

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

PUEBLO OF SAN FELIPE, a federally)
recognized Indian tribe,)

Plaintiff,)

v.)

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

Defendant,)
_____)

Case No. 1:23-cv-296 (JOB)(LF)

**REPLY BRIEF IN SUPPORT OF FEDERAL DEFENDANTS’ MOTION TO DISMISS
AMENDED COMPLAINT (DKT. NO. 127)**

This Court dismissed Plaintiff Pueblo of San Felipe’s (“Plaintiff” or “San Felipe”) Complaint for lack of jurisdiction. The Court found that the Complaint sought to quiet title to Indian lands and the Quiet Title Act (“QTA”) therefore preserved the United States’ sovereign immunity. The Court allowed San Felipe to file a very narrow claim under the Administrative Procedure Act (“APA”). San Felipe’s First Amended Complaint (Doc. No. 127) does not comply with the Court’s orders granting leave to file and still seeks to quiet title. This Court should dismiss San Felipe’s First Amended Complaint under Rule 41(b) for failure to comply with the Court’s order. The Complaint should also be dismissed under Rule 12(b)(1) because the Quiet Title Act preserves Federal Defendants’ immunity from suit and, therefore, the Court lacks jurisdiction over Plaintiff’s First Amended Complaint.

I. ARGUMENT

A. **San Felipe’s First Amended Complaint does not comply with the Court’s Order granting leave to amend.**

This Court granted San Felipe leave to file only “APA claims challenging the implementation of the Tompkins Opinion,” namely “whether the BLM properly conducts the land resurvey in compliance with the Tompkins Opinion.” Doc. No. 126 (“Reconsidered Order”) at 2; *see* Fed. Defs.’ Mot. to Dismiss Am. Compl. (Dkt. No. 127) and Mem. in Supp. (“Fed. Defs.’ Mem.”), Doc. No. 133, at 8–10. This Court’s Orders preclude San Felipe from challenging the M-Opinion issued by the Solicitor of the Department of the Interior in 2013 (“the Tompkins Opinion”). Reconsidered Order at 2.

Trying to avoid dismissal, San Felipe’s First Amended Complaint seeks to challenge Federal Defendants’ authority to conduct the resurvey under the guise of challenging the April 2017 decision of the Interior Board of Land Appeals (“IBLA” or “Board”) and the underlying “BIA Special Survey Instructions and the subsequent BLM requested cadastral survey and the agency actions implementing it.” Pl. Pueblo of San Felipe’s Resp. in Opp. to Fed. Defs.’ and Def. Intervenor’s Mots. To Dismiss the First Am. Compl. (“Pl.’s Resp.”), Doc. No. 138, at 10–11, 13. But San Felipe’s arguments amount to nothing more than challenges to the Tompkins Opinion. The Court’s Orders were clear and San Felipe’s displeasure with the Court’s conclusions is not a reason to ignore the Orders.

San Felipe’s Response Brief points to four groups of allegations in the First Amended Complaint. *Id.* at 13. The first group of allegations is that BIA and BLM lacked authority to conduct the resurvey and to change the boundaries of a congressionally confirmed patent. *Id.* (citing FAC ¶¶ 154–161, 167–170). The second group of allegations is that the instructions directing the surveyor to remove existing boundary monuments and resurvey the El Ranchito Tract northern

boundary was improper under the BLM’s 2009 Survey Manual. *Id.* (citing FAC ¶¶ 156–161; ECF 127-6; ECF 127-7). The third group asserts that BLM’s execution of the resurvey and removal of monuments violated federal law and the BLM’s 2009 Survey Manual. *Id.* (citing FAC ¶¶ 158–160). The fourth group asserts that the BIA and BLM’s actions, and the Board’s affirmance of them, were arbitrary, capricious, and in excess of statutory authority under the Administrative Procedure Act (“APA”). *Id.* (citing FAC ¶¶ 179–181).

Federal Defendants agree that the Board’s decision is the only final agency action in this case subject to APA challenge. But San Felipe’s arguments are not challenges to the Board’s decision, but actually challenges to the Tompkins Opinion, which San Felipe may not bring under this Court’s Orders. San Felipe asserts that “The 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—including the legal authority constraints that the Tompkins Opinion itself acknowledged applied?” Pl.’s Resp. 12. This is not the claim the Court allowed San Felipe to bring.

