery that resembles Tewa pottery after Spanish contact. Nov. 8 Tr. at 2432:9-2440:10 (West, Gauthier) and Nov. 8 Tr. at 2457:16-2458:6 (West,

⁸ In his testimony, Mr. Gauthier testified he identified three Tewa sherds as seen in his isolated sherd maps contained on DX-RR-009, Figure 4. In his map of isolated sherds, Mr. Gauthier identifies three Tewa isolated sherds in Banco Bonito as items 3188, 3189 and 3787. DX-RR-009, Figure 4. However in looking at Mr. Gauthier’s own notes on 3787, in some columns he indicates that there are four sherds and in others he indicates there are five sherds. Despite identifying 3787 as “Tewa”, his notes in the artifact description say, “Five sherds, **thick Jemez B/W** or possible biscuit” DX-RW, Collection Log Tab, Row 347 for Log 3787; see duplicate copy at PX 101-022. Isolated sherd 3188 and 3189 each contain one sherd respectively. PX 120-021. It is unclear if Mr. Gauthier considers 3787 as one, four or five sherds, and why he identified the sherd as Tewa despite his notes that there were “five thick Jemez B/W.” PX-120-021-22.

⁹ Jemez Pueblo proposed findings of facts concluded that Mr. Gauthier was less credible than Dr. Liebmann based on Mr. Gauthier’s credentials, his methodology and inconsistencies in his own report and notes. ECF No. 388, Jemez Proposed FOFs ¶¶ 492-508, at 148-150. The Pueblo acknowledges that the Court declined to make such a comparison, but the Court may want to reexamine the Order’s heavy reliance and weight on Mr. Gauthier’s conclusions concerning the three Tewa sherds amongst hundreds of Jemez sherds on Banco Bonito, especially given Mr. Gauthier’s inconsistencies, his failure to consider all the archeological evidence and his credentials.

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Gauthier); Oct. 30 Tr. at 410:11-411:8; Tr. at 419:20-420:16; Tr. at 439:8-23 (West, Liebmann); Tr. at 581:21-582:3 (Marinelli, Liebmann); Oct. 31 Tr. at 637:18-25; 653:23-654:17 (West, Liebmann); Dec. 13 Tr. at 5542:5-16; 5546:7-5547:11 (West, Liebmann); PX 196-002-005.

Mr. Gauthier's admits that he did not consider over 700 other pieces of pottery found in Banco Bonito that support Jemez exclusive or dominant use and failed to consider what pottery Jemez started making and trading after the Pueblo Revolt. *Id.* The VCNP did not collect the ceramic sherds in Banco Bonito because those sherds, generally accepted as Jemez, are so numerous and redundant. Nov. 8 Tr. at 2432:9-2440:10 (West, Gauthier). Not realizing that the VCNP did not collect all the sherds that were surveyed, Mr. Gauthier's analysis (See attached Exhibit G on Gauthier Sites) did not consider survey reports from the Banco Bonito that contained a ceramic analysis separate from the VCNP collection such as PX 178. Nov. 8 Tr. at 2432:9-2440:10 (West, Gauthier); Dec. 13 Tr. at 5552:3-5555:15 (West, Liebmann). As such, he failed to consider over 700 sherds, which would be a standard practice. *Id.* These 700 sherds make the evidence of Jemez's dominant use on Banco Bonito even more clear.

Even if Mr. Gauthier was correct that there were three to four Tewa sherds in Banco Bonito, which could be made or traded by Jemez after the Pueblo Revolt, that is not even a fraction of the total sherds from this discrete area, that are overwhelmingly Jemez black-on-white. And even limiting the evidence to only those Jemez sherds Mr. Gauthier included in his analysis (limited to the VCNP collection which does not include the 700 additional sherds found on Banco Bonito) there are approximately 175 Jemez sherds considered by Mr. Gauthier on Banco Bonito, and only three or perhaps four Tewa sherds are found in the same area. Adding the at least 700 additional sherds from Banco Bonito that Mr. Gauthier did not look at or consider, and that Dr. Liebmann identified to be Jemez, there are at most four Tewa sherds

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among 875 Jemez sherds. The Tewa sherds identified by Mr. Gauthier comprise merely .004% of the sherds in Banco Bonito. DX-RT (duplicative of PX 104) and Dec. 13 Tr. at 5552:3-5555:15 (West, Liebmann). Looking at all the ceramic evidence in Banco Bonito presented as trial, even just from experts of the United States, Jemez's uses of Banco Bonito dominated other tribes and a Tewa presence was not "substantial."

