

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

**PUEBLO OF SAN FELIPE, a federally
recognized tribe,**

Plaintiff,

v.

No. CIV 23-0296 JB/LF

**DOUGLAS BURGUM, Secretary of the
United States Department of the Interior,
et al.,**

Defendants,

PUEBLO OF SANTA ANA,

Intervenor-Defendant

**INTERVENOR-DEFENDANT PUEBLO OF SANTA ANA'S REPLY IN SUPPORT OF
ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT (DOC. 132)**

Intervenor-Defendant Pueblo of Santa Ana (“Santa Ana”), by and through its counsel, hereby submits its Reply in support of its Motion to Dismiss Plaintiff’s First Amended Complaint (Doc. 127) for Failure to State a Claim on Which Relief Can Be Granted, or in the Alternative, for Lack of Jurisdiction, Doc. 132. This memorandum responds to Plaintiff Pueblo of San Felipe’s Response in Opposition to Federal Defendants’ and Defendant-Intervenor’s Motions to Dismiss the First Amended Complaint, Doc. 138 (“SF Resp.”).

ARGUMENT

In its brief Memorandum Opinion and Order issued on March 12, 2026, Doc. 126, this Court ruled that “San Felipe Pueblo may pursue APA claims challenging the implementation of the Tompkins Opinion -- whether the BLM properly conducts the land resurvey *in compliance with the Tompkins Opinion*; and . . . San Felipe Pueblo *may not pursue APA claims challenging*

the validity of the Tompkins Opinion itself.” *Id.* at 2 (emphasis added). In our opening brief in support of our Motion to Dismiss, we said that San Felipe’s First Amended Complaint (“FAC”) fails to meet that standard “by a wide margin.” San Felipe’s Response in opposition to our motion and that of the United States demonstrates not only that the FAC doesn’t come close to complying with the Court’s Order, but that its non-compliance is seemingly deliberate.

A. The FAC Does Not Allege That the Resurvey Did Not Comply With the Tompkins Opinion

It should first be noted that nowhere in the FAC is there any allegation that the BLM resurvey of the south and west boundaries of the San Felipe Grant did not comply with the Tompkins Opinion. The allegations related to the resurvey, FAC ¶¶ 130-138, claim that the request for the resurvey “ignore[d] the historical record,” *id.* at ¶ 133, and that the filing of the plat was “in violation of San Felipe’s rights,” *id.* at ¶ 138, but there is no mention of the Tompkins Opinion. Similarly, the brief allegations relating to the decision of the Interior Board of Land Appeals (“IBLA”) (which is the only final agency action lawfully subject to attack in this case), ¶¶ 139-143, make no mention of whether or not the resurvey complied with the Tompkins Opinion.

San Felipe seeks to overcome this problem by simply rewriting the Court’s Order. San Felipe contends that “[t]he phrase ‘in compliance with the Tompkins Opinion’ is most naturally read to mean: did BIA and BLM’s implementation of the resurvey *conform to applicable law*?” SF Resp. at 12 (emphasis added).¹ “Applicable law,” of course, in San Felipe’s parlance,

¹San Felipe attempts to justify this wholesale revision of this Court’s Order by insisting that “[t]he Tompkins Opinion was crystal clear that the resurvey conducted had to comply with applicable law and the BLM 2009 Survey Manual.” SF Resp. at 6. For that claim it cites only to footnote 5 of the Opinion, which cites the Survey Manual in explaining how a resurvey is carried out (but contains no discussion of any requirements set forth in the Manual). That is the only reference to the Survey Manual in the Opinion, and in the Conclusion, which is where the

