UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PUEBLO OF SAN FELIPE, a federally recognized Indian tribe, *Plaintiff*, *v.* DEBRA HAALAND, Secretary of the Interior, *et al.*, *Defendants,* PUEBLO OF SANTA ANA, *Intervenor-Defendant*.	No. 1:23-cv-296-JB-LF

PLAINTIFF'S REPLY BRIEF TO FEDERAL DEFENDANTS AND DEFENDANT-INTERVENOR'S RESPONSE BRIEFS IN OPPOSITION TO THE PLAINTIFF'S MOTION TO AMEND THE COMPLAINT AND SUPPLEMENTAL BRIEFING IN RESPONSE TO JUNE 7, 2024, ORDER

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Plaintiff Pueblo of San Felipe ("San Felipe") respectfully files this Reply Brief to Federal Defendants and Defendant – Intervenor's Response Briefs in Opposition to Plaintiff's Motion to Amend the Complaint and Supplemental Briefing in Response to the Court's June 7, 2024, Order. This Reply Brief addresses the arguments set forth by the Federal Defendants and Defendant-Intervenor (hereinafter collectively "Defendants") in their respective Response Briefs.[1]

I. INTRODUCTION

The First Amended Complaint ("FAC") seeks a declaratory judgment that federal actions purporting to alter the southern boundary of the San Felipe Pueblo Patent were *void ab initio* because they were not authorized by Congress. Further, the FAC seeks a finding that the Federal Defendants were absolutely barred from recent actions to issue a "corrective resurvey" of the 1689 San Felipe Spanish Land Grant and 1864 Patent; to alter TAAMS[2] records on ownership of some of the lands within the San Felipe Patent without prior notice to Plaintiff; and to disburse funds from an Individual Indian Money (IIM) account held as trustee for Plaintiff and Santa Ana Pueblo without notice to the Plaintiff that Federal Defendant officials were terminating the trust beneficiary status of Plaintiff based on the "corrective survey." As relief, the First Amended Complaint requests injunctive, mandamus and declaratory relief to reverse the *ultra vires* actions of Federal Defendant officials. The Federal Defendant officials' unlawful actions constituted a breach of specific trust responsibilities, constituted a taking of tribal property interests - not for

[1] References to pages in Plaintiff's Memorandum in Support of the Motion to Amend the Complaint will be set forth as "ECF 79 at __." References to pages in the Federal Defendants' Response Brief herein will be set forth as "ECF 86 at ___," and references to Defendant-Intervenor's Response Brief will be set forth herein as "ECF 87 at ___"

[2] TAAMS stands for "Trust Asset and Accounting Management System." The record of title is not the same as TAAMS records, which hold accounting records on trust accounts and trust lands and are maintained in the Bureau of Trust Funds Administration. See 25 C.F.R. § 115.002 (defining a "trust asset" as "trust lands, natural resources, trust funds, or other assets held by the federal government in trust for Indian tribes and individual Indians"); Privacy Act Notice, 79 Fed. Reg. 68292 (Nov. 14, 2014) (describing TAAMS).

public use - but instead to benefit a non-federal party. Those actions are reviewable by this Court under the Administrative Procedure Act ("APA"). The FAC is not futile because Federal Defendants' actions are not protected by sovereign immunity under the Quiet Title Act (hereinafter "QTA"). The APA waives immunity. *See* APA, 5 U.S.C. § 702 (1992).

San Felipe's Proposed FAC can only be rejected if it is "futile." *Hinkle Fam. Fun Ctr., LLC v. Grisham*, 2022 WL 1797213, *2 (10th Cir. Dec. 28, 2022) (quoting *Bradley v. Val-Mejias,* 379 F.3d 892, 901 (10th Cir. 2004)); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004) ("[A] district court has discretion to deny a motion to amend on grounds of futility where the proposed pleading would not survive a motion to dismiss."). The Federal Defendants attempt to use the QTA as a barrier to this court's jurisdiction by characterizing the FAC as contesting title to land in which the United States holds an adverse interest on behalf of Santa Ana Pueblo. Building on that unfounded assertion, they claim that the QTA is the exclusive means to contest title to land in which the United States holds an interest, and under the QTA they are immune from suit. ECF 86 at 9. As a matter of both fact and law, it is Federal Defendants' arguments that are futile. The QTA is inapplicable. The FAC does not seek determination of title adverse to the United States. Rather, it seeks reversal of the unlawful actions of Federal Defendant officials starting with fictitious "corrective resurvey" of a patent boundary, and flowing from this unlawful and arbitrary action, their subsequent attempt to transfer property rights they do not hold in land which cannot be transferred without San Felipe's authorization to transfer by altering TAAMS trust asset account records, and unlawfully disbursing an IIM account. In fact, there is no genuine legal dispute over the ownership of the "Former Overlap Area," nor does the United States hold any property interest in the "restricted fee" lands within the boundaries of the 1864 patent issued to San Felipe (hereinafter "San Felipe Patent"), let alone one adverse to San Felipe Pueblo.

In 1854 Congress authorized the Surveyor General to investigate and report to Congress on pueblos in New Mexico, including "the nature of their titles to land," and directed that the report

"be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide grants* . . . ." Act of July 22, 1854, c. 103, 10 Stat. 308, § 8 ("1854 Act"). Lands subject to pueblo claim were reserved from disposition "until the final action of Congress on such claims." *Id.* In 1858, Congress took final action on San Felipe's 1689 Spanish Land Grant, and confirmed that and other Pueblos' land claims, thereby relinquishing "all title and claim of the United States to any of said lands." Act to Confirm the Land Claim of Certain Pueblos and Towns in the Territory of New Mexico, c. 5, 11 Stat. 374 (Dec. 22, 1858) ("1858 Act"). The 1858 Act explicitly restricted its scope, as it provided that its "confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands…." *Id.* In 1864, the United States issued a patent to San Felipe in simple fee - relinquishing all United States property interests. FAC, Ex. B, ECF 78-4.[3]

The boundaries of the San Felipe Patent were long since resolved and irrevocably established by the United States, acting through the General Land Office pursuant to authority granted by Congress in the 1854 Act and the 1858 Act. The southern boundary was not altered by this Court in *Algodones*. Instead, this court confirmed the 1860 Clements survey and 1906 Hall resurvey originally established boundary when it adopted the 1916 Joy survey, acting pursuant to authority granted by Congress in the Pueblo Lands Act ("PLA"). PLA § 13; *see also* FAC at ¶¶ 71, 72, 76, 89, 90, ECF 78-1. In 2005, Congress amended the PLA, unambiguously establishing that the boundaries of pueblo land grants confirmed by Congress pursuant to the 1854 Act, including the San Felipe Patent, are fixed and the jurisdiction over lands within those patent boundaries remains fixed, regardless of who owns the fee to those lands.

"Not worth the paper it's written on" means that a promise or contract has no valid or legal meaning even though it is written out on a seemingly legal document. It is exactly that proposition

[3] Citations to other documents already in the court record will be referenced in the format "ECF [number]".

the Defendants would have this court believe when contemplating the San Felipe Patent. Both Defendants ask the court to ignore the binding effect of the San Felipe Patent, which permanently "quits" any United States claim to any property rights – it is a relinquishment of any claim by the sovereign to any of the bundle of property rights in the land patented. FAC, Ex. B, ECF 78-4; *cf.* ECF 87 at 21. Congress, having confirmed the recommendation of the Surveyor General in the 1858 Act, directed then President Lincoln to issue a patent to San Felipe Pueblo following the established boundaries recognized by the Surveyor General. Not only does that action extinguish the applicability of the QTA, but it also memorializes – forever – the boundaries of the San Felipe Patent. Any subsequent attempts to interfere with those boundaries are ineffective. Defendants ignore the fundamental law that the legal description in the original 1689 Spanish Land Grant, as surveyed and set forth in the 1864 Patent, is controlling.

The "Former Overlap Area" falls within the boundaries of the San Felipe Patent, ratified by the United States Congress, and those boundaries can only be modified by an act of Congress. FAC at ¶¶ 1, 5, 42-44, 8588, 172-174, 182-186, ECF 78-1; FAC, Ex. B, ECF 78-4; 25 U.S.C. § 211; 25 U.S.C. § 398; Pueblo Lands Act, Pub. L. 109-133, 119 Stat. 2573 (Dec. 20, 2005), 25 U.S.C. §331 Note; 43 U.S.C. § 772; 43 U.S.C. § 1746. Importantly, from the date the San Felipe Patent was issued to the present, only two Congressional acts authorized actions related to pueblo lands. First, in 1897, Congress created a Court of Private Land Claims ("CPLC"). FAC ¶¶ 36-38, ECF 78-1; Act of March 3, 1891, c. 539, 26 Stat. 854 ("Private Land Claims Act"). The CPLC, however, was not given authority to disturb any existing land patent, or to issue any overlapping land patent. It therefore could not alter the boundaries of the previously issued San Felipe Patent in any decree it issued. Private Land Claims Act §§ 8, 13, 14.

Second, in 1924 Congress enacted the PLA. Act of June 7, 1924, c. 331, 43 Stat. 636 (1924). *See also United States v. Smith*, 482 F. Supp. 3d 1164, 1168 (D.N.M. 2020), *aff'd* 100 F.4th 1244 (10th Cir. 2024). Congress enacted the PLA to resolve disputes over Pueblo lands. Santa Ana

never brought a claim under the PLA over the "Conflict Area" (they now label as "Former Overlap Area") or any other portion of the San Felipe Patent, even after Congress extended the time for Pueblos to do so by one year. FAC at ¶¶ 73-74, 79-83, ECF 78-1; Act of May 31, 1933, c. 45, 48 Stat. 108. That statute of limitations expired on May 31, 1934. FAC at ¶¶ 189, 190, ECF 78-1; Act of May 31, 1933, § 6, 48 Stat. at 110-11. Any third-party claim seeking to alter the boundary of the San Felipe Patent thereon after May 31, 1934, reconfirmed by the 1916 Joy survey, was forever barred. *See United States v. Thompson*, 708 F. Supp. 1206 (D.N.M. 1989). In *Algodones*, this Court implemented the PLA authorized remedy to quiet title to both successful adverse claimants and San Felipe Pueblo. *United States v. Algodones Land Co.*, 52 F.2d 359 (10th Cir. 1931). No other claims pursuant to the PLA were brought against the San Felipe Patent before the statute of limitations expired on May 30, 1934. In *United States v. Thompson,* the Tenth Circuit held the statute of limitations in the PLA barred not just pueblos, but also the Federal Defendants acting as a pueblo's trustee, from bringing an action asserting title to lands based on land rights under Spanish law after the expiration of the PLA statute of limitations. The Court held,

> In view of the caselaw and the history of the PLA, it would be absurd for Congress to pass a statute which did not encompass the United States' trust duty to the Indians. It would hardly settle title to the lands of non-Indian claimants if the United States could bring actions on behalf of the Pueblo once the statute of limitations had run on the Pueblos. Moreover, § 5 of the PLA strongly suggests that the limitations period runs against the United States, as well as the Pueblo.

708 F. Supp. at 1216. In light of that finality, it is impossible that the PLA grants or permits Federal Defendants unfettered power to alter a Pueblo patent boundary confirmed by Congress. By the time the statute of limitations ran in 1934, the United States Attorney had defended the San Felipe Patent before the CPLC, the Pueblo Lands Board, and the court in *Algodones*. *See* FAC ¶¶ 43-47, 62-63, 74-78, 88-90 192. The PLA process was complete, and boundary challenges and any attempts to eradicate boundaries were foreclosed.

The *Algodones* adjudication illuminates and proscribes the application of *Santa Ana Pueblo v. Baca* to San Felipe in this case. Because the land title in question in *Baca* had been quieted to Baca's predecessor in *Algodones*, no pueblo-owned land was involved. 844 F.2d 708 (10th Cir. 1988). Simply put, the *Baca* case was no more than a successful adverse possession under state law brought against private landowners. *Id.* at 709, 712-13.

Had the underlying lands been owned by San Felipe Pueblo, the case would have been dead upon arrival at the clerk's door due to pueblo immunity from suit. In the end *Baca* was about adverse possession - not the historical context of Spanish and Mexican prior asserted adjudications brandished by the Defendants. The FAC sets forth both factual and legal reasons why *Baca* cannot control in these proceedings. FAC ¶¶ 106-109, 124-126, ECF 78-1.

The QTA does not block redress against the United States when Federal Defendant officials, acting without any authority under the law, alter a patent boundary through a faulty "corrective resurvey" and then interfere with the jurisdiction of San Felipe over lands within the San Felipe Patent boundaries, and San Felipe property rights granted by a specific Acts of Congress. Because the restricted fee lands owned by San Felipe Pueblo within the Conflict Area are not trust land owned by the United States for the benefit of an Indian tribe or pueblo, the United States lacks the powers it is accustomed to exercising over trust land to which it retains title. Instead, the United States' interest to the Conflict Area is only to its solemn duty to restrict alienation first established by an Act of Congress in the PLA, but only when San Felipe initiates and authorizes the conveyance of all or part of its property rights, and then the duty is limited to a determination of whether the conveyance is in the best interest of San Felipe. Pueblo Lands Act §17. The United States cannot initiate a conveyance of the underlying fee, which is an essential stick in the bundle of property rights, when it lacks any ownership interest in the property. The interest of the United States, if any, is a duty of the sovereign—in this case a trust duty—in that the Pueblo is not able to convey its property without the participation of the United States. When

the sovereign violates its duty under the law, the QTA does not bar relief under the APA, the Fifth Amendment to United States Constitution, or under a breach of trust claim.