3. The Court Should Reconsider its Conclusion about the Effect and Location of Zia Trails in Light of the Order's Extensive Findings of Jemez Pueblo's Comprehensive Trail Network in and around Banco Bonito.

The Order contains numerous findings confirming Jemez Pueblo's extensive trail network in and adjacent to the Banco Bonito, providing further evidence of Jemez Pueblo's exclusive and dominant use on the Banco Bonito (See attached Exhibit H on Mapping):

- The Court found that the extensive trail network Jemez constructed connected the approximately thirty-five large, ancestral Jemez villages of fifty rooms or more to the thousands of fieldhouses that the Jemez built in the northern Rio Jemez Watershed, including the fieldhouses in Banco Bonito. Order FOFs ¶¶ 59, 66, and 431, at 30-32, 36, and 205.
- [REDACTED] Order FOFs ¶ 463, at 213.
- The Court finds that a large section of a [REDACTED] Order FOFs ¶ 464, at 213. ([REDACTED] ")
- [REDACTED] cuts across [REDACTED] See PX-573, testimony of P. Correo at Nov. 1 Tr. at 879:4-882:17 (Richardson, P. Correo); PX-575 and PX 576, testimony of T. Loretto at Nov. 1 Tr. at 962:7-963:16 (Solimon, T. Loretto); PX 576, testimony of A. Yepa Nov. 5 Tr. at 1610:14-1612:1, 1654:6-1655:7 (Solimon, A. Yepa); PX-579, testimony of C. Toya at Nov. 15 Tr. at 3596:8-15; 3634:11-18; 3687:3-3689:2 (Solimon, C. Toya).

The Order also contains numerous other findings confirming Jemez Pueblo's extensive network of trails and trail sections in [REDACTED] Order FOFs ¶¶ 66, 431 and 433, at 36, 205

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and 206 as follows:

- Jemez has trails [REDACTED] Order FOFs ¶ 433, at 206.
- Jemez runs on trails [REDACTED] Order FOFs ¶ 458, at 212.
- Jemez has [REDACTED] Order FOFs ¶ 465, at 213.
- There are [REDACTED] Order FOFs ¶ 463, at 213.
- There are [REDACTED] Order FOFs ¶ 480 at 221.
- Jemez has trails [REDACTED] Order FOFs ¶ 481, at 221.
- Jemez uses a trail that [REDACTED] Order FOFs ¶ 495 at 225.

Concerning Banco Bonito, the Order contains only limited findings of “evidence that multiple [REDACTED] would traverse the Banco Bonito [REDACTED] to numerous locations throughout the Valles Caldera, including [REDACTED] [REDACTED] Order COLs ¶ 442, at 513-514. The Order has very few, inconsistent facts for Zia use on Banco Bonito. Fact 381 of the Order finds that “Zia Pueblo attaches great spiritual significance to [REDACTED] which it accesses by passing through Banco Bonito.” Order, FOFs ¶ 381, at 178-179. However, this single finding contradicts other findings by the Court and misinterprets witness testimony. It relies on Dr. Anschuetz’s testimony for the finding that Zia is “passing through”¹⁰ Banco Bonito [REDACTED] “unless a person made a detour[.]” Order FOFs ¶ 381, at 178-179; Nov. 29 Tr. at 4650:1-4651:5 (Marinelli, Anschuetz). For this finding, there is no specific evidence other than Dr. Anschuetz’s speculation. *Accord Wichita*, 696 F.2d at 1385 (“While the

¹⁰ To the extent that the Court still finds Zia is passing through Banco Bonito, Zia would be passing by Jemez fieldhouses and trails and in such case, Zia use is permissive.