means San Felipe's claim that the resurvey was illegal, because it changed San Felipe's "congressionally confirmed boundary markers." SF Resp. at 2.² But the point of the resurvey, as is made clear in the Tompkins Opinion, at 2 and 15, was to eliminate the conflict between the boundaries of the two Pueblos, by moving the San Felipe boundary to the north, as the Solicitor had determined that "San Felipe never had a compensable interest in the overlap area." Tompkins Opinion at 15. There is nothing in the FAC, nor in San Felipe's Response, that suggests that the resurvey failed to comply with this clear and definite purpose of the Tompkins Opinion, or that the IBLA opinion found that it failed to do so. And indeed, in its original Complaint, Doc. 1, at ¶ 177, San Felipe alleged, "[i]n accordance with the direction of the Solicitor in Opinion M-37027, the BLM conducted a 'corrective resurvey' in October 2013" See also, Proposed First Amended Complaint, Doc. 78-1, at ¶ 143 (containing a virtually identical allegation).

B. San Felipe's Arguments Regarding the BLM Survey Manual are New, and Should be Disregarded.

As part of its insistent argument that the resurvey violated applicable law, San Felipe cites repeatedly to the BLM Survey Manual, and in fact attached the entire Manual as an exhibit to the Affidavit of Rebecca Kidder, Doc. 138-3.³ This is new. San Felipe did not cite or refer to

directive for a resurvey appears, there is no mention of the Survey Manual or "applicable law." Notably, as is explained in the text, San Felipe never mentions the *substance* of the Opinion's directive of a resurvey, which is that it must eliminate the conflict between the two Pueblos' boundaries.

²San Felipe repeatedly refers to its boundary and its patent as being "congressionally confirmed." See SF Resp. at 2, 24, 26, 29, 32, 36. This is incorrect. Congress simply confirmed the San Felipe Grant, a purported 1689 Spanish document (*but see* Pueblo of Santa Ana's Response to Plaintiff's Motion for Leave to File First Amended Complaint, Doc. 87, at 4 n. 4). Congress never confirmed, and had nothing to do with, either the American patent or any of the subsequent surveys of that tract.

³The Manual, technically entitled MANUAL OF SURVEYING INSTRUCTIONS (2009), was not part of the administrative record before the IBLA, and thus technically should not be before the Court in

the Survey Manual in its original Complaint, Doc. 1, or in its Proposed First Amended Complaint, Doc. 78-1 or in the memorandum filed in support of its motion for leave to amend, Doc. 79. In fact, the IBLA decision, Doc. 49-7, p. 70, found that

in objecting to Olver’s 2013 corrective resurvey, the Pueblo of San Felipe is *not arguing that Olver failed, in undertaking the mechanics of surveying, to conform to applicable survey law and Survey Manual policy guidance.*

(Emphasis added.) It further noted that the Pueblo “offers no contrary professional opinion or supporting evidence.” *Id.* at 73. In an effort to counter those clear rulings by the IBLA, San Felipe submitted as an exhibit to Rebecca Kidder’s affidavit the “Statement of Reasons” (the document prescribed by Interior Department rules regarding appeals to the IBLA that sets forth the grounds for the appeal; essentially the appellant’s brief; *see* 43 C.F.R. § 4.412) that San Felipe had filed in the appeal. Doc. 138-2. That 32-page document mentions the Survey Manual exactly twice, on pp. 5 and 6, in paragraphs attacking the Tompkins Opinion, which the IBLA (correctly) ruled it was bound by. Doc. 49-7 at 66-68 and n. 47. Nowhere in the argument is there any attempt to show that the resurvey was not in compliance with the Manual (which is not, in any event, legally binding, but is only, as the IBLA noted in the passage quoted above, “policy guidance”). Rather, the entire Statement of Reasons is devoted to arguing that San Felipe had title to the disputed area, that Santa Ana had no basis to claim title, that Opinion M-37027 was wrong and contrary to federal law, and that the resurvey, in moving a portion of San Felipe’s

this case. *See, e.g., Dine Citizens Against Ruining Our Env’t v. Jewell*, No. Civ 15-0209 JB/SCY, 2015 WL 4997207, at *26 (D.N.M. Aug. 14, 2015) (“In reviewing a decision under the arbitrary-or-capricious standard, the court reviews the entire administrative record—or at least those portions of the record that the parties provided—but it may not consider materials outside of the administrative record.”), *aff’d*, 839 F. 3d 1276 (10th Cir. 2016). However, the IBLA decision, Doc. 49-7, p. 54, refers to the Manual repeatedly, and thus its inclusion in the record by San Felipe is probably harmless.

south boundary to the north boundary of Santa Ana's El Ranchito tract, violated San Felipe's rights.