Because Congress has never acted to change the boundaries of the San Felipe Patent thereof, or to empower anyone else to do so, Federal Defendant officials had no legal authority to issue a "corrective resurvey" or to destroy official boundary survey monuments, alter TAAMS records, or disburse IIM account trust funds. Title to the fee is clearly established; San Felipe has no need to quiet title to its restricted fee lands. Consequently, San Felipe is not making a claim under the QTA, and because the Federal Defendants' entire claim of "futility" rests upon the false premise that San Felipe's FAC seeks title adverse to the United States restriction on alienation duty. San Felipe's Motion for Leave to File its First Amended Complaint must be granted.

This court requested supplemental briefing from the parties on the question of patents. Plaintiffs made their position clear in their supplemental briefing. *See* ECF 79 at 4-23. Federal Defendants, however, made no attempt to articulate their position. The law is clear – patent boundaries are to be upheld regardless of alleged mistakes in the survey legal description. *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887). As the Supreme Court in *Jones v. St. Louis Land & Cattle Co.* held, once the Surveyor General completed his investigation on the validity of a Spanish Land Grant under the 1854 Act, reported it to Congress, and Congress confirmed it, the validity of the patent, the legal description contained in the 1689 Spanish Land Grant, and the 1858 patent issued pursuant to the 1854 Act cannot be challenged before the Court or altered by any federal agency. 232 U.S. 355, 362-63 (1914). The land grant first in time and the patent first in time prevails. *Id.* In this case, the 1689 Spanish land grant to San Felipe and San Felipe's Patent, both first in time, cannot be altered by the *ultra vires* "corrective resurvey" or and other unlawful acts of the Federal Defendants.

II. THE LEGAL STANDARDS APPLICABLE TO THE MOTION TO AMEND THE COMPLAINT DO NOT PERMIT CONSIDERATION OF FACTS OUTSIDE THE COMPLAINT OR DISPUTE OF THE FACTS SET FORTH IN THE COMPLAINT.

Federal Rule of Civil Procedure 15 provides that: amendments "shall be freely given when justice so requires," unless there is a showing of "futility of amendment." *Sher v. Amica Mut. Ins. Co.*, 722 F. Supp. 3d 1176, 1181 (D. Colo. 2024) (citing *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993)). The non-moving party bears the burden to overcome this presumption favoring amendment. *Id.* (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)). Federal Defendants assert that the QTA applies, and the resulting sovereign immunity renders the FAC futile.

While sovereign immunity is a proper threshold question, the *Foman* factors dictate that the "futility" analysis for a motion to amend is governed by the liberal criteria of Federal Rule of Procedure "12(b)(6)," not 12(b)(1). *Narragansett Indian Tribe of R.I. v. Banfield*, 294 F. Supp. 2d 169, 174 (D.R.I. 2003) (quoting *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 19 (1st Cir. 2001); *see also Seale v. Peacock*, 32 F.4th 1011, 1027-28 (10th Cir. 2022); *Chilcoat v. San Juan Cnty.,* 41 F.4th 1196, 1217-18 (10th Cir. 2022), meaning that fact disputes are irrelevant. At this time, the Court does not consider a 12(b)(1) or 12(b)(6) motion. Rather, the courts apply the 12(b)(6) *pleading standard* to determine if the Rule 15 motion to amend pleadings is futile. "Specifically, we consider whether an amendment of these claims would be subject to dismissal under Rule 12(b)(6) for failure to state a claim." *Seale*, 32 F.4th at 1027-28. Thus, factual allegations are not in dispute, and are to be taken as true:

> A claim is plausible when the complaint contains 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Waller v. City & Cnty. Of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019). When analyzing plausibility, a plaintiff's allegations are 'read in the context of the entire complaint.' *Uller v. Bradley*, 949 F.3d 1282, 1288 (10th Cir. 2020). A plaintiff need only 'nudge[ ] her claim 'across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Chilcoat, 41 F.4th at 1218.

Defendants disregard the applicable rule, asserting factual disputes with the FAC as though

the motion before the Court were a 12(b)(1) motion or one for summary judgment. *See* ECF 86 at 8; *see also* ECF 87 at 8-34. But courts may only dismiss an amended complaint as futile if "it appears beyond doubt that the plaintiff can plead no set of facts that would entitle him to relief." *K.S. ex rel. T.S. v. Santa Fe Publ. Schs.*, 2015 WL 13662572 at *3 (D.N.M. June 11, 2015) (quoting *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001). Defendants do not assert that the facts in the FAC are insufficient to establish claims under the law, so their factual disputes with the FAC are not properly before this court. *Anderson v. Suiters*, cited by Defendant-Intervenor, does not apply because there, unlike this case, the court held there was no set of facts that could meet the elements of the claims asserted. 499 F.3d 1228, 1238 (10th Cir, 2007).

III. ARGUMENT

A. The QTA Does Not Prevent APA Review of Federal Defendants' Wrongful Actions.

The federal courts have consistently recognized the rights of tribes, pueblos, and individual Indians to file suit under the APA when Federal officials take actions that negatively affect their trust and restricted fee lands, their treaty rights, their jurisdiction, and IIM funds held for their benefit. *See, e.g., Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (Ruling lower court had jurisdiction under the APA to review breach of fiduciary obligations claims against Federal Defendants regarding IIM accounts); *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 590 (10th Cir. 1992) ("The Secretary . . . acted inconsistently with fiduciary responsibilities owed to Indian mineral interest owners."). Despite Federal Defendants' protestations that the QTA is unambiguous, Federal courts have allowed tribes and individual Indians to bring claims in district court when their Congressionally confirmed real property interests are interfered with.

1. The QTA does not Deprive this Court of Jurisdiction.

The QTA is inapplicable. San Felipe does not seek "land from the federal government," ECF 86 at 32. Instead, the FAC's Claims and Prayer for Relief clearly set forth the injunctive, mandamus, and declaratory relief sought to overturn the unauthorized "corrective resurvey" and

M-Opinion 37027; to restore monuments and markers of official government surveys obliterated by Federal Defendant officials; to restore the IIM account unlawfully disbursed by Federal Defendant officials; to restore TAAMS records altered unlawfully, and to provide other equitable relief necessary to restore the constitutionally and statutorily protected rights of the Pueblo of San Felipe as they existed prior to Federal Defendant officials' unlawful actions. FAC at 57-58, ECF 78-1. The United States altered evidence of the boundary of lands it did not and does not own, nor did it own the IIM account or the monies it wrongfully disbursed. *See* Section III.A.2, III.C, *infra*. The Federal Defendants concede the land is restricted fee land the United States does not and has not ever owned. ECF 86 at 2. Federal Defendants attempt to evade their Congressionally mandated duty to protect pueblos' fee patented lands from alienation except as initiated by the Pueblo holding the patent. Pueblo Lands Act, §17. Federal Defendants' attempts to recast this solemn duty as a "property interest" is legally unsound and demonstrably false. ECF 86 at 16, 22 n.10 (the "United States' adverse claims to restricted fee Indian lands" and "a colorable interest in the contested land on Santa Ana's behalf").

Federal Defendants breathlessly recite the number of times the word "title" or "ownership" are set forth in the FAC. *See, e.g.,* ECF 86 at 17. But using the words title or ownership in a Complaint does not invoke the QTA nor deprive this Court of jurisdiction. Neither does the Federal Defendants' 102 incantations of "Quiet Title Act" successfully conjure a QTA sovereign immunity shield. Rather, the nature of the relief sought establishes that the Court has jurisdiction. The relief sought by San Felipe, involving no adverse federal property interest, falls within the jurisdiction of this Court to under the APA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.[4]

Courts have upheld tribe and pueblo APA challenges of federal officials' unauthorized actions that adversely affect that tribe's or pueblo's land or money. *See, Comanche Nation v.*

[4] Contrary to the Federal Defendant's assertions, the Declaratory Judgment Act grants authority to issue declaratory judgments once jurisdiction is established. *Duggins v. Hunt*, 323 F.2d 746, 748 (10th Cir. 1963) (internal citations omitted).

United States, 393 F. Supp. 2d 1196 (W.D. Okla. 2005) (action to set aside trust-to-trust conveyance was properly brought under APA and not the QTA); *Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979) (Gasch, J.) (pueblo had a right to challenge a survey of its own patent boundary); *Pueblo of Sandia v. Babbitt*, No. CIV 94-2624, 1996 WL 808067 (D.D.C. Dec. 10, 1996) (Greene, J.) (pueblo challenge to federal official's decision not to correct clearly erroneous survey of public land was proper under the APA – not the QTA); *Hodel v. Irving*, 481 U.S. 704 (1987) (District court had jurisdiction under the APA and the Fifth Amendment to the Constitution); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (court had jurisdiction to hear complaint that statute violate Fifth Amendment property interests); and *DuMarce v. Norton*, 277 F. Supp. 2d 1046 (D.S.D. 2003) (court had jurisdiction to hear complaint that statute deprived them of property interests in violation of the Fifth Amendment and not barred by the QTA); *see also Cobell v. Norton*, 240 F.3d 1081 (suit for declaratory and injunctive relief by IIM account beneficiaries is proper under APA for violations of trust duties).

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012) does not eliminate the exceptions recognized in *Irving v. Hodel, Babbitt v. Youpee* and *DuMarce v. Norton*. Injunctive and declaratory relief remain available for takings by interference with tribal and pueblo land and jurisdiction. *See* ECF 86 at 32. *Patchak* did not involve Federal officials' *ultra vires* actions that interfered with a pueblo, tribe, or Indian person's property interests or a pueblo's civil and criminal jurisdiction. Just as in *DuMarce v. Norton* and *Comanche Nation*, the United States' interest doesn't change – it only has a duty to protect against alienation. Attempting to alter which pueblo benefits from the restriction on alienation does not alter the United States' interest in the land. *DuMarce v. Norton,* 277 F. Supp. 2d at 1051-52; *Comanche Nation*, 393 F. Supp. 2d at 1207 ("At most, beneficial title will be affected—a matter in which the United States and its officers have no interest . . . .").

In *Patchak,* the Supreme Court recognized that the QTA does not preclude suits authorized

under other statutes, including the APA, in cases that impact federal interests in lands, because, as a remedial statute, the QTA does not bar additional avenues of relief. 567 U.S. at 223-24. As the Court explained, the QTA does not bar all cases that would have the impact of affecting "the Government's ownership of property. But that commonality is not itself sufficient. We have never held, and see no cause to hold here, that some general similarity of subject matter can alone trigger a remedial statute's preclusive effect." *Id.* at 223. *Patchak* does not speak to the extraordinary circumstances present in *Hodel v. Irving, Babbitt v. Youpee, DuMarce v. Norton* and this case. *Patchak* bars the use of the QTA as a shield for federal officials' *ultra vires* actions.

Both *Block v. North Dakota* and *Nevada v. United States* are also inapplicable because they were dismissed for failure to challenge United States' fee title within the statute of limitations, not at issue here. *Block v. North Dakota*, 461 U.S. 273 (1983); *Nevada v. United States*, 731 F.2d 633 (9th Cir. 1984). Unlike *Block*, the FAC does not challenge the United States' fee title to the land. 461 U.S. at 285-86; *see also United States v. Mottaz,* 476 U.S. 834, 846 (1986).

Mistakenly relying on cases in which the QTA was an available remedy[5], Federal Defendants argue that the QTA is the exclusive remedy available to Plaintiffs. ECF 86 at 32. Nor does *Shawnee Trail Conservancy v. United States Department of Agriculture* have any bearing here. 222 F.3d 383 (7th Cir. 2000), *cert. denied*, 531 U.S. 1074 (2001). In *Shawnee Trail Conservancy*, the complaint challenged the United States Department of Agriculture's right to regulate use of road easements in which the fee was owned by the United States. *Id.* at 386. The Seventh Circuit did not rule that the APA review was unavailable to challenge the decisions of federal officials. Rather, Plaintiff's failure to exhaust administrative remedies deprived the court of jurisdiction. *Id.* at 389-90. Here, Federal Defendants concede there is no failure to exhaust

[5] *Nevada v. United States*, 731 F.2d 633, 636 (9th Cir. 1984); *Montanans For Multiple Use v. Barbouletos,* 542 F. Supp. 2d 9, 19-20 (D.D.C. 2008).

administrative remedies that precludes this Court's jurisdiction under the APA. ECF 86 at 31.

2. *Sandia* and *Taos* Further Demonstrate that the QTA is not Applicable Because the United States "Interest" in Restriction on Alienation is not Adverse to San Felipe.