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Comanches and Kiowas may have ranged over large portions of the hunting grounds without any regard for the Wichitas, the closer the former two tribes came to the Wichitas' villages, the more likely it would be that they were entering what they viewed as Wichita land. At some near enough line, the Comanche and Kiowa presence would not have impinged on the Wichitas' exclusive use of the land.”).

Fact 381 is also inconsistent with the findings which establish that when Zia accesses the Valles Caldera it takes [REDACTED] located in the northern portion of the claim area and [REDACTED] Zia is not crossing Banco Bonito, which is in the southwestern corner of the Valles Caldera. See Order FOFs ¶¶302, 305, 307, 374-378, 389, 395, at 132-134, 174-178, 184, and 186.¹¹ See also Order COLs ¶ 246, at 370 (United States arguing that when [REDACTED] [REDACTED] before and after Spanish contact in 1541.”). Facts 302 and 305 find that every time any Zia [REDACTED] [REDACTED]. Order FOFs ¶¶ 302, 305, at 132, 133. The Court also describes Zia’s [REDACTED] [REDACTED].¹² Order FOFs ¶¶ 307 at

¹¹ These facts reply primarily on Florence Hawley Ellis and Andrea Ellis-Dodge, Religious Use of the Valles Caldera by Zia and Jemez Pueblos at 45-46 (dated 1981), admitted November 29, 2018, at trial as United States’ Ex. DX-EZ (“Valles Caldera Religious Use). A review of that source supports the analysis that when Zia accesses the Valles Caldera, Zia’s first stop is either [REDACTED] not Banco Bonito which is the southwestern corner of the claim area.

¹² Zia associates Valles Caldera’s [REDACTED] associated with all people. Order FOFs ¶ 376, at 176-177. The Court finds that Zia [REDACTED] Order FOFs ¶ 395, at 186. Fact 378 finds that [REDACTED] Order FOFs ¶ 378, at 177-178.

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134, 374-377 at 174-177, and 389 at 184. There is no finding or evidence that any Zia [REDACTED] has an association with [REDACTED]

The Order confirms that to the extent Zia had trails in the Valles Caldera, Zia's routes "evince particular independence from Jemez Pueblo." Order COLs ¶ 454, at 521-522. Indeed, during the Coronado Expedition in 1541, Zia advised Spanish authorities of an "agreeable, southern route through the Valle Grande that was geographically separate from any route that Jemez Pueblo would have taken during that period." *Id.* But after identifying these two points, the Order mistakenly states Zia is passing through Banco Bonito with citations to Facts 380 and 381, both of which only reference routes in the Valle Grande, which is to the east of Banco Bonito. Order FOFs ¶¶ 380, 381, at 178-179.

Fact 380 is also problematic as it concerns the significance of the Jemez River to Zia and contains no evidence of Zia using Banco Bonito. Order FOFs ¶ 380, at 178. Holding a river to be significant is not specific evidence of use. Order FOFs ¶ 381, at 178-179. The limited record evidence regarding Zia use of trails [REDACTED] [REDACTED] at any time, and at least not prior to 1650.

B. Jemez Has Proved Aboriginal Title to Redondo Meadows Subarea.

The Order confirms that during the relevant period, only Jemez used and occupied the Redondo Meadows subarea shown in Exhibit B.¹³ In the findings identified in the section on Banco Bonito above, [REDACTED]

[REDACTED] The Court's findings confirm Jemez is the only Pueblo accessing the Valles Caldera from the west. Even today, Jemez

¹³ Two of the Order's findings of fact – 86 and 381 – address other tribal use of Banco Bonito yet are relevant to Redondo Meadows because Redondo Meadows is between Sulphur Springs and Banco Bonito. Order FOFs ¶ 86, at 48 and FOFs ¶ 381, at 178-179.

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members [REDACTED] to access Jemez [REDACTED] trails. Order FOFs ¶¶ 479, at 220-221. A [REDACTED]

[REDACTED] Order FOFs ¶¶ 480, 481, at 221-222.