San Felipe is precluded by this Court’s Orders from challenging the M-Opinion issued by the Solicitor of the Department of the Interior in 2013 (“the Tompkins Opinion”). Reconsidered Order at 2. The Tompkins Opinion concluded that “the boundaries of the lands patented to the Pueblos conflict, that a resurvey of the disputed boundary is necessary, and that the boundary between Santa Ana’s El Ranchito Tract and the Pueblo of San Felipe lies north of the southern boundary line of the San Felipe Patent.” Tompkins Op. at 2. The Tompkins Opinion further directed that “the Bureau of Land Management (BLM), in coordination with the Bureau of Indian Affairs (BIA), needs to address this overlap and undertake a resurvey of the disputed boundary based on this Opinion.” *Id.* BLM therefore was authorized and directed to undertake a resurvey southern boundary of the San Felipe Pueblo Grant. The BLM conducted the resurvey, which San Felipe challenged before the Board. The Board held that the Tompkins Opinion “concluded that BLM is

authorized and required to undertake a corrective resurvey of the common boundary between the landholdings of the San Felipe Grant to the north and the El Ranchito Tract to the south.” 190 IBLA 18 (also found at Doc. No. 49-7). The Tompkins Opinion was binding on the Board. Accordingly, the Board did not consider “whether BLM has the authority to undertake the resurvey, an issue already decided with finality by the Solicitor, on behalf of the Department.” *Id.* at 19. The sole question before the Board was “whether BLM properly resurveyed the boundary as directed by the Solicitor.” *Id.* at 68.

Nonetheless, San Felipe attempts to relitigate the conclusions of the Tompkins Opinion by arguing “no such error existed” in prior surveys and resurvey that required correction, and therefore the BIA and the BLM’s actions in carrying out the resurvey were unlawful. Pl.’s Resp. 11. In fact, San Felipe’s First Amended Complaint alleges that “[t]he Solicitor erroneously concluded that ‘the boundaries of the lands patented to the respective Pueblos conflict.’” FAC ¶ 126 (citing Ex. E at 2, 11, 5). But San Felipe’s claim ignores that the Tompkins Opinion authorized the BIA and the BLM to conduct the resurvey to correct the conflicting boundaries, and the BIA and the BLM were bound by that determination. As stated by the Board: “BLM was specifically instructed, by the Solicitor’s 2013 Opinion, to start over again, in correctively resurveying the southern boundary of the San Felipe Pueblo Grant, disregarding Hall’s resurvey to the extent that it deviated from Clements’ original survey, with the aim of determining anew the location of Clements’ SE and SW corners and the intervening southern boundary of the Grant.” 190 IBLA 37. The Tompkins Opinion also “instructed BLM to disregard Hall’s 1909 survey as in error, and to perform a corrective resurvey of the southern boundary.” *Id.* Thus, San Felipe’s attacks on Federal Defendants’ actions as lacking authority to conduct a resurvey constitute attacks on the legal conclusions of the Tompkins Opinion. This is in direct violation of the Court’s holding that “San

Felipe Pueblo may not pursue APA claims challenging the validity of the Tompkins Opinion itself.” Reconsidered Order at 2.

For the same reasons, San Felipe’s efforts to frame its First Amended Complaint as one challenging the Board’s decision, rather than the Tompkins Opinion, fail. The Board’s decision states: “Whether Olver accurately reestablished Clements’ originally surveyed southern boundary of the San Felipe Pueblo Grant, in common with Walker’s originally surveyed northern boundary of the El Ranchito Tract, is all that is presently subject to review and adjudication by the Board.” 190 IBLA 34. San Felipe’s First Amended Complaint does not mount any claim or argument attacking the Board’s decision in this regard. Instead, San Felipe argues that BIA and BLM violated the BLM 2009 Survey Manual by disregarding the Hall 1909 resurveyed boundary. But BIA and BLM were specifically instructed by the Tompkins Opinion to disregard the Hall 1909 resurvey because it was in error, and the Board explicitly declined to “adjudicate the validity of the Solicitor’s Opinion by way of deciding whether Olver’s 2013 corrective resurvey conformed to the Survey Manual, since we are bound by that Opinion.” 190 IBLA 39. Thus, San Felipe’s First Amended Complaint amounts to a challenge of the Tompkins Opinion.