Consistent with *Taos*, *Sandia*, and *Comanche Nation,* the Supreme Court in *Patchak* articulated clearly that "adverse claimants," means "plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's." 567 U.S. at 219-220. Here, the United States' interest is more accurately described as a duty to restrict alienation that is not adverse to San Felipe Pueblo's interest in protecting its Patent boundaries. The United States interest/duty in restricting alienation of lands it does not own remains unaffected by the *ultra vires* actions challenged in the FAC, just as the United States interests in *Taos*, *Sandia* and *Comanche Nation* did not change. The Federal Defendants' attempt to redefine the nature of their interest as running with Santa Ana Pueblo's asserted interest in the fee title, and the further claim that they are stepping into the shoes of Santa Ana Pueblo, does not change the nature of the interest – which remains only an interest in upholding a duty to restrict alienation of lands specifically deeded and quieted to San Felipe – whether it abides by that duty or not. ECF 86 at 33-4, 39. No federal statute or case permits Federal Defendants' to repudiate the singular duty of protection owed to the San Felipe Patent, which is ultimately the point: this case challenges the Defendants' actions that attempt to shift its fiduciary obligation from one pueblo to another – a paper fabrication that cannot change property interests.

Federal Defendants' recharacterization of *Sandia* and *Taos* as QTA actions against the United States defies the holdings in both cases. ECF 86 at 30. Neither case held a right to sue under the QTA beyond the statute of limitations. *Taos* and in *Sandia* held the QTA did not apply and jurisdiction was proper under the APA. *Taos,* 475 F. Supp. at 365; *Sandia,* 1996 WL 808067 at *4 ("The action before the Court is not one contesting the government's ownership of the land in question, and it therefore should not be judged under the Quiet Title Act.") Both cases are consistent with *Patchak* and *Comanche Nation* in finding that there was no adversarial interest, so

the QTA did not preclude jurisdiction under the APA. *Patchak*, 567 U.S. at 219-220; *Comanche Nation*, 393 F. Supp. 2d at 1207.

The Defendant-Intervenor argues that the Secretary had authority to move the boundaries of the San Felipe Patent under *Taos* and *Sandia*. ECF 87 at 13-15. Defendant-Intervenor's conclusion about these cases is wholly incorrect. First, unlike the case at bar, in *Taos* "title to both parcels of land involved rest[ed] with the United States." *Taos*, 475 F. Supp. at 365. Likewise, *Sandia* held that the power of corrective resurvey was limited to "public lands." *Sandia,* 1996 WL at *7. Defendant-Intervenor uses a partial quotation from *Taos* that "the Secretary has a 'duty . . . to determine the boundaries of Indian lands . . . .'" ECF 87 at 14 (quoting *Taos*, 475 F. Supp. at 365). In context, the quotation supports judicial relief from administrative action under the APA:

> Therefore it is clear that important rights of the Pueblo were created by the order of defendant Andrus, the official whose duty it is to determine the boundaries of Indian lands. 25 U.S.C. § 176 (1976). These rights were adversely affected by defendant Andrus' decision to conform to the opinion of the Attorney General. Accordingly, the Court finds that the complaint presents a justiciable case or controversy brought by a party aggrieved by adverse administrative action and governed by judicially discoverable and manageable standards.

475 F. Supp. at 365; *see also Sandia,* 1996 WL at *7 ("[t]his suit is therefore properly governed by the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1992), which operates as a waiver of sovereign immunity in a suit seeking relief other than money damages.").

3. Federal Defendants Lack Authority to Alter the San Felipe Patent Boundary Without Further Congressional Action.

The FAC demonstrates that the United States has never had any claim to any real property interest adverse to the Plaintiff within the San Felipe Patent. FAC ¶¶ 22-35, 37-38, ECF 78-1; ECF 79 at 9-17. Federal Defendants' claim they are defending this action in a capacity on behalf of Santa Ana Pueblo is specious. With no adverse property interest at issue, Federal Defendants don't get to switch shoes to create an adverse interest solely for the purpose of deploying the QTA as a shield for their illegal actions.

Five fundamental characteristics of the San Felipe Patent bar Federal Defendants from altering its boundaries through a "corrective resurvey," and from subsequently adjudicating title to any of the Restricted Fee lands located within those boundaries:

a) the San Felipe Patent is a congressional confirmation of a prior sovereign's grant (the United States never acquired title);

b) the land's status as a patent *per se*;

c) the inviolability of the original surveyed boundaries of a patent *per se*;

the statutory restriction prohibiting alienation of Pueblo patented lands without Secretarial review and approval; and

d) the special significance of the boundaries of a Pueblo patent issued pursuant to the 1854 Act under the 2005 PLA Amendment.

Because Congress never authorized a "corrective resurvey" to alter the San Felipe Patent boundaries, the substance of the FAC falls within the APA, wholly unaffected by the QTA.

a. Only Congress Can Alter Patents Confirmed by Congress and Issued in Fulfillment of the United States' Obligations Under the Treaty of Guadalupe Hidalgo.

The boundaries of the San Felipe Patent, signed by President Abraham Lincoln, pursuant to the 1854 Act and the 1858 Act cannot be altered or second-guessed by executive officials or the courts.[6] ECF 79 at 11-3 (citing *Beard v. Federy*, 70 U.S. 478, 491 (1865); *Tameling v. Freehold & Emigration Co.,* 93 U.S. 644, 662-63 (1876); *United States v. Maxwell Land Grant Co.,* 121 U.S. at 82). Defendants do not meaningfully contradict this, nor distinguish any of the authorities cited by Plaintiff for this proposition. Congress never authorized Federal Defendants to override the congressional confirmation of the San Felipe Patent. *See Tameling*, 93 U.S. at 662. Property

[6] That same year, President Lincoln ordered the delivery of ebony canes to each of New Mexico's 19 pueblos, to mark the arrival of United States Land patents of the original Spanish Land Grants to each pueblo nation. Dailey, Martha LaCroix, "Symbolism and Significance of the Lincoln Canes for the Pueblos of New Mexico," *New Mexico Historical Review* 69, 2 (1994).

rights, once granted to Pueblos by a prior sovereign and patented to them by the United States, are not subject to collateral attack. Defendants cannot, and do not, challenge that fundamental principle. Opn. M-37002 at 23, Pl.'s Supp. Doc. 64 and 65, ECF 49-6 (*citing Sanchez v. Taylor,* 377 F.2d 733, 737 (10th Cir. 1967); *Mondragon v. Tenorio*, 554 F.2d 423, 424 (10th Cir. 1977)); *see also Astiazaran v. Santa Rita Land & Mining Co.*, 148 U.S. 80, 82-84 (1893); *Ainsa v. N.M. & A.R. Co.*, 175 U.S. 76, 86 (1899); *Russell v. Maxwell Land-Grant Co.*, 158 U.S. 253, 255 (1895).

Once Congress confirmed a claim pursuant to the 1858 Act, it directed the Commissioner of the Land Office to "cause a patent to issue therefor as in ordinary cases to private individuals, … relinquish[ing] … all title and claim of the United States to any of said lands," 1858 Act. Defendants are therefore unable to challenge that confirmation of a grant from the prior sovereign was "an admission that the **rightful ownership had never been in the United States.**" *United States v. De la Paz Valdez de Conway*, 175 U.S. 60, 70 (1899) (citing *Beard*, 70 U.S. 478, and *Miller v. Dale*, 92 U.S. 473 (1875)) (emphasis added). Tellingly, Defendants do not dispute that, unlike patents of public lands, the patent process established by the 1854 and 1858 Acts confirmed patent boundaries without transferring ownership and control, because ownership never vested in the United States – it was always vested in the Patent holding pueblo – in this case San Felipe.[7]

[7] Nothing in the Treaty of Guadalupe Hidalgo, Article IX, 9 Stat 922, 1848 WL 6374 (U.S. Treaty), or the 1854 Act authorizes Santa Ana's claim that the original San Felipe Spanish Land Grant or any of the nine pueblos referenced' Spanish land grants were "fraudulent" after the period for challenging such under the 1854 Act expired, referencing only legal counsel's book published in 2014 as authority. ECF 87 at 4 n.4; *see* Pl.'s Supp. Docs., ECF 49-1 at 14. Legal Counsel for Defendant-Intervenor's own self-serving publication is not properly before this court, is not admissible as evidence of the truth of the matter asserted, and as the Supreme Court held in *McGirt v. Oklahoma*, extratextual sources are not proper when determining the validity of Congressional acts that establish tribal land boundaries. 591 U.S. 894, 916 (2020). It defies all logic that ten of the nineteen of New Mexico's pueblos were not granted lands by Spain and that their land grants were fraudulent. The ten affected pueblos by this assertion are: San Felipe, Acoma, Cochiti, Jemez, Laguna, Picuris, San Juan (the present day Ohkey Owingeh), Santo Domingo, Zia, and Zuni. Will all of these pueblos now be subjected to challenges to their long confirmed Congressionally approved patents on the same time-barred argument?

Because the United States held no property interests in lands patented under the 1854 and 1858 Acts, the Federal Defendants' 102 cries of QTA are illusory. *See Shawnee Trail Conservancy*, 222 F.3d 383. In the case most often cited by Defendants, "the Supreme Court has made clear that, through its adoption of the Act, "Congress intended ... to provide the exclusive means by which *adverse claimants* could challenge the **United States' title to real property**." *Block,* 461 U.S. at 286 (emphasis added). There is no adverse interest at stake here.

b. Once Patents are Issued by the United States Under the 1858 Act, They are Conclusive and Cannot be Altered by Federal Defendants Through Corrective Survey or Otherwise.

A patent *per se* is "the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal." *United States v. Stone*, 69 U.S. 525, 535 (1864) (emphasis added); *see also United States v. Estate of St. Clair*, 819 F.3d 1254, 1257 (10th Cir. 2016). The Federal Defendants argue that Plaintiff cites no case, post QTA, that bars the United States from interfering with a Patent. ECF 86 at 45. Federal Defendants ignore *United States v. Reimann*, decided two years after the adoption of the QTA. 504 F.2d 135 (10th Cir. 1974). *Reimann* held that "once patent has been issued, the rights of patentees are fixed, and the government has no power to interfere with these rights, as by a corrective resurvey." *Id.* at 138; *see also Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960) (Secretary is "without power to annul a patent once it has issued."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (only Congress "can authorize the taking of private property for public use."). These post-QTA cases confirm Federal Defendants had no authority to override patent boundaries by resurvey or otherwise.

c. Defendants Cannot Alter the 1864 Patent Boundaries as Set Forth in the Patent.

The Federal Defendants do not dispute that the issuance of a patent irrevocably establishes the boundaries of the patented land. *See Kean v. Calumet Canal & Improvement Co.*, 190 U.S.

452, 461 (1903), and *Reimann*, 504 F.2d at 138. Defendant-Intervenor argues that those cases deal with patents of formerly public lands but are inapplicable to surveys of lands privately held under a prior sovereign. ECF 87 at 20 n.24. The distinction is irrelevant. Defendant-Intervenor cites no authority that allows a resurvey based on private land tenure under a prior sovereign. ECF 79 at 8 n.1. As set forth above, Federal Defendants' duties are fixed by Congress – which has not granted Federal Defendants any power to alter the boundaries of the San Felipe Patent.

Citing no authority, Defendant-Intervenor asserts that Federal Defendants could lawfully obliterate the southern boundary of the confirmed San Felipe Patent – conjecturing that 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." ECF 87 at 8. *De La Paz Valdez de Conway* does not support this assertion. *De la Paz Valdez de Conway*, 175 U.S. at 68. *De la Paz Valdez de Conway* supports Plaintiff's argument that the grant of its Patent cannot be disturbed except by Congress, confirming that:

> Nor is the action of Congress confirming such private land claim subject to judicial review. As was said by this court in *Tameling* v. *United States Freehold & E. Co.*, 93 U. S. 644, 662, 23 L. Ed. 998, 1002: 'No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim reserved to Congress is, of course, conclusive, and therefore not subject to review in this or any other forum.

Id. at 67. [8]

[8] *Jones v. St. Louis Land & Cattle Co.* also supports the Plaintiff's position, holding that where both patents were issued pursuant to the Act of July 22, 1854, c. 103, § 8, 10 Stat. 308, 309, the Spanish land grant first in time and first to be confirmed under United States law prevailed. 232 U.S. 355, 360-63 (1914). Here, the 1689 San Felipe Spanish Land Grant was first in time because it was issued in 1864 under the authority of the 1854 Act. The El Ranchito Tract is made up of several parcels purchased from non-Indians between 1709 and 1763, FAC ¶ 42, ECF 78-1, and was not confirmed by the 1854 Act. Instead, its confirmation is subject to the limitations in the Private Land Claims Act that forbade issuance of any patent that overlapped a patent already issued

Defendant-Intervenor claims that under *Beard* the United States can reallocate land from existing patents based on third party claims to "superior titles" from a prior sovereign. ECF 87 at 7. But *Beard* addressed claims that were specifically authorized in the "fifteenth section of the act of March 3d, 1851," and, unlike here, those claims were timely brought. 70 U.S at 479. Defendant-Intervenor's citation to *Interstate Land Company v. Maxwell Land Grant Company* is similarly inapplicable. 139 U.S. 569 (1891); *see* ECF 87 at 8-9. That dispute was between two non-Indians, was timely brought, and the Supreme Court held the grant confirmed by Congress prevailed. 139 U.S. at 579-80. In contrast, here Congress imposed a specific statute of limitations for bringing claims against pueblo fee patented lands in the PLA, as amended. Act of May 31, 1933, c. 45, 48 Stat. 108. Defendant-Intervenors failed to file within that statutory time. The other cases cited by Defendant-Intervenor support Plaintiff's position that courts and the Federal Defendants have no authority to obliterate or alter the San Felipe Patent boundaries surveyed in 1860 and confirmed by Congress. *See United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 382; *United States v. State Inv. Co.*, 264 U.S. 206, 212 (1924); *Russell v. Maxwell Land-Grant Co.*, 158 U.S. at 258-59; *Stoneroad v. Stoneroad*, 158 U.S. 240, 253 (1895); *De Guyer v. Banning,* 167 U.S. 723, 742-43 (1897); ECF 87 at 8-9.

d. The Pueblo Lands Act of 1924 Precludes Alienation of Pueblo Restricted Fee Lands Within the San Felipe Patent Without San Felipe's Authorization or an Act of Congress.

