



United States Department of the Interior

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Memorandum

To: Neil G. Kornze, Acting Director, Bureau of Land Management
Jesse Juen, New Mexico State Director, Bureau of Land Management

From: Hilary C. Tompkins, Solicitor *Hilary Tompkins*

Subject: Applicability of the New Mexico Bureau of Land Management's Riparian Policy to Lands within the Boundaries of the Santa Clara Pueblo Grant

I. Issue

The Bureau of Land Management, New Mexico State Office ("BLM"), requested a legal opinion related to the application of its 1989 policy statement concerning the survey of riparian boundaries of small non-Pueblo holdings ("BLM Riparian Policy" or "Policy", Attachment A) within the exterior boundaries of a Pueblo land grant. The BLM Riparian Policy provides that where a parcel is bounded by a waterway, such as a lake or river, the parcel is deemed riparian, riparian rights attach, and the associated doctrines of accretion, avulsion, and reliction apply. The BLM Riparian Policy also provides that where the boundary of a parcel is referenced as "a river bank or related component of the river," the parcel so described is also deemed "riparian" such that the boundary can move with subsequent movements of the waterway. At present, application of the BLM Policy is uniform for all private land claims in New Mexico and does not distinguish private claims that are located within the boundaries of a Pueblo land grant.

The Bureau of Indian Affairs, Southwest Region ("BIA"), requested that the BLM conduct a cadastral survey of two specific sections of land in the Espanola area of New Mexico ("Chacon property") within the Santa Clara Pueblo (the "Pueblo"). The BLM requested legal guidance from the Solicitor's Office on the application of its Riparian Policy to private lands within original Pueblo land grants before finalizing its cadastral survey. Our review is limited to the facts presented in this specific matter.

II. Summary Conclusion

The complex factual situations and Federal law principles applicable to the unique history of Pueblo land grants must be considered before applying the BLM Riparian Policy to

surveys within Pueblo land grants.¹ The focus of the BLM's Riparian Policy is the common law rule that a grant of land bounded by a non-navigable river generally carries the exclusive right and title of the grantee to the centerline of the river. In addition, the Policy extends this common law principle to presume that calls to the bank of the river also extend to the centerline. In our view, however, the Pueblo Lands Act of 1924, 43 Stat. 636 (1924), provides the legal framework within which the BLM must operate when surveying lands within Pueblo land grants and in that unique context, the Pueblo Lands Act rebuts the presumption applied by the BLM. This advice differs from previous advice given to the BLM New Mexico by the Southwest Regional Solicitor's Office. That prior advice did not undertake an in depth legal analysis of all applicable law.

The BLM Manual of Surveying Instructions recognizes exceptions to the BLM's extension of the common law rule. It states that a boundary call to the bank will be presumed to be to the center of the river, but it goes on to specify at least four circumstances where a meander line will be construed as a fixed boundary, rather than as an indicator of the sinuosities of the watercourse. *See* BLM Manual of Surveying Instructions, at 3-162 (2009). The exception relevant here is provided in § 3-162(4), which states that a meander line may be considered a fixed boundary "where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines." *Id.*² Moreover, where there are federal interests involved, the BLM Manual applies federal law to determine boundaries, including instances involving Indian property and land grants from foreign nations. *See* BLM Manual of Surveying Instructions, at §§ 1-7 (Mexican land grants), 8-3 (Indian lands) & 8-57, 8-58 (Source of law). As discussed further below, New Mexico, including grant lands, was acquired by the United States under the Treaty of Guadalupe Hidalgo. Under Spanish and Mexican law, the sovereign usually retained the bed of any navigable or non-navigable river. Through the Treaty, the land grants came under the control of the United States and Mexico's sovereign interest in riverbeds was also transferred to the United States. Then, in confirming the Santa Clara land grant, the United States relinquished all of its title and claim to lands within the grant, including the riverbed.

Here, the Santa Clara Land Grant encompassed the Rio Grande. The boundary descriptions for the Chacon land grant located within the Santa Clara Pueblo consistently refer to the bank of the river to describe the physical location of the boundary rather than to the Rio Grande itself. Further, pursuant to the Pueblo Lands Act, all non-Indians claiming land within a Pueblo land grant were required to demonstrate adverse possession, with or without color of title, and payment of taxes before Pueblo title to a particular parcel of land would be relinquished. *See* Pueblo Lands Act, Pub. L. No. 68-253, 43 Stat. 636 (1924). Given the rigorous conditions imposed for relinquishment of Pueblo title, it is reasonable to read a boundary call to the bank of the river as a call to a

¹ The BLM Manual of Surveying Instructions recognizes that at times a surveyor will encounter complex situations that raise legal issues that cannot be resolved by the surveyor, but that the surveyor should be aware of these legal issues, use good judgment, and be prepared to provide technical advice. BLM Manual of Surveying Instructions, at § 1-7 (Source of Law) (2009).

² Here the special circumstances are the Pueblo Lands Act and the history of the Santa Clara Pueblo land grant.

physical point or definite location on dry land unless there is evidence to the contrary. This interpretation is also consistent with congressional intent to restore lands to Pueblos that were lost to non-Indian claimants and extend federal protections against alienation or diminishment of such lands.

We therefore conclude that the BLM's extension of the common law rule that a grant of land bounded by a non-navigable river generally conveys title to the centerline of the river does not apply to the facts here. The boundary description of the Chacon property includes a call to the bank of the river rather than to the river itself and the special circumstances of the conveyance at issue indicate a clear federal interest and congressional intent for the Santa Clara Pueblo to retain title to all lands not expressly identified and confirmed as relinquished. Because of this, we conclude that the Pueblo lands at issue are subject to federal law and not the riparian common law theory set forth in the BLM Riparian Policy.

III. Factual Background

The BIA requested that the BLM conduct a cadastral resurvey of the Chacon property, located in sections 34 and 35 in Township 21 North; Range 8 East; New Mexico Principle Meridian. These lands are within the exterior boundary of the Pueblo of Santa Clara.³ The purpose of the resurvey was to clarify which lands are Pueblo lands and which are private lands, based on the adjudications resulting from the Pueblo Lands Act. The BLM completed the resurvey for these sections in accordance with the BLM Riparian Policy whereby the private landowner's boundary would be ambulatory based on the movement of the Rio Grande, but agreed to delay issuing the resurvey until receiving legal advice regarding application of its policy.