Similarly, San Felipe asserts in its Response Brief that its First Amended Complaint “asks the Court to determine whether federal officials had lawful authority under applicable laws and regulations to permanently obliterate the existing boundary monuments marking the southern and western limits of San Felipe’s congressionally confirmed Patent and substitute in their place a resurvey of the El Ranchito Grant.” Pl.’s Resp. (citing FAC ¶¶ 156–161; ECF 127-6; ECF 127-7). The Board also rejected this argument. “BLM was specifically instructed, by the Solicitor’s 2013 Opinion, to start over again, in correctively resurveying the south boundary of the San Felipe Pueblo Grant, disregarding Hall’s resurvey to the extent that it deviated from Clements’ original survey, with the aim of determining anew the location of Clements’ SE and SW corners and the

intervening southern boundary of the Grant.” 190 IBLA 37. The Tompkins Opinion also “instructed BLM to disregard Hall’s 1909 survey as in error, and to perform a corrective resurvey of the southern boundary.” *Id.* The Board declined to adjudicate whether the Tompkins Opinion correctly ordered a resurvey because it was bound by the decision. *Id.*

But in any event, by arguing that federal officials had no authority to undertake the survey or reestablish the boundary, San Felipe challenges the Tompkins Opinion itself, rather than the BIA’s or BLM’s compliance with that Opinion. San Felipe thus implicitly concedes the First Amended Complaint does not comply with the Court’s Orders. This Court held that San Felipe’s challenges to the Tompkins Opinion were not filed within the statute of limitations and that San Felipe may not challenge the Tompkins Opinion. As such, this Court should find that San Felipe failed to comply with the Court’s Orders in filing its First Amended Complaint.

San Felipe also argues that the First Amended Complaint directly challenges the BIA’s and the BLM’s execution of the resurvey. Pl.’s Resp. 12–16. But the First Amended Complaint does not contain any allegations regarding whether the BLM resurvey accurately reestablished the originally surveyed southern boundary of the San Felipe Pueblo Grant, in common with the originally surveyed northern boundary of the El Ranchito Tract, in accordance with the Tompkins Opinion. *Id.*

San Felipe also argues that its First Amended Complaint meet the Court’s Orders because it asserts that Federal Defendants violated BLM’s 2009 Survey Manual. *Id.* (citing FAC ¶¶ 130, 156–160). But San Felipe does not identify errors in the technical aspects or calls and corners of the BLM resurvey. Instead, San Felipe alleges that the BIA and BLM failed to comply with the Survey Manual because they lacked authority to disregard Hall’s 1909 Boundary and resurvey the southern boundary of the San Felipe Pueblo Grant. FAC ¶¶ 153–161, 167, 169, 171, 176. As noted above, the Tompkins Opinion decided that issue. As the Board held, the Tompkins Opinion directed

the BLM to “start over.” *See* 190 IBLA 28–29. “[San Felipe] seeks to preserve Hall’s southern boundary despite the fact that the Solicitor’s Opinion expressly rejected that boundary.” *Id.* The Board recognized San Felipe’s argument that the resurvey did not conform to the 2009 Survey Manual as a challenge to “the validity of the Solicitor’s Opinion.” *Id.* The Court did not allow San Felipe to raise such a claim and should dismiss the First Amended Complaint on that basis.

San Felipe admits as much by arguing in its Response Brief that “BIA and BLM had no authority to ignore the restrictions on resurveys imposed by applicable laws and regulations including the BLM 2009 Survey Manual, just as BIA and BLM *had no authority to rely on the Solicitor’s Opinion* to issue and execute orders to erase the San Felipe southern and portions of the western boundary based on the Tompkins Opinion.” Pl.’s Resp. 15 (emphasis added). In short, San Felipe’s First Amended Complaint alleges that Federal Defendants violated the APA *by relying on the Tompkins Opinion*. This is clearly beyond the scope of the amendment the Court allowed.

Finally, San Felipe takes issue with the comparison charts Federal Defendants provided in the Swanson Declaration. The charts compare paragraphs in the First Amended Complaint with the original complaint dismissed by this Court and the proposed amended complaint the Court rejected. The charts were included for demonstrative purposes to assist the Court in its review of the various complaints. None of San Felipe’s arguments against the charts have merit. San Felipe faults Exhibit 1 as “incomplete,” but the declaration notes that “certain” paragraphs or portions of the pleadings were included. The declaration does not profess to be a full comparison of every paragraph.

San Felipe argues that the First Amended Complaint removes all “title-claim language that previously caused the Court concern.” Pl.’s Resp. 19. But this is just an admission that San Felipe is attempting to plead around the QTA’s preservation of sovereign immunity. The removal of specific language regarding title claims does not in and of itself avoid coverage by the QTA. The

caselaw bears this out. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 217 (2012). *Patchak* made clear that the focus for QTA purposes is a plaintiff’s “demand for relief.” 567 U.S. at 215. And San Felipe admits that *High Lonesome Ranch, LLC v. Bd. of Cnty. Comm’rs*, 61 F.4th 1225, 1238 (10th Cir. 2023), focuses its QTA analysis on the relief requested. Pl.’s Resp. 25 (“*High Lonesome Ranch* directs courts to look at what the plaintiff is actually asking for.”). As the Court has noted in prior orders, the “heart of San Felipe’s grievance, under *Patchak*, is an ownership dispute over land in which the United States has an interest, i.e., as Santa Ana’s trustee.” Doc. No. 55 at 21.

