IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PUEBLO OF SAN FELIPE, a federally recognized tribe,

***Plaintiff*,**

v. **No. CIV 23-0296 JB/LF**

DEBRA HAALAND, Secretary of the United States Department of the Interior, et al.,

Defendants,

PUEBLO OF SANTA ANA,

Intervenor-Defendant

PUEBLO OF SANTA ANA'S RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

INTRODUCTION

Intervenor-Defendant Pueblo of Santa Ana, by and through its counsel, hereby files its Response to Plaintiff Pueblo of San Felipe's Motion for Leave to File First Amended Complaint.[1]

[1] Santa Ana originally filed its Motion for Limited Intervention, Doc. 32, seeking leave only to file a Motion to Dismiss Plaintiff's Complaint for Failure and Inability to Join an Indispensable Party. At a hearing in open court on November 20, 2023, the Court indicated that this "would be a very strange case [if] we [did] not have Santa Ana participating.," Trans. at 5, but the Court did not allow Santa Ana to file a motion to dismiss. The ruling was memorialized in an Order entered on September 10, 2024 (Doc. 81), but the Court has allowed counsel for Santa Ana to participate in oral argument at each hearing in this case, over San Felipe's objection that Santa Ana had not filed any written brief to which San Felipe could respond. Santa Ana has concluded that, while it does not wish to waive its position that the Complaint (or the First Amended Complaint, should the Court allow that to be filed) should be dismissed for failure and inability to join Santa Ana as a party, it also believes that it can add materially to the United States' arguments regarding the Motion for Leave to File FAC, and wants Plaintiff's counsel to see its arguments before the hearing on this motion.

The Motion should be denied. Despite the complete rewriting of the Complaint, it remains clear that San Felipe's sole purpose in this lawsuit is to reinstate its claim to land that indisputably belongs to the Pueblo of Santa Ana, and has been in Santa Ana's sole and exclusive possession for more than a quarter of a millennium. This goal is plain from the allegations at the heart of the proposed First Amended Complaint ("FAC"), at ¶¶ 122-63, which challenge the Defendants' determination that the 1907 Hall resurvey of the San Felipe Pueblo Grant should be corrected so as to eliminate the overlap between that Grant and Santa Ana's El Ranchito tract. (The area of overlap, which was eliminated by the 2013 resurvey of the south and west boundaries of the San Felipe Grant, is referred to herein as the "Former Overlap.")

San Felipe attempts to avoid the unavoidable conclusion that this action continues to be an impermissible effort to claim title to Indian lands in two ways: first, by claiming that the sovereign immunity bar of the Quiet Title Act's Indian lands exception, 28 U.S.C. § 2409a(a) ("QTA") is not applicable here, because all of the federal defendants' actions that led to, and included, the correction of the survey of the San Felipe Grant so as to eliminate its overlap with Santa Ana's El Ranchito tract, were "*ultra vires*" and unconstitutional, and therefore not protected by sovereign immunity; and second, by making the frankly astonishing assertion that Santa Ana has never had any valid claim of title to the Former Overlap, or at least is barred from making any such claim now, so that the Former Overlap lands are not in fact "Indian lands." San Felipe supports these fantastic claims by repeated mischaracterization of documents, misstatements of legal rulings and utter failure to cite to or acknowledge documents in the record or case law that thoroughly refute its contentions.

As will be shown, the actions of the various federal officials named as defendants in this case, in upholding Santa Ana's superior title to the Former Overlap and correcting the erroneous

survey of the San Felipe Pueblo Grant that created the overlap, were well within those officials' authority under federal statutory and case law, and that authority was confirmed by an opinion of the Solicitor of the Department of the Interior. And the fact that the Former Overlap has been owned and exclusively occupied by Santa Ana for 270 years is clearly established by the unimpeachable historical record, and by a decision of the Tenth Circuit Court of Appeals. These facts should force the denial of San Felipe's Motion for Leave to File First Amended Complaint.[2]

It might be noted that San Felipe's memorandum in support of its motion to amend mainly argues the merits of San Felipe's case, rather than focus on the grounds for filing an amended complaint, and for that reason (but also because, to some extent, the issues underlying the federal defendants' Motion to Dismiss overlap with issues on the merits), this memorandum will also address matters that go to the merits as well as to the Quiet Title Act issues.

ARGUMENT

I. PATENTS BASED ON PRIVATE CLAIMS ARE MERE QUITCLAIMS, AND THE FEDERAL DEFENDANTS' CORRECTIONS OF ERRONEOUS SURVEYS OF THE PATENTED LANDS ARE FULLY WITHIN THEIR AUTHORITY.

On June 7, 2024, the Court issued an Order in this case, Doc. 70, in which it asked the parties to address the legal significance, if any, of San Felipe's patent.[3] The question is an extremely apt one, and bears directly on San Felipe's insistent claims that the federal defendants acted beyond their authority. Despite San Felipe's characterization of its patent as something

[2] Santa Ana has attached as exhibits several documents from the administrative record before the Interior Board of Land Appeals ("IBLA") that bear directly on these issues, but that were not included in the documents that San Felipe submitted into the record on February 9, 2024, Doc. 49.

[3] The Court also requested the parties to address how the United States should handle a situation in which two parties, towards both of whom it has trust responsibilities, are adverse. That will be addressed below, in Section V.

akin to holy writ, patents issued based on confirmations of titles held under prior sovereigns are mere quitclaims of the United States' interests in the land claimed, and are fully subject to valid adverse claims, such as, here, that of Santa Ana.

First, it should be noted that San Felipe spends an inordinate amount of its time and effort railing against the Defendants' attack on its patent. *See, e.g.*, Plaintiff's Memorandum in Support of Motion for Leave to Amend, etc., Doc. 79, filed on July 29, 2024 ("SF Mem.") at 6-10, 16-17. These protestations are entirely misplaced. The validity of the San Felipe patent has never been questioned,[4] nor did any action of any of the federal defendants in this case reflect any effort to invalidate or undermine it (although it should be pointed out that San Felipe's statements that its patent was "Confirmed by Congress," *see, e.g.*, FAC at 7, heading before ¶ 22, is incorrect: Congress confirmed the "grant" in 1858; the survey was performed in 1859, and the patent was issued five years later, in 1864; Congress had nothing to do with either the patent or the survey). Rather, it is the *survey* of the lands embraced by the patent that has been a longstanding source of frustration and puzzlement on the part of federal land officials.[5] But as

[4] The Supreme Court has ruled that congressional confirmation of a title established under a prior sovereign is conclusive, as a legal matter, of the validity of the title. *Tameling v. United States Freehold & Immigration Co.*, 93 U.S. 644 (1876); *Jones v. St. Louis Land & Cattle Co.*, 232 U.S. 355 (1914). But as a matter of *historical* fact, it is well established that the purported San Felipe Pueblo Grant, like eight of the nine other Pueblo paper "grants" that were confirmed by Congress by the Act of December 22, 1858, 11 Stat. 374, are frauds. Purportedly made in September, 1689 by then Governor Don Domingo Jironza Petriz de Cruzate (and now generally referred to as the "Cruzate grants") the documents were in fact created sometime in the mid-1800s, probably after the Treaty of Guadalupe Hidalgo was signed, and they first appeared in 1855 and 1856, after the Surveyor General of New Mexico requested the Pueblos to bring their land documents to his office so they could be confirmed. (Note that San Felipe repeatedly refers to a grant "from the King of Spain," *e.g.*, SF Mem. at 4, FAC at 7, ¶ 23. In fact, land grants in New Mexico during the Spanish period were all made by the Spanish territorial governors.) The story of these fascinating documents, and the still unsolved mystery of their origin and creator, is detailed in Ebright, Hendricks and Hughes, FOUR SQUARE LEAGUES: PUEBLO INDIAN LAND IN NEW MEXICO (UNM Press 2014) (hereinafter, "FOUR SQUARE LEAGUES"), at 205-34.

[5] San Felipe cites cases such as *Moore v. Robbins*, 96 U.S. 530 (1877), *Pan Am Petroleum Corp.*

even the history as recounted by San Felipe makes clear, those federal officials have always possessed the power to correct erroneous surveys of private claims. Indeed, we might not be in this proceeding had the General Land Office not had Wendell Hall resurvey the San Felipe Pueblo Grant in 1907.

A. San Felipe's Patent is Merely a Quitclaim.

It is true, as the Supreme Court has held, that confirmation of a claimed title under a prior sovereign is binding as against the United States (when acting in its proprietary capacity), *see, e.g., United States v. Maxwell Land-Grant Co.,* 121 U.S. 325 (1887), *United States v. State Investment Co.*, 264 U.S. 206 (1924); as against persons whose titles derive from the United States, *see, e.g., Russell v. Maxwell Land-Grant Co.*, 158 U.S. 253 (1895), and as against the patentees themselves. *E.g., Stoneroad v. Stoneroad,* 158 U.S. 240 (1895); *De Guyer v. Banning*, 167 U.S. 723 (1897).