The BLM Riparian Policy states, in part, that "two major conclusions are reached and will be considered policy for this [BLM State] office:

³ These two sections of land are predominantly owned by private landowners who are not members of the Santa Clara Pueblo. Private landowners obtained title pursuant to the adjudications required by the Pueblo Lands Act. However, over the last 40 years, as the seasonal high flows of the Rio Grande have reduced due to man-made and natural causes, the banks of the river have moved toward the area that was formerly riverbed, resulting in "new" dry lands being created adjacent to the river. These two sections contain lands that run along the Rio Grande, near Española, that are being contested by Pueblo and non-Pueblo land owners.

The question of ownership of these lands was raised before the Interior Board of Indian Appeals ("IBIA") in 2002 after the BIA Regional Director issued a decision determining that certain land along the river claimed by the Pueblo of Santa Clara was owned by the Chacon family. The Pueblo appealed to the IBIA, which dismissed the appeal on the jurisdictional ground that the BIA Regional Director lacked the authority to issue a decision purporting to determine title to land. *Pueblo of Santa Clara v. Acting Southwest Regional Director, Bureau of Indian Affairs*, 40 IBIA 251 (2005). The IBIA held that because the BIA had no authority to issue the relevant decision, there was no valid appeal before the Board. The Board noted that this situation could be resolved either by issuing a Solicitor's Opinion as to title, so long as the parties agreed to abide by it, or a resurvey completed by the BLM. *Id.* n.10. To date, neither the IBIA nor the Interior Board of Land Appeals ("IBLA") have ruled on the merits of any of the affected New Mexico private landowners' claims to ownership associated with a call to the bank as a defined boundary.

- 1) All claims with boundary calls in the original field notes to a river bank or a related component of the river, e.g., gravel bars, water, or bed, will be considered riparian.
- 2) With no river related calls, even though the claim was originally located in the vicinity of a river and a portion of the boundary approximately traversed the water's edge, the claim boundary is considered fixed. Later erosion of the claim by river movement will not create riparian rights in the formerly upland claim other than allowing future accretions to restore the original area of the claim."

BLM Riparian Policy, Part III. Riparian Nature of Claims, at 2, Attachment A.

The BLM Riparian Policy also cites the common law rule that "government conveyance of title to a fractional subdivision fronting upon a non-navigable stream, unless specific reservations are indicated, either in the patent from the federal government or in the laws of the state [sic]⁴ in which the land is located, carries ownership to the middle of the stream." *Id.* (citation omitted) (emphasis in original). The policy concludes by declaring:

When parcels of land meet Part III-1, described above, Cadastral Survey recognizes riparian ownership to the medial line. When parcels of land meet Part III-2, described above, the upland owner would not enjoy riparian rights.

BLM Riparian Policy at 3. This statement is of special importance because it means, in effect, that the BLM adopted its own variation of the common law rule that now presumes any reference to a river bank or a river-related feature in a survey description as riparian and ownership of the riverbed will be conveyed to the medial line of the stream or "the center line of the water at the time the boundary was first established." *Id.* at 2. Accordingly, when a waterway that is the boundary of land moves through an accretive or relictive event, the boundary line also moves. Thus, if the BLM Riparian Policy is applied to the parcels of land within the Santa Clara Pueblo, the boundary of the non-Indian land parcels within the Pueblo's land grant would move with such events and any newly accreted or relictive dry lands would be owned by the private land owner rather than by the Pueblo.⁵

The Pueblo has disputed this application of the BLM Riparian Policy and argues that title to the bed of the Rio Grande was never relinquished by the Pueblo. *See* Letter from

⁴ Here, the phrase "or the laws of the state" is inapplicable because a federal statute controls and a state cannot mandate what the federal government conveys or does not convey. BLM Manual of Survey Instructions § 8-57(1).

⁵ A factual determination has not been made as to whether there has been an event that could be characterized as accretion, reliction, or avulsion of the Rio Grande. Reliction, unlike accretion and avulsion, does not necessarily involve movement of the river from one side of its banks to another or displacement of the course of the river. Rather, in reliction the river draws down to a center channel either exposing previously submerged lands through natural events or by damming, channelizing, or other man-made methods. BLM Manual of Survey Instructions § 8-84.

Richard Hughes Re: Pueblo of Santa Clara/Charlie Chacon Claim (Jan. 28, 2011). The Pueblo claims ownership of all lands, including the bed of the Rio Grande, that lie within the bounds of the grant made by Spain, confirmed by Congress, and recognized by the Pueblo Lands Board for which Pueblo title was not expressly extinguished. Further, the Pueblo argues that neither the Pueblo nor the United States authorized the relinquishment of title to lands beyond those for which adverse possession had been demonstrated pursuant to the Pueblo Lands Act and as defined in title documents and limited by the metes and bounds descriptions in survey field notes. *Id.*

Conversely, private landowners, who trace their chain of title to the private claimants receiving confirmation of lands through the Pueblo Lands Board, also claim title to the lands physically surveyed and demarcated and to any additional dry land that became available for use through accretion or reliction. *See, e.g.,* Order Vacating Decision, *Pueblo of Santa Clara v. Acting Regional Director*, Bureau of Indian Affairs, 40 IBIA 251, 251-52 (Feb. 16, 2005). The private landowners' claim is based on the belief that the title granted by the Pueblo Lands Board also conferred the riparian rights of accretion or reliction consistent with the BLM Riparian Policy as presently written.

IV. Legal Background

Federal and state courts have addressed the complex questions associated with determining title to property bounded by waterways on both private and public lands, as well as to lands held in trust for individual Indians and federally recognized tribes. These cases have not, however, dealt with the application of these questions to private land holdings within Pueblo grant boundaries. In assessing the legal sufficiency of the BLM Riparian Policy as applied to the facts presented to us, we begin by reviewing federal and state common law principles and doctrines applied to riparian lands in general. We then review the unique legal history of Pueblo land title and the provisions governing relinquishment of title to non-Indian claimants.

A. Federal Law and Riparian Lands

Under federal law applicable to public lands,⁶ unless a contrary intention is stated or may be inferred from the terms of the grant, a federal grant of public land bounded by a non-navigable stream or river conveys ownership to the center or thread of the water.⁷

Where the United States owns the bed of a nonnavigable stream and the upland on one or both sides, it, of course, is free when disposing of the upland to retain all or any part of the river bed; and whether in any particular instance it has done so is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown

⁶ 43 U.S.C. § 931 (“in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.”). Notably, this law does not apply to Indian trust lands.

⁷ Questions of navigability are federal questions. *See United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Oregon*, 295 U.S. 1, 14 (1935).

that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular - according to the law of the State in which the land lies. Where it is disposing of tribal land of Indians under its guardianship the same rules apply.

Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922). Thus, federal law generally controls in interpreting the boundaries of grants by the United States, but in some instances where grants are made without reservation or restriction, courts have construed them according to the law of the state in which the land lies. See, e.g., *United States v. Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir. 1946), *aff'd* 331 U.S. 788 (1947); *Bear v. United States*, 611 F. Supp. 589, 594 (D. Neb. 1985) (holding that title to accreted lands, unless preserved, including land within Indian reservations, passes with any conveyance of appurtenant land) (emphasis added).

With respect to state law, most states apply the common law rule that when a non-navigable⁸ waterway forms a boundary between two parcels of land, and that waterway moves by processes of accretion or erosion, the boundary between the parcels of land follows the movements of the river. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 660 (1979) (citing *United States v. Wilson*, 433 F. Supp. 57, 62 (N.D. Iowa 1977)). The BLM Riparian Policy adopts this general principle. The common law rule also provides that this presumption applies unless the terms of the grant and the attendant circumstances denote an intention to stop at the edge or margin of the river. *Choctaw and Chickasaw Nations v. Seay*, 235 F.2d 30, 35 (10th Cir. 1956), *cert. denied* 352 U.S. 917 (1956) (emphasis added). See also BLM Manual of Surveying Instructions, at § 3-162(4). The legal effect of accretion with regard to riparian boundaries is such that when a non-navigable river moves by accretion, the boundary line set by the river continues to run through the center of the river channel in its new location including the accumulated soil.⁹ *Nebraska v. Iowa*, 143 U.S. 359, 360-61 (1882) (citations omitted).

The common law rule for riparian lands has been found to apply in instances “where the United States disposes of tribal lands of Indians under its guardianship.” *Choctaw and Chickasaw Nations*, 235 F.2d at 35; see also *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1921) (“Where [the United States] is disposing of tribal land of Indians under its guardianship the same rules apply” as to any other disposition of land). In other circumstances, however, federal law is held to be controlling. Notably, the Supreme

⁸ For purposes of this memorandum, the Rio Grande constitutes a non-navigable river. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 696 (1899).

⁹ For a riparian parcel, the act of accretion “denotes the process by which the area of owned land is increased by the gradual deposit of soil due to the action of a bounding river or other body of water.” *Bauman v. Choctaw-Chickasaw Nations*, 333 F.2d 785, 789 (10th Cir. 1964). Conversely, avulsion is distinguished by “the more rapid, easily perceived and sometimes violent, shifts of land incident to floods, storms or channel breakthroughs . . .” *Bauman*, 333 F.2d at 789. Avulsive events do “not affect title to the lands thus transferred from one side of the river to the other.” *Id.*; see also *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892).

Court in *Wilson*, 442 U.S. at 671, found that federal law controlled the issue of Indian property rights where “the United States has never yielded title or terminated its interest” over the Indian trust lands, although state standards could be borrowed where appropriate. Similarly, the BLM Manual of Surveying Instructions discusses source of law considerations where there is a Federal interest. For example, where the “boundaries of Indian property are to be determined,” federal law is applied, and federal law is used to determine the ownership of beds and banks of waterways where there is a federal interest. See BLM Manual of Surveying Instructions §§ 8-3 (Indian lands), 8-57, 8-58 (Source of Law Considerations). Moreover, according to the BLM Manual of Surveying Instructions, “boundaries created by foreign sovereigns, such as Mexican land grants, will be controlled by application of the relevant law of Mexico at the time the boundary was established.” BLM Manual of Surveying Instructions, at § 1-7. As discussed below, New Mexico was acquired by the United States from Spain pursuant to the Treaty of Guadalupe Hidalgo. Under Spanish and Mexican law, the sovereign retained the bed of any navigable or non-navigable river.¹⁰ With respect to the Pueblo land grants in New Mexico, those lands were not at any time “public lands” subject to general disposal by the United States. Rather, they were communal fee lands granted by the Spanish crown to the Pueblos, title to which the United States was required to recognize and respect under the Treaty of Guadalupe Hidalgo. And, as explained below, in reviewing and confirming the Pueblo’s land grant, the United States relinquished all title and claim that it could assert to lands within the grant and expressly included the riverbed in the acreage confirmed.¹¹

B. The History of Pueblo Land Title and the Pueblo Lands Act of 1924

In reviewing the treaties, statutes and law surrounding the history of the Pueblos, it is important to note that the canons of construction that derive from the unique relationship between the United States and Indian tribes apply to any ambiguities in a statute. See, e.g., *Choate v. Trapp*, 224 U.S. 665 (1912). Under these canons, statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians, with any ambiguities to be resolved in their favor. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); see also *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

Indeed, the legal history of Pueblo lands is unique among Indian tribes in the United States. The Pueblo Indians lived in organized communities well before the earliest Spanish explorers visited the region and, in many cases, the Indians were occupying the same lands they now occupy. See *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240 (1985). “From the earliest days, the Spanish conquerors recognized the Pueblos’ rights in the lands they still occupy, and their ownership of these lands was confirmed in land grants from the King of Spain” and later by the independent Government of Mexico. *Id.* The United States took possession of present-day New

¹⁰ See Part 3, Title 28 Laws 26, 31.

¹¹ See *infra* discussion at pp. 8-11.

Mexico during the war with Mexico, which ended with the ratification of the Treaty of Guadalupe Hidalgo in 1848.

Early confusion regarding whether the Pueblos were Indian tribes and entitled to protection under federal law led to Pueblo land being lost and transferred to non-Indians. In 1851, three years after the Treaty of Guadalupe Hidalgo, Congress extended the Indian Trade and Intercourse Act to “Indian tribes of the territories of New Mexico and Utah.” Act of Feb. 27, 1851, ch. 14, § 7, 9 Stat. 574. And, on September 30, 1856, the Surveyor-General of New Mexico recommended that Congress confirm Santa Clara’s Spanish land grant in his report to the Department of the Interior pursuant to Section 8 of the Act of July 22, 1854 (10 Stat. 308) (“The Pueblo Indians are constantly encroached upon . . . [and] despoiled of their best lands; I therefore respectfully recommend that these claims be confirmed by Congress as speedily as possible . . .”). Report of the Commissioner of the General Land Office, Annual Report of the Surveyor General of New Mexico, at - 225 (Sept. 30, 1856).¹² Based on the report of the Surveyor-General of New Mexico, the Santa Clara Pueblo land title, which had been recognized by the Spanish and Mexican Governments, was confirmed by Congress in the Act of December 22, 1858 (11 Stat. 374).¹³ In recognizing the Santa Clara land grant, the United States also expressly relinquished “all title and claim of the United States to any of said lands . . .” *Id.* On September 15, 1860, the Surveyor-General of New Mexico approved the final plat of the survey of the Pueblo of Santa Clara. The final plat of the Santa Clara Pueblo from 1860 showed the total acreage as including the Rio Grande and it is this total acreage that was recognized by Congress as belonging to the Pueblo of Santa Clara.¹⁴ See Attachment B.

