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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)(JFR)

PUEBLO OF JEMEZ'S REPLY
IN SUPPORT OF ITS MOTION
TO RECONSIDER AND ALTER FINAL DECISION

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INTRODUCTION

Defendant United States of America ("Defendant") attacks Jemez Pueblo's Motion to Reconsider and Alter Final Decision ("MTR") based entirely on two arguments:

> First, Plaintiff attempts to replead its claim as one for separate subdivisions of the Preserve rather than the entire Preserve. Second, Plaintiff does nothing more, nor less, than present the Court with the same evidence the Court already found insufficient and ask the Court to draw a different conclusion.

ECF 416 at 4. Both of Defendant's attacks fail under the law.

As to Defendant's first argument, in the body of its Response, Defendant once again concedes that this case has always included claims for subareas. *See e.g.,* ECF 416 at 23 ("Plaintiff's motion for summary judgment put this Court and the United States on notice that Plaintiff sought to carve out . . . discrete areas within the Preserve"). That is the law of aboriginal title and this case. Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order issued August 31, 2019, ECF 398 ("Order") COLs ¶ 371, at 453 ("tribe's non-exclusive use of one segment of the claim area is not automatically imputed to the whole claim area"). Plaintiff's claim for the full area of the Valles Caldera necessarily includes discrete areas. Likewise, courts routinely award part but not all of the relief requested by claimants. *See* Section I(B). Defendant's second argument confirms its misunderstanding of the law, which requires that the MTR do nothing more nor less than identify for the Court the relevant evidence introduced at trial.

Defendant supports its two erroneous attacks with sweeping statements regarding irrelevant evidence, using ambiguity and lack of specificity to blur the evidence of Jemez Pueblo's ("Jemez") exclusive use of the four discrete subareas identified in the MTR. Jemez's MTR picks up, as it must, from where the Court left off in its ruling by addressing specific findings already made by the Court. *Anderson Living Tr. v. WPX Energy Prod. LLC*, 308 F.R.D.

410, 434-35 (D.N.M. 2015) (Browning, J.) (addressing exact and specific points helps reduce the depth of the Court's analysis "the second time around – thus conserving judicial resources"). Those facts confirm Jemez's exclusive use and occupancy of the four discrete subareas.

I. Summary of the Law.

A. The Law of Motions for Reconsideration.

Jemez timely filed its MTR under Fed. R. Civ. P. Rule 59(e). Therefore, Defendant's argument regarding Rule 60 motions is irrelevant.

B. Aboriginal Title Claims Include Claims to Discrete Subareas.

This Court and others have consistently held, Defendant concedes [*e.g.*, ECF 416 at 23], and Jemez has repeatedly argued, that aboriginal title claims include independent claims to discrete subareas within the overall claim area. Order COLs ¶ 371, at 453 ("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 Tex. v. United States*, Congressional Reference No. 3-83, 2000 WL 1013532, at *1, 14 (Fed. Cl. 2000) (reviewing modified claim area after Plaintiff "voluntarily excised approximately 2.6 million acres from the northern and southern portions of the original claim area") (emphasis added); *see Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1385 (Fed. Cir. 1983) (finding that the "sphere of Osage influence capable of disrupting the Wichita's 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. In no Indian land case has the plaintiff been denied recovery because it proved aboriginal title to only part, but not all of the claimed area. *See e.g., Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 901-06 (Ct.Cl. 1963); *Strong v. United States*, 518 F.2d 556, 565-69 (Ct.Cl. 1975) (affirming "Commission's

finding of aboriginal title for the Claimant tribes in the two relatively small portions" of the area).

The Court held in its order on Jemez'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 317 at 86; *see also* ECF 375 (Order denying Plaintiff's Motion for Summary Judgment as to the Banco Bonito and Redondo Mountain).

Not only did Defendant not object to these rulings, it supported them. ECF 248 (Defendant's Response to Jemez's Motion for Summary Judgment); and ECF 102 (New Mexico Gas Company's Unopposed Motion for Order Approving Stipulations). Defendant repeatedly conceded that the Court could award title to discrete subareas. ECF 416 at 23 (Recognizing that Jemez's "motion for summary judgment put this Court and [Defendant] on notice that Plaintiff sought to carve out . . . discrete areas"). Indeed, the Court asked Defendant during closing argument whether the Court could, in its discretion, confirm that Jemez proved aboriginal title to parts of the Valles Caldera. Defendant agreed it could. Closing Argument Tr. at 80:18-24.