But the patenting and survey of such a tract is *never* considered conclusive as against a claim by a third party who holds a superior title derived from the prior sovereign. Numerous

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v. Pierson, 284 F. 2d 649 (10th Cirt. 1960), *United States v. Riemann*, 504 F. 2d 135 (10th Cir. 1974) and others for the proposition that once surveyed, "the rights of patentees are fixed, and the government has no power to interfere with those rights, as by a corrective resurvey." *Riemann*, 504 F. 2d at 138. *See* Memorandum in Support of Motion for Leave to Amend, etc. ("SF Mem."), at 8-9. But those cases all deal with surveys of *public* lands, and of tracts acquired by patentees under the public land laws. A different rule applies with respect to surveys of private claims under titles acquired under a prior sovereign. *See Adam v. Norris*, 103 U.S. 591, 593 (1880). In the case of surveys of private claims, the government retains the power to correct an erroneous survey, as will be discussed below. Ironically, on the page before it cites the public land cases, San Felipe attacks the Tompkins Opinion of 2013, M-37027, for citing statutes dealing with the Secretary's authority to resurvey lands, including public lands, under her jurisdiction. SF Mem. at 7. The opinion (attached as Exhibit E to the FAC, and as Exhibit 1 to the Federal Defendants' Motion to Dismiss, Doc. 29; it will be referred to herein as the "Tompkins Opinion") cites such statutes in footnote 5, which generally explains the Secretary's authority to order resurveys, but they are not the basis for the opinion's conclusion that Santa Ana has superior title to the Former Overlap.

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decisions of the Supreme Court hold clearly that such third parties always retain the right to assert claims to such lands, notwithstanding the American confirmation, patent and survey. Indeed, the Act of Congress that confirmed the San Felipe Pueblo Grant, the Act of December 22, 1858, 11 Stat. 374, states expressly that the confirmation "shall only be construed as a relinquishment of all title and claim of the United States to . . . said lands, and *shall not affect any adverse valid rights*, should such exist." (Emphasis added.) The same language appears in the patent to San Felipe. *See* Exhibit B to FAC, at 4.

A contention identical to that made here by San Felipe was addressed by the Supreme Court in *Adam v. Norris*, 103 U.S. 591, 593 (1880). In that case, as here, the Court confronted conflicting surveys of properties held under Spanish or Mexican titles. Counsel for the plaintiffs had argued "that a patent from the United States is final and conclusive on everybody, and that the title which it confers cannot be disputed in a court of law." In response, the Court, through Justice Miller, stated:

> No doubt, where the patent is for land to which the government had an undisputed title, the proposition is generally, if not always, true. But the United States, in dealing with parties claiming, under Mexican grants, lands within the territories ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the government issues a patent, *it was in the nature of a quitclaim*, – an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed. . . . Such a patent was, therefore, conclusive evidence *only as between the United States and the grantee that the latter had established the validity of the grant.*

(Emphasis added.) Like San Felipe here, the plaintiff in *Adam* contended that the prior American survey and patenting of his grant conclusively determined that the lands in conflict belonged to him. The Court disagreed, saying, "*We do not think, therefore, if the defendants'*

survey and patent are based upon a superior Mexican grant, that their rights are concluded by the prior survey of the plaintiffs." *Id.* at 594 (emphasis added). And the Court further made clear that the Land Office was free to act to correct the survey, so that the lands intended to be covered by the prior title had been correctly delineated and quitclaimed.

Similarly, in *Henshaw v. Bissell*, 85 U.S. 255 (1873), the Court was faced with a dispute by two claimants holding Mexican grants that had been confirmed under congressional authority, and that had been surveyed and patented by the United States, both of which surveys embraced some of the same lands. The Court acknowledged that the confirmations "established the validity of the claims." *Id*. at 264. It flatly rejected, however, the claim that the grant that was first surveyed and patented should prevail. It said, "this fact *is not a matter of any weight in this case*." (Emphasis added.) Rather, it said, the Court must "look beyond the patents, to the original source of title as it existed under the former government." *Id*. It went on to observe,

> The fact that two surveys embrace the same land is itself proof that either one of the original concessions was improvidently issued and to the extent of its interference with the other was inoperative, *or that error has intervened in one of the surveys*.

Id. at 265 (emphasis added). The Court proceeded to determine the case by looking to the character of the titles under Mexican law, determining that the plaintiff's claim, though surveyed and patented later than the defendant's, should prevail, as the latter was merely a floating grant, lacking definitive location until it was established on the ground. *Id*. at 267-68. *See also, Beard v. Federy*, 70 U.S. 478 (1865) (patent to land claimed under prior sovereign subject to claims of third parties "who hold superior titles"); *United States v. Valdez de Conway*, 175 U.S. 60, 70-71 (1899) (Court held that "if defendant's survey and patent are based upon a superior Mexican grant, [we do not think that] their rights are concluded by the prior survey of the plaintiffs. . . .

conflicting claimants are at liberty to resort to the ordinary remedies at law or in equity, . . .")[6]; *United States v. Baca*, 184 U.S. 653, 660 (1902) (similar to *Valdez de Conway*; claim for land within previously confirmed grant dismissed, but "without prejudice to the right of the petitioner to assert his title in any court of competent authority"); *Jones*, 232 U.S. at 361 ("if there be claims under two patents each of which reserves the rights of other parties, the inquiry must extend to the character of the original concession. The controversy can only be settled by determining which of these two gives the better right to the demanded premises."). Other like authorities are referenced in the cited cases. *See also, Pueblo of Santa Ana v. Baca*, 844 F.2d 0708, 710-11 (10th Cir. 1988).

The critical point is that, contrary to San Felipe's assertions, San Felipe's title, such as it is, derives from the Spanish "grant," not from the United States patent, which is only, as the Court said in *Adam*, "an admission that the rightful ownership had never been in the United States." 103 U.S. at 593. The American survey, moreover, was never intended to "create" the boundaries of the grant, but rather to identify the boundaries as they existed under the prior sovereign, and to segregate those lands from the public domain. To the extent any such survey might infringe on other lands held under a different, and better, valid title under the prior sovereign, it must be void, since the United States would have had no authority to convey any portion of such lands, and the prior valid title would control.[7] As the Court said in *Interstate*

[6] Thus, San Felipe's claim that "courts are without jurisdiction to adjudicate pueblo patent boundary disputes," SF Mem. at 12, is simply incorrect.

[7] "[N]othing is better settled by this court than that a patent issued by the United States to lands which they do not own is a simple nullity." *Valdez de Conway*, 175 U.S. at 68. San Felipe makes the novel argument that the challenged resurvey of its grant violated Section 17 of the Pueblo Lands Act, which among other things precludes any involuntary alienation of Pueblo lands. SF Mem. at 10-11, 28-29. The flaw in this argument is that the area of the Former Overlap, having been determined to be part of Santa Ana's El Ranchito tract, could never have been validly conveyed to San Felipe by the United States in the first place, and to the extent the

Land Co. v. Maxwell Land Grant Co., 139 U.S. 569, 580 (1891), while congressional confirmation of a Spanish or Mexican grant precludes an attack on the validity of that grant, and the surveying and patenting of that grant settle issues as between the United States and the grantee, "those proceedings do not estop a party claiming the same land under a prior grant from the Mexican government. But, to succeed in this claim, he must recover on the strength of his own title." In other words, no action of the United States forecloses a contest between two claimants to the same land, both claiming under titles derived from the prior sovereign. San Felipe's American survey and patent, thus, are no defense to a claim by one, like Santa Ana (or, likewise, the United States acting as trustee for Santa Ana), that can show a superior title to the disputed lands.[8]

That this is so with specific respect to the San Felipe Pueblo Grant itself is shown very clearly by a Tenth Circuit court decision that San Felipe disregards, citing only the district court decision. *United States v. Algodones Land Co.*, 52 F.2d 359 (10th Cir. 1931),[9] was the quiet title action brought by the United States to conclude the Pueblo Lands Act process at San Felipe. In each such action, the United States would ask the federal court to quiet the Pueblo's title to all of the lands within the Pueblo's exterior boundaries, except for the tracts that the Pueblo Lands Board found met the criteria of Section 4 of the Act and the Pueblo's title to which would thus be extinguished under the terms of the Act, and which tracts were listed as "exceptions" in the Board's report. *See* Section 3 of the Act of June 7, 1924, 43 Stat. 636, 636-37. Unsuccessful

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Hall resurvey purported to include that area within the grant, it was void.

[8] As the court said in *Baca*, "confirmation by the United States is not conclusive and does not decide which claimant has the better right." 844 F. 2d at 711.

[9] In its FAC, San Felipe cites only to the unreported district court decision. *See* FAC at 21 ¶ 88, 22, ¶¶ 90-92, and the full opinion of the district court was not placed into the record by San Felipe. It nowhere mentions the court of appeals decision, which directly contradicts its argument, as is explained in the text.

claimants before the Board would be named as defendants in each such action, and would have another opportunity to have their claims upheld, this time by the court.