The Court's findings and the record evidence confirm that no other pueblo or tribe [REDACTED] in the Valles Caldera from the west, as other pueblos and tribes are today accessing the Valles Caldera from the east.¹⁴ See Order Figure 6, at 30. That non-Jemez pueblos and tribes access the Valles Caldera from the east aligns with the Court's analysis that other non-Jemez pueblos and tribes are not passing through Jemez Pueblo to access the Valles Caldera. See Order COLs ¶ 454, at 521-522. At the closest, the court finds other pueblos and tribes accessed the Valles Caldera via a south-central location.¹⁵

Finally, the only findings that address non-Jemez use of Redondo Meadows are those same findings that the Court felt indicate non-Jemez use of Banco Bonito. See Order FOFs ¶¶ 86, at 48 and 381, at 178-79 discussed above. Although Order FOFs ¶ 86 refers to non-Jemez ceramics sherds being found in Redondo Meadows, the testimony relied on does not identify Redondo Meadows but concerns the [three] non-Jemez ceramics sherds found in Banco Bonito

¹⁴ Keres and Tewa communities occur along the northeastern and eastern flanks of the Jemez Mountains, and Tewa, Keres, Navajo, and Anglo people use several routes and trails all on Valles Caldera's east side. Order FOFs ¶ 56, at 28. Tewa and Navajo populations also used several trails on the Valles Caldera's eastern boundary. Order FOFs ¶ 58, at 30. Santa Clara accesses the Valles Caldera [REDACTED] Order FOFs ¶ 364, at 170-171.

¹⁵ See Order FOFs ¶¶ 79-81, at 45-47 (non-Jemez ceramics identified on [REDACTED] Order FOFs ¶¶ 84-85, at 47-48 (non-Jemez use of southeast and south-central areas) Order FOFs ¶¶ 87-90, at 49-50 (non-Jemez ceramics found at [REDACTED] 94-100 (non-Jemez use of Cerro del Medio obsidian), Order FOFs ¶ 103, at 55 (Tewa populations on east flank of Jemez Mountains), 112 ("Pueblo peoples on the Jemez Mountains' northeast, east, southeast, and south-central flanks had access to the Jemez Mountains."), and Order FOFs ¶¶ 302, at 132, 305 at 133, 307 at 134, 374-378 at 174-178, 389, at 184, and 395, at 186 (Zia's [REDACTED] of the claim area)

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and discussed above. See Order FOFs ¶ 86 (Nov. 8 Tr. at 2331:14-2332:2 (Leonard, Gauthier); id. at 2391:13-2393:5 (Leonard, Gauthier)). Mr. Gauthier did not testify as to other pueblos or tribes using Redondo Meadows subarea, nor did any other witness, and there is no evidence of Redondo Meadows use except by Jemez Pueblo. The Court's findings establish that Zia is not passing through Banco Bonito or Redondo Meadows because [REDACTED]

C. Jemez Has Proved Aboriginal Title to the Western Two-Thirds of Valle San Antonio Subarea.

The Order confirms the evidence showing that Jemez Pueblo is the only tribe that used and occupied the western two-thirds of the Valle San Antonio subarea which is geographically identified in Exhibit C. The findings evidence that Jemez Pueblo's use of the western two-thirds of the Valle San Antonio was exclusive and dominant during the relevant time period. [REDACTED]

[REDACTED] of the claim area and is [REDACTED]
[REDACTED] Valle San Antonio does not include the area [REDACTED]

All the Court's findings pertaining to the Valle San Antonio subarea describe Jemez use. The Court's findings confirm that [REDACTED]

[REDACTED] historic camps, and [REDACTED] Order FOFs ¶¶ 486, at 223, 493, at 224, and 495, at 225. Specifically, the Court found that:

- The Valle San Antonio is a [REDACTED] Order FOFs ¶ 485, at 222.
- The Jemez [REDACTED] delineates the Valles Caldera's northwestern edge. Order FOFs ¶ 487, at 223.
- Remains of a [REDACTED]

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Order FOFs ¶ 488, at 223 and 492, at 224.