This case is about title to the Valles Caldera, including discrete subareas, where Jemez has proved all elements of aboriginal title. All subareas were identified and discussed by Jemez witnesses and are included in Jemez's proposed findings of fact. ECF 388 at 90-96. Defendant's failure to address the evidence presented by Jemez on each subarea identified in discovery and at trial is of Defendant's own making and is not sufficient to defeat Jemez's proof of aboriginal title to these subareas.[1] *Wichita Indian Tribe*, 696 F.2d at 1385 ("[S]ince the Wichitas did establish aboriginal title to some portions of land . . . the trial judge's delineation of the Wichitas' shared

[1] Defendant relied on Dr. Anschuetz's commons theory throughout this entire trial which allowed Defendant to avoid addressing discrete areas. Nov. 29 Tr. at 4463:25-4464:3 (Marinelli, Anschuetz).

hunting grounds is too general for us to sustain.").

C. The Law Regarding the Relevant Time Period.

The MTR specifically asserts (II.A.1.) the legal requirement for the Court to determine aboriginal use in a specific time period. ECF 405 at 8-10. Rather than address any of the cases cited in the MTR, Defendant instead rejects out of hand the legal requirement for a relevant time period (simply describing it as "legally unsound," without citation) and complains of Jemez "reframing" the relevant time period.[2] ECF 416 at 17-18. On the contrary, Jemez has consistently asserted that it established aboriginal Indian title either during pre-historic times or during Spanish colonial times. ECF 236 at 10-11, ECF 387 at 13, ECF 391 at 105. Contrary to Defendant's argument, all aboriginal title cases address the relevant time period considered by the court, something that this Court also must do.

D. Defendant Concedes Arguments in the MTR to which Defendant Did Not Respond.

Failure to address or otherwise respond to an argument raised in a motion "concedes the issues[.]" *Tant v. Henderson*, No. CIV 98-0920 PK/RLP-ACE, 1999 WL 35809796, at *4 (D.N.M. Feb. 4, 1999) (citing *Artes-Roy v. City of Aspen*, 31 F.3d 958, 960 n.1 (10th Cir. 1994)).

1. Defendant Concedes that Use by Other Tribes Must Include Actual Physical Presence If It Is to Impact Jemez's Aboriginal Title.

The MTR (II.A.2) specifically argued that any alleged use by other tribes must include actual, physical presence if it is to impact Jemez's aboriginal Indian title. ECF 405 at 10. Defendant does not address the requirement and has conceded the issue.

[2] Defendant argues that aboriginal title cannot be "frozen for over 300 years." The characterization "frozen" can only mean that Jemez continued to hold title. Jemez argued, correctly, that once established it can only be lost to other Indian tribes through conquest or abandonment, which was not found by the Court. Closing Argument Tr. at 23:11-16.

2. Defendant Concedes that Absence of Evidence that Other Tribes Used a Discrete Area in the Valles Caldera Confirms Jemez's Aboriginal Title to that Area.

The MTR specifically argued that the absence of evidence that other tribes used a discrete area confirms Jemez's aboriginal Indian title to that discrete area. ECF 405 at 6. Although Defendant argues that there is evidence of use by other tribes, mostly non-specific to the discrete areas claimed, Defendant does not dispute, and therefore concedes, that the absence of specific evidence of use of an area by other tribes, in the face of specific evidence of Jemez use, confirms Jemez's title to the specific area at issue.

3. Defendant Concedes that Aboriginal Title Can Only Be Lost to Other Tribes Through Conquest and Abandonment.

The MTR (II.A.4) specifically asserted that confirming that aboriginal title, once established, can only be lost to other tribes by conquest or abandonment. ECF 405 at 12. Defendant doesn't dispute this requirement, and instead apparently argues that Zia owns portions of the Valles Caldera.[3] ECF 416 at 18. As set forth below, Defendant fails to provide any factual basis for Zia's use of the discrete subareas, and does not refute Zia's abandonment, or Jemez's conquest of, these areas. Having failed to contest the "conquest or abandonment" requirement, Defendant has conceded the issue.