Notwithstanding Congress’ extension of the Indian Trade and Intercourse Act and subsequent confirmations of land grants to the Pueblos, in the late 1800s, the New Mexico Territorial Supreme Court in *United States v. Lucero*, 1 N.M. 422 (N.M. Terr. 1869), and later the United States Supreme Court in *United States v. Joseph*, 94 U.S. 614 (1876), ruled that the Pueblos were not Indian tribes within the meaning of the Indian Trade and Intercourse Act. Several years later Congress, in the New Mexico Enabling Act, provided that “all lands owned or held by any Indian or Indian tribes acquired through or from the United States or any prior sovereignty shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress.” Act of June 20, 1910, ch. 310, 36 Stat. 557.¹⁵ Then in *United States v. Sandoval*, 231 U.S. 28,

¹² The 1854 Act established the office of the Surveyor-General in certain states, including New Mexico, and Section 8 directed the Surveyor-General to ascertain the extent and locality of all Pueblo claims so that a report could be submitted to Congress to take “such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of [Guadalupe Hidalgo].” 10 Stat. 309 (emphasis added).

¹³ The 1858 congressional recognition of Pueblo land title provided that “this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist.” 11 Stat. 374.

¹⁴ A previous plat from July 26, 1859 included the Rio Grande within the exterior boundary of the Pueblo and noted the total acreage of the Pueblo—both with and without the land covered by the Rio Grande.

¹⁵ The Enabling Act further specified that “the terms ‘Indian’ and ‘Indian country’ shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.” 36 Stat. 560. The New Mexico Constitution provided a similar guarantee to Pueblo land tenure:

47 (1913), and in *United States v. Candelaria*, 271 U.S. 432, 441 (1926), the Supreme Court made clear that the Pueblos were indeed Indians tribes, subject to the plenary authority of Congress and the exercise of its guardianship over Indians. By this time, as a result of the *Lucero* and *Joseph* decisions, non-Indians had already acquired Pueblo land holdings through sale, adverse possession, delinquent taxes, and other methods. See *Mountain States*, 472 U.S. at 243. The Supreme Court's decision in *Sandoval*, however, cast doubt over the validity of title to lands held by non-Indians within a Pueblo land grant. See, e.g., *id.*

To address these increasing issues of title and ownership of disputed Pueblo lands, Congress enacted the Pueblo Lands Act in 1924. Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636. The primary purpose of the Pueblo Lands Act was to consolidate title in the Pueblos by settling and adjusting conflicting land claims by non-Indians and "secur[ing] for the Indians all of the lands to which they are equitably entitled." S. Rep. No. 492, 68th Cong., 1st Sess., at 5 (1924). This objective was accomplished in large part by the United States bringing quiet title suits against non-Indian claimants. Pueblo Lands Act § 1. The Pueblo Lands Act also established a Pueblo Lands Board, composed of the Attorney General, the Secretary of the Interior (each of whom was authorized to act through an assistant), and a third member appointed by the President. The Pueblo Lands Board examined all non-Indian property claims within the exterior boundaries of the Pueblo land grants. The Board issued a report for each Pueblo describing "any land granted or confirmed to the Pueblo Indians of New Mexico . . . title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act . . ." *Id.* § 2.

The Pueblo Lands Act allowed for the continued occupation of discrete parcels of land by non-Indians who could meet the strict criteria for establishing a valid claim under Section 4 of the Act. Section 4 provided that non-Indians could assert a claim by (a) demonstrating actual adverse possession of the claimed lands under color of title from January 6, 1902 to the date of passage of the Pueblo Lands Act, and payment of all taxes due during that period; or (b) adverse possession from 1889 to 1924 and payment of all taxes due since 1899. *Id.* § 4. In this way, the Pueblo Lands Board administratively investigated and determined the validity of private land claims. Based upon the Board's report, the Attorney General then brought actions to quiet title in federal district court to resolve claims for which the Pueblo Lands Board found no extinguishment of Pueblo title. Parties who could satisfy the Section 4 requirements were able to prove up their private land claims in the district court. Through this process, private land claims within the Pueblo land grants were adjudicated, and, if successful, resulted in specific identification of boundaries for those lands. The successful claimant received a patent in

The people inhabiting this state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.

N.M. Const., Art. XXI, § 2 (adopted Jan. 21, 1911).

which the United States and the Santa Clara Pueblo relinquished all claims to that specific parcel of land.

Thus, by enacting the Pueblo Lands Act, Congress intended to permanently settle title disputes to non-Indian lands with finality, confirm Pueblo land holdings, and protect Pueblo lands from future diminishment and alienation. *See United States v. Thompson*, 941 F.2d 1074, 1078 (10th Cir. 1991); *see also* S. Rep. No. 492 at 11.¹⁶ Pursuant to Section 13 of the Pueblo Lands Act, after concluding that a non-Indian land owner had carried his burden under Section 4, a survey of the Pueblo and non-Indian lands was conducted. The survey notes and plats were then made a part of the patent issued to the non-Indian. *See* Pueblo Lands Act § 13. The survey documents contained metes and bounds descriptions for particular parcels of land and specific acreages for each parcel. Section 13 of the Act also provided that these field notes and plats, certified by the surveyor general of New Mexico, were to be accepted as “competent and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands so described” *Id.* (emphasis added).

Separate and apart from the intent of Congress in enacting the Pueblo Lands Act and the procedures it created in order to settle land title, the Pueblo Lands Act also granted protections to the Pueblo lands that had not been affirmatively stated in prior legislation. Specifically, Section 17 of the Pueblo Lands Act requires that future land transfers be subject to federal and not state law, and protects Pueblo lands against alienation without consent of the Secretary of the Interior. Pueblo Lands Act § 17; *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957). *See also Mountain States*, 472 U.S. at 240. The court in *Alonzo* recognized that Section 17 of the Pueblo Lands Act, by placing restrictions on alienation of Pueblo lands, “insured that the restrictions implicit in the decision in *United States v. Sandoval*, would continue in force as to lands, title to which was found to be in the Pueblos.” *Alonzo*, 249 F.2d at 195 (citation omitted). The court further held that “[t]he power of Congress to reimpose restrictions [on alienation of Pueblo lands] while the Pueblos were still wards of the Nation is not open to question.” *Id.* at 196 (quoting *Brader v. James*, 246 U.S. 88, 96 (1918)); *McCurdy v. United States*, 246 U.S. 263, 273 (1918). Indeed, the court concluded that “[w]e are of the opinion that the restrictions against alienation apply to lands acquired by the Pueblo through purchase, as well as to lands acquired by the Pueblo in any other manner.” *Id.*