Defendants cannot rebut the foundational principle that Congress controls alienation of Patented Pueblo lands. As previously set forth:

> Congress prohibited the involuntary transfer of title to pueblo lands except as authorized by Congress. Pueblo Lands Act of June 7, 1924, c. 331, § 17, 43 Stat.

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by the United States. *See* Act of March 3, 1891 §§ 8, 13, 14, c. 539, 26 Stat. 854; *see also United States v. Baca*, 184 U.S. 653, 659-60 (1902) (CPLC petition dismissed for lack of jurisdiction because the land had already been patented to another party) Thus, any portion of the subsequent Santa Ana confirmation that overlaps the San Felipe Patent is void.

> 636. The restriction on alienation is another special feature of Pueblo land patents, including San Felipe's Restricted Fee lands located within the 1864 Patent. The restriction on alienation that attaches to Pueblo patented lands withholds the kind of control the Secretary would need to cancel, diminish, or alienate part of a Pueblo's patented lands other than by approving a transaction "freely made by [the] Pueblo." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 252 (1985); *see Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937) (holding federal government's "[p]ower to control and manage the property and affairs of Indians in good faith for their betterment and welfare … does not extend so far as to enable the government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation; for that would not be an exercise of guardianship, but an act of confiscation") (cleaned up) (quoting *United States v. Creek Nation*, 295 U.S. 103, 110 (1935), *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919)).

ECF 79 at 10-11.

No amount of repackaging can transform the duty of the United States to restrict alienation of lands into a property right. That duty is not part of the bundle of property rights and does not create an adverse property interest in land that makes the QTA applicable. While the right to alienate one's land in part (grants of easement, rights-of-way) or in whole (conveyance of fee interest) is a real property interest, the sovereign's duty to restrict alienation if not in the best interest of the fee holder is what was breached in this case – the nature of the interest – the protective duty to restrict alienation, is just that – a duty. According to the Code of Federal Regulations,

> *Restricted land* or *land in restricted status* means land the title to which is held by an individual Indian or a Tribe and which can only be alienated or encumbered by the **owner** with the approval of the Secretary due to limitations contained in the conveyance instrument pursuant to Federal law or because a Federal law directly imposes such limitations.

25 C.F.R. § 151.2(e) (emphasis added).[9]

[9] Similar language is repeated on the United States Department of Interior's Bureau of Indian Affairs Website. Bureau Indian Affs., Fee to Trust Land Acquisitions, https://www.bia.gov/bia/ots/fee-to-trust ("Restricted fee land," also known as "restricted land," is land to which the title is held by an individual Indian or Tribe (**not by the United States**), but that can only be alienated or encumbered (for example, sold, gifted, or leased) with approval by

As the Court held in *Mesa Grande Band of Mission Indians v. Salazar,* the United States could not alter a patent granted to Santa Ysabel and replace Sante Ysabel with Mesa Grande, because to do so "would have the effect of taking land from Santa Ysabel…[A]llowing Plaintiff or any other litigant to sue the United States to cancel a land patent issued in favor of an Indian tribe would interfere with the United States' trust commitment to that tribe…" 657 F. Supp. 2d 1169, 1175 (S.D. Cal. 2009). The restriction on alienation is an obligation specific to the San Felipe Pueblo - the Federal Defendant officials cannot change the beneficiary of that restriction put into place under the PLA specific to the Congressionally confirmed patent. ECF 79 at 18-20.

e. The 2005 Amendment to the Pueblo Lands Act Confirms that Only Congress Can Diminish the San Felipe Patent Boundaries.

The Supreme Court recently confirmed that only Congress by clear statement can diminish reservation or pueblo patented boundaries. *McGirt v. Oklahoma*, 591 U.S. 894, 903-04 (2020); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Smith*, 482 F. Supp. 3d at 1171-74; *New Mexico v. Romero*, 140 N.M. 299, 308 (2006); *see also* 25 U.S.C. § 211; 25 U.S.C. § 398d; Pub. L. 109-133 (2005), 119 Stat. 2573, 25 U.S.C. § 331 Note. *Solem v. Bartlett*, and *McGirt* control, as Defendants concede by their silence. *see* ECF 79 at 12. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470. "If Congress wishes to break the promise of a reservation, it must say so." *McGirt,* 591 U.S. at 903-04.[10] Defendants have no answer. A federal officer cannot change the boundaries by the stroke of a pen that has not been blessed by Congress.

Defendants ignore the 2005 amendment to the PLA under which Pueblos exercise jurisdiction over their lands under 18 U.S.C. Section 1151 (a). Pub. L. 109-133, 119 Stat. 2573 (Dec. 20, 2005), 25 U.S.C. §331 note ("2005 Amendment"). Further, the jurisdictional recognition

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the Secretary of the Interior.") (emphasis added).

[10] 25 U.S.C. § 398d extended the protection that only Congress can alter reservation boundaries to reservations created by other than an Act of Congress. In *Yankton Sioux Tribe v. Podhradsky* the Eighth Circuit upheld the mandate that unless Congress acts, a reservation is not disestablished or further diminished. 606 F.3d 994, 1017 (8th Cir. 2010). *Cf.* ECF 86 at 32 n.11.

accorded pueblo patents applies to crimes occurring "anywhere within the exterior boundaries of any grant from a prior sovereign, **as confirmed by Congress** or the CPLC to a Pueblo Indian tribe of New Mexico…." *Id.* (emphasis added). Patents issued by Congress pursuant to the 1854 Act and the 1858 Act, or by the CPLC in its limited jurisdiction to issue decrees resolving claims to previously unpatented lands, define a Pueblo's jurisdictional exterior boundaries. Only an act of Congress may change those boundaries. *See also,* FAC at ¶¶ 5, 42-3, 85-7, 172-174, 182-186, ECF 78-1; FAC Ex. B, ECF 78-4; 25 U.S.C. § 211; 25 U.S.C. § 398; 2005 Amendment; 43 U.S. § 772; 43 U.S.C. § 1746. In the 2005 PLA Amendment, Congress reaffirmed the permanence of the San Felipe Patent boundaries determined under the 1854 and 1858 Acts.

4. 25 U.S.C. § 176 Provides no Authority to Correct a Survey Based on a Federal Official's Determination of Ownership Under Spanish Law.

Under the Treaty of Guadalupe-Hidalgo and the 1854 Act, San Felipe's 1689 Spanish land grant never became public lands of the United States. As a result, Opinion M-37027's reliance the Department's regulatory authority over public lands was clear error.[11] FAC ¶ 122; FAC Ex. E at 2 n.5, ECF 78-7. As noted above, Tenth Circuit precedent contradicts the assertion that 25 U.S.C. § 176 authorizes a corrective resurvey of patented lands: "once patent has been issued, the rights of patentees are fixed, and the government has no power to interfere with these rights, as by a corrective resurvey." *Reimann*, 504 F.2d at 138. The Solicitor manifestly had no power to order a "corrective resurvey" of the San Felipe Patent and provided no valid legal support for doing so. *See* ECF 79 at 9-10; Opinion M-37027 at 2 n.5, FAC Ex. E, ECF 78-7; *See* 25 U.S.C. § 176; 43 U.S.C. § 1746. Without discussion, Federal Defendants ignore 43 U.S.C. § 1746 (limited to public lands) and simply rely on 25 U.S.C. § 176 as the sole authority. ECF 86 at 23 n.11. Defendants fail to address 43 U.S.C. § 772 stating: "no … resurvey or retracement shall be so executed as to impair

[11] 25 U.S.C. § 176 (surveys of Indian or other reservations), 43 U.S.C. § 772 (retracements and resurveys of public lands), 16 U.S.C. § 488 (establishment of national forest boundaries).

the bona fide rights … of any … owner of lands affected by such resurvey or retracement." *See also* Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub. L. No. 94-579, § 701(a), 90 Stat. 2786. Nor do Defendants address the holding in *United States v. State Investment Company*, that "[a] resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the Government, after conveyance of the lands, having 'no jurisdiction to intermeddle with them in the form of a second survey.'" 264 U.S. 206, 291 (1924) (*citing Kean v. Calumet Canal Co.*, 190 U. S. at 461).

M-Opinion 37000 concluded that resurveys may not affect the title of patentees, stating the power to resurvey "is a power which may not be exercised against the rights of patentees." Opn. M-37000 at 9, (*citing Cragin v. Powell*, 128 U.S. 691 (1888)), ECF 49-6, Doc. 65, at 36; *see also Pueblo of San Felipe*, No. IBLA 2104-256, 190 IBLA 17, 30 (Apr. 5, 2017), ECF 49-7, Doc. 72 at 67 ("San Felipe IBLA Decision") (corrective resurvey did not affect title to lands); FAC ¶¶ 122-137, ECF 78-1. The Solicitor ignored Opinion M-37000's conclusions that she lacked legal authority: a glaring demonstration of knowingly acting *ultra vires*.

Defendant-Intervenor claims that "[i]n the case of surveys of private claims, the government retains the power to correct an erroneous survey." ECF 87 at. 4-5 n.5. Without further explanation, Defendant-Intervenor cites *Adam v. Norris* to support this conclusion. 103 U.S. 591 (1880). In fact, *Adam* supports San Felipe's claims here:

> … the effect of a compliance with the act [of June 14, 1860] is limited to the establishment of the conformity of the survey to the decree of confirmation, which fact could not afterwards be disputed by anyone who, under that act, had opportunity to contest it before the District Court.

Adam, 103 U.S. at 592-93 (internal citations omitted). Defendant-Intervenor also wrongly contends that the *Adam* "[c]ourt further made clear that the Land Office was free to act to correct the survey." ECF 87 at 7. The *Adam* court did no such thing. All the *Adam* court did was affirm the trial court's ruling that the Defendant's land grant and patent, which predated plaintiff's lgrant

and patent, established superior title. 103 U.S. at 594.

Next, Defendant-Intervenor claims that in *Henshaw v. Bissel,* 85 U.S. 255 (1873), 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 . . . ." ECF 87 at 7 (citing *Henshaw*, 85 U.S. at 267-68). In fact, the *Henshaw* court honored the patent obtained as prescribed by Congress, which defendant could have contested by a date certain but failed to do so. 85 U.S. at 269-71. Importantly, the *Henshaw* court confirmed that, "[t]he whole subject of surveys is under the control of Congress, and **until the patent issues thereon**, any survey may be set aside and a new one ordered by its authority." *Id*. at 269 (emphasis added). Here, the San Felipe Patent issued in 1864. Thereafter the PLA authorized the District Court to confirm the patent boundaries by reference to the specific 1916 Joy survey, which this court affirmed in the *Algodones* decision. FAC ¶¶ 87, 89-90, ECF 78-1. No other Congressional acts authorized resurveying of the patent boundary.

As set forth in the FAC, Santa Ana Pueblo failed to avail itself of the procedures prescribed by Congress for challenging the San Felipe Patent boundaries not once, but three times. As in *Henshaw*, the Defendants are barred by the applicable statutes of limitations from doing so now. *See*, FAC ¶ 27, ECF 78-1. (Opportunity to present conflicting claims under the 1854 Act); Pl.'s Supp. Docs., ECF 49-1 at 14; ECF 49-1 at 133-134; FAC ¶¶ 53-54, ECF 78-1 (Santa Ana Pueblo Spanish Land Grant claim presented to the Surveyor General under the 1854 Act did not include the El Ranchito Tract); FAC ¶¶ 80-83, ECF 78-2 (Santa Ana Pueblo filed no contest of the San Felipe 1864 Patent survey and no claim under the Pueblo Lands Act when its claim was not accepted in *Algodones*.); FAC ¶¶ 94-96, ECF 78-1. No "corrective resurvey" is possible, and any

such survey has no effect.