[3] Defendant vaguely argues that Zia may have used areas prior to Jemez's arrival. Any claim Zia may have had was abandoned or lost by Jemez conquest. *See* ECF 374 at 3 (Court Order denying Defendant's Motion on the Pleadings and for Summary Judgment) ("[T]he Pueblos to which the Defendant refers 'have not continuously used the claimed land and any conflicting aboriginal title claims they may have had were extinguished when Jemez entered the area or have been abandoned'"). To the extent that Defendant relies on Dr. Ellis that Zia or any other tribe was present before Jemez, that argument is inconsistent with the previous position Defendant has taken regarding Jicarilla, Order COLs ¶ 141, at 322-323, and in Dr. Ellis' work she repeatedly states that Zia stopped using the claim area, which is consistent with the other evidence and testimony heard by the Court. DX-FC-50 and ECF 204 at 206-207.

4. Defendant Concedes Jemez's Argument Regarding the Law of Dominant Use.

The MTR specifically argued the legal requirements for proof of aboriginal title based on dominant use. ECF 405 at 13. Defendant's Response does not address the requirement of "dominant use" and has therefore conceded the issue.

II. The Court's Findings of Fact and the Record Support that Jemez Established Aboriginal Title to All Four of the Discrete Subareas Addressed in the MTR.

A. Jemez's Exclusive and Dominant Use of the Banco Bonito.

1. The Pueblo of Cochiti Did Not Traditionally Use Banco Bonito.

The record cited to by Defendant does not support that Cochiti de Pueblo ("Cochiti") traditionally used Banco Bonito. Defendant asserts that "Dr. Steffen [redacted]" implying that [redacted] Rather, the record indicates the opposite – [redacted] when fires had destroyed resources in Cochiti's traditional use area. Defendant relies on DX-ND, an email from Dr. Steffen to a Cochiti employee that states, "We look forward to the opportunity [redacted] ECF 416 at 8 (citing DX-ND and DX-NP). The email explains features of Banco Bonito because Cochiti, not having familiarity with Banco Bonito, does not know where to collect. Defendant also relies on DX-NP, which is a letter from the Valles Caldera Trust to Cochiti Governor Suina. *Id.* When discussing this same letter at trial, Dr. Suina confirmed that Cochiti did not customarily use Banco Bonito and only did so when its customary areas outside the Valles Caldera were destroyed. Nov. 8 Tr. at 2724:16-2726:15.[4]

[4] [redacted] Nov. 8 Tr. at 2718:13-2720:21. Dr. Suina testified that the rest of the Valles Caldera was the ancestral domain of Jemez. Nov. 8 Tr. at 2718:7-13 and PX 577.

2. Jemez Was the Only Tribe to Occupy Fieldhouses in Banco Bonito[5], and Jemez's Uses of Banco Bonito Were Not Limited to Farming.

Defendant's assertion that Plaintiff argued only that it "farmed the entire Banco Bonito" is a mischaracterization of Plaintiff's position. ECF 416 at 8 (citing ECF 405 at 14). Rather than limiting Jemez's uses to farming, the MTR argues that "[t]he Order supports Jemez's exclusive or dominant use of the eight square miles of Banco Bonito subarea for agricultural purposes, hunting, gathering and to demarcate their territory." ECF 405 at 14 (citing Order COLs ¶ 406, at 485). The Order finds not only evidence of Jemez farming in Banco Bonito, but that Jemez people "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.

Contrary to Defendant's assertion, the record does reflect that Dr. Steffen, along with other witnesses, *did* refer to Banco Bonito as Plaintiff's. When discussing fieldhouses in or near Banco Bonito, Dr. Steffen uses the following terms: "fieldhouses as the architecture of occupation and the emblem of Jemez occupation" (DX-RZ-006); "the Jemez Plateau fieldhouse phenomenon" (DX-RZ-0002); "100 fieldhouses inside the VCNP on the Banco Bonito are a tiny fraction of the >2,500 fieldhouse sites known across the Jemez Plateau" (DX-RZ-0003); "Jemez Plateau fieldhouses" (DX-RX-0003-04 and DX-RZ-005). *See also* Nov. 14 Tr. at 3302:24-3306:9 (Steffen, West). If Dr. Steffen had referred to Banco Bonito as belonging to any other tribe, which she did not, she would have contradicted the well accepted understanding among archeologist that the fieldhouses in Banco Bonito belonged to Jemez and the Court's findings of