The patents issued by the Pueblo Lands Board contained specific metes and bounds descriptions and specific acreages, title to which was thereby extinguished in the

¹⁶ The Pueblo Lands Act also provided for consolidation of each Pueblo’s land holdings through identification of parcels within and adjacent to the exterior boundaries of the Pueblo that could be purchased from non-Indians for transfer to the Pueblo. Pueblo Lands Act § 8. In a 1929 legal opinion concerning the quality of title of the lands to be purchased and restored to the Pueblos, Solicitor E.C. Finney observed that “the tracts to be purchased were originally held by the Indians in communal fee simple ownership and are surrounded by other lands held by the Indians under the same sort of title.” Claims within Indian Pueblos-New Mexico, Dept. of the Interior Solicitor’s Opinion, M-25278, August 7, 1929, (1 Opinions of the Solicitor Related to Indian Affairs 222, 225). Finney concluded that “the intention [of Congress] was to remove these non-Indian claimants by purchase of their rights and restore the lands to their original status.” *Id.*

Pueblo.¹⁷ The Tenth Circuit has recognized that when patents to land from the United States are designated by a phrase referring to the plats made from the surveys, the official plat becomes part of the instrument of conveyance. *Walton v. United States*, 415 F.2d 121, 123 (10th Cir. 1969). The *Walton* court further held that “[t]he importance of patents as the highest evidence of title is well settled.” *Id.* (quoting *United States v. Stone*, 69 U.S. 525 (1864)). It is also well settled law in the Tenth Circuit that “[i]n a public grant nothing passes by implication and, unless the grant is clear and explicit regarding the property conveyed, a construction will be adopted which favors the sovereign rather than the grantee.” *Id.* (emphasis added) (citing *McDonald v. United States*, 119 F.2d 821 (9th Cir. 1941)), *cert. granted*, *Great Northern Ry. Co. v. United States*, 314 U.S. 596, *modified*, 315 U.S. 262 (1942)). Additionally, Section 13 of the Pueblo Lands Act provided that these certified plats and field notes “shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same.” Pueblo Lands Act § 13. Thus, based on the purpose of the Pueblo Lands Act to permanently settle title disputes and consolidate Pueblo land holdings and the description of the final plat issued to the Pueblo and the patents issued to non-Indians pursuant thereto, the conveyances of the non-Indian lands are limited and fixed by the metes and bounds descriptions, and are not ambulatory based on the movement of the river. *See Bauman*, 333 F.2d at 788 (“Under the common law . . . a grantor who owns to the center or thread of the stream . . . conveys to the center of the stream, unless the terms of the grant and the attendant circumstances clearly denote an intention to stop at the edge . . . of the river.”) (emphasis added)).

C. A Call to the Bank and New Mexico Law

Even when looking to state law to address the question presented here, the New Mexico courts provide little to no guidance. There are some New Mexico Supreme Court cases adopting the common law rule that “where a natural object having extension is named as a boundary, the line runs to the middle of the object. This interpretation has been repeatedly held as to non-navigable rivers and lakes” *Tagliaferri v. Caesar Grande*, 120 P. 730, 731 (N.M. 1911); *see also Burnham v. City of Farmington*, 957 P.2d 1163, 1168 (N.M. Ct. App. 1998). However, a review of the reported New Mexico state cases reveals no authority addressing the question of whether a surveyor’s use of the “bank” as a boundary demonstrates an intention to extend the boundary to the centerline of the waterway. In many states, however, courts have taken the position that a call to the bank represents a fixed point rather than the middle of the water course.¹⁸ New Mexico courts

¹⁷ The patent or certificate of title issued to the successful non-Indian claimant “shall have the effect only of a relinquishment” of title by the United States and the Pueblo. Pueblo Lands Act § 13.

¹⁸ *E.g.*, *Glover v. Giraldo*, 824 P.2d 552, 554 (Wyo. 1992) (a boundary definition of the “bank” demonstrates an intention by the grantor to retain ownership of lands below the bank); *Comm’rs Commercial Waterway Dist. No. 2 of King County v. Seattle Factory Sites Co.*, 135 P. 1042, 1047 (Wash. 1913) (“where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee’s rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream.”); *Murphy v. Copeland*, 51 Iowa 515 (1879); *Jenkins v. Cooper*, 50 Ala. 419 (1874); *People ex rel. Burnham v. Jones*, 112 N.Y. 597 (1889); *People ex rel. Comm’rs of Highways v. Board of Sup’rs of Madison County*, 125 Ill. 9

have also not addressed this issue with regard to private land holdings within Pueblo boundaries.

D. Previous Legal Memoranda Addressing the BLM Riparian Policy

The Southwest Regional Solicitor's Office has, on two prior occasions, provided legal memoranda regarding Pueblo lands and the BLM Riparian Policy. First, in 1998, the Southwest Regional Solicitor, Tim Vollmann, authored an opinion responding to a request from BIA regarding a trespass on San Juan Pueblo. "Riparian Trespass Issue at San Juan Pueblo," Tim Vollmann, Feb. 27, 1998 ("Vollmann Opinion"). In his opinion, Vollmann addressed whether a tract of land along the Rio Chama, where the patent designated the eastern boundary as the right bank of the river, created riparian rights to accreted land as the river moved to the east. Vollmann cited the common law rule that a boundary defined by a non-navigable river includes the riparian right of accretion based on subsequent movement of the river. Vollmann Opinion at 1-2. Vollmann noted that "these laws governing riparian ownership are not merely applicable to public lands, but to all forms of riparian ownership." *Id.* at 2. Referring to *Wilson v. Omaha Indian Tribe*, 442 U.S. 655, discussed above, Vollmann also reached the overly broad conclusion that the common law rule governing riparian ownership had been applied successfully to Indian claims. *Id.* As noted *supra*, in *Wilson*, the court held that federal law governed the substantive aspects of the case, although state law standards could be borrowed where appropriate. *Id.* at 672-73.