In the San Felipe case, one of the claims rejected by the Board was that of one Alfredo Montoya and others for a tract of land, consisting of about 1400 acres, known as the Santa Rosa de Cubero Grant. The grant lies almost entirely within the San Felipe Pueblo Grant as ultimately resurveyed by Wendell Hall. *See* Exhibit C attached to the FAC. The district court, reversing the Board, upheld the claim, and the court of appeals affirmed. This grant had originally been made in 1815 by the Spanish governor of New Mexico, Alberto Maynez, to one Domingo Fernandez and others, and it was described as being the land *between* the Pueblos of San Felipe and Santo Domingo.[10] During the Spanish period, it was universally understood that when the "lands" of a Pueblo were referred to in grant and similar documents, the reference was to the Pueblo's "League," a square parcel of land, centered on the mission in the Pueblo village, each of whose sides lay one league, or about 2.6 miles, in each of the cardinal directions from the mission, and encompassing about 17,350 acres. That, under Spanish law, was the recognized minimum land entitlement of each Pueblo (although some Pueblos received additional grants of land, outside their Leagues). *See* FOUR SQUARE LEAGUES at 11-47. Although many of the fraudulent Cruzate Grants were for Pueblo Leagues, others, such as San Felipe's, had natural monuments for one or more boundary calls, and in San Felipe's case those were on the north and south sides. *See id*. at 205-34; *supra* n. 4. But given the description of the grant in the grant documents, the Santa Rosa de Cubero Grant was determined to have as its south boundary an

[10] The original documents pertaining to the Santa Rosa de Cubero Grant are in the Spanish Archives of New Mexico, and are listed in Ralph Twitchell's still authoritative index to those documents, at I Twitchell, SPANISH ARCHIVES OF NEW MEXICO (Cedar Rapids: Torch Press, 1914; reprinted, Santa Fe: Sunstone Press, 2008) (hereinafter, "SANM") at 93, Doc. 281.

east-west line one league north of the church at San Felipe, and as its north boundary a line one league south of the church at Santo Domingo, and thus laying right athwart the San Felipe Grant as it would later be surveyed by Hall.

The Santa Rosa de Cubero Grant was confirmed by the Court of Private Land Claims in 1900 (notwithstanding what San Felipe would undoubtedly claim was its clear conflict with the confirmed San Felipe Pueblo Grant[11]), and a patent for the grant was issued in 1914. *Algodones Land Co*., 52 F. 2d at 361. Both the district court and the court of appeals held that even though the grant as patented lay directly across the Hall resurvey of the San Felipe Pueblo Grant, San Felipe had never in fact owned any part of the Santa Rosa de Cubero. *Id*.[12] This ruling demonstrates plainly that San Felipe's claim, that superior titles from the prior sovereign fail in the face of its American survey and patent, is wrong. Neither the district court nor the court of appeals had any difficulty determining that San Felipe's patent and resurvey were simply *void* to the extent of their conflict with the Santa Rosa de Cubero Grant. The same is true as to the conflict of that resurvey with Santa Ana's El Ranchito tract, and that, of course, was precisely the purpose and effect of the 2013 resurvey that San Felipe protests in this proceeding–that is, to eliminate the "void" portion of the survey of the San Felipe Grant, that is, the portion that conflicted with the El Ranchito survey.

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[11] In fact, there is another grant confirmed by the Court of Private Land Claims that conflicts with the San Felipe Grant—the Angostura Grant, a 1745 grant to one Juan Jose Gallegos. More than half of that grant, as surveyed in 1898 by John Walker, overlaps the southwest corner of the San Felipe Grant as resurveyed by Hall. It is shown clearly on the plat of Hall's resurvey of the San Felipe Grant, Exhibit C to the FAC.

[12] In its decision the court of appeals undertook an extensive examination of Clements' original survey of the north boundary of the San Felipe Pueblo Grant, and concluded that the surveyor "ignored" the boundary call in the grant document, and established the north boundary on a line that could not be justified by anything in the grant. As will be shown, the same is true of the south boundary, a fact that, in part at least, led to the creation of the Former Overlap.

In short, these cases demonstrate that a survey based on a patent such as the one that San Felipe received from the United States does not establish an impregnable barrier to conflicting claims, but only determines the patentee's rights as against the United States, and persons whose titles are derived from it, in its proprietary capacity. Moreover, as federal statutory law, case law and documents in the record establish, the Secretary of the Interior retains the authority to correct surveys of such grants when they are shown to be clearly erroneous, as San Felipe's was in this instance.

B. The Secretary Plainly Had the Authority to Order a Corrective Resurvey of the San Felipe Pueblo Grant.

By the Act of April 8, 1864, Congress conferred on what became the Bureau of Land Management the power to survey "any Indian or other reservations, or any lands" (now codified at 25 U.S.C. § 176). That fact should be a complete answer to San Felipe's incessant claims that for the Bureau to carry out the resurvey of portions of the south and west boundaries of the San Felipe Pueblo Grant was "ultra vires" and "unconstitutional." But there is more to it.

In 1988, then Interior Solicitor Ralph Tarr issued an opinion entitled "Pueblo of Sandia Boundary," 96 I.D. 331 (the "Tarr Opinion"), in Part IV of which he opined that 25 U.S.C. § 176 had been impliedly repealed by the Quiet Title Act, 28 U.S.C. § 2409a, and by the Indian Claims Commission Act of 1946, 60 Stat. 1049 (formerly codified at 25 U.S.C. §§ 70 *et seq*.), and that thus the Secretary of the Interior lacked any authority to consider a claim by a Pueblo Indian tribe that the survey of its Spanish grant was erroneous. A year later, in 1989, Santa Ana filed its Petition with the Secretary of the Interior, asking him to exercise his authority under § 176 to correct the survey of the San Felipe Pueblo Grant so as to eliminate the overlap with Santa Ana's El Ranchito tract. The first substantive response to that Petition from the Department was in December, 2000, when Solicitor John Leshy issued Opinion M-37000 (the "Leshy Opinion;" it is

in the record of this case in Doc. 49-6, at 28-41, Bates Nos. 0793-806), entitled "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,' 96 I.D. 331 (1988)." In that opinion, Leshy reconsidered Part IV of the Tarr Opinion, and decided that it was in error, and that its "anomalous conclusion" should be overturned. In addition to rejecting the implied repeal of § 176, he reviewed the long history of resurveys and corrections of surveys of Indian land, to which the Tarr Opinion had given short shrift.[13] Leshy thus concluded that the Secretary had the authority to grant the relief Santa Ana was seeking in its Petition, to correct the resurvey of the San Felipe Pueblo Grant to eliminate the area of conflict with El Ranchito, if Santa Ana's claim on the merits prevailed.[14]

There are, moreover, two federal court decisions that fully support the position that the Secretary has the authority to correct erroneous surveys of Pueblo lands. *Pueblo of Taos v. Andrus*, 475 F.Supp. 359 (D.D.C. 1979), was a suit by the Pueblo to obtain confirmation of a resurvey ordered by the Secretary of the Interior to correct the boundary of an old Spanish grant that had been acquired by the United States for the benefit of the Pueblo. Although the facts leading to the case, involving conflicting opinions among several federal administrative agencies as to where the boundary should lie, are complicated, there was no argument that the Secretary

[13]Leshy also rejected San Felipe's argument that the relief Santa Ana sought was barred by 25 U.S.C. § 398d, an argument also made by San Felipe here. SF Mem. at 12. That statute prohibits changes in the boundaries of Indian reservations created by Executive order or proclamation. San Felipe's "grant," obviously, is no such thing.

[14] San Felipe purports to quote the Leshy Opinion as stating that the Secretary does not have the authority to affect titles of patentees, saying that "the power to resurvey 'is a power which may not be exercised against the rights of patentees.'" SF Mem. at 10 (quoting Leshy Opinion at 9). But this quote omits critical language. The full quote, from the Leshy Opinion at 9, is, "a power which may not be exercised against the rights of patentees or good faith purchasers *of public lands*." (Emphasis added.) That passage, despite San Felipe's blatant misquote in an attempt to enlist it to its cause, does not support its claims. San Felipe is not a "patentee of public lands."

did not have the authority to correct an erroneous grant survey, and the court noted that the Secretary has a "duty . . . to determine the boundaries of Indian lands." *Id.* at 365.

Pueblo of Sandia v. Babbitt, No. 94-2624, 1996 WL 808067 (D.D.C. 1996), involved another Pueblo grant surveyed, like San Felipe's, by Reuben Clements. The grant document (which happens to be an authentic grant document, not a Cruzate grant, like San Felipe's, although it turned out that Sandia was in possession of *two* Cruzate documents, that had never been presented to the Surveyor General; *see* FOUR SQUARE LEAGUES at 226-27) described the grant as being bounded on the east by "'the main ridge called Sandia,'" 1996 WL 808067 at *1 (quoting translation of grant document[15]), but it was surveyed by Clements to the crest of a low ridge in the foothills of the Sandias. *Id.* Sandia petitioned the Secretary of the Interior to correct the survey, and several Interior Department officials, including the Associate Solicitor for Indian Affairs, supported the Pueblo's petition, and agreed that the boundary as surveyed was incorrect. Ultimately, however, Solicitor Ralph Tarr issued the Tarr Opinion, discussed above, reversing the opinion of the Associate Solicitor, and finding that the Clements survey was correct (and opining that, as discussed above, the Secretary lacked authority to correct erroneous surveys of Indian lands). Secretary Donald Hodel, and his successor, Secretary Bruce Babbitt, both declined to order a resurvey. Sandia sued, claiming that the two Secretaries' failure to order a corrective resurvey were violations of the Administrative Procedure Act.