[5] Although Defendant asks the Court to hold that Spain extinguished any title that might have been associated with the Banco Bonito fieldhouses, ECF 416 at 11 n.10, the Court, in its Final Opinion had already ruled that "Spanish Constraints on Jemez Pueblo Did Not Disturb Jemez Pueblo's Actual and Continuous Valles Caldera Use Sufficient to Preclude Jemez Pueblo's Aboriginal Title Claim." Order COLs ¶¶ 407-410, at 486-489. *See also, United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941).

the same. *See* Dr. Steffen discussion of respecting Michael Elliott, who identified fieldhouses in Banco Bonito as Jemez. *Id* and PX 122. "[A]rcheologists associate most Banco Bonito sites with Jemez's ancestors." *See also* Order COLs ¶ 125, at 315. Also, Defendant's expert witness Mr. Gauthier confirmed the fieldhouses on Banco Bonito were Jemez multiple times. Nov. 8 Tr. at 2374:11-15 (Leonard, Gauthier) ("The Banco Bonito . . . it's seasonal activity of farming is the primary reason for the existence of these Jemez sites."); Tr. at 2393:2-3 (Leonard, Gauthier) ("Banco Bonito, Towa sites"); 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 Tr. at 2484:16-18 (Leonard, Gauthier) ("Towa sites are most common in Banco Bonito").

3. **Neither the Order nor the Record Indicate that Zia Pueblo Used Banco Bonito.**

Defendant alleges that Dr. Anschuetz "placed Zia in many areas around Banco Bonito" but fails to cite to any evidence that Zia [redacted] Banco Bonito. Dr. Anschuetz did not testify that Zia used [redacted] Banco Bonito, but merely noted that Banco Bonito [redacted] Nov. 29 Tr. at 4651:1-5 (Anschuetz, Marinelli) ("Do you have an understanding of what land formation lies between or is directly to the south?"). Using maps from Dr. Anschuetz's report, only Jemez fieldhouse and villages were located directly south of [redacted] in Banco Bonito - not Zia. DX-SA-0033-34 (Anschuetz Rebuttal Report, Figures 3 and 4 showing Zia/Glazeware). Zia is located far to the south **and east** [redacted] and Banco Bonito, on the Pajarito Plateau. *Id*. Based on Dr. Anschuetz's own plotting, Zia's most direct path to [redacted] would not be through Banco Bonito. *Id*. If Zia did elect to take a longer, circuitous route through Banco Bonito to [redacted], it would have to pass through Jemez villages and fieldhouses. This illogical speculation of a Zia trail fails to demonstrate Zia's

use and occupation, and pales in comparison to the Court's finding of Jemez's "extensive trail systems" through Banco Bonito maintained by GPS. ECF 405 at 22.

Immaterial to Banco Bonito, Defendant also relies heavily on testimony or articles that reference a map recreated by Dr. Ellis. This map focuses on peaks outside of the four discrete MTR areas, concerning peaks [redacted] ECF 416 at 9 (citing DX-RP-207 and Nov. 29 Tr. at 4640:19-4643:8 (Anschuetz, Marinelli)). Neither [redacted] Zia areas alleged by Defendant, are within Banco Bonito or the other subareas. (Neither DC-RP-170-172 nor DX-FC-46 and 49 contains a reference to Banco Bonito).

4. **Neither the Order nor the Record Support that Jicarilla Apache Used Banco Bonito.**

Defendant also falsely claims, "Plaintiff's own witnesses admitted that Jicarilla Apache members and member of other non-Jemez Tribes peeled trees on Banco Bonito," as support that Jicarilla used the Banco Bonito. ECF 416 at 11. Defendant relies on its own proposed findings of fact, whose citations demonstrate that Plaintiff's expert did not rely on evidence of peeled trees in Banco Bonito for either Jemez or non-Jemez use because peel trees cannot, by their nature, indicate ethnic affiliation. ECF 386 ¶ 570, at 173. Dr. Liebmann testified that archeologists cannot determine ethnic affiliation from a peeled tree and that it could be evidence of Jemez use. Oct. 31 Tr. at 663:4-12 (Liebmann, West). Dr. Roney testified that peeled trees are "associated with a number of ethnic groups." DX-VE (Roney Dep. 79:2-5). Therefore, evidence of a peeled tree does not defeat Jemez exclusive and dominant use of Banco Bonito.