In reaching his conclusion, Vollmann noted that the Taos Pueblo benefitted from the riparian aspect of a similar patent in a case against the Forest Service, *Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979). Our review of *Andrus*, however, reveals that the case is not analogous to the facts and issues presented by the BLM Riparian Policy here or to the facts at issue in the Vollmann Opinion. The dispute in *Andrus* involved interpretation of measurements provided by competing surveys of a land grant, the eastern boundary of which was defined in a court decree and subsequent survey instructions as "the current of (the) Rio Lucero to its source." *Id.* at 362. The initial survey was found to have improperly located the meander lines for the Rio Lucero at some distance from the actual location of the river. In resolving the matter, the court noted the general rule that "where a surveyor intended to meander the contours of a body of water forming the boundary of a tract of land, the true boundary is the body of water and not the meander lines." *Id.* at 366. The court also noted that the case did not constitute a quiet title action because title to both parcels of land at issue were held by the United States, one parcel held in trust for the Pueblo of Taos and the other under the management of the Forest Service. *Id.* at 365. The court therefore determined that such an adjustment did not affect an actual ownership interest. *Id.*

(1888); 1 Gould, *Waters* (3d ed.), § 199), compare with, *Dellana v. Walker*, 866 S.W. 2d 355, 359 (Tx. App. 1993) (description with meander line creates the stream as the boundary and accretion applies); *Sheldon v. Sevigny*, 272 A.2d 134, 137 (N.H. 1970) (the fact that a deed boundary runs "by the bank" of a river does not denote an intent to limit the conveyance away from the water's edge); *Wilt v. Endicott*, 684 P.2d 595, 600 (Or. Ct. App. 1984) (absent additional evidence, a boundary defined as the "bank" will include riparian rights of accretion).

Importantly, however, Vollmann's opinion does not address or discuss the purpose and intent of the Pueblo Lands Act in resolving non-Indian claims within the Pueblos' boundaries. And, by analogizing to a case where the boundary call at issue was to the river and not to the bank, the Vollmann Opinion did not distinguish between the factual differences presented in the San Juan Pueblo case and those described in *Andrus*.¹⁹ Thus, in applying the common law rule, his opinion fails to examine whether the calls to the bank in the survey field notes or the circumstances of the conveyance taken as a whole indicate an intent to limit the conveyance to the bank of the river. Although Vollmann's opinion appears to apply the common law rule to Pueblo lands, he qualifies his opinion by stating that he would like to know if the Pueblo's legal counsel has other legal theories that could be utilized to assert a claim to the riparian lands on the Pueblo's behalf. *Id.* at 3.

On March 1, 2002, Acting Southwest Regional Solicitor Grant Vaughn issued a memorandum to the BIA regarding the same boundary considerations involving Mr. Chacon within the Santa Clara Pueblo that are at issue here. In a cursory one-page memorandum, Vaughn concluded that, based on the materials provided by the BIA, the boundary defined by the bank of the Rio Grande included the riparian right of accretion. The memorandum does not reference federal or state statutes or case law. The BIA then issued its decision and the Pueblo appealed to the IBIA, which dismissed the appeal on the jurisdictional ground that the BIA Regional Director lacked the authority to issue a decision purporting to determine title to land. *Pueblo of Santa Clara v. Acting Southwest Regional Director, Bureau of Indian Affairs*, 40 IBIA 251 (2005).²⁰

To the extent that the 1998 Vollmann Opinion and the 2002 Acting Regional Solicitor opinion conflict with the present legal opinion, those earlier opinions are hereby superseded.

IV. Legal Analysis

A. Federal Law Controls Interpretation of Pueblo Land Title

In 1858, Congress confirmed title to the Santa Clara Pueblo land grant, which had been recognized by the Spanish and Mexican Governments. Pursuant to this action, the Surveyor-General ordered a survey of the Pueblo boundaries. The 1859 plat and the 1860 final plat included the Rio Grande and counted its acreage in the total acreage of

¹⁹ In his opinion, Vollmann did reference Section 17 of the Pueblo Lands Act, noting that it was viewed by the Supreme Court as comparable to the Indian Non-Intercourse Act, 25 U.S.C. § 177. Vollmann went on to explain that he was applying the riparian rule because the laws governing riparian ownership had been successfully applied to other Indian claims and he had a difficult time seeing a distinction based on Pueblo title. *Id.*

²⁰ See 25 U.S.C. § 176 provides: Whenever it becomes necessary to survey any Indian lands or other reservations, those lands "shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed." See also Op. Sol. M-37000, Boundary dispute Between Santa Ana Pueblo and San Felipe Pueblo (Dec. 5, 2002).

lands within the external boundary of the Pueblo's land grant. As discussed above, typically Spanish and Mexican land grant titles ceased at the water's edge. Boundary descriptions of such property usually referred to a description such as "on the bank," or "along the bank," etc. This rule of law may explain why the 1859 plat specifically delineated separately the acreage of the Rio Grande within the boundary of the Pueblo. Alternatively, it could be that the acreage of the river bed was noted separately to make clear that this acreage was relinquished by the United States in confirming the Pueblo's land grant. Regardless, the acreage of the river bed was ultimately included in total acreage confirmed by Congress and the 1858 Act confirming the Santa Clara Pueblo grant contains a proviso in which the United States relinquished all title and claim to said lands. *See* 11 Stat. 374. As noted in the BLM Manual of Surveying Instructions, "[s]urveys of water boundaries that involve Indian lands . . . are highly variable in nature by virtue of the specific language used in the original Treaty, Executive orders, or congressional acts that describe the Indian interest." BLM Manual of Surveying Instructions, § 8-3 (emphasis added).²¹ Thus, in the case of the Santa Clara Pueblo and taking into account the Indian canons of construction, a reasonable reading of the 1858 Act is that Congress relinquished any claim the United States may have had to the bed of the Rio Grande by the terms of the Act and fee simple title was confirmed to the entire area, including the lands beneath the Rio Grande.²² As discussed below, the underlying survey plat also supports this interpretation.

Additionally, the specific facts and circumstances surrounding the relinquishment of title to Pueblo lands under the Pueblo Lands Act further support this interpretation and weigh strongly against applying the BLM Riparian Policy to determine the boundaries of the Chacon property. Only persons who could demonstrate "open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed," coupled with payment of taxes for these lands from 1889 to 1924, or from 1902 to 1924 if possession was under color of title, would be eligible to plead their claim in the quiet title action brought by the United States on behalf of the Pueblo. Pueblo Lands Act § 4. The structure and language of the Act reflects Congress' intent to limit extinguishment of Indian title and impose a burden of proof on non-Indian claimants. Even when successfully maintained, the plea would only "entitle the claimants so pleading to a decree in favor of them . . . for the premises so claimed by them, respectively, or so much thereof as may be established . . ." Pueblo Lands Act § 5 (emphasis added). To establish a right to a portion of the bed of the Rio Grande, therefore, a claimant would have had to submit persuasive evidence of open and notorious use of the riverbed.²³

²¹ *See infra* p. 7 (exceptions to BLM Surveying Instructions).

²² *See infra* at pp. 8-11.