The district court clearly agreed that Sandia had proven that the Clements survey incorrectly had omitted approximately 10,000 acres of land that should have been included,[16] and

[15]The language of the grant is, "por el Oueste La Sierra Madre llamada de San Dia." 1996 WL 808067 at *1.

[16] The court noted that Sandia's expert, Dr. Ward Alan Minge, had been relied on by another federal court for its decision in a land dispute between a Pueblo and the United States, citing *Pueblo of Santa Ana v. Baca*, 844 F.2d 708, 712 (10th Cir. 1988).

it held that, notwithstanding the Tarr opinion, "[t]here is accordingly no question that Secretaries Hodel and Babbitt *had the authority to order a corrected survey*." *Id*. at *7 (emphasis added). It further held that because the land rights of an Indian tribe were at stake, the Secretaries had not only the authority, but also the duty to order the resurvey. *Id.* at *8.

Santa Ana submits that those cases and the very detailed Leshy Opinion should leave no doubt of the Secretary's authority to order the corrective resurvey here. It should make no difference that in *Taos* and *Sandia*, the effect of the resurvey was to add to the tribe's lands land that had erroneously been under the jurisdiction of another federal agency. In this case, the resurvey removed a cloud that had existed on Santa Ana's land for a century, caused by an erroneous American survey. The fact that that it technically reduced the area of another tribe's grant, by eliminating therefrom land that that tribe had never actually owned or possessed, fulfilled the government's trust obligation to Santa Ana. It cannot be said that the government had any such obligation to San Felipe to maintain or defend a survey that purported to include in its land an area that neither it nor the United States had, in fact, ever owned or possessed.[17]

II. WHOLLY APART FROM ITS OVERLAP WITH SANTA ANA'S LAND, THE HISTORY OF THE SURVEYS OF THE SAN FELIPE PUEBLO GRANT DEMONSTRATES THEIR FLAWED NATURE.

That the survey of the San Felipe Pueblo Grant was clearly erroneous, and thus required

[17] In both *Taos* and *Sandia*, the United States had argued that the cases were essentially quiet title cases, and were thus barred by the 12-year statute of limitations of the Quiet Title Act. In both cases the courts ruled that the actions were not within the QTA, because the Pueblo involved was not seeking title to the claimed lands, but merely a transfer of administrative authority over the lands from the Forest Service to the Bureau of Indian Affairs. The United States would retain title to the lands. *See Taos*, 475 F.Supp. at 365; *Sandia*, 1996 WL 808067 at *4. As this Court found in its Order, Doc. 55, filed on March 29, 2024 ("Dismissal Order"), at 31-34, however, this case is different, in that the land San Felipe seeks is not held by the United States in trust, but rather is owned in fee simple by Santa Ana, but subject to federal law restrictions on alienation, which restrictions establish the federal "interest" that brings the action within the scope of the QTA.

correction, is evident from the history of that and other surveys in that vicinity, the commentary of federal officials called upon to oversee the surveys, and the views of courts called upon to resolve disputes that involved the surveys.

It might first be noted that Clements' survey of the San Felipe Grant has twice been considered by the Tenth Circuit Court of Appeals, and in both instances that court found the survey to be seriously deficient, to the point of being described as "inept" in *Baca*, 844 F.2d at 712. In *Algodones Land Co.*, discussed above in Section I(A), the court noted that Clements "ignored the description [of the north boundary] in the 1689 grant." The north boundary in the grant is identified as the "Bosque Grande" (or "large woods"), but Clements placed the north boundary of the grant along the same line as the south boundary of the Santo Domingo Pueblo Grant (another Cruzate grant, that Clements had surveyed just before he started on the San Felipe Grant), even though the south boundary of the Santo Domingo Grant is given as "the Loma Pelada, a bare bald hill." 52 F.2d at 360. That inexplicable discrepancy led the court to conclude that the Santa Rosa de Cubero Grant (which had been confirmed by the Court of Private Land Claims based on clearly authentic documents), even though it was almost entirely within the boundaries of Hall's resurvey of the San Felipe Grant, should be allowed as an exception to the lands title to which were quieted in San Felipe.

In the *Baca* case, the court explained a more serious problem with Clements' survey, which led directly to the current dispute. The San Felipe Cruzate grant describes its boundaries as being on the east, one league (about 2.6 miles), and on the south, a "'little grove, which is in front of a hill called Culcurra,[18] opposite the fields of the Santa Ana Indians.'" Tompkins Opinion at 6 (quoting Report of the Surveyor General's Office, New Mexico, at 504 (1856)).

[18] Probably should be "Culebra." *See* FOUR SQUARE LEAGUES at 211.

Clements began his survey by going one league due east from the steps of the mission church at San Felipe, then went due south. His field notes, incorporated into the San Felipe patent from the United States (Doc. 49-3 at 37, Bates No. 0309), state that "At Five miles. Thirty-five chains.[19] Cross San Francisco Creek South East and North West." Then, "At Five Miles. Forty Chains. To the South East Corner of Pueblo Grant it bring [*sic*] one of the old established corners of this Pueblo." *There is no reference in the field notes to the "little grove," which is the call for the south boundary of the grant.* And from this so-called "old established corner" (something unheard of in the descriptions of Pueblo Spanish grants) he ran "North Eighty Seven degrees West along the South boundary." But the important point here is that Clements claimed to have found the "old established corner" (which he said was exactly five and one-half miles south of his starting point, not one foot more or less, a monumentally improbable event), to be exactly five chains (330 feet) south of the east boundary's crossing of the thread of San Francisco Creek.

As documents submitted into the record by San Felipe show, a fundamental problem with Clements' survey of the San Felipe Grant was that after he was finished, virtually no evidence of the survey could be located on the ground. Thus, when John H. Walker surveyed Santa Ana's El Ranchito "grant"[20] in 1898, he found nothing that could be identified as one of Clements' monuments.[21] The General Land Office engaged Walker in 1899 to resurvey the east, south and west boundaries of the San Felipe Grant, and then in 1900 hired Thomas Hurlburt to reexamine

[19] Just under five and one-half miles. A chain is 66 feet, and a mile is eighty chains.
[20] Actually, El Ranchito is not a grant, but a series of purchases by Santa Ana from Spanish settlers. *See* FOUR SQUARE LEAGUES at 49-86.
[21] The field notes of Walker's survey of El Ranchito are at Doc. 49-3 at 92-114, Bates Nos. 0363-86. The plat is Doc. 49-4 at 2, Bates No. 0426, but a better copy is attached hereto as Exhibit A. The plat clearly shows the Angostura Grant abutting El Ranchito on the north, and the Felipe Gutierrez Grant on the south, but there is no mention of the San Felipe Pueblo Grant, nor is there any reference to it in Walker's field notes.

Walker's resurvey. Hurlburt's report of this examination, dated April 20, 1900, Doc. 49-3 at 128, Bates No. 0400, noted that Clements' field notes place the southeast corner of the grant five chains south of the crossing of San Francisco Creek, but Walker, apparently following Clements' distances, placed it "1 mile and five chains south of this same creek." Hurlburt Report on Walker Survey at 5. In other words, the creek was four and one-half miles south of the starting point, not five and one-half, as Clements had claimed. Hurlburt wrote, "There can be no mistaking this creek and I am of the opinion that *the original survey may be in error to the exten [sic] of one mile in the location of its south boundary*." *Id*. (emphasis added).

Hurlburt was then engaged to examine Clements' original survey. *See* Doc. 49-3 at 137, Bates No. 0409. Hurlburt's report, dated May 16, 1900, reveals an exhaustive effort to determine where Clements' lines were located on the ground, but without success. None of Clements' monuments could be found. He concluded with the question, "will the courses and distances reproduced on the ground without regard to natural objects or monuments define the true bdys. of this grant, or will the line and the monuments as established by Deputy Clement [*sic*] in his original survey define the proper boundaries?" In the *Baca* case, the court observed that the inconsistency between the claimed distance to the creek and the actual distance "calls into question the validity of the survey," and noted that "it is axiomatic that references to natural monuments in surveys usually control over citations to distances." 844 F.2d at 712 (*citing Cordova v. Town of Atrisco*, 53 N.M. 76, 201 P.2d 996 (1949)). "A proper reading of Mr. Clements' field notes, therefore," the court explained, "would locate the southeast corner just south of San Francisco Creek, resulting in no overlap between San Felipe's and Santa Ana's land." *Id*.

Hurlburt concluded his report on his examination of Clements' survey as follows:

> It would therefore seem to me that further attempts to resurvey or re-establish any of the bdys. of the "San Felipe Pueblo" grant would be useless and unnecessary until such time as an authoritative opinion may be obtained to determine the manner in which the bdys. of this grant can be defined.

Doc. 49-3 at 146, Bates No. 0418.