5. **The Ceramics Evidence Shows Jemez Exclusive and Dominate Use.**

Defendant fails to address the ceramics argument raised in the MTR and the Court's findings concerning the same. Order COLs ¶ 243, at 368-69 ("The Court asked the United States to address Jemez's contention that experts predominately associate the ceramic evidence with

Jemez, and the United States responded that such evidence is almost exclusively confined to Banco Bonito."); and Order COLs ¶¶ 211, 283, at 358, 381 ("ancestral Jemez Pueblo members predominately used the Valles Caldera's extreme southwestern corner," and "[Defendant] discussed the Valles Caldera ceramic sherd collection and argued that most Jemez Pueblo sherds are located on the Banco Bonito.")

Defendant weakly notes that Mr. Gauthier found nominal evidence of non-Jemez sherds in *and outside* of Banco Bonito. ECF 416 at 10 and DX-RR-0008. However, Defendant fails to acknowledge that Mr. Gauthier stated that Jemez ceramics dominated Banco Bonito multiple times. His report states, "Towa 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 … Towa sites are most common in the Banco Bonito area of the VCNP." DX-RR-0018; *see also* Nov. 8 Tr. at 2370:4-7 (Leonard, Gauthier) ("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."); and Nov. 8 Tr. at 2391:17-20 (Leonard, Gauthier). Finally, Defendant does not attempt to even discuss, and therefore concedes, Mr. Gauthier's flawed methodology.

B. Jemez's Exclusive and Dominant Use of Redondo Meadows.

Defendant relies almost entirely on the Court's findings regarding the geothermal litigation in response to Jemez's claim to Redondo Meadows, citing to various maps in the geothermal EIS. However, only a few maps show the boundaries of the geothermal project site. Those maps, attached as Exhibit A, show that the site was situated on and near Redondo Creek - not in Redondo Meadows which is west of the Creek. While Redondo Creek flows through

Redondo Meadows, Redondo Creek is distinct from Redondo Meadows. Jemez is not claiming aboriginal title to the geothermal site area.

Defendant's other citations are irrelevant to Redondo Meadows. DX-VG is a map of the claim area marked by Governor Chavarria to identify [redacted] DX-VG does not support Zia's use of Redondo Meadows or Banco Bonito. *See also* ECF 416 at 12-13 (citing DX-EZ-81-83 discussing [redacted]) (citing DX-FC-50-52 discussing [redacted] marked in DX-EY) (citing DX-EX-58 discussing areas between [redacted] (citing Nov. 29 Tr. at 4644:5-4645:8, Dr. Anschuetz discussing San Antonio Peak) (citing Order FOFs ¶ 274, at 118 discussing Valle Seco).

C. The Court's Findings Demonstrate Jemez's Exclusive and Dominant Use of the Western Two-Thirds of Valle San Antonio.

The Valle San Antonio is a valley, which is topographically distinct and separate from the six domes, all above 9,000 feet and in the northern part of the claim area. Jemez's claim to Valle San Antonio is not based on a "single sherd" as Defendant erroneously asserts, *see* ECF 416 at 10, but rather, on the Court's numerous explicit findings on Jemez's continuous use and occupancy of this subarea. ECF 405 at 26-27. But for the Court's single Fact 91, which concerns testimony regarding a single, purportedly non-Jemez sherd, there is no evidence of non-Jemez tribal use of this area. Interestingly, Defendant does not dispute Jemez's argument on Fact 91. Rather, Defendant attempts to identify additional evidence to supplement the Court's findings, but that additional evidence is conflicting, irrelevant, and ambiguous. For instance, Defendant cites to [redacted] However, DX-VG contradicts Defendant's assertion, because Governor Chavarria [redacted] DX-VG also conflicts with Dr. Anschuetz's testimony because Dr. Anschuetz testified

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that [redacted] and "good three-quarters" of the claim area. ECF 416 at 14 (citing Tr. at 5067:1-23, Dr. Anschuetz discussing DX-VF which was an ethnographic study of the Jemez Mountains identifying tribal use areas[6]). Dr. Anschuetz's testimony conflicts with Governor Chavarria's [redacted] of the claim area in his areas of use in DX-VG. Given that the Court used DX-OY, a map marked by Mr. Whatley during his deposition, as evidence of Jemez exclusive use areas, the same weight should be given to DX-VG as evidence for Santa Clara's use area outside of the subareas.