5. Federal Officials' Actions Violated Federal Law and Regulations Governing "Resurveys."

Federal Defendants ignored the resurvey of the San Felipe Patent that they ordered and William Olver completed in 2009 and they ignored the field investigation of the southeast corner of the San Felipe Patent they ordered and Paul Hickey completed in 2012. FAC ¶¶ 120, 121; Pl.'s Supp. Docs. 67 at 75; 68 at 96, ECF 49-6. Following the applicable laws, regulations, and the 2009 Survey Instruction Manual, Hickey's investigation did not find "any conclusive evidence that can be accepted as sufficient proof to overturn Hall's 1909 reestablished position of the southeast corner of the [San Felipe Grant] which has been continually recognized by adjoining landowners as the true corner of the Grant for over 100 years." FAC ¶121. Federal Defendant officials did not follow the requirements of the 2009 Bureau of Land Management Survey Instruction Manual regarding resurveys in any respect. Bureau of Land Mgmt., 2009 Survey Instruction Manual, https://www.blm.gov/sites/blm.gov/files/Manual_Of_Surveying_ Instructions_2009.pdf (last visited Jan. 6, 2025) ("Manual"). They did not follow the restriction set forth in Section I-29 of the Manual that requires:

> First. That the boundaries and subdivision of the public lands as surveyed under approved instructions by the duly appointed surveyors, the physical evidence of which survey consists of monuments established upon the ground, and the record evidence of which consists of field notes and plats duly approved by the authorities constituted by law, are unchangeable after the passing of title by the United States.

Manual at 13. They ignored the limitation "[t]hat the original township, section, quarter-section, and other monuments as physically evidenced shall stand as the true corners of the subdivisions which they were intended to represent and shall be given controlling preference over the recorded directions and lengths of lines." *Id.* at 14; or the requirement that, "Sixth. That lost or obliterated corners of the approved surveys must be restored to their original locations whenever this is

possible." *Id.*

The FAC demonstrates that Federal Defendant officials ignored the resurveys and investigations they ordered to be undertaken pursuant to the 2009 Survey Instruction Manual, and instead, ordered the obliteration of the San Felipe Patent southern boundary. FAC ¶¶ 123 – 145, ECF 78-1; FAC Ex. F, ECF 78-8; Ex. H, ECF 78-10. The Federal Defendants' "corrective resurvey" purported to change the southern boundary of the San Felipe to the El Ranchito Tract northern boundary to match Walker's survey of the El Ranchito Tract. FAC ¶ 145, ECF 78-1. That boundary was not based on correcting an error in the 1860 Clements survey. FAC ¶¶ 127, 129, ECF 78-1. It was not based on a determination that the 1860 boundary as confirmed by Hall in 1907 and Joy in 1916 did not match up with the description of the boundary in the San Felipe 1689 Spanish Land Grant which called for a boundary "on the east one league, and on the west one league and on the south a little grove, which is in front of a hill called Culcura, opposite the fields of the Santa Ana Indians." FAC ¶¶ 24, 129-131, ECF 78-1.[12] Defendant Intervenor's citation of

[12] Defendant-Intervenor spends extensive time disputing the accuracy of the Clements survey. ECF 87 at 15-21. Defendant-Intervenor's arguments should be disregarded given that dispute of facts set forth in the FAC are not proper for consideration on a Motion to Amend. *See* Section II, *infra.* Despite assertions to the contrary, nothing in the rejected Walker re-survey of the San Felipe Patent, the Hurlburt investigation, nor Vance's recommendations establishes that the Clements original survey of the southern boundary did not line up with the natural monument set forth in the 1689 Spanish Land Grant, which was the "Culcura Hill." The only discrepancy pointed out is the discrepancy of 330 chains south of a creek with the overall distance Pl.'s Supp Doc. 28, ECF 49-3 at 143-144. This does not demonstrate any discrepancy with the 1689 Spanish Land Grant which references "Culcura Hill" or "Culebra Hill." FAC ¶¶ 58-61, 65-67, ECF 78-1. Hurlburt's investigation report found the "Culebra Hill" to be located on Clements southern boundary and not on the rejected Walker resurvey which relied only on distances. Pl.'s Supp Doc. 28, ECF 49-3 at 143-144. FAC ¶¶ 58-61, 65-67, ECF 78-1. Notably, the Walker resurvey of the southern boundary of the San Felipe Grant was rejected by the Surveyor General as inconsistent with several other approved public surveys. FAC ¶¶ 58, ECF 78-1; Pl.'s Supp Docs. 25 and 26, ECF 49-3 at 120-21, 124-25. The 1909 Hall resurvey and the 1916 Joy survey rightly relied on not distances marked by chains as Walker did, but rather, the Culcura Hill, and overall distance. Ultimately, the El Ranchito Tract northern boundary recognized as the "common boundary" by the Federal Defendants bears no relationship to the Culcura (Culebra) Hill demarcated in the 1689 San Felipe Spanish Land Grant, the Clements survey, the 1909 Hall Survey, the 1916 Joy Survey, or the

Cordova v. Town of Atrisco relies on inapplicable New Mexico laws, but it confirms the correctness of reliance on natural monuments set forth in the Spanish Land Grant – not distances measured by chains in a survey thereof. 53 N.M. 76, 80 (1949); ECF 87 at 18. The governing natural monument here is Culcura Hill, and not the creek, which is not referenced in the 1689 Spanish Land Grant. Defendants fail to meet the very high standard set forth in *Taos* and *Sandia* of demonstrating a clear error in the legal description of a Spanish Land Grant based on natural monuments.[13] *Sandia*, 1996 WL 808067 at *1; *Taos*, 475 F. Supp. at 366.[14]

6. Congress Did Not Authorize Defendant Officials to Obliterate Evidence of the Boundary of the San Felipe Pueblo Patent.

The actions of the Federal Defendant officials in ordering the removal of the markers and monuments of the southern boundary of the San Felipe Patent violated federal law prohibiting destruction of official survey monuments and markers. 18 U.S.C. § 1858[15]; FAC ¶¶ 1, 196, 231, 237, ECF 78-1; FAC Ex. F at 3, ECF 78-8; *see also* BLM 2009 Manual of Survey Instructions, Section 1-18 at 9. The statute prohibits the willful destruction of monuments and corners demarcated by Clements in 1860, and confirmed by Hall in 1909, and Joy in 1916.

7. Defendant's Actions were *Ultra Vires* and Void.

Federal Defendants' incorrectly claim that Plaintiff cites no post QTA authority that the

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rejected Walker resurvey of the San Felipe Grant. Accordingly, the Federal Defendant officials did not perform a "corrective resurvey."

[13] Defendant-Intervenors concede: "there is no way to know whether Hall located the boundaries in the same location that Clements claimed to have." ECF 87 at 21.

[14] Remarkably, Defendant-Intervenor fails to inform the Court that the survey in *Taos* held to be invalid because it relied on distances rather than natural monuments was performed by Walker, who made the same error in attempting to resurvey the Clements survey of the 1689 San Felipe Spanish Land Grant and 1864 Patent at issue here. *See Taos*, 475 F. Supp. at 366.

[15] "Whoever willfully destroys, defaces, changes, or removes to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or willfully cuts down any witness tree or any tree blazed to mark the line of a Government survey, or willfully defaces, changes, or removes any monument or bench mark of any Government survey, shall be fined under this title or imprisoned not more than six months, or both."

Executive branch lacks authority to alter boundaries of patents. ECF 86 at 20. While it is true that *Moore v. Robbins* predates the QTA, it is still good law. 96 U.S. 530, 534 (1877). Later cases, after the QTA's passage, also hold that corrective resurvey executed after federal title has passed to patentee "is a legal nullity." *In re Mitchell*, 104 IBLA 377, 380 (Sept. 27, 1988); *see also, S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 752 (10th Cir. 2005).

Defendants also ignore *Mandan, Hidatsa and Arikara Nation v. Department of the Interior*, which affirms that the Department of the Interior "lacks authority to adjudicate title to real property," neither a Solicitor's M-Opinion purporting to resolve a title dispute, nor the "Bureau of Indian Affairs recording title in its records office" establishes legal title. 66 F.4th 282, 285 (D.C. Cir. 2023) (internal quotation marks omitted). All such actions are constitutionally void.

Defendants' use of *Block* and *Patchak* are unavailing. *See* Sections III.A.1 *infra.* Defendants simply cannot avoid the fact that their actions in obliterating the boundary markers of the southern boundary of the San Felipe Patent resulted in an interference with San Felipe property rights that is a taking without authority rendering it "constitutionally void." *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 702 (1949). This means "the acts of the [federal] officers may be enjoinable, but they do not constitute a taking effective to vest some kind of title in the government and entitlement to just compensation in the owner or former owner." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (quoting *Armijo v. United States*, 663 F.2d 90, 95 (Ct. Cl. 1981)); *see also Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 127 n.16 (1974) (also known as the *Regional Rail Reorganization Act Cases*). Simply put, neither *Block* nor *Patchak* overrules or distinguishes *Larson, Del-Rio Drilling Programs, Inc.,* or *Blanchette.* In fact, they bolster Plaintiff's *ultra vires* claims.

Further, San Felipe's primary dispute is not "the correctness or incorrectness" of an official's decision under general law, but "the power of the official, under the statute, to make a decision at all." *Larson*, 337 U.S. at 691 n.12. Defendants' actions – performing a boundary

resurvey and changing TAAMS trust asset records - were far beyond the Federal Defendants' delegated powers limited by statute, Supreme Court precedent, and the Constitution. *See Del-Rio Drilling*, 146 F.3d at 1363; *Leopold v. Manger*, 102 F.4th 491, 496 (D.C. Cir. 2024).

Plaintiff's Memo in Support provides the following blow to Defendants' sovereign immunity assertion:

> Without authority, the challenged actions were not the actions of the government. *Hooe v. United States*, 218 U.S. 322, 335-36 (1910); *see Larson*, 337 U.S. at 689-90. Moreover, in a suit challenging such *ultra vires* actions, the Defendants cannot invoke the United States' sovereign immunity, therefore no statutory waiver of immunity is required to maintain the suit. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996).

ECF 79 at 15. Defendants provide no response.

8. Santa Ana Pueblo holds no Valid Patent to the Conflict Area.

The Federal Defendants assert that as a factual matter, "the General Land Office simply issued overlapping patents to San Felipe and Santa Ana." ECF 86 at 3. Defendant-Intervenor likewise asserts an overlapping patent was issued pursuant to the decree of the CPLC. ECF 87 at 30. The CPLC specifically excluded any land in the El Ranchito Tract Santa Ana purchased from non-Indians that overlapped with the San Felipe Patent in its decree on the El Ranchito Tract. FAC ¶¶ 49-51; Ct. Pr. Land Claims Decree ¶¶ 16, 18 ECF 49-3, Doc. 22 at 89-90. Further, the CPLC had no authority under the law to issue an overlapping patent. FAC ¶¶ 36-38, ECF 78-1; Act of March 3, 1891, §§ 8, 13, 14, c. 539, 26 Stat. 854. Finally, the Supreme Court has already ruled that to the extent a party claims they hold a patent issued by the CPLC that overlaps with a prior issued patent, that patent is void, regardless of the validity of such claim under Mexican or Spanish law. ECF 79 at 29; *see also La Joya Grant v. Belen Land Grant*, 242 U.S. 595 (1917). Defendants do not provide a single case in support of their assertion Santa Ana holds an overlapping patent.

As a matter of law and fact there is no overlapping El Ranchito Patent. Whether the

Surveyor General's Office filed surveys that overlap has no bearing on and cannot overrule the 1909 El Ranchito Tract patent actually approved by Congress which was subject to the limitations of the CPLC Decree excluding from the patent any lands that fell within the previously surveyed San Felipe Patent. FAC ¶¶ 51, 66-70, ECF 78-1; FAC Ex. D, ECF 78-6.[16]

Defendant-Intervenor's factual claim that it has exclusive use and occupancy of the Conflict Area and that those rights have been consistently recognized by the United States is not only improper at this stage of determining whether the Motion to Amend the Complaint should be granted, *see* Section II, *infra*, it is blatantly contradicted by the well pleaded facts in the FAC. ECF 87 at 3 n.2, 7; *see* FAC ¶¶ 87, 93-95; 97-100, ECF 78-1.[17]

9. Under *Loper*, Defendant Officials' Actions are Due no Deference.

Federal Defendants assert that the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* has no application to the instant case because the PLA is unambiguous. 144 S. Ct. 2244 (2024); ECF 86 at 37. *Loper* applies directly to whether Defendant officials had authority to take any of the *ultra vires* actions alleged by San Felipe; whether the PLA restriction on alienation runs

[16] Defendant-Intervenor inappropriately interposes a factual dispute asserting a superior claim to the land under Spanish law. ECF 87 at 21-24. To do so, Defendant-Intervenor improperly relies on its attorney's own book written in 2014, references the opinion in *Pueblo of Santa Ana v. Baca*, No. CIV-81-303, at 6, ¶ 27 (D.N.M. Apr. 30, 1985), *aff'd by* 844 F.2d 708 (10th Cir. 1988), and references historical documents that are not part of the record in this case. ECF 87 at 31-33. As set forth in Plaintiff's Brief in Support of the Motion, *Baca* is neither *res judicata* nor *collateral estoppel* in this case. ECF 79 at 32; FAC ¶¶ 106-110, ECF 78-1. Further, the FAC explains that Santa Ana does not have a Spanish land grant from Spain or Mexico for the El Ranchito Tract unlike San Felipe who holds the Land Grant directly from Spain; Santa Ana never produced all of the Deeds in perfected form which it claims it purchased land from non-Indians; Santa Ana never produced the underlying claimed Spanish land grants to the non-Indians from whom it claims it purchased the land. *See* FAC ¶¶ 40, 53, 42, 43, 46, 51, 53. San Felipe's opposing facts, as set forth in the FAC, must be accepted as true at this stage of the proceeding.