²³ The Pueblo Lands Act did allow in certain instances the Pueblos to be compensated for lands and any appurtenant water rights that were lost. 43 Stat. at 456 (§6). However, compensation for appurtenant water rights does not change or impact the boundaries of lands that were confirmed by the Pueblo Lands Board. The water rights of non-Indians are subject to New Mexico law, which is a prior appropriation state and requires that water be put to beneficial use in order to be perfected. *See State of New Mexico v. Aamodt*, 537 F.2d 1102, 1112 (10th Cir. 1976); N.M. Stat. Ann. §§ 72-5-1 et seq. & 72-12- 1 et seq. This opinion does not affect the water rights associated with the Chacon property.

Further, our review of the private land claims recorded in the report of the Pueblo Lands Board for Santa Clara Pueblo revealed no cases where the description of private land holdings included a boundary defined by a call to the Rio Grande itself. *See* Report No. 1, Santa Clara Pueblo. Report on Titles to Land Granted or Confirmed to Pueblo Indians Not Extinguished (March 17, 1930) (“Report No. 1, Santa Clara Pueblo”). In all cases where a boundary description referenced the river, the reference was exclusively in the form of a call to the “bank of the Rio Grande or “along the bank of the Rio Grande.” For example, the description for the parcel now held by Charlie Chacon and identified as “Exception No. 1, Part of Private Claim No. 1, Parcel No. 1” in the Santa Clara Pueblo section 2 report reads:

Beginning at an iron post marked cor. No. 1 of this claim, (identical with cor. No. 1 of P.C. 3 P. 1);

Thence S. 88 ° 35’ W., 17.08 chs., to cor. No. 2;

...

Thence N. 89 ° 59’ E., along the north boundary of the Santa Clara Pueblo Grant, 60.63 chs., to the west bank of the Rio Grande;

Thence S. 19 ° 05’ E., along the west bank of the Rio Grande, to cor. No. 1 and place of beginning.

Report No. 1, Santa Clara Pueblo at Exception No. 1, p. 10.²⁴ Our review of survey field notes revealed no examples where a boundary was defined by a call to the river itself. The absence of boundary calls to the river itself in the survey field notes and plats is especially significant in light of Section 13 of the Pueblo Lands Act which requires that these certified plats and field notes “be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same.” *Id.* In conjunction with resolving non-Indian claims under Section 13 of the Act, Section 17 provided additional protections against alienation of Pueblo lands by requiring that future land transfers be subject to federal and not state law, and requiring approval of such transfers by the Secretary of the Interior. Pueblo Lands Act § 17. *See generally* Mountain States, 472 U.S. at 239-247.

²⁴ It is interesting to note that the land description in this Report for Exception No. 3, Private Claim No. 3, Parcel 1, includes no reference to the Rio Grande or the bank of the Rio Grande despite its shared boundary with corner no. 1 of Exception No. 1, which is an iron post located on a point on the west bank of the Rio Grande. Report at Exception No. 3, p.12. The field notes of the survey required by the Pueblo Lands Act of the private claim identified as Exception No. 1, the Chacon property, include three references to the bank of the Rio Grande. The description in the field notes begins “At a point on the bank of the Rio Grande” and, after defining nine angle points, returns “to the bank of the Rio Grande” and proceeds “along river bank, to angle point 1, the place of beginning.” Boundary references to the Rio Grande in the survey field notes for adjacent claims, including that for Exception No. 3 mentioned above, are also limited exclusively to calls to “a point on the bank” or “along the bank” or “to the bank” of the Rio Grande. While these examples are more anecdotal than dispositive, they reflect what appears to be the practice in both the more general land descriptions found in the Reports prepared by the Pueblo Lands Board and the detailed field notes prepared by the surveyors to define the parcel boundary by referencing the bank of the river rather than calling to the center of the river itself.

And, unlike the Town of Atrisco in *Westland*, discussed below, the Pueblos and the United States had a clear interest in limiting the loss of lands through extinguishment of Pueblo title within the Pueblo land grant boundary. Section 6 of the Pueblo Lands Act required the United States to compensate Pueblos for the loss of title to lands that could have been prevented through “seasonable prosecution” by the United States, while Section 8 of the Act directed the Pueblo Lands Board to identify parcels that should be purchased to consolidate Pueblo land title. Even where a claimant could demonstrate adverse possession and tax payments for specific lands as required by Section 4 of the Act, an unstated, future conveyance of ownership of the riverbed adjoining such lands based on the unpredictable vagaries of riverflow would be inconsistent with Congress’ intent to promote land consolidation and limitation of extinguishment of title to non-Indian claimants.

The unique requirements imposed by the Pueblo Lands Act in determining both Pueblo and non-Indian title, coupled with restrictions against alienation of Pueblo lands without Secretarial approval, provide persuasive legal support for the position that the boundaries of non-Indian parcels were intended to be fixed and that Congress did not intend to convey any interest to Pueblo land beyond that defined by the metes and bounds land descriptions. To apply the BLM Riparian Policy here would be contrary to Congressional intent and further diminish Pueblo land holdings within grant boundaries by, in effect, extinguishing title to lands not expressly included in the land descriptions adjudicated by the Pueblo Lands Board. Because Pueblo lands cannot be diminished without Congressional action, the most appropriate reading of the land titles conveyed to non-Indian landowners is to restrict those lands to the specific acreage described in the underlying survey documents. Thus, the manner in which the Santa Clara Pueblo land grant was confirmed by Congress, the purpose and intent of the Pueblo Lands Act, and the field surveys and notes relating to the Chacon property in sections 34 and 35, dictate that Federal law, and not the BLM Riparian Policy, controls in this instance. *See Oklahoma v. Texas*, 258 U.S. at 594-95; BLM Manual of Surveying Instructions, at §§ 1-7, 8-3, 8-57, 8-58. This determination is also consistent with the BLM Manual of Surveying Instructions, which states that a meander line may be considered a fixed boundary “where the facts and circumstances disclose an intention to limit a grant or conveyance to the actual traverse lines.” Section 3-162(4).