Other evidence offered by Defendant is irrelevant. DX-EY, a map by Dr. Ellis identifying areas of Zia use in the Valles Caldera, does not include the Valle San Antonio. Similarly, DX-SB-16 concerns "the east side of the VCNP" and Defendant's cite to Dec. 3 Tr. at 5112:24-5114:21 identifies [redacted] but not the Valle San Antonio. ECF 416 at 10 (citing same).

Defendant argues that Navajos used the Valles Caldera, but notes that "Plaintiff's own stories place hostile Navajo in the Valle San Antonio." ECF 416 at 14. In fact, Jemez drove Navajos out of the Valles Caldera consistent with Jemez aboriginal Indian title and dominant use. Order FOFs ¶ 174, at 87 ("Eleven Jemez Pueblo herders tending cattle near the hay camp attacked the Navajo raiders, killing two, and recapturing five mules. *See e.g.,* Nov. 15 Tr. at 3555:2-12 (Luebben, García y Griego); Kehoe Report at 6-7; VCNP Land Use History at 27.")

Defendant cites to Nov. 19 Tr. at 4131:10-4132:15 for alleged support that Santa Clara uses the Valle San Antonio; however, there Dr. Kehoe testifies that an exhibit "does not specify

[6] DX-VF did not include the claim area in the ethnographic study.

whether its San Antonio mountain, Rio San Antonio, Valle San Antonio. And I wasn't sure if there were other important sites with the name San Antonio in the area." ECF 416 at 14 (citing same). This evidence is too ambiguous. Similarly, DX-LL, cited for support that Santa Clara uses trails traversing the Valle San Antonio, contains no suggestion that Santa Clara traverses that area, nor does it suggest that Santa Clara has ever used any of the other "historic and modern trails." No other tribe or Pueblo is identified as using these trails, rather DX-LL mentions only that San Ildefonso and Jemez use one trail far to the south. DX-CK, which contains Zia, Santa Ana, and Jemez Indian Claims Commission ("ICC") testimony, is also too ambiguous to support that Zia or Santa Ana used this area. DX-CK-31 identifies a [redacted] ECF 416 at 14 (citing DX-LL-27 attached as Exhibit C identifies [redacted] outside of the claim area). DX-CK-33 identifies [redacted] and, DX-CK-65 identifies [redacted] which is not the Valle San Antonio. Exhibit B. None of the additional evidence offered by Defendant[7] defeats Jemez's title to this area.

D. Jemez's Exclusive Dominant Use of Discrete Areas on Redondo Mountain.

[7] Defendant asserts that Jemez did not include the Valle San Antonio in its map identifying the "Jemez Province" and cites to its proposed finding of fact, which was not adopted by the Court. ECF 416 at 13 n.13. "Jemez Province" and Jemez's usage area differ. Province is used by archeologist to describe a specific area of architectural structures and is not intended to be a mapping of Jemez's territory. Oct. 29 Tr. at 279:21-280:8 (Dykema, Tosa).

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Defendant's Response to Jemez's claim of aboriginal title to areas on Redondo Mountain align with the Court's findings that there are [redacted]

The springs identified in Jemez's MTR are not the same springs discussed by Defendant. Defendant cites to Dr. Ellis' work, DX-FC, but Dr. Ellis discusses different springs and she misidentifies the springs' locations. [redacted] At DX-FC-46, Dr. Ellis describes [redacted] DX-FC-48 concern [redacted] Defendant's other cites to DX-FC concern "headwater springs" and non-specific "small springs on Redondo and La Jara Creek, nearby." ECF 416 at 16 (citing same). These springs are not addressed in Jemez's MTR.

In response to Jemez's claim to its [redacted], Defendant asserts that "many Tribes who traverse Banco Bonito and Redondo Peak … [redacted][.]" ECF 416 at 16. Defendant provides no supporting citation for this assertion, nor does Defendant offer any evidence to show that other tribes use Jemez's Trail because there is no evidence of the same.