The FAC contains four references to the Survey Manual. Three of them, contained in the Claim for Relief, at ¶¶ 156, 158 and 160, simply cite to various chapters in the document, without alleging any particular aspects of the resurvey that did not comply with the Manual. Paragraph 144 recites the definition of a dependent resurvey, explaining that it is a “retracement and reestablishment of the lines of the original survey . . .” (quoting Survey Manual at § 5-10, p. 130). Notably, the IBLA found that “Olver restored the southern boundary of the San Felipe Pueblo Grant to the position it had occupied at the time it was originally surveyed by Clement in 1860.” Doc. 49-7, at 63; *see also id.* at 68 (“BLM had the authority . . . to correct the erroneous 1909 resurvey by Hall, thus restoring the common boundary to its true original position.”) San Felipe makes no allegation of facts that would refute those findings of the IBLA, and otherwise alleges no basis for any conclusion that the IBLA erred in any respect in concluding that the resurvey complied with the Survey Manual.

Nor does it in its Response, although the Survey Manual is cited at least 15 times in San Felipe's Response. Again, most of the cites are to whole chapters, or even to the Manual generally without citing any specific portion, and there is no argument specifically citing a provision of the Manual that San Felipe claims to be inconsistent with the resurvey. And as explained above, the claim that the resurvey was contrary to the dictates of the Survey Manual (which would not, in any event, be grounds for rejecting the resurvey) is not only a new argument, but it is contrary to the position that San Felipe took before the IBLA, as shown by the IBLA's own decision. As such, it should not be considered by this Court. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994) (“Reviews of agency action in the

district courts must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Civil Procedure.”); *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991) (“an appellate court will not consider an issue raised for the first time on appeal”).

C. San Felipe’s Claim of Loss of Jurisdiction is Equivalent to a Claim of Loss of Title

San Felipe insists that it is not claiming title to the former overlap lands, but rather is only claiming that its *jurisdiction* has been diminished by the allegedly unlawful actions of the federal defendants in moving the boundary markers of the San Felipe Grant. *See, e.g.*, SF Resp. at 3, 4, 17, 27, 29, 32. But these are really two sides of the same coin. The boundary of a tribe’s lands generally demarcates the limits of its ownership, and that status in turn prescribes its jurisdiction. For example, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the tribe challenged New Mexico’s right to impose a gross receipts tax on the receipts of the tribe’s ski resort, Ski Apache. The bulk of the resort is on leased Forest Service lands, adjacent to but outside of the tribe’s reservation. The Court held that the tribe’s jurisdiction (really, its immunity from state tax laws) ended at the reservation border, and thus the tax was allowed. *Id.* at 148-49. That tribal jurisdiction is normally restricted to lands in tribal ownership is shown by *Ute Indian Tribe v. McKee*, 32 F.4th 1003 (10th Cir. 2022), in which the Tenth Circuit affirmed a ruling that the Ute Tribal Court lacked jurisdiction to enjoin the use of water by a non-Indian on land owned by the non-Indian within the boundaries of the Ute Reservation. The Court observed that “tribes can generally regulate *only their territory* and their members on the reservation.” *Id.* at 1006 (emphasis added).