There are no findings as to any non-Jemez use in the western two-thirds of Valle San Antonio. The Court's order confirms that Jemez has exclusively used and occupied Valle San Antonio's western two-third, with no use by any other tribe or Pueblo.

The Court's findings as to non-Jemez use in the "northern" portion of the claim area are not specific to the Valle San Antonio. They apply to the northeast and northcentral areas – specifically the [REDACTED]. See Order FOFs ¶ 246, at 106 (Zia use of [REDACTED] Order FOFs ¶ 305, at 133 (discussing Zia and [REDACTED] Order FOFs ¶ 378, at 177 (discussing Zia [REDACTED] in the Valles Caldera), Order FOFs ¶¶ 394, at 186 and 395, at 186 (Zia use of [REDACTED] The Valle San Antonio subarea is [REDACTED]

Fact 91 is the only fact that indicates non-Jemez use of the western two-thirds of the Valle San Antonio subarea. Order FOFs ¶ 91, at 50. Fact 91 relies on Mr. Gauthier's Report Figure 7, which identified, in the [REDACTED] one Keres site ([REDACTED]), one Jemez site, and two unknown sites. Mr. Gauthier testified that the Keres affiliated site consisted of one ceramic sherd. Nov. 8 Tr. at 2444:14-16 (West, Gauthier). The Court uses Fact 91 (and the one ceramic sherd) to support its statement that the "ceramics record also demonstrates that ancestral Tewa and Keres peoples used the Valles Caldera's northern portions. See supra FOFs ¶ 91, at 50." Order FOFs ¶ 442, at 513. Mr. Gauthier dates this one sherd between 1700 and 1800s. DX-RT-0002. As to this single sherd, Mr. Gauthier testified that Jemez stopped making Jemez black-on-white pottery after the Pueblo Revolt. He testified that he does not know what a

¹⁶ Dr. Ferguson identifies [REDACTED] Ferguson Report at 106.

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Jemez ceramics assemblage looked like after the Pueblo Revolt. His testimony, non-specific and limited as it is, does not indicate that Jemez people did not make or purchase the pot that once broken left this sherd. Nov. 8 Tr. at 2457:16-2458:6 (West, Gauthier).¹⁷ The evidence shows that Jemez Pueblo used and occupied the western two-thirds of the Valle San Antonio subarea and that Jemez use was exclusive and dominant.

D. Jemez Has Proved Aboriginal Title to Discrete Areas on Redondo Mountain.

1. [REDACTED]

The Court [REDACTED] but identifies [REDACTED] [REDACTED] Order FOFs ¶ 45, at 18 and attached Exhibit D. Out of all the features in and around the Valles Caldera, the Court found that the [REDACTED]

[REDACTED] Order FOFs ¶ 45, at 18. The Court confirmed that the Jemez people believe the [REDACTED] Order FOFs ¶¶ 45, 47-48, at 18-21.

As found by the Court, one of the [REDACTED] [REDACTED] Order FOFs ¶¶ 45, 46, at 19. Indeed, the Court found that [REDACTED]

[REDACTED] Order FOFs ¶ 472, at 215. The Court found on two occasions William Whatley accompanied [REDACTED], where he

¹⁷ See also, Oct. 30 Tr. at 410:11-411:8; Tr. at 419:20-420:16; Tr. at 439:8-23 (West, Liebmann); Tr. at 581:21-582:3 (Marinelli, Liebmann); Oct. 31 Tr. at 637:18-25; Tr. 653:23-654:17 (West, Liebmann).

¹⁸ The Court identifies [REDACTED] contained in the record. The first is described [REDACTED]

[REDACTED] See Order FOFs n.17, at 20-21.

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observed [REDACTED] Order FOFs n.57, at 61-62. And as discussed above, the Court found that Jemez Pueblo uses a specific trail to access the Jemez

[REDACTED]¹⁹ Order FOFs ¶ 481, at 221; Order FOFs ¶ 433, at 206. Those are not findings of specific use of the Jemez [REDACTED] by other Indians. There is no evidence of any member from any other tribe worshipping at the Jemez [REDACTED]. Jemez Pueblo’s use of its primary and [REDACTED] is exclusive and dominant.