The Surveyor General, Quinby Vance, quoted that passage in a letter dated August 30, 1900, to the Commissioner of the General Land Office, Doc. 49-3 at 148, Bates No. 0420(?) (number obliterated). The letter was actually Vance's recommendation that the Walker survey of the El Ranchito "grant" be approved, but in the course of it, Vance commented at some length on the supposed conflict between El Ranchito and the San Felipe Grant. He said that in an "exhaustive" supplemental report on the resurvey of the south and west boundaries of the San Felipe Grant Hurlburt had concluded that this supposed conflict "was either very uncertain or entirely erroneous." *Id*. at 149, Bates No. 0421(?). Vance expressed his opinion that actually determining the location of this supposed conflict,

> is impossible of accomplishment by this office, because the southern and western boundary line of the patented "San Felipe" grant cannot be found on the ground according to the survey executed by R.E. Clements, U.S. Deputy Surveyor, in November and December 1859, upon which patent has been issued, and its re-establishment should be left to some court of competent jurisdiction to define where these boundaries of the patented "San Felipe" grant should be located. It is therefore deemed impossible by this office to determine with any accuracy the area in conflict between the "Pueblo of Santa Ana" or "El Ranchito" grant, and the patented "San Felipe" grant.

Id. at 150, Bates No. 0422(?).[22]

But the General Land Office apparently decided against getting a court determination of

[22] Vance nevertheless recommended, in closing, that the approval of Walker's survey of El Ranchito "exclude this unknown conflicting area," *id*. at 152, Bates. No. 0424, but that recommendation was rejected. The General Land Office directed the approval of the survey in its entirety, as shown by the plat, Exhibit A; Doc. 49-4 at 2, Bates No. 0426, bearing Vance's signature evidencing approval as of December 16, 1900.

where the boundaries of the San Felipe Grant should be located, and it seems to have ignored the "axiomatic" principle about natural monuments prevailing over inconsistent distances: in 1907 it contracted with Wendell Hall to undertake a resurvey of the San Felipe Pueblo Grant, and instructed him to locate the southeast corner five miles and forty chains (five and one-half miles) from the starting point, disregarding the crossing of San Francisco Creek. Tompkins Opinion at 8 (citing Special Instructions to Wendell V. Hall, dated February 1, 1907). That decision, and Hall's subsequent resurvey in compliance with those instructions, resulted in the overlap between the San Felipe Grant and El Ranchito.[23]

This history explains why San Felipe's claim that its grant boundaries "were established within the 1864 patent," SF Mem. at 9, 20 is simply incorrect.[24] The patent, which incorporates Clements' field notes, describes a supposed survey that ignores the actual boundary calls of the "grant" that it was supposed to define on the ground, that has never been actually located on the ground, and that contains a glaring inconsistency in placing the southeast corner of the grant 330 feet south of the crossing of San Francisco Creek, but then claims that point to be *five* and one-half miles from the starting point, when in reality the distance is *four* and one-half miles. The fact is that the 1864 patent *does not* describe the survey of the San Felipe Grant: the Hall

[23] It should be noted that although San Felipe argues throughout its memorandum that the Secretary has no power to resurvey a patented grant (an argument that is simply wrong, as is explained above in part I(B)), it plainly has no problem with Hall's 1907 resurvey of its grant.

[24] Again, San Felipe cites cases such as *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452 (1903) and *United States v. Reimann*, 504 F. 2d 135 (10th Cir. 1974), in support of its claim that the Secretary has no power to correct a survey, SF Mem. at 9, but those cases deal with patents of formerly *public lands*. As the cases cited and discussed in section I(A), above, show, public land cases are inapplicable to surveys of lands privately held under a prior sovereign.

The Court's Order of June 7, 2024, Doc. 70, posed a hypothetical somewhat related to the foregoing. Assuming the patented lands were public lands, no federal agency should have been entitled to resurvey the non-Indian tract; but the non-Indian could very well be barred from trying to recover the land she lost by the resurvey, if it had been declared to be part of the tribe's land.

resurvey purports to (though it disregarded a natural monument referenced in the original survey—San Francisco Creek--that would have, if followed, avoided any conflict with El Ranchito), and there is no way to know whether Hall located the boundaries in the same locations that Clements claimed to have.

III. THE FORMER OVERLAP LANDS HAVE BEEN IN SANTA ANA'S EXCLUSIVE OWNERSHIP AND POSSESSION SINCE 1763, AND ITS TITLE HAS BEEN FULLY RECOGNIZED BY THE UNITED STATES.

San Felipe makes several astonishingly baseless claims regarding Santa Ana's longstanding title to the Former Overlap, essentially denying that Santa Ana ever had title, and claiming that even if it did it no longer may claim any such title. Based on that claim, San Felipe asserts that the United States had trust duties only to it with respect to the Former Overlap lands, and that it breached that duty by ordering the resurvey. All of these assertions are utterly without any basis in law or fact.

San Felipe's principal error in this regard is its apparent belief that the world began in 1848, with the American acquisition of the New Mexico territory. It fails to acknowledge the significant events that occurred during the Spanish dominion over the territory that bear directly on this case. Many of these events are recounted in the *Baca* decision from the Tenth Circuit, and they are presented in much greater detail in FOUR SQUARE LEAGUES, at 49-86. Original Spanish documents detailing these events are in the Spanish Archives of New Mexico, and in particular Twitchell's SANM gives a very detailed account in English of the Spanish adjudication of the boundary between Santa Ana and San Felipe. The events will be briefly summarized here. As noted above, the following facts are contained in the *Baca* decision or in FOUR SQUARE LEAGUES, or both, but citations to SANM will be given.

Santa Ana made a series of purchases of land from Spanish settlers north of Bernalillo,

between 1709 and 1763. The most significant purchase was in 1763, when the Pueblo purchased a large *rancho* on the east side of the Rio Grande from Quiteria Contreras, the widow of one Cristobal Martin, that was bordered on the north by the lands of San Felipe. The north boundary was described as being at "*la mitad de la Angostura*," or the middle of the narrows (of the Rio Grande). I SANM at 401, Doc. 1349. The *Baca* court noted that the area of the Former Overlap is situated within the 1763 purchase. 844 F. 2d at 709.

In 1813, Santa Ana sent a petition to the Spanish governor of the territory, complaining that San Felipe was selling Santa Ana land to Spanish settlers. I SANM at 422, Doc. 1356. Governor José Manrique appointed the alcalde of Albuquerque, José Pino, to meet with representatives of the two Pueblos to try to resolve the dispute. The alcalde met, reviewed the land and the documents submitted by each Pueblo, and ultimately decided the matter in favor of Santa Ana. San Felipe was dissatisfied with that result, and it petitioned the governor to review the decision.

Governor Manrique then appointed José Maria de Arce, the first *alferez* (ensign) of the Santa Fe presidio, to undertake a new review of the dispute. *Id*. at 425. On June 5, 1813, de Arce, with two witnesses, the alcaldes of Alameda and Jemez and Felipe Sandoval, the protector of the Indians, met with the representatives of the two Pueblos, read over the report of the proceedings conducted by Pino, and asked to see each Pueblo's documents. San Felipe produced a document stating that its lands were bounded on the south by the *rancho* of Cristobal Martin,[25] the tract that Santa Ana had purchased in 1763, as shown by the documentation of the proceedings of that purchase, which it produced, and de Arce determined that San Felipe was

[25] The original of this document, which documents San Felipe's purchase of a rancho from one Cristobal Baca in 1753, is located in the Spanish Archives, I SANM at 400-401, Doc. 1348.

trespassing on the Santa Ana land. He therefore marked the boundary between the two Pueblos with mounds of stone and mud. He then conducted further proceedings on the other side of the river, and marked the line joining the two sections of the boundary. Both parties indicated their agreement with the adjudication of the boundaries, and de Arce directed that San Felipe had to reimburse the Spanish settlers the money they had paid for what turned out to be Santa Ana land, or to give them other land of its own. He subsequently reported on his work to Governor Manrique, who approved the decisions. *Id.* at 428.

San Felipe, however, failed to reimburse the Spanish settlers, or give them other land, and in 1819 the new protector of the Indians, Ignacio Maria Sánchez Vergara, took the matter to the Audiencia in Guadalajara, which sat as the "supreme court" of New Spain. The Audiencia ordered that the Spanish settlers be moved off of Santa Ana land, and that San Felipe give them other suitable land. *See* I SANM at 358-59, Doc. 1234. That process went on for several more years, and is detailed in FOUR SQUARE LEAGUES at 72-81, but need not be addressed further here. The important point is that after the 1813 adjudication by the Spanish authorities, *there was no overlap between the lands of Santa Ana and the lands of San Felipe on the east side of the Rio Grande*, and Santa Ana's northern boundary was well-marked.[26]

Santa Ana presented its deeds from the Spanish settlers to the Court of Private Land Claims (sometimes referred to herein as the "CPLC") in 1893, in *Pueblo of Santa Ana v. United States*, Dkt. 157, "the El Ranchito Case." San Felipe makes some remarkable assertions about

[26] As the Supreme Court said in *Henshaw v. Bissell*,

> The fact that two surveys embrace the same land is itself proof that either one of the original concessions was improvidently issued and to the extent of its interference with the other was inoperative, or that error has intervened in one of the surveys.