[17] Plaintiff reconfirms its objection that Defendant-Intervenor's status (permissive intervention or intervention by right) in this case is wholly unclear. *See* ECF 87 at 1, n.1. As argued above, because Santa Ana failed to contest the San Felipe patent nearly 100 years ago, it is forever barred from asserting legal interest in such property now. *See* Section I, *infra*, at 6.

with the patents issued by Congress as described in those patents; and whether the statute of limitations set forth in the amendment to the PLA in the Act of May 31, 1933, c. 45, 48 Stat. 108, applied to all claims by pueblos and non-Indians against pueblos on their Spanish land grants patented by the United States. For all of these questions, Defendants claim the Solicitor's Opinion M-37027 must be deferred to and if their claim of right to take the actions they did is even "colorable," this Court's power to hear the complaint is removed. ECF 86 at 21-23, 23 n.11, 36-7; s*ee also*, ECF 87 at 3, 4-5 n.4, 13 n.13, 34. Contrary to this absurd assertion, *Loper* removes judicial deference to the agency's decisions. 144 S. Ct. at 2268-69. M-Opinion 37027's interpretation of the relevant laws including its own legal authority to take the actions it did violate applicable precedent and deserve no deference. Finally, the *Taos* decision held that Solicitor's Opinions conclusions of law and findings of fact regarding surveys do not bind the Court. 475 F. Supp. at 363-364.

10. The Legislative History of the Quiet Title Act Does Not Support Defendants' Position that the Quiet Title Act Precludes Relief in this Case.

The QTA is entirely compatible with the application of *Taos, Sandia, Comanche Nation, Irving, Youpee*, and *DuMarce* that follow the holdings in *Larson* and *Malone* to achieve equity. In the astonishing circumstance presented here, where a federal official seizes patented pueblo property with no congressionally delegated power to do so, *Larson* and *Malone* are not abrogated by the QTA and remain controlling precedents.[18]

The QTA, like any statute, must be construed "to avoid the conclusion that Congress

[18] Even when courts have rejected *ultra vires* arguments, they have construed the QTA as limited to circumstances where the defendant federal officials' claim ownership of the property. *Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1231 (10th Cir. 2010); *Alaska v. Babbitt* (*Bryant*), 182 F.3d 672, 675 (9th Cir. 1999); *Kansas ex rel. Graves v. United States*, 86 F. Supp. 2d 1094, 1097 (D. Kan. 2000), *aff'd*, *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). In the present case, the United States has no colorable claim to an interest adverse to San Felipe's fee title because the United States holds no fee title. *See*. Section III.A.1, *infra*.

intended to use the privilege of immunity" to "preclude any review at all of constitutional claims seeking equitable relief." *Robbins v. Bureau of Land Mgmt.*, 438 F.3d 1074, 1084 (10th Cir. 2006) (internal quotation omitted); *see Webster v. Doe*, 486 U.S. 592, 603 (1988). Under this standard, because the QTA does not contain express language barring judicial review of unlawful "corrective resurveys" that result in takings from pueblos, the QTA must be construed not to bar such review. *See Citizens for Const. Integrity v. United States*, 57 F.4th 750, 758-59 (10th Cir. 2023); *see also Cuozzo Speed Techs, LLC. v. Lee*, 579 U.S. 261, 275 (2016).

The QTA's legislative history confirms that Congress intended to provide additional remedies to address the "[g]rave inequity" resulting from the United States' assertion of sovereign immunity that had ordinarily denied "citizen[s] involved in a title dispute with the Government [their] day in court." S. Rep. No. 92-575, 1, 2 (1971); *see also* Hrg. Before the Subcomm. on Pub. Lands of the Comm. on Interior and Insular Affairs, U.S. Senate, 92nd Cong., 1st Sess., 8, 20, 27 (1971) (Statements of Atty. Gen. S. Kashiwa and Sen. Church) ("Senate Hrg."). In cases where "government officers mistakenly [or without authority] seize or hold private property," Congress surely "prefer[s] a prohibitory injunction to a grant of compensation." *Id.* at 65.

B. The Court Has Jurisdiction Over Fifth Amendment Claims Under the APA.

Plaintiff's Sixth, Seventh and Tenth Claims for Relief in the FAC, are based on the Fifth Amendment and the APA, 5 U.S.C. § 706. Once again, Federal Defendants wishfully assert the claims are barred by the QTA, and thus futile. *See*, ECF 86 at 30-33; FAC ¶¶ 230-241, 268-276. None of the by Federal Defendants' cases apply where: 1. The actions of Federal Defendants were *ultra vires*; 2. The takings by Federal Defendant officials were not for a "public use," as contemplated in *First English Evangelical Lutheran Church v. County of Los Angeles*; 3. The fee property interest interfered with by obliterating the 1864 Patent boundary was held not by the United States; and 4. The fee property interests interfered with belong to a pueblo to whom the Defendant officials owed statutory trust obligations to restrict alienation unless alienation was in

the pueblo's best interest, and those trust obligations were violated.

First English Evangelical Lutheran Church aptly notes that Federal Defendants may interfere with real property interests only for "public use" and that interference must be pursuant to a legitimate authority under the law to take for that purpose. 482 U.S. 304, 314-15 (1987). In *First English Evangelical Lutheran Church*, the Plaintiff sought to reverse the California Supreme Court's determination that it could not bring a claim for compensation under the Fifth Amendment based on California law permitting only nonmonetary relief - because the Plaintiff did not seek nonmonetary relief. *Id.* at 308-9. In addition, the taking was not *ultra vires. Id.*

1. Fifth Amendment Claims are Not Barred by the QTA.

The Sixth Claim for Relief in the FAC, brought under APA § 706 and the Due Process clause of the Fifth Amendment, challenges the Federal Defendants' specific actions:

a. Issuance of "Opinion M-37027";
b. "destruction of survey monuments marking the southern and portions of the western boundaries of the 1864 San Felipe Patent.";
c. "the April 5, 2017 IBLA decision";
d. "the April 20, 2017 filing of the resurvey";
e. "the 2017 change to record ownership of the Conflict Area in the BIA TAAMS records";
f. "the January 11, 2018 disbursement of the tribal trust funds";
g. "the ongoing actions of the Defendants to deny San Felipe access to the lands and waters within the Conflict Area"

FAC ¶ 231. Federal Defendants assert that the claim is barred because it is "aimed at securing title to Santa Ana's land." ECF 86 at 31. The FAC does no such thing. It requests only the reversal of the Federal Defendant's *ultra vires* "corrective resurvey" and the subsequent unlawful actions flowing from it, which interfered with San Felipe's rights to access land and money that the United States did not and does not own. FAC Prayer for Relief ¶¶1-3 at 57-58. *Patchak* explained that APA review is available where the court's decision might address land status, but the complaint

does not challenge the interest held by the United States. 567 U.S. at 224.

2. Fifth Amendment Due Process Claims are Proper Under the APA.

Citing no authority, Federal Defendants argue the Department of Interior agency officials provided all the process due. They urge the court to agree that if any administrative process is provided (even whereas here the alleged process was provided after the fact), a Due Process claim under the Fifth Amendment is futile.[19] ECF 86 at 30-2. While administrative remedies must be exhausted before seeking judicial review, no case holds that administrative review forecloses subsequent court jurisdiction. *Cf. Shawnee Trail Conservancy*, 222 F.3d at 386 (dismissal for failure to exhaust). Federal Defendant officials took their *ultra vires* actions without notice or any administrative process to challenge those actions. FAC ¶¶153-155, ECF 78-1.

Federal Defendants ignore the facts set forth in the FAC (which must be accepted as true and viewed in the light most favorable to Plaintiff), which demonstrate that the IBLA determined that Opinion M-37027 was "binding on the Board and final for the Department" and that the Board "lack[ed] authority to adjudicate BLM's authority to undertake a corrective resurvey at issue." FAC ¶148, ECF 78-1; San Felipe IBLA Decision, 190 IBLA 17, 30, ECF 49-7, Doc. 72 at 67.

Further, the IBLA held that "BLM did not purport to adjudicate the competing claims of title to such lands, nor did the State Director purport to determine title in adjudicating [San Felipe's] protest to the official filing of the survey plat." *Id.*; *see also* FAC ¶149, ECF 78-1. This directly contradicts Federal Defendants determination to alter ownership listing in TAAMS trust asset records *after* the IBLA issued its ruling that in fact Federal Defendants had not determined ownership of any lands within the "corrective resurvey" boundary. Regarding the "corrective resurvey," the only path available was submission of documents to the Solicitor in a process, undefined by statute or regulation, that resulted in Opinion M-37027. The flaws in that process

[19] To the extent that Federal Defendants are attempting to assert facts by reference related to the administrative proceedings that contradict the FAC, they are not appropriate at this juncture as explained in Section II, *infra*. Plaintiff disputes those assertions of fact.

and the resulting Opinion M-37027 are fully set forth in the FAC. FAC ¶¶ 111-145, ECF 78-1. Defendants fail to address these fatal flaws. Plaintiff had no way to the challenge Opinion M-37027, as the IBLA confirmed. San Felipe IBLA Decision, 190 IBLA at 30, ECF 49-7, Doc. 72 at 67. No process was afforded to the Plaintiff to challenge the unauthorized alteration of TAAMS trust asset records or the determination of IIM account ownership and disbursement of the IIM account without notice to San Felipe. Plaintiff's arguments regarding the corrective resurvey were ignored by the Federal Defendants in a process that never pretended to provide a fair adjudication or independent appeal. *See* FAC ¶¶ 111-118, 122-150, ECF 78-1. The APA, 5 U.S.C. §702 and §706, provides jurisdiction to district courts to ensure due process. The Federal Defendants are not immune from suit for the nonmonetary relief sought under 5 U.S.C. § 702.

3. Fifth Amendment Takings Claims are Not Barred by the Tucker Act or the QTA.

Federal Defendants attempt to protect themselves from Fifth Amendment claims for nonmonetary relief by insisting those claims are not ripe for adjudication. Without merit they assert that the Tucker Act requires that just compensation claims can only be brought before the Federal Court of Claims. 28 U.S.C. § 1491, ECF 86 at 31. Federal Defendants erroneously claim support from *Alto Eldorado Partners v. City of Santa Fe*. 644 F. Supp. 2d 1313, 1348-49 (D.N.M. 2009). However, *Alto Eldorado Partners* concluded the plaintiff's facial challenge to a Fifth Amendment Taking claim in federal court was not ripe because state procedures to assert just compensation for a taking for a "public" purpose had not been commenced at the state level. *Id*. There is no state involved in this case, so the ripeness issue is not an issue here. In *Northern New Mexicans Protecting Land Water & Rights v. United States*, the Tenth Circuit cited *Schanzenbach v. Town of La Barge*, explaining that a claim under the Takings Clause is not ripe until the government has reached a final decision regarding the application of regulations to the property at issue, the plaintiff has sought just compensation through available procedures, and has been denied relief.

704 Fed. Appx. 723, 727 (10th Cir. 2017) (citing 706 F.3d 1277, 1281–82 (10th Cir. 2013)). All the cases Defendants cite involved facial challenges to statutes and laws, which, as explained above, are not ripe for review until the sovereign has an opportunity to decide whether to provide compensation or reverse the regulation or statute causing the taking.[20]

The cases cited by the Federal Defendants (including *Alto Eldorado Partner* and *Northern New Mexicans)*, are inapplicable for other reasons: those cases did not involve a taking for a non-public purpose, or an assertion that no valid law authorized the taking, and they were not claims by tribes or pueblos for interference with their own property rights.

Federal Defendants argue that *Babbitt v. Youpee* and *DuMarce v. Norton* are limited to their facts as regulatory takings for which injunctive and declaratory relief are not available under the Fifth Amendment. ECF 86 at 32. All of the cases cited by the Federal Defendants involve regulatory takings, but—more importantly—the decisions in *Irving*, *Youpee*, and *DuMarce v. Norton*, are direct precedent supporting the jurisdiction of the Court to hear a Complaint seeking declaratory and injunctive relief for an unconstitutional taking by interference with Indian land interests. The Supreme Court in *Irving* and *Youpee* explained that injunctive relief was available not because it was a regulatory taking, but because the legislation in question resulted in the "'virtua[l] abrogation of the right to pass on a certain type of property.' Such a complete abrogation of the rights of descent and devise could not be upheld." *Youpee*, 519 U.S. at 240 (quoting *Irving,* 481 U.S. at 716-17); *see also DuMarce v. Norton*, 277 F. Supp. at 1053.

In this case, as in *Irving, Youpee*, and *DuMarce v. Norton*, compensation under the Tucker Act is not an adequate remedy. The loss of jurisdiction over the lands and the loss of access and use by the pueblo and its members to its original 1689 Spanish Land Grant lands resulting from

[20] *Northern New Mexicans* is also distinct because, unlike this matter, the *Northern New Mexicans* Plaintiffs conceded at the District Court level that compensation would be an adequate remedy, and they had not sought compensation. 161 F. Supp. 3d 1020, 1043 (D.N.M. 2016).

the "corrective resurvey" is not compensable with money. The actions of the Federal Defendants cloud the civil and criminal jurisdiction of the San Felipe Pueblo over the land, water and the conduct of its members within the Conflict Area, and according to the Defendants, subject San Felipe Pueblo members to the civil jurisdiction of the Santa Ana Pueblo, violating the Pueblo's right to make its own laws and be governed by them. No amount of money remedies this loss, which must simply be reversed. FAC ¶¶ 176-187, ECF 78-1.