[REDACTED]

[REDACTED] Order FOFs n.143, at 181, Order FOFs

¹⁹ In a footnote, the Court does say that [REDACTED] but the evidence used to support the Court’s conclusion does not make reference to a specific [REDACTED] rather the broader [REDACTED] Order FOFs n.16, at 20.

Id. As discussed, Douglass and Zia testimony establish that there are different [REDACTED] and Pueblos maintain different [REDACTED] That Zia does not hold the [REDACTED] which led to a dispute with Jemez Pueblo. Order FOFs n.143, at 181, Order FOFs ¶ 387, at 183.

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¶¶ 387, 388, at 183-184. The Court finds that Zia maintained and [REDACTED]
[REDACTED]

[REDACTED] Order FOFs ¶ 384, at 179-80. The Court notes that
Jemez never saw [REDACTED] Order FOFs ¶ n.141, at 179.

2. Exclusive Use of [REDACTED]

i. Jemez [REDACTED]

The Court should alter its Order to confirm that there is no record evidence showing use
by any other tribe or pueblo of Jemez Pueblo's [REDACTED] See attached
Exhibit I [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Order FOFs ¶ 465, at 213;

Ferguson Report, PX 190-180 (in Exhibit D). The Court found that [REDACTED]
[REDACTED] trail. The Jemez [REDACTED] used for [REDACTED]
[REDACTED] Jemez members and identified in Order FOFs ¶ 458, at 212 follows
approximately the [REDACTED] trail identified in Order FOFs ¶ 465, at 213.²⁰ The Jemez

[REDACTED]
Order FOFs ¶ 463-464, at 213, citing Ferguson report; PX 190-246 (in Exhibit D). It is
undisputed that Jemez believes [REDACTED]

²⁰ Compare Order FOFs ¶ 458, at 212 (PX 573 identifying in blue the general path the Jemez
[REDACTED] follows and Oct. 31 Tr. at 880:1-25 (Brar, Shendo) describing trail starting in the
[REDACTED] and Order FOFs ¶ 465, at 213 (Ferguson
Report, PX 190-180 describing trail leading through [REDACTED] and
[REDACTED])

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[REDACTED] are “umbilical cords” connecting the Jemez Pueblo itself to Redondo Mountain. Order FOFs ¶ 433, at 206. See also Order FOFs ¶ 464, at 213. [REDACTED]

[REDACTED] confirmed by the Order. Some of these [REDACTED]
[REDACTED]

[REDACTED] The Order and the record evidence confirm that Jemez Pueblo used these [REDACTED]
[REDACTED] trails during the relevant period, and there is no finding or record evidence of any other pueblo or tribe using this trail during the relevant period or at anytime thereafter. Thus, Jemez Pueblo’s use of these trails was exclusive and dominant.

ii. Jemez [REDACTED] Trail Springs

The Court found that along the Jemez [REDACTED] trail there are [REDACTED]
[REDACTED] exclusively use when travelling to the [REDACTED]

[REDACTED] Order FOFs ¶ 464 at 213 and attached Exhibit D. These [REDACTED]
[REDACTED]

[REDACTED] The [REDACTED] Order FOFs ¶ 467, at 214; Ferguson Report, PX 190-203 (in Exhibit D). The [REDACTED] is above the first and on the [REDACTED] Order FOFs ¶ 466, at 214; Ferguson Report, PX 190-179 (in Exhibit D). The [REDACTED] used in by Jemez [REDACTED] Order FOFs ¶ 468, at 214; PX 190-200 (in Exhibit D). There is no evidence that any other tribe or pueblo used these [REDACTED] There is no evidence that Jemez Pueblo’s [REDACTED] was not exclusive and dominant.

CONCLUSION

The Pueblo of Jemez respectfully requests that the Court grant this motion and reconsider its August 31, 2019 Order and alter that decision to confirm Jemez Pueblo’s aboriginal title to the discrete areas addressed in this motion.

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September 28, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2019, I caused to be filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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