85 U.S. at 265. Here, of course, both factors are at work. The San Felipe Grant (which was never produced by the Pueblo in the course of the Spanish adjudication) is fraudulent, *see supra* n. 4, and the survey of that grant, as described above in section II, is deeply flawed.

this proceeding, that have no support in the record. First, it is not correct, as San Felipe claims, SF Mem. at 29, that Santa Ana's original petition "asserted those purchased tracts overlapped the 1864 [San Felipe] Patent." The original petition is Doc. 49-3 at 48-49, Bates No. 0320, and on the second page it states clearly, "the [tract] does not conflict in whole or in part with any other grant derived from Spain or Mexico." There is no basis for the claim that the United States "asserted San Felipe's interest in its 1864 patent precluded any award of lands within the 1864 patent," SF Mem. at 29. Santa Ana did file an amended petition, but not to reduce the area it claimed. The amended petition, Doc. 49-3 at 52-57, Bates Nos. 324-29, gave a much more detailed description of Santa Ana's purchases, and reiterated its claim to the entire area. That petition, moreover, did state that the area claimed did not conflict with any other grant, "other than *as the same may be infringed upon* in the northern part thereof by the patented lands of the Pueblo of San Felipe, to what extent your petitioners are not now able to state." *Id*. at 56, Bates No. 0328 (emphasis added). It is correct that the United States filed a motion to join San Felipe, and the claimants of the Town of Bernalillo (Felipe Gutierrez) and three other grants, but there is no evidence that that motion was granted, although Thomas B. Catron, an infamous Santa Fe lawyer regarded as the head of the notorious "Santa Fe Ring," did appear at the trial for the Town of Bernalillo Grant claimants, and objected to virtually all of the Pueblo's evidence. *See* Transcript, Doc. 49-3 at 60-83, Bates Nos 0332-55.[27]

[27] In its FAC, at ¶ 45, San Felipe claims that the United States was represented by "three Assistant United States Attorneys." This is incorrect. The transcript shows that John Pope was the only attorney representing the United States. Catron was there for the Town of Bernalillo Grant claimants, and George Hill Howard represented the Pueblo. At FAC ¶ 46, San Felipe claims that the United States attorney made numerous objections to the testimony and Santa Ana's evidence. This is incorrect. As the transcript shows, nearly all of the objections were made by Catron, and few were ruled on by the court. Catron cross-examined every witness; Pope conducted no cross-examination, and put on no evidence for the United States.

San Felipe makes the following assertions, SF Mem. at 29:

> The United States Attorney objected to that [amended] petition, and asserted San Felipe's interest in its 1864 Patent precluded any award of lands within the 1864 Patent—specifically defending San Felipe's patent boundaries.
>
> The Court of Private Land Claims, guided by the federal defense of the 1864 Patent, denied Santa Ana's claims to lands overlapping the 1864 Patent. The Court properly refused to patent the El Ranchito Tract to Santa Ana until it withdrew its claim to lands located within the 1864 Patent.

There is no basis for any of these claims. Apart from the brief reference in the amended petition and the motion to join San Felipe and other claimants, there is no mention of San Felipe in the record of the case. San Felipe is never mentioned in the trial transcript. Santa Ana never "withdrew its claim to lands within the 1864 Patent." As will be explained, it did greatly reduce its claim, because the United States attorney complained to George Hill Howard, the Pueblo's attorney, that the area to which the Pueblo had proven its title was "excessive." The court's final decree, Doc. 49-3 at 85-90, Bates Nos. 0357-62, at paragraph 14, describes the area to which Howard and Pope had agreed to limit the claim, which was essentially the area of the 1763 Contreras purchase, and that description was exactly the area surveyed by Walker in 1898, which survey fully encompassed the Former Overlap.

A letter that was not included in the documents submitted into the file by San Felipe, attached hereto as Exhibit B, explains the course of the case. The letter, from Matthew G. Reynolds, then United States Attorney for New Mexico, to the Attorney General in Washington, was Reynolds' report on the Santa Ana case, in compliance with Section 9 of the Act of March 3, 1891, 26 Stat. 854, that created the CPLC. He set out Santa Ana's claims, and acknowledged that the Pueblo had proven that it had a "complete and perfect title to the lands and premises heretofore described," which, he said, was estimated to be about 95,360 acres. Exhibit B at (unnumbered page) 5. He added, "The government had no special defense to offer, *its sole*

contention being that the area and boundaries claimed were excessive." Id. at 6. To obviate that concern, he explained, the attorney for the Pueblo agreed to reduce the area claimed to about 8000 acres.[28] On that basis, Reynolds recommended that he be authorized to certify the decree of the court to the General Land Office. The letter was approved by the Chief Justice of the Court of Private Land Claims, Joseph R. Reed., as required by Section 9 of the Act of March 3, 1891. Nowhere in the letter, except in the description of the north boundary of the land purchased by Santa Ana in 1763, is San Felipe mentioned at all.

San Felipe tries to make much of paragraph 16 of the court's final decree in the case, which states,

> Sixteenth—This confirmation shall not pass to the confirmees 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 lands so patented by the United States to said Pueblo of San Felipe having been expressly waived on the hearings of this cause by the claimants herein.

Pueblo of Santa Ana v. United States, Dkt. 157, Final Decree (Ct. Private Land Claims, May 31, 1897), Doc. 49-3 at 89-90, Bates Nos. 0361-62. San Felipe claims that Santa Ana's attorney "waived those claims" to any conflict with San Felipe lands, SF Mem. at 29, and that Santa Ana's failure to appeal the decree evidenced a decision "not to further pursue a claim to title to lands within the 1864 Patent boundaries." FAC at ¶ 52. None of this is correct.

The first phrase in paragraph 16 is boilerplate language, that appeared in most all of the

[28] In fact, as surveyed by Walker, El Ranchito contains a little less than 5000 acres, including the Former Overlap. One must wonder whether the Pueblo authorized or agreed to that reduction in its claim.

CPLC decrees. The only "waiver" Santa Ana's attorney made was any right to sue the United States in the event it turned out that San Felipe's "grant" overlapped El Ranchito. He never waived Santa Ana's claim to the full extent of the area described in paragraph 14 of the decree. It must be remembered that, as is explained above, in Section II, as of the date of the decree in Case No. 157, *no one knew* where the south boundary of the San Felipe grant lay. There was only a suspicion that there might be an overlap. There is an interesting letter, attached hereto as Exhibit C, from the Commissioner of the General Land Office to the Surveyor General of New Mexico, Quinby Vance, dated July 27, 1898, that is replying to two earlier letters from Vance. Vance was concerned with the possible conflict between the El Ranchito tract and the San Felipe grant, and he had expressed that concern and others to the Commissioner. The Commissioner had then communicated those concerns to the Clerk of the CPLC, James H. Reeder, and he quoted Reeder's response in his reply to Vance. Notably, following that quote, he said to Vance,

> It will be observed that in the letter of the Court, quoted above, that no reference is made to the supposed conflict existing between the "El Ranchito, and the "Pueblo of San Felipe", the Court treats solely of the boundary line between the "El Ranchito" grant and the "Town of Bernalillo" grant. *It is assumed therefore, that the Court does not consider that a conflict exists between the "El Ranchito" grant and the "San Felipe Pueblo" grant.*
>
> You are therefore directed to enter into a contract with a competent surveyor to survey the confirmed "El Ranchito" or "Santa Ana" grant . . .

Exhibit C, at 2-3 (emphasis added).

As it happened, of course, and as was noted above, in Section II, when John Walker conducted the survey of El Ranchito, in October, 1898, he encountered no evidence of the San Felipe Pueblo grant, and thus no conflict, and his survey included the entirety of the area that ten years later would be overlapped by the Hall resurvey of the San Felipe grant.[29] Hurlburt was

[29] San Felipe's FAC, at ¶ 55, states that the Court of Private Land Claims "ordered a survey of the El Ranchito tract to determine if an overlap existed with the 1864 San Felipe Patent." This is

retained to examine Walker's survey, and in his report, Hurlburt stated that Walker "executed this survey in strict accordance with the boundary calls set forth in the decree issued by the Court of Private Land Claims." See Exhibit D, attached hereto, at 7. Vance engaged Walker, on February 7, 1899, to resurvey the east, south and west boundaries of the San Felipe grant, to try to determine its intersections with the surveys of the Angostura Grant (*see* n. 11, *supra*) and the El Ranchito tract, which were not shown in the surveys of either of those tracts (obviously because the Clements lines could not be located). The Commissioner of the General Land Office (San Felipe mistakenly says it was the Commissioner of Indian Affairs) approved Walker's instructions on February 24, 1899. Doc. 49-3 at 120, Bates No. 0392. A year later, on February 24, 1900, Vance hired Thomas Hurlburt to examine Walker's resurvey. *Id*. at 123, Bates No. 0395. Hurlburt reported on April 20, 1900, *id*. at 128, Bates No. 0400, and made a particular point of the location of the southeast corner of the San Felipe grant. (This matter was discussed above, in Section II, but bears repeating.) He noted that Clements' field notes placed that corner five chains (330 feet) south of the east boundary's crossing of San Francisco Creek, but Walker had placed the corner one mile and five chains south of the crossing (apparently following Clements' distance call).[30]

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a total fabrication. The CPLC did not order surveys, the General Land Office did, as provided in Section 10 of the Act of March 3, 1891. But this survey was not to determine if there was any overlap with San Felipe (nor could it, since San Felipe's boundaries were unknown). The Act required that every tract confirmed by the CPLC was to be surveyed by the United States. Similarly, the outlandish claims in ¶ 56 of the FAC, that Walker's survey was to determine if there was an overlap, and its purpose "was to ensure the El Ranchito Patent would not include any lands located within the 1864 Patent boundaries," are completely made up, and untrue. There is no support in the historical record for any of this. Walker was simply directed to survey the El Ranchito tract in accordance with the description in paragraph 14 of the decree of the CPLC, which he did. Ten years later, as explained above, in Section II, Hall's resurvey of the San Felipe grant created the overlap with the Walker survey of El Ranchito.