In short, San Felipe’s claim that the federal defendants’ actions have wrongfully diminished its jurisdiction, by removing boundary markers on the Hall survey line of the south

boundary and placing new boundary markers on the north boundary line of Santa Ana's El Ranchito tract, is the equivalent of a claim that San Felipe had title to the disputed lands. As such, the claim plainly "dispute[s] title to real property in which the United States claims an interest," and thus, like both of San Felipe's previous attempts to frame a complaint in this litigation, runs head-on into the Indian Lands Exception in the Quiet Title Act, 28 U.S.C. § 2409a(a).

D. Contrary to This Court's Order, the FAC Directly Challenges the Validity of the Tompkins Opinion

As noted above, the Court's March 12, 2026 Order, Doc. 126, at 2, expressly precluded San Felipe from "challenging the validity of the Tompkins Opinion itself." Santa Ana pointed out in our opening brief, at 12-13, that ¶¶ 116 through 129 of the FAC do exactly that, attacking virtually every aspect of the Tompkins Opinion. San Felipe responds, without a hint of irony, that those paragraphs contain "background factual allegations." SF Resp. at 22. *See also id.* at 5, 36. This claim is simply laughable. There is virtually nothing "factual" about those allegations. They contend that the Opinion made "incorrect" assertions, ¶ 116; "improperly" relied on the Tenth Circuit's thorough analysis of the title dispute between Santa Ana and San Felipe in *Santa Ana v. Baca*, 844 F.2d 708 (10th Cir. 1988), ¶ 119; "without authority and in violation of San Felipe's rights 'determine[d] that Santa Ana's title to the overlap area is superior,'" ¶ 121; "ignored the historical record," ¶ 123; "erroneously asserted the Hall 1909 survey relied on distances alone," ¶ 124; "failed to explain" how a difference in acreage in the patent could be reconciled with the resurvey, ¶ 125; "erroneously concluded" that the boundaries of the two Pueblos conflict, ¶ 127; and "failed to cite any evidence" regarding the proper location of the San Felipe south boundary, ¶ 128.

These are legal arguments, embodying San Felipe's thoroughly erroneous legal claims to

title to the former overlap, and they plainly constitute a challenge “to the validity of the Tompkins Opinion.” They are barred by the statute of limitations applicable to such claims, 28 U.S.C. § 2401(a), and precluded by the Court’s March 12, 2026 Order.

E. San Felipe Now Claims That the FAC is Directed at Ministerial Actions of Interior

Finally, San Felipe makes the fairly astonishing admission that “[t]he FAC’s claim for relief is directed at the BIA Special Survey Instructions and the subsequent BLM requested cadastral survey and the agency actions implementing it.” SF Resp. at 13. It is difficult to make sense out of this claim. The Special Survey Instructions are nowhere mentioned in the FAC’s Claim for Relief, which is a rambling, 6-page, 32-paragraph rant repeating San Felipe’s claims that its “jurisdiction,” and the boundaries of its land grant, have been unlawfully diminished by the removal of its boundary monuments, etc. But taking this claim in the Response at face value, it further shows that the FAC must be dismissed. Neither the Special Survey Instructions nor the resurvey nor the agency actions implementing it (whatever actions are meant) are final agency actions. They are merely ministerial actions implementing the directives of the Tompkins Opinion (which, as the Court found, is the final agency action with respect to resolution of the dispute between the two Pueblos). Those actions thus cannot be the targets of an Administrative Procedure Act challenge, which this case is. *Chem. Weapons Working Grp., Inc. v. U.S. Dep’t of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997) (“the implementation of” an already consummated final agency action is not itself final agency action). And in any event, the 6-year statute of limitations applicable to any suit challenging those actions expired long before this suit was filed. Moreover, this new characterization of the FAC’s focus is nowhere near what this Court stated it would allow San Felipe to file.

CONCLUSION

For all of the foregoing reasons, and those stated in Santa Ana's opening brief, Santa Ana respectfully urges that San Felipe's First Amended Complaint be dismissed, and that San Felipe not be allowed to seek leave to file any further amended complaints.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2026, I caused the foregoing *Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint* to be filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all ECF registrants in this case.

/s/ Richard W. Hughes