In *DuMarce v. Norton*,[21] the Court rejected the claims that the QTA and the Little Tucker Act deprived the Court of jurisdiction. 277 F. Supp. 2d at 1051, 1053-1054. As in *DuMarce*, no interests of the United States are in dispute here. The Federal Defendants cannot create a disputed interest by fiat. The United States holds no ownership of the fee in the lands whose boundaries it obscured. Its only interest is its obligation to review actions to alienate lands desired by the Pueblo patent holder and to determine whether the alienation is in the best interest of the Pueblo. See Section III.C, *infra.* The *DuMarce* court aptly noted that requesting return of land interests in the prayer for relief does not convert a Fifth Amendment case into a QTA case. 277 F. Supp. 2d at 1051-52. Here, the Prayer for relief does not seek an adjudication of title: it seeks reversal of Federal Defendants' *ultra vires* actions.

Arguing that injunctive relief is unavailable, Federal Defendants rely on *Fideicomiso de la Tierra del Cano Martin Pena v. Fortuño* and *Wiese v. Becerra* to no avail. ECF 86 at 33; *see Fortuno*, 604 F.3d 7 (1st Cir. 2010); *and Wiese*, 263 F. Supp. 3d 986 (E.D. Cal. 2017). *Fortuno* and *Wiese* do not apply for several reasons. In *Fortuno,* unlike here, specific federal legislation authorized the taking. 604 F.3d at 10. In *Wiese*, the Court held the government taking of gun magazines (personal property) was valid under the state's police powers. 263 F. Supp. 3d at 995.

[21] In a subsequent appeal, in *DuMarce v Scarlett*, the court held that the nonmonetary claims were barred by the statute of limitations applicable to Fifth Amendment Takings claims. 446 F.3d 1294, 1304-05 (Fed. Cir. 2006). No such statute of limitations issue exists here.

Neither bears on the FAC challenge to Federal Defendants actions taken without legal authority. *See, e.g.,* FAC ¶¶ 1-7, 232, 233, 237-239, 270-271, ECF 78-1.

Additionally, *Fortuno*, found jurisdiction to hear complaint to stop a taking that was not for a "public use." 604 F.3d at 17. The court noted that "the Takings Clause sets two conditions on the government's constitutional authority to take private property: the government may take private property for "public use," but it must provide just compensation when it does so." *Id.* at 12. *Fortuno* found the two categories of public use that authorize a taking under the Fifth Amendment are: 1) "takings that transfer private property to public ownership, resulting in the administration of lands for the public good…"; and 2) *"*takings that make property available for use by general public…" *Id.* at 17 (citations omitted). The Federal Defendants actions did not meet either of the "public use" requirements. *See, e.g.,* ECF 86 at 21.

The FAC describes *ultra vires* actions by Federal Defendants that interfered with Plaintiff's property interests and sovereign jurisdiction by attempting to alter the pueblo boundaries. These interferences constituted takings that violated both federal law and the Fifth Amendment. *See* FAC ¶¶ 232, 233, 237-239, 270-271, ECF 78-1. In *Hawaii Housing Authority v. Midkiff,* The Supreme Court reaffirmed the rule that, "[t]o be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 467 U.S. 229, 241 (1984) (internal citations omitted). In this case, the controlling national public interest is the enforcement of the valid congressional acts by which the San Felipe Patent boundaries were confirmed and protected several times over, most recently in the 2005 PLA Amendment, as well as the statute of limitations Congress prescribed, to prevent ongoing challenges to pueblo land ownership and jurisdiction. The Federal Defendants are bound by those limitations. *See* Section III.A.3, *infra.*

Neither *Fortuno* nor *Wiese* addressed Fifth Amendment Due Process clause claims. ECF 86 at 33. Nothing in *Fortuno* or *Wiese* relates to the QTA or supports the Federal Defendants'

assertion that the QTA bars the Court's jurisdiction to hear the Fifth Amendment claims presented in the FAC. *Id.* Both cases recognize the availability of injunctive relief where the taking is not for public use or is not pursuant to lawful authority. *Fortuno,* 604 F.3d at 17; *Wiese*, 263 F. Supp. 3d at 996. In cases like this, where there is no public use and no authority to take, the remedy is to strike down the unconstitutional act, enjoin any further reliance on it, and restore the status quo ante. *Cf. Knick v. Township of Scott, Pa.*, 588 U.S. 180, 200-01 (2019) (allowing equitable relief).

C. Plaintiff's Breach of Trust Claims VIII and IX in the First Amended Complaint are Not Subject to Dismissal as Futile.

Federal Defendants attempt to evade and restructure its trust responsibility directly related to the lands patented to San Felipe Pueblo in 1864. In the first instance, they seek to use the QTA as a barrier to this court's inquiry into applicable law. Once that barrier is dispelled, *See* Section III.A, *infra*, the Federal Defendants' obligation to protect and defend the San Felipe Patent boundary is indelibly established by treaty and statute. The government's reliance on its general trust obligations and residual powers over Indian trust lands are both inapposite and deceptive.

Unless Congress intervenes, the boundaries of the San Felipe Patent and title to lands within the Conflict Area held by San Felipe Pueblo are irrevocable. Santa Ana or the Federal Defendants had a window of opportunity to challenge the patent boundaries under the 1854 Act or land tenure under the PLA, however, that opportunity ended on May 31, 1934. *See* Section I.A.; *see Thompson,* 708 F. Supp. at 1216 (Statute of limitations in PLA applies to claims by pueblos and by the United States attorney acting as pueblo trustee).[22]

Because the Federal Defendants lacked authority to alter the boundaries of the San Felipe Pueblo or title to lands therein, its reference to "Former Overlap" lands is incorrect and self-serving. ECF 86 at 1. There may have been an "overlap" of plat maps issued by the General Land

[22] Indeed, as discussed in Brief in support of Motion, ECF 79 at 32, the United States actively defended the confirmed boundaries San Felipe Patent.

Office, but there was no overlapping patent. *See* Section III.A.6, *infra*. Absent an Act of Congress, Federal Defendants had no authority to diminish the boundaries of the San Felipe Patent. Moving boundary markers and altering TAAMS records is no more than an illusion without effect.

1. With Respect to the Conflict Area, the United States Bears an Unambiguous Trust Responsibility to San Felipe Alone.

San Felipe's right to the boundary of the San Felipe Patent, jurisdiction over lands within those boundaries, and ownership rights in restricted fee lands within those boundaries, were and remain conclusively established according to rules established by Congress. ECF 79 at 27-32. San Felipe's rights were confirmed conclusively by Congress in the 1858 Act following investigation of those rights by the Surveyor General under the 1854 Act. FAC ¶¶ 26-35, ECF 78-1. The CPLC was not granted authority by Congress to issue overlapping patents or otherwise alter the San Felipe Patent, nor did the Court do so in its Decree, nor did the United States issue an overlapping Patent. FAC at ¶¶ 36-62, ECF 78-1; *see* Section III.A.6, *supra*.

Section Seventeen of the PLA, Congress provided that confirmed, unextinguished Pueblo lands were restricted against alienation:

> *No right, title, or interest in or to the lands* of the Pueblo Indians of New Mexico to which their title has not been extinguished as heretofore determined *shall hereafter be acquired or initiated . . . in any other manner except as may hereafter be provided by Congress*, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, *made by any pueblo as a community or any Pueblo Indian living in a community,* shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Pueblo Lands Act, § 17 (emphasis added). This established the specific duty to restrict the pueblo fee land from alienation except as initiated by San Felipe Pueblo and approved by the Secretary of Interior. In *Mountain States,* the Supreme Court explained that this duty applied to all future conveyances or grants of right-of-way. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 251-53 (1985). The restriction on alienation is at heart a duty of the sovereign to protect. *Heckman v. United States*, 224 U.S. 413, 437 (1912).

The Federal Defendants assert that *United States v. Candelaria* means that its PLA duty to restrict alienation ran to both pueblos – not just San Felipe, and that the PLA simply did not address one pueblo attempting to challenge another pueblo's patented Spanish land grant. ECF 86 at 36; *Candelaria*, 271 U.S. 432, 442-44 (1926). The Tenth Circuit has already rejected that argument, holding in *Thompson* that the restriction on alienation set forth in Section 17 of the PLA applies to specific pueblo lands not previously alienated in district court proceedings included in Section 2 of the report issued by the Pueblo Lands Board for that specific pueblo patent.[23] *Thompson,* 708 F. Supp. at 1210. The Tenth Circuit's opinion is dispositive: Section 17 of the PLA establishes an absolute bar not just against other pueblos, but also against the United States acting as a trustee for a pueblo, from bringing a claim to lands held pursuant to a quiet title action under the PLA. *Id.* at 1216. *Thompson* was decided in 1989; however, *Thompson* does not overrule the Supreme Court holding just four years earlier in *Mountain States* that Section 17 of the PLA did not extend the provisions of the Non-Intercourse Act to pueblos. 472 U.S. at 251-253.

Instead, Congress enacted a very specific restriction on alienation governing lands retained by pueblos after quiet title proceedings had ended in district court, restricting those lands from future alienation except as initiated by the pueblo and with the Secretary's approval. *Id.* The San Felipe Patent precisely meets those conditions. Nothing in *Candelaria* or *Thompson* supports the

[23] Strangely, Federal Defendants reference the Supplemental Pueblo Lands Board Report issued in 1932 to argue the Report determined Santa Ana in fact held the title to the lands in the Conflict Area within the San Felipe 1689 Spanish Land Grant and San Felipe Patent. ECF 86 at 36. The referenced report, as set forth in the FAC, did not alter the Pueblo Lands Board decision in the San Felipe Pueblo Lands Board Report not to grant Santa Ana's claim; the United States attorneys decision not to file suit to extinguish San Felipe's fee interest in the lands in the Conflict Area; and it did not alter the conclusion of the Pueblo Lands Board that at best, Santa Ana was asserting an adverse possession claim to approximately 243 acres only within the Conflict Area. The Pueblo Lands Board in no way vested title in Santa Ana with regard to the Conflict Area. *See* FAC ¶¶ 87, 93, ECF 78-1; ECF 43-1 at 5-6; Supp. Docs., Ltr. from Sp. Atty. George A.H. Fraser to C.J. Rhoads, Comm'r of Indian Affairs (Oct. 1, 1932), ECF 49-5, Doc. 43 at 101 (noting Santa Ana Pueblo adverse possession claim to 200 acres only).

Federal Defendants' efforts to override the PLA limitations. Neither the Federal Defendants nor this court are free to substitute historic claims to superior title under Spanish law for the explicit finality of the PLA process as applied to the San Felipe Patent, including the PLA's expired statute of limitations that cuts off any consideration of those historic claims.

The Federal Defendants' asserts they bear no responsibility for breach of trust, absent specific duties imposed by treaty, statute or regulation. ECF 86 at 39. Even accepting that statement, the PLA, a very specific Act of Congress (along with the 1858 Act that establishes the boundaries of the San Felipe Patent), precisely satisfies the requirement established by language cited by the Federal Defendants. ECF 86 at 34. Federal courts have repeatedly upheld specific trust responsibilities related to restricted fee lands. Those duties are defined by determining the holder of the fee in the lands patented by the United States. In *United States ex rel. Absentee Wyandotte Allotment of Van Pelt v. Weyerhaeuser Company*, the court explained that:

> The Secretary of the Interior has a trust relationship with restricted allotments. *See Heckman v. United States*, 224 U.S. 413 (1912). The crucial element in determining the trust relationship of the allotment is the restriction on alienation, not the type of federal land allotted to the individual Indian. *See United States v. Ramsey*, 271 U.S. 467 (1926) ("In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same.").

765 F. Supp. 643, 646 (D. Or. 1991). Likewise, in *United States v. Bowling*, the Supreme Court explained that whether land is held in restricted fee or trust, the duty of the federal government is "… to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction." 256 U.S. 484, 487 (1921).

Mesa Grande underscores that the trust responsibility runs with the patent issued. 657 F. Supp. 2d 1169. There, the Court held that the federal trust responsibility ran with the patent, such that the patent approved by Congress in 1863 and issued to a tribe could not be challenged by the second tribe under the QTA. *Id.* at 1171, 1175. The Court ultimately held that the suit was precluded by the statute of limitations because the patent issued in 1863 was not timely challenged.

Id. at 1177. Here, as in *Mesa Grande,* the dispute is not fundamentally between two tribes or pueblos, but rather, it is about the enforcement of Congressional limits on federal interference with confirmed patent rights. Without authorization by Congress, Federal Defendants' administrative acts violate Federal Defendants' specific trust obligation to defend those patented lands against alienation. *Mesa Grande* would have barred those actions, and for this reason, *Mesa Grande* supports this court's jurisdiction. *Sandia* and *Taos* also confirm Federal Defendants' trust responsibilities and thus confirm this court's jurisdiction. ECF 79 at 39-40.