San Felipe also takes issue with the declaration because it makes “trial counsel a witness in this proceeding.” Pl.’s Resp. 20. But the charts juxtaposing the First Amended Complaint with the prior pleadings did not make trial counsel “a necessary witness” in trial or otherwise. The declaration explains only how the charts were compiled, it does not proffer any relevant facts. San Felipe does not assert that the charts inaccurately quote the pleadings. The charts show how little has changed from the pleadings the Court rejected and the current pleading. San Felipe’s arguments regarding the Swanson Declaration and accompanying charts should be discarded.

B. The First Amended Complaint seeks to quiet title in the former overlap area and the Quiet Title Act therefore preserves the United States’ immunity from suit.

San Felipe’s Response Brief makes clear that the First Amended Complaint plainly seeks to quiet title in the Former Overlap Area, a claim this Court has repeatedly rejected. Pl.’s Resp. 23–29. San Felipe’s argument that its claim is an APA challenge to an unlawful administrative action lacks merit.

First, San Felipe argues that *Patchak* permits APA challenges to land management agency actions even where Indian land is involved. Pl.’s Resp. 23–26. But San Felipe’s reliance on *Patchak* is misplaced. *Patchak* recognized that suits brought by plaintiffs asserting ownership interests are

barred by the QTA. In fact, the Court posed a hypothetical example relevant here: “suppose Patchak had sued under the APA claiming that *he* owned the Bradley Property and that the Secretary therefore could not take it into trust.” *Patchak*, 567 U.S. at 216. That is the scenario in this case: San Felipe claims that the resurvey “altered” its patent boundary and interfered with its purported jurisdictional territory, which amounts to a claim of ownership. FAC, Prayer for Relief ¶ 1(d). In *Patchak*, the Court allowed the case to proceed because, although Patchak’s suit “contests the Secretary’s title, it does not claim any competing interest in the Bradley Property.” *Patchak*, 567 U.S. at 217. Here, conversely, San Felipe claims a competing interest in the Former Overlap Area.

Patchak clarified that the QTA preserves the United States’ sovereign immunity from quiet title suits “when they involve Indian lands.” *Patchak*, 567 U.S. at 216. The QTA’s plain language does not include an exception to the Indian Lands exception where a tribe seeks to seize another tribe’s restricted fee lands in which the United States holds an interest. Indeed, such an exception would frustrate Congress’s explicit preservation of sovereign immunity by undermining the interests of the United States, beneficiary Tribes, and tribal sovereign immunity. *See id.*; *Block v. North Dakota*, 461 U.S. 273, 284-85 (1983); *Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1237 (10th Cir. 2010).

In sum, “a plaintiff cannot use the APA to end-run the QTA’s limitation[.]” to challenge title to Indian lands in which the United States has an interest. *Id.* at 216, 219-20. San Felipe attempts just that end run here, as it seeks to quiet title to lands in which the United States holds an interest on behalf of Santa Ana. And as the Supreme Court indicated, that end run is barred by the QTA. *Patchak*, 567 U.S. at 216, 219-20.

San Felipe attempts to distinguish *Patchak* by arguing that San Felipe claims only that “the Government lacked authority to redraw the boundary of [its] congressionally confirmed patent.”

Pl.’s Resp. 24. But by claiming that its purported patent boundary is inviolable, San Felipe makes an ownership claim. San Felipe does not claim that BLM improperly located the boundary of the San Felipe Pueblo Grant, but that BLM lacked any authority to reestablish the boundary through a dependent resurvey. Thus, San Felipe seeks to exercise its ownership rights and quiet title.

San Felipe relies on *Pueblo of Taos v. Adrus*, 475 F. Supp. 359 (D.D.C. 1979) and *Pueblo of Sandia v. Babbitt*, No. CIV 94-2624, 1996 WL 808067 (D.D.C. Dec. 10, 1996) to argue that the QTA did not bar APA challenges to allegedly wrongful resurveys of Indian land boundaries. Pl.’s Resp. 24. This Court, however, previously found that those cases were distinguishable from the case at bar. Doc. No. 55 at 27–34. In both cases, the Pueblo-plaintiffs sought to compel the federal government to correct the surveyed boundary between the Pueblo’s land and neighboring government land. *Id.* at 27–28. Both courts found that the QTA did not apply because “the interests at play effectively were not adverse to one another.” *Id.* at 28. But in this case, the dispute is between two Pueblos, making the interests “adverse to one another.” *Id.* at 31. The Court held, therefore, that these cases supported the conclusion that this is an action to quiet title. *Id.* at 34–35.