[30] San Felipe's FAC, at ¶ 60, mistakenly says Walker placed the corner "one mile *north* of where the Clements survey placed the southeast corner." (Emphasis added.) San Felipe has the

Hurlburt was then retained to examine Clements' original survey, a thoroughly unsuccessful effort (described above, in Section II), that led to Vance's letter of August 30, 1900, to the Commissioner, recommending approval of Walker's survey of the El Ranchito tract, in which he states that locating any conflict between the El Ranchito and the San Felipe Grant "is impossible of accomplishment by this office, because the southern and western boundary line of the patented 'San Felipe' grant cannot be found on the ground according to the survey executed by R.E. Clements." Doc. 49-3 at 148, 150, Bates No.420, 422. As noted at n. 22, *supra*, Vance nonetheless recommended that the approval of Walker's survey "exclude this unknown conflicting area," but that recommendation was rejected. Walker's survey of El Ranchito, which includes the entirety of the Former Overlap, was approved. *See* Exhibit A. The subsequent approval of the Hall resurvey of the San Felipe Grant created the overlap with El Ranchito, and with the Angostura Grant, and with the Santa Rosa de Cubero Grant (as to which, see above in Section II).

The patent to El Ranchito was issued to Santa Ana on October 18, 1909. It described the tract just as the CPLC decree had in paragraph 14. Doc. 49-4 at 77, Bates No. 0501. San Felipe makes much of the fact that after reciting the boundaries of the tract, as described by the CPLC (and as Walker surveyed it, including the Former Overlap), the patent states that the grant is made subject to the terms of the Act of March 3, 1891, and of the decree. (Indeed, these words

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direction wrong, and to say the corner was in a different place than where Clements placed it is totally in error, since Clements' corner has never been located, and his field notes are inconsistent by a mile as to where it should have been, as has been explained in the text. The statement in the FAC at ¶ 65, that Hall "reestablished Reuben E. Clements 1859-1860 southern boundary for the San Felipe Patent," is incorrect and baseless. As has been repeatedly shown, from contemporaneous documents, none of Clements' monuments on the south boundary have ever been found, and given the inconsistency in his field notes it is not possible to know where his south boundary, if he actually surveyed one, was located.

are printed in boldface in the FAC, ¶ 68.) This is boilerplate language, that was included in all patents based on CPLC decrees, but San Felipe insists that here it means the patent excluded all lands included in the San Felipe resurvey. More likely, it refers to the fact that decrees of the court shall not affect the rights of other persons, but shall operate solely as a release by the United States of any right or title to the land. *See* Act of March 3, 1891, at Section 13, Fifth and Sixth paragraphs.

But regardless, subsequent treatment of the conflict area flatly refutes San Felipe's claim that the overlapped area was excluded from Santa Ana's patent. Every map or plat of the area from Hall's survey thereafter shows the overlapping surveys of the San Felipe Grant and El Ranchito. The 1916 Perkins-Joy survey of the San Felipe Grant, Doc. 49-4 at 82-115, Bates Nos. 0512-39 (which notes at p. 11 (Bates No. 0512) that Wendell Hall, in his 1907 resurvey, located only two corners on the entire grant boundary that were apparently set by Clements), carefully notes at p. 34 (Bates No. 0536) the intersection of the south boundary with the east boundary of "El Ranchito Grant." San Felipe did not submit the field notes of the 1916 Perkins-Joy survey of the El Ranchito, but they are attached hereto as Exhibit E. The surveyors began at the northeast corner of the tract, as shown on the Walker plat (and which is also the northeast corner of the Former Overlap), then ran southerly. At p. 4 they noted the intersection of the east boundary of El Ranchito with the south boundary of the San Felipe Grant, and they marked the spot with a brass cap. On p. 26, they note the intersection of the north boundary of El Ranchito with the west boundary of San Felipe (which happened to be in the river at that time, so they erected a witness corner). The resurvey plainly included the entire area of overlap. A 1920 General Land Office plat of Township 13 North, Range 4 East, Doc. 49-4 at 117, Bates No.

0541, clearly shows the two overlapping tracts.[31] All of this demonstrates that San Felipe's claim that the Former Overlap area was excluded from Santa Ana's patented El Ranchito tract is wrong.

In 1927, George A.H. Fraser filed *United States v. Brown*, a suit to quiet Santa Ana's title to the El Ranchito tract, (a parallel proceeding to *United States v. Algodones Land Co.*, the quiet title action filed for San Felipe). *See* Complaint submitted as Doc. 49-4 at 164-70, Bates Nos. 0588-94. The legal description given for the tract shows that it totals 4945.24 acres, *id.* at 167, Bates No. 0591, exactly the acreage shown on the Walker plat for the entire El Ranchito tract, including the Former Overlap area, and shown in the legal description in the Pueblo Lands Board's report, Doc. 449-4 at 126, Bates No. 0550. The final decree in *Brown*, Doc. 49-5 at 2-7, Bates Nos. 0697-0701, quieted Santa Ana's title in "the entire El Ranchito Purchase," except for the tracts described in paragraph 1 of the decree (tracts of private claimants rejected by the Board but approved by the court) and the exceptions listed in the Board's report on the El Ranchito. *Id.* at 6, Bates No. 0600. The "exceptions" are numbered 1 through 21 in the Report, Doc. 49-4 at 128-42, Bates Nos. 0552-66. The Former Overlap area was not an "exception," and it is not otherwise excluded from the quiet title decree in *Brown.*

San Felipe touts the fact that its title was quieted in the Former Overlap area in *Algodones Land Co.,* but the same is true of Santa Ana's title to that area in *Brown*. Consequently, San Felipe's claim that "[t]here is no overlapping Patent to the Pueblo of Santa Aan in this case," SF

[31] Attached hereto as Exhibit F are a more recent plat of the same township; a copy of portions of the United States Geological Survey Placitas, New Mexico, Bernalillo, New Mexico, Santa Ana Pueblo Quadrangle and San Felipe Pueblo Quadrangle maps (the Former Overlap happens to be at the junction of the four quadrangles); a portion of a map produced by the Department of the Interior's Geodetic Service Center; and a portion of the Santa Ana Pueblo Base Map produced by the Bureau of Indian Affairs. Each shows the overlap between the El Ranchito tract and the San Felipe Pueblo Grant. These maps, of course, were all produced before the 2013 resurvey.

Mem. at 29, is flatly wrong. The Former Overlap is shown in the approved survey of El Ranchito, it is within the area described in the patent and in the Joy survey, it is shown in virtually every government map produced since, and Santa Ana's title to it was quieted in *Brown*.

The *Baca* case was a trespass suit brought by Santa Ana against a non-Indian owner of a tract of land formerly within the Hall resurvey of the San Felipe Grant, that had been patented out in the course of the Pueblo Lands Act proceedings at San Felipe, 131 acres of which were within the Former Overlap area. Because Baca was a direct successor in interest to San Felipe, the case was really a contest between Santa Ana's title and San Felipe's to the Former Overlap, and the five-day trial included extensive expert witness testimony on the proceedings, described above, between Santa Ana and San Felipe under the Spanish regime, and on issues relative to the survey of the San Felipe Grant. Ultimately the Tenth Circuit, affirming this Court, said,

> As mentioned, the 1813 adjudication determined that no overlap existed between the lands owned by Santa Ana and San Felipe. We do not believe an inept survey which Santa Ana had no opportunity to contest should trump the findings of this detailed adjudication and the clear import of the existing documents.

844 F. 2d at 712. The court thus found that the Former Overlap was Santa Ana land, and Baca's deed, to the extent it included a portion of the Former Overlap, was void.

It must be recalled that U.S. Attorney Matthew Reynolds advised the Attorney General that Santa Ana had proven in its case presented to the CPLC that it had "a complete and perfect title to the lands and premises" described in its claim. Those premises plainly included the Former Overlap area. But if Santa Ana already had a "complete and perfect title" to that tract, a purported conveyance of it by the United States to some other party, even by quitclaim, would be void, regardless whether it was made before or after the confirmation of Santa Ana's title. *See* n. 7, *supra*; *see also Henshaw*, 85 U.S. at 264 (whether one grant was surveyed and patented before

the other "is not a matter of any weight.") As the Tenth Circuit decided with respect to the Santa Rosa de Cubero Grant in *Algodones Land Co.*, it must be that the San Felipe Grant was simply void to the extent of the conflict of the Hall resurvey with the El Ranchito tract.