Because the United States holds NO PROPERTY INTEREST in patented Pueblo restricted fee land, it is more stringently bound than in settings in which it carries out obligations towards trust lands to which the United States retains the fee title – it must comply with its duties not to alienate the restricted fee lands without the authorization of the patent holding pueblo. Pueblo Lands Act § 17. As a result, Federal Defendants' reliance on cases construing its powers over trust land do not apply to restricted fee land patented by the United States.

2. General Trust Responsibilities do Not Supersede Specific Trust Duties.

The federal trust responsibility embodies general fiduciary duties owed by the United States to all federally recognized tribes, as recently reaffirmed in a 2014 Guidance Document issued by the Secretary of the Interior as Order No. 3335. Sec. Interior Order No. 3335, § 2 (August 20, 2014). Beyond fiduciary responsibility, the Order acknowledges obligations imposed by statute. *Id.* at § 3(b) ("particular 'statutes and regulations . . . clearly establish fiduciary obligations of the Government ' in some areas"). Common law trust may also be applicable. *Id.* ("Once federal law imposes such duties, the common law 'could play a role'"). But applicable statutes . . . "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id.* (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)). Thus, the Interior Department has no basis for disclaiming the applicability of common law trust principles, and even more, it cannot evade the specific statutory responsibility – imposed by the

PLA – to protect the confirmed property rights of San Felipe Pueblo.

This court's June 7, 2024, order asked the parties to address whether the United States could navigate the problem of adverse interests among tribal beneficiaries. ECF 70 at 3. Because the specific statutory responsibility overcomes the more generalized responsibility, the answer is clear. When standing in defense of land confirmed to San Felipe in 1864 and restricted from alienation pursuant to Section 17 of the PLA in 1924, the United States is not permitted to change its shoes.

The Federal Defendants brief evades the Court's question by denying that conflicting trust responsibilities matter, citing examples of statutory solution to conflicting tribal ownership, or shared/common ownership on shared reservations. ECF 86 at 37-39. Both the examples and the proffered conclusion beg the question. The Federal Defendants assert that no answer is necessary because their unitary obligation is to protect the Santa Ana land was "established" by a resurvey the Solicitor authorized. The resurvey itself was a breach and cannot retroactively justify itself. *See* Section III.A.2, *infra.* San Felipe agrees with the United States that the general trust responsibility to both pueblos is inapplicable here and creates no conflict for the federal trustee. As the Federal Defendants argue, they bear trust responsibility only as authorized by specific treaty, statute, or regulation. ECF 86 at 39. No treaty, statute, or regulation created any trust duty allowing Federal Defendants to attempt to administratively establish land tenure through their shocking actions changing the government's TAAMS records of trust assets and obliterating of ancient boundary markers. Those actions were entirely unsanctioned by Congress. *See* ECF 79 at 27, 37. The unitary fiduciary duties owed to San Felipe do not disappear because of Federal Defendants' unlawful actions – the trust obligation to San Felipe remains.

Defendant-Intervenor is similarly unsupported in its use of *Jicarilla Apache Nation*, *Nance v. Environmental Protection Agency,* and *Hoopa Valley Tribe v. Christie* to assert that, in the face of conflicting general trust obligations to more than one tribe, the government is only obligated to

administratively "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." ECF 87 at 37; *see Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1986); *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981); and *Jicarilla Apache Nation*, 564 U.S. 162. First, *Hoopa Valley* and *Nance* were decided on the merits – they were not dismissed on jurisdictional grounds, therefore providing no basis to deny the Motion to Amend. 812 F.2d at 1103; 645 F.2d at 716. Second, in both cases the Court held there was statutory and regulatory authority to act, and the actions taken were not unlawful based on the facts. 812 F.2d at 1103; 645 F.2d at 716. *Hoopa Valley* involved no specific statutory duty to a specific tribe, no lack of statutory authority to act, and involved only an overarching duty to balance the interests of all tribes in the relocation of a BIA agency office. *Id.* at 1100, 1102. The Defendant-Intervenor's use of *Nance* is similarly misleading. In *Nance*, the EPA had specific statutory obligations that it was required to follow, and the Ninth Circuit found that it did so. 645 F.2d at 704-5, 711. In contrast to *Hoopa Valley* and *Nance*, in this case, the FAC alleges the Federal Defendants violated their specific statutorily mandated fiduciary trust obligations to San Felipe and acted without any lawful authority. The specific statutory obligation here is the protection of San Felipe's rights in its confirmed patent boundaries, which the Federal Defendants defied.

The Defendants are unrelenting in their attempt to interpose the QTA to prevent an inquiry into the facts of the attempt to deprive San Felipe of its congressionally confirmed pueblo boundary and some of the restricted fee lands within those boundaries. The utter disregard of the undeniable trust obligation to protect congressionally established Patent rights of San Felipe where the Solicitor herself admitted the QTA would have barred suit by Santa Ana to accomplish in a court what the Federal Defendants chose to unlawfully do, is egregious and without legal authority under the law. FAC ¶¶ 120-157, ECF 78-1; FAC Ex. E, Opinion M-37027 at 14, ECF 78-7 ("It is our opinion that the QTA has no bearing on this proceeding."). It ill behooves the federal trustee to act in contravention to its established trust duties and then argues that the unlawful outcome protects

it against inquiry into those bad acts.

3. The Federal Defendants Breached Their Duties as to the IIM Trust Account.

Federal Defendants seek to evade its trust responsibilities to San Felipe Pueblo for the funds it held - in trust - in an IIM (Individual Indian Money) Account, for both pueblos, representing proceeds from an easement over the Conflict Area. Federal Defendants assert that they need only account for the disbursement of funds *ex post facto*, and its duty ends. ECF 86 at 40. Once again, it hides behind the QTA to evade a challenge as to the appropriateness of the disbursement. *Id.* The trustee's duties to San Felipe Pueblo as an IIM trust account beneficiary require more than identifying that the funds were disbursed – it requires a deeper examination of whether those disbursements were consistent with the trust responsibility of the custodian of the IIM account. The funds may only be disbursed for lawful purposes. As a trust account beneficiary, San Felipe Pueblo had a right to be notified of the trustee's repudiation of its interests and a due process right to dispute the disbursement of trust funds. It received neither.

Federal Defendants ignore caselaw, statutes, regulations, and analysis setting forth the specific duties violated, and the basis for those duties in the law. ECF 79 at 33-38. The cases cited by Federal Defendants are inapplicable. *Arizona v. Navajo Nation* did not involve IIM trust account funds, nor did federal officials interfere with tribal land interests guaranteed by Congress. 599 U.S. 555, 563-4 (2023). Likewise, *Jicarilla Apache Nation* did not involve repudiation of a trust account beneficiary without notice or disbursement of the trust fund – it only involved access to the United States' attorney-client privileged documents. 564 U.S. at 184-85. *Cobell v. Salazar* supports the Plaintiff's position, holding that "the scope of the accounting is derived from statutory law. But when Congress affords courts equitable jurisdiction—as it has done in this case—it draws on a tradition of flexibility, not rigidity, in equity." 573 F.3d 808, 813 (D.C. Cir. 2009); *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013).

Most importantly, the Tenth Circuit previously determined that Defendants owed San

Felipe a fiduciary duty related to the IIM account in *Pueblo of San Felipe v. Hodel*, 770 F.2d 915, 917 (10th Cir. 1985). The Tenth Circuit held that the IIM account was held under the Secretary's asserted "fiduciary duty to each of the Pueblos." *Id.*; *see also Cobell v. Norton*, 240 F.3d at 1086, 1098-99 (IIM account beneficiaries are owed specific fiduciary obligations). Once a fiduciary duty is established, as it was here, the duty of notice and opportunity to the beneficiary to challenge the repudiation applies. Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 4041-4046; 25 C.F.R. § 2.104(a); *Pelt v. Utah*, 611 F. Supp. 2d 1267, 1283 (D. Utah 2009) ("[A] cause of action for breach of trust traditionally accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation.") (quoting *Shoshone Indian Tribe of Wind River v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004); *see also* ECF 79 at 38. Here, Federal Defendants never notified San Felipe Pueblo that they had altered TAAMS records to remove San Felipe Pueblo as the property owner of the underlying restricted fee lands, never notified San Felipe Pueblo that Santa Ana Pueblo had applied for disbursement of the IIM trust account, and never notified San Felipe Pueblo they had disbursed the IIM trust Account until San Felipe contacted Federal Defendants about the missing funds. FAC ¶¶ 153-157, 159, 162. Each of those failures is an independent breach of trust.

4. Common Law Trust Principles Apply to the Actions Related to the IIM Account.

In *Cobell v. Norton*, the Court explained that with respect to IIM accounts and tribal and pueblo real property,

> Courts "must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." *Id.* at 330. Much as the Supreme Court has regularly turned to the Restatement and other authorities to construe trust responsibilities, it is appropriate for the district court to consult similar sources. Common law trust principles inform any breach of trust examination.

240 F.3d at 1099. The trustees, the Federal Defendants, owe IIM beneficiaries fiduciary duties,

many of which are enumerated under the Indian Trust Fund Management Reform Act of 1994, and include "providing adequate controls over receipts and disbursements." *Id.* at 1090. Trustees also have duties to not waste assets; and to maintain loyalty to the beneficiary. ECF 79 at 35-8. The Trustee cannot choose to substitute another entity as owner of a trust corpus, particularly without notice and opportunity to dispute such action without breaching the duty of loyalty. Federal Defendants specifically violate that limit. FAC ¶¶ 120-157, ECF 78-1.

Federal Defendants misquote *Cobell v. Salazar* claiming that tribes must establish entitlement to an accounting, and that Federal Defendants have no obligation to provide the best possible accounting. ECF 86 at 41. This is, frankly, the opposite of the D.C. Circuit's holding. *Cobell v. Salazar* overturns the district court's determination that, given the financial constraints caused by reliance on Congressional funding, an equitable accounting would be impossible. 573 F.3d at 813. Federal Defendants' falsely assert "Tribes must first establish that they 'are entitled to an accounting under the statute.'" ECF 86 at 41 (quoting *Salazar*, 573 F.3d at 813). The full sentence from the D.C. Circuit's opinion simply says, "[t]he plaintiffs are entitled to an accounting under the statute." *Id.* Defendants' reliance on *Fletcher v. United States* is similarly misplaced, as set forth in previous briefing and need not be repeated here. *See,* ECF 40 at 31-3.

CONCLUSION

This Court has jurisdiction to hear and decide the controversy before it. The FAC is not futile because the QTA does not apply, jurisdiction is proper under the APA, and the Defendant Officials' actions constitute an unlawful taking under the Fifth Amendment that was not for public use. The Federal Defendants owe San Felipe an exclusive fiduciary duty to protect the San Felipe Patent boundaries and San Felipe restricted fee lands from alienation; and specific fiduciary obligations to San Felipe as a beneficiary of the IIM trust account. Federal Defendants had no authority to alter the boundaries, or the evidence of boundaries of said Patent under any Act of Congress. This case arises from Federal Defendants' flagrantly illegal action, in violation the

constitutionally and statutorily protected rights of the San Felipe Pueblo. The APA provides an avenue for relief from precisely such administrative abuses of power. FAC ¶¶ 158-163, ECF 78-1.

According to a Bureau of Indian Affairs website, in 2019 there were 68,543,612 acres of Indian lands over which the United States served as fiduciary, 703,261 acres were held in tribally owned restricted fee, and of this, 684,216 acres were in New Mexico.[24] The United States trust relationship to that restricted fee land is one of responsibility only, without power to interfere in the pueblo's jurisdiction over its homelands, unless Congress specifically authorizes it. Congress did not authorize the "corrective resurvey" or the actions that followed in this case.

For the foregoing reasons, Plaintiff respectfully requests the Court grant leave to amend the Complaint in this action and order the proposed First Amended Complaint be filed.

Respectfully submitted this 21st day of January, 2024.

/s/ Rebecca L. Kidder
Rebecca L. Kidder (D.N.M. Bar No. 23-93)
DRAGONFLY LAW GROUP, P.C.
731 St. Joseph Street, Suite 230
Rapid City, South Dakota, 57701
Telephone: (605) 484-2761
Email: rebeccak@dflylaw.com

Thomas J Nitschke (D.N.M. Bar No. 24-352)
Judith Shapiro (D.N.M. Bar No. 25-19)
DRAGONFLY LAW GROUP, P.C.
731 St. Joseph Street, Suite 230
Rapid City, South Dakota, 57701
Telephone: (605) 484-2761
Email: tomn@dflylaw.com
jshapiro@dflylaw.com

Timothy J. Humphrey, Sr. (D.N.M Bar No. 23-108)
Annette T. Brown (D.N.M. Bar No. 23-106)

[24] Native Land Information System, "BIA Land Area Totals for US Native Lands," https://nativeland.info/dashboard/land-area-totals-for-us-native-lands/ (last checked Jan. 21, 2025.)

STETSON LAW OFFICES, P.C.
1305 Rio Grande Blvd., N.W.
Albuquerque, New Mexico 87104
Telephone: (505) 256-4911
Email: tjh@stetsonlaw.com
atb@stetsonlaw.com

Attorneys for Plaintiff Pueblo of San Felipe

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the ECF registrants in this case.

/s/ Rebecca L. Kidder