San Felipe asserts that it seeks relief under the APA, including the reinstatement of survey monuments and a declaration that the agency actions accomplishing the resurvey were void. But San Felipe asks the Court to enjoin any further actions to survey the Pueblo’s boundaries, which amounts to a quiet title action. *See* FAC, Prayer for Relief ¶¶ 1 (seeking declaration that Defendants lack authority to “alter the boundaries of the 1864 San Felipe patent” or “diminish San Felipe’s jurisdictional territory”); 2 (seeking order preventing “any subsequent alteration of agency records . . . purporting to alter the boundaries of the 1864 Patent”); 3(c) (seeking order preventing “further interference by others”); 4 (seeking “Order enjoining Defendants from taking any further actions to alter the 1864 Patent boundaries”). San Felipe asks the Court to hold that the “congressionally confirmed patent boundary” is San Felipe lands that cannot be interfered with. It does not assert

that the BLM resurvey was improperly performed, and San Felipe’s First Amended Complaint conspicuously omits any claim that the calls and corners of the resurveyed boundary are incorrect for specific technical reasons. The First Amended Complaint seeks to quiet title.

San Felipe argues that it does not seek a title adjudication but, rather, a reinstatement of the prior survey plats. Pl.’s Br. 3. But its request for relief is broader than simply a reinstatement—it seeks reinstatement and prohibition of any further agency action. *See* FAC, Prayer for Relief ¶ 4. In an APA action, the proper remedy is remand to the agency for reconsideration. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978). But here San Felipe seeks a declaration that the resurvey of the San Felipe southern boundary can *never* be performed if it results in reestablishing the boundary. This would require the Court to make a title determination.

Further, San Felipe’s reference to its jurisdiction over the Former Overlap Area show that it seeks ownership over the lands. For example, Paragraph 80 of the First Amended Complaint asserts that Federal Defendants “impermissibly” sought “to divest San Felipe inherent jurisdiction over lands within the patent boundaries.” FAC ¶ 80. San Felipe requests the Court take actions necessary to prevent “interference with San Felipe’s sovereign jurisdiction over lands with the boundaries of the 1864 Patent.” (Prayer for Relief, ¶¶ 3(c), 4). This asks the Court to determine that San Felipe has superior title to the Former Overlap Area and any resurvey is completely prohibited. Per the Court’s Orders, the sole claim that San Felipe could have brought was whether the BLM properly implemented the Tompkins Opinion, which is a technical challenge based on the conduct of the resurvey. But here, San Felipe reverts once again to the jurisdictional arguments based on the Pueblo Lands Act. *See* Pl.’s Resp. 3, 31. The Court’s Order precludes San Felipe from challenging the resurvey directive in the Tompkins Opinion, but that is what San Felipe attempts to do in its First Amended Complaint.

San Felipe cannot simply frame its claim as one that asserts the government acted *ultra vires* when it is in fact a challenge to BLM’s authority to conduct a resurvey. *See id.* at 27–28. The Tompkins Opinion confirmed that the Department had authority to resurvey Indian lands in this instance. The Court concluded that San Felipe failed to timely challenge the Tompkins Opinion, so the Court clarified that San Felipe could only amend its complaint to challenge whether BLM properly implemented the Tompkins Opinion. San Felipe now argues that BLM improperly performed the resurvey because Federal Defendants lack authority to resurvey the boundaries of the San Felipe Pueblo Grant. The claim is one to quiet title because San Felipe asserts it has sole ownership and “jurisdictional authority” over lands within its purported patent boundaries.

San Felipe’s creative pleading does not permit it to evade Congress’s carefully constructed bar against suits challenging the United States’ interest in Santa Ana’s restricted lands. All of San Felipe’s claims should thus be dismissed.

II. CONCLUSION

The First Amended Complaint should be dismissed. It should be dismissed under Rule 41(b) because San Felipe failed to comply with the Court’s orders granting it leave to amend its complaint. Alternatively, the Court should dismiss the First Amended Complaint under Rule 12(b)(1) because San Felipe’s claim still seeks to quiet title in San Felipe in the Former Overlap Area. As such, the QTA preserved the United States’ immunity from suit and the Court lacks jurisdiction over the First Amended Complaint.

Respectfully submitted this 9th day of July, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2026, 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/ Devon Lehman McCune

Devon Lehman McCune