It should also be mentioned that even if San Felipe's outlandish argument, that the Former Overlap was never actually confirmed to Santa Ana by the Court of Private Land Claims or the United States patent or the *Brown* quiet title decree, were true, Santa Ana would still have an enforceable title to that area. As has been explained above, none of these actions by the United States actually created title in the grantee or confirmee; they merely recognized a pre-existing title, or claim of title, under the prior sovereign, and quitclaimed the United States' interest in such land. The Supreme Court has held that if one had a complete and perfect title under a prior sovereign, "such a title 'is protected by the treaty, and is independent of any legislation in Congress, and requires no proceeding in a court of the United States to give it validity.'" *Ainsa v. New Mexico & Arizona R. Co.*, 175 U.S. 76, 81 (1899) (*quoting United States v. Pillerin*, 54 U.S. (13 How.) 9 (1851)). The Court in *Ainsa* held that the holder of a valid Mexican grant encompassing a ranch in southern Arizona territory could assert that title in a quiet title action in the territorial court, even though that title had not been confirmed by Congress and had never been presented to the CPLC.

San Felipe's last contention seeking to establish that Santa Ana has no claim to the Former Overlap is its argument, laid out in greater detail in the FAC at ¶ 94, that Santa Ana failed to file a claim against San Felipe under the Pueblo Lands Act or the Pueblo Compensation Act of 1933, and that it failed to intervene in the *Algodones Land Co*. case to assert its claim to the Former Overlap lands, and that it was now barred from making any such assertion. What is remarkable about this argument is that there is no case law support for it at all, and that in fact

the Tenth Circuit Court of Appeals has squarely rejected the very same argument, *that was made in the very same context*. In the *Baca* decision in the Tenth Circuit, which was in reality a contest between Santa Ana's and San Felipe's claims to title to the Former Overlap, the Bacas made the exact same argument, that Santa Ana should have filed an independent suit against San Felipe, or intervened in the *Algodones Land Co.* case. The Tenth Circuit responded to this argument directly, saying,

> The Pueblo Land Act, however, was intended only to oblige non-Indians to prove claims to Pueblo land; Pueblos could only file suit in response to claims made against them by non-Indians. The Act, therefore, did not provide a device for deciding land disputes between Indians. Furthermore, Santa Ana had no reason to file suit under § 4 of the Act because no claim was made against it concerning the disputed land. Santa Ana had no notice that its rights were jeopardized by non-Indian claims. . . . Thus, the suit *did not affect the rights of Santa Ana to later assert a claim for the property in dispute*.

Baca, 844 F. 2d at 709 n.1 (emphasis added).[32] The only other case known to counsel that addresses this issue is *United States v. Thompson*, 941 F.2d 1074, 1080 n.3 (10th Cir. 1991). That case was a challenge to the Pueblo Lands Board's action in ruling that a conflicting non-Indian grant extinguished the Pueblo of Santo Domingo's title to the area overlapping its grant, which ruling was admittedly contrary to Section 14 of the Pueblo Lands Act. The court ruled

[32] San Felipe repeatedly claims that the Defendants were wrong to rely on the Tenth Circuit decision in *Baca*, because San Felipe was not a party to that case and is therefore not bound by it. While that is technically true, it is also true that San Felipe was not party to virtually any of the dozens of cases it cites in its memorandum, but it is plainly not asking the Court to ignore the holdings of those cases. *Baca*'s rulings on pure legal issues, such as whether Santa Ana had a duty to file suit against San Felipe under the Pueblo Lands Act, or whether the Hall survey was in error by its failure to follow the natural monuments noted in Clements' field notes, should be given as much weight as any other Tenth Circuit case San Felipe cites, if not more. And it is especially noteworthy that the historical underpinnings of the case, while placed into evidence by Santa Ana's expert, Dr. Alan Minge, are thoroughly documented in unquestionably authentic documents in the Spanish Archives of New Mexico, cited above in Section II. San Felipe offers nothing to contradict any of that information, nor could it, as there are no contrary documents. *Baca*'s rulings should be carefully considered by this Court.

that the Pueblo should have brought an independent suit under section 4 of the Pueblo Lands Act, and that it (and the United States) was now barred from challenging that action. The court distinguished *Baca* on the ground that in *Baca*, Santa Ana had no notice of the claims being made in the San Felipe proceedings, whereas Santo Domingo plainly had notice of the Board's action in its own case.

What is peculiar here is that San Felipe makes this argument, while failing to acknowledge that this identical argument, involving the very same facts, has been explicitly rejected by the appellate court with direct authority over this district. The claim should be disregarded.

IV. AT ITS CORE, THE PROPOSED FIRST AMENDED COMPLAINT STILL SEEKS TITLE TO INDIAN LAND, AND THUS THERE IS NO WAIVER OF THE UNITED STATES' SOVEREIGN IMMUNITY.

If the Court is satisfied that, as has been shown above, the Defendants' actions in this matter were within their lawful authority, and that the Former Overlap is part of Santa Ana's El Ranchito tract, there should be no question that by the proposed First Amended Complaint, San Felipe seeks to acquire Indian land, an action plainly within the terms of the Quiet Title Act but for which that Act provides no waiver of the United States' immunity from unconsented suit. That this is so is clear from the Prayer for Relief at pp. 58-60 of the FAC, and the allegations of paragraphs 113-152, all of which attack the various actions taken by the Defendants in ruling on Santa Ana's 1989 petition to the Secretary to correct the south boundary of the San Felipe Grant to eliminate the overlap, and then acting on the ruling. The prayers for relief seek an order setting aside all of those actions, and an order restoring San Felipe's erroneously surveyed south boundary, and any federal records recognizing that boundary. Particularly telling is paragraph 1(g) of the prayer, which seeks a declaration that the United States owes a duty to defend what

San Felipe claims as its title, and a duty "to reject any claim that is antagonistic to San Felipe's interests in the continued recognition of the boundaries of the 1864 Patent." This seems clearly to be a call for the Defendants to, in some fashion, undo Santa Ana's longstanding ownership of the Former Overlap, all based on an erroneous survey of a fraudulent grant.

While in general parties should be freely given leave to file amended pleadings "when justice so requires," F.R.Civ.P. 15(a), it is well established that if an amended complaint would not cure the problem that led to the original complaint being dismissed, a motion for leave to amend should be denied on the ground of futility. *See, e.g., Tafoya v. New Mexico*, 517 F.Supp. 3d 1250, 1297 (D.N.M. 2021); *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007). That is the case here. San Felipe's motion should be denied.

V. THE COURT'S QUESTION AS TO THE COMPETING TRUST OBLIGATIONS OF THE UNITED STATES TO THE TWO PUEBLOS SHOULD NOT CHANGE THE ANALYSIS.

In its June 7, 2024, Order, Doc. 70, the Court asked the parties to brief their positions on issues addressed on pages 31 and 32 of the Dismissal Order. San Felipe's lengthy response to that directive, SF Mem. at 22-40, is flawed because of its premise, dealt with above, that the United States has trust obligations only to San Felipe with respect to the Former Overlap, *i.e.,* that Santa Ana has no basis for any claim to that tract. SF Mem. at 29. If that were true, then the answer to the Court's question would be simple (and would not require an 18-page response). But San Felipe's claim that Santa Ana has no valid title to the Former Overlap, a contention that has never been accepted by any court or federal agency since the overlap was created in 1908, is, as has been shown, simply baseless.

As the Supreme Court noted in *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011), the United States in its relationships with the Indian tribes is not a private trustee,

and its obligations to the tribes are not dictated by the common law, but by Congress. The Court noted that the United States "may also face conflicting obligations to different tribes." *Id*. at 182. In such cases, the government must follow procedures to ensure that the interests of both (or all) are fully considered, and take the action that appears most closely aligned with the law. *See, e.g., Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986). It should be remembered that before this case was filed, Santa Ana's petition to correct the survey of the south boundary of the San Felipe Grant was pending before the Secretary of the Interior for more than 23 years. At least 15 briefs and hundreds of pages of documents were filed by the two tribes. It cannot be said that the Department did not give the matter exhaustive consideration. It might also be noted that, as the Pueblo Lands Board stated in the Supplemental Report it produced, on June 30, 1931, after a special hearing it held on the conflict, at the request of Santa Ana, which report is attached hereto as Exhibit G,[33]

> it 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. It appears that so far back as the memory of any living Indian, the Santa Ana Indians have been in possession of the land in conflict and have cultivated all of the tract. They have never been disturbed in this possession.

Exhibit G at 2-3. As in *Nance*, apart from the fact that Santa Ana's title to the tract, which was fully adjudicated and confirmed by Spanish authorities in 1813, is "perfect and complete," while San Felipe's claim is based solely on a questionable survey of a fraudulent grant, a trustee could reasonably conclude that having never been in possession of the tract, San Felipe would not be

[33] San Felipe submitted a transcript of the hearing before the board, and a letter from attorney George Fraser concerning the dispute, but it did not submit this report.

unduly prejudiced by the trustee's taking action to remove the cloud on Santa Ana's title. And even where there would be prejudice to the tribe that is adversely affected by the action, as in *Hoopa Valley*, given its unique situation the government must take the action that is most clearly dictated by the circumstances.

CONCLUSION

Santa Ana submits that despite its strident (but unsupportable) claims, San Felipe has not shown that its FAC is anything but an effort to seize land that has been owned and occupied by Santa Ana for 270 years, and that is in fact "Indian land." The complaint would thus be barred by the United States' sovereign immunity, and it would thus be pointless to allow it to be filed. The Motion for Leave to File First Amended Complaint should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2024, I caused the foregoing Response to Motion for Leave to File First Amended Complaint to be filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all ECF registrants in this case.

/s/ Richard W. Hughes