[8] [redacted]

As already established by the Court, exclusive use is clear when only one tribe knows its location,[9] and [redacted]

Because Defendant is unable to cite any specific evidence of other tribes using these areas on Redondo Mountain, Defendant argues that Jemez's claim must be rejected because: 1) "for the same reason that this Court held that Plaintiff lacks aboriginal title to the entire Preserve"; *i.e.*, the entire claim and "all of Redondo Mountain is a commons," and 2) Congress rejected Jemez's effort to purchase 200 acres in 2000. ECF 416 at 4 and 16. These arguments are irrelevant to whether there is evidence of other tribes using these areas. Defendant's assertion that a "commons" area automatically defeats aboriginal title to any specific area conflicts with the Court's prior ruling that non-exclusive use of one area "is not automatically imputed" [10] to the whole area. Order COLs ¶ 371, at 453.

III. The Exhibits Attached to the MTR Are Properly Before the Court.

Defendant argues that the purpose of Jemez's exhibits to the MTR is to "evade" the page limit prescribed by D.N.M.LR-Civ. 7.5, because, according to Defendant, Jemez's exhibits E, F, G, H, and I, ECF 405 at 5-9, are merely "excessive footnotes." ECF 416 at 26. This contention ignores the Court's Local Rules and the content of the exhibits.

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[9] Moreover, even if there were evidence that other trails **cross** Jemez's Trail, that does not constitute other tribes use of the Trail itself or compromise Jemez's exclusive use and occupancy. [redacted]

[10] Imputed is defined as assigning something by inference. Defendant asks the Court to deny Jemez's MTR based on its "commons" argument - automatically inferring without evidence that the areas at issue here are part of that commons. As acknowledged by the Court, the term "commons" has not been used or adopted by any Court, including the ICC. It is not necessary for the Court to embark on a new theory. Rather, this Court should consider Jemez's argument that "what we seek here is simple justice based on the basic principles of Anglo-American property law going back prior to the founding of the American Republic." Sep. 14 Tr. at 64:14-65:2, 76:1-77:8, May 7, 2019 Tr. at 95:2-17.

First, under D.N.M.LR-Civ. 10.5:

> all exhibits to a motion, response or reply, including excerpts from a deposition, *must not exceed a total of fifty (50) pages*, unless all parties agree otherwise. If agreement cannot be reached, then the party seeking to exceed the page limit must file a motion in accordance with D.N.M.LR-Civ. 7. A party may file only those pages of an exhibit which are to be brought to the Court's attention.

(Emphasis added). Jemez's exhibits are a total of 16 pages, well within the 50-page limit, and no agreement was necessary before filing. Second, most of Jemez's exhibits do not "consist entirely of single-spaced text critiquing several of this Court's findings of fact," ECF 416 at 26, but contain trial exhibit maps in support of its MTR. Any additional text is not "excessive" but minimally supports the arguments in the MTR.

To the extent the Court agrees with Defendant concerning the additional text, not only is this issue not before the Court, but the Court should use its discretion to accept the text as proper. *Chavez v. Bd. of Cnty. Comm'rs of Sierra Cnty.*, No. CIV 11-1008 JB/LAM, 2012 WL 2175776, at *6 (D.N.M. May 30, 2012) (Browning, J.). Defendant has not filed a separate motion objecting to Jemez's MTR exhibits as required under the Local Rules, nor has the Clerk of Court notified counsel that Jemez's MTR is non-conforming. D.N.M.LR-Civ. 7.1; D.N.M.LR-Civ. 10.3(c). In any event, the issues in this case are sufficiently complex that such a minimal expansion of pages should be allowed. *Dawson v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo.*, Civil Action No. 16-cv-01281-MEH, 2017 WL 5188341, at *4 (D. Colo. Jan. 3, 2017).

CONCLUSION

Defendant merely rehashes old arguments rejected by the Court or fails to cite to evidence. Defendant's legal arguments are unsupported and fly in the face of accepted law.

WHEREFORE, the Pueblo of Jemez respectfully requests that the Court grant its Motion for Reconsideration and alter the August 31, 2019 Order to confirm Jemez Pueblo's aboriginal title to the discrete subareas addressed in Jemez's MTR.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 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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