B. Even Applying the Common Law Rule, the Circumstances Applicable to Pueblo Land Title Rebut the Extension of the Rule Embodied in the BLM Riparian Policy

In surveying sections 34 and 35, which includes the Chacon property, within the land grant confirmed by Congress for the Santa Clara Pueblo, the BLM applied the common law rule in the Riparian Policy and interpreted a boundary call to the bank to mean a meandering boundary subject to accretion and avulsion. However, the precedent that the BLM relied upon does not apply to the facts presented here. In support of the use of the common law rule, the Policy cites to a 1987 IBIA decision, *Holly H. Baca, Estate of Anthony K. Baca*, 97 IBLA 126 (1987). That case concerned an appeal from a decision of the Albuquerque BLM office rejecting a color-of title application for a 1.468 acre

parcel of land that was generally, though inconsistently, described in title documents and surveys as having the Embudo River as a boundary. Grounding its decision on the specific area of the land conveyed as described in its 1985 survey, the BLM excluded approximately 0.15 acres of land continuing to the Embudo River. The BLM argued that whether or not the river was listed as a boundary, the acreage to the river was not the same as and therefore not part of the acreage conveyed in the deed. *Id.* at 127. The Appellants alleged that a previous survey which appeared to include the 0.15 acres and the fact the prior deeds described the property as bounded on the north by the Embudo River, supported their claim for the additional land to the river.²⁵ *Id.* at 130. The IBLA posited that the difference between the area of land described in the 1985 survey and that conveyed may be due to accretion, and noted that the “generally accepted rule governing accretions holds that title to the accreted land belongs to the riparian owner.” *Id.* The IBLA remanded the matter to the BLM to determine whether the additional land was created by accretion which would indicate that the Appellants owned the land to the river. *Id.* at 131. The *Baca* case can be distinguished from the facts at issue here because that case did not involve a title description based on a “call to the bank” of a stream or river, nor was the land at issue located within a Pueblo land grant. Rather, the case concerned title descriptions that set the boundary of the parcel as “the Embudo River.” Thus, the *Baca* case does not support extension of the common law rule to the facts and circumstances currently before us involving the boundaries of the Chacon property located within the Santa Clara Pueblo land grant.

Moreover, the common law rule embodied in the BLM Riparian Policy is subject to exception if evidence disclosed in the facts and circumstances indicate an intention to limit the grant to the actual traverse lines and not the body of the stream. *Producers Oil Co. v. Hanzen*, 238 U.S. 325, 339 (1915). As noted above, there are no reported New Mexico state court cases which conclude that a call to the bank is sufficient to trigger application of the common law rule that conveyance of title is to the centerline of the river. In finding that a reference to an irrigation ditch as the boundary of a parcel included ownership to the centerline of the ditch, the New Mexico Supreme Court declared that “[w]e deem it, therefore, the law of this jurisdiction that a boundary call for an irrigation ditch goes, in the absence of some contrary intent manifested in the instrument, to the middle of the ditch.” *Tagliaferri*, 120 P. 730 at 732; *see also Burnham* at 1168 (holding that a boundary reference to the Animas River conveyed title to the river’s center point, based on the rule that a “strong presumption exists that a conveyance of land which describes a boundary with width conveys to the center of the boundary monument absent a contrary intent manifested in the conveying instrument in the context of surrounding circumstances”). It follows from these decisions that a boundary

²⁵ Certain of the deeds in the chain of title, but not all, made reference to the parcel as being bounded on the north by the Embudo River but identified the acreage as not including the 0.15 acres. In weighing the facts, the IBLA noted that “where the location of the boundary lines is uncertain by reason of inconsistent or conflicting descriptive calls in the conveyance, the courts have held that the recital of quantity or area of land conveyed or retained will be least influential.” *Holly H. Baca*, 97 IBLA at 130. Thus, given the inconsistency between the boundary calls and the acreage noted in the underlying conveyances that were present in the *Baca* case, the IBLA gave less weight to the acreage totals in determining the boundary of the parcel. There are no such inconsistencies with respect to the Chacon conveyances.

reference to a specific point at the edge of the object, such as the bank of a river, versus the object itself, like a river, can rationally be understood to not mean the boundary call conveyed title to the middle of the object.²⁶

In an unreported New Mexico state court decision brought to our attention by the BLM, the court looked at the intent of conveyances that involved both calls to the river and to the bank of the river, in determining that the parcels were riparian and included title to the middle of the river. *Westland Development Co. v. Craig Ann Tim*, No. CV-98-04022 (2d Jud. Dist. NM, Sept. 18, 2003). The *Westland* case involved deeds issued in 1940 by the Town of Atrisco to 35 heirs of the Atrisco Land Grant.²⁷ The Rio Grande forms the eastern boundary of the Atrisco Land Grant. Of the 35 deeds issued, most described the land being conveyed as bounded on the east by the Rio Grande, while some of the deeds described the boundary as “the bank of the Rio Grande” or “Rio Grande bank.” *Westland* at 3. The court noted that “it was the policy of the Town of Atrisco to deed a five-acre parcel, more or less, to each heir at the time such heir attained their 21st birthday.” *Id.* The court also found that the Town of Atrisco did not reserve or sever riparian rights in its conveyances to the heirs and that the deeds therefore conveyed land to the Rio Grande along with riparian rights. *Id.* Without addressing the difference in the boundary calls, the court concluded that the call to the Rio Grande as the eastern boundary of the tracts controlled over other boundary descriptions in the same deeds and conveyed title to the middle of the of the Rio Grande. *Id.* at 16.

The *Westland* case has not been subjected to review by higher New Mexico courts, and it is notable both for the absence of any reference to state, federal, or common law and for its failure to address the difference in boundary calls between deeds that referred to the property as bounded by the Rio Grande and those that described the property boundary as the bank of the Rio Grande. Given that the properties were all deeded during the same year and for the same purpose to heirs of the Atrisco Land Grant, it was reasonable for the court to assume that the deeds all conveyed ownership to the centerline of the Rio Grande. This would be consistent with the facts and circumstances surrounding those conveyances, notably that (1) the heirs were not adverse to the party conveying the land, (2) calls to the river and calls to the bank of the river were used interchangeably in deed descriptions, surveys and plats, and (3) the Town of Atrisco lacked any discernible future interest in retaining control of that part of the riverbed conferred by the deeds. But, as discussed below, the facts in *Westland* are readily distinguishable from the circumstances surrounding the relinquishment of title to non-Indian claimants on Pueblo lands.

²⁶ See, e.g., *Glover*, 824 P.2d at 554 (a boundary definition of the “bank” demonstrates an intention by the grantor to retain ownership of lands below the bank).

²⁷ This case did not involve Pueblo land, but it does involve lands that were originally part of a Spanish land grant made in the early 1700s to settlers in the Atrisco area. The land was incorporated in 1892 under the laws of the Territory of New Mexico as the Town of Atrisco, upon the petition of more than 225 persons claiming to be owners of the Atrisco Grant. See *Armijo v. Town of Atrisco*, 239 P2d 535, 536-37 (NM 1951). In 1905, the United States issued a patent granting title in fee simple of 82,728 acres to the Town of Atrisco. *Id.* at 537-38. At the time of this 1951 court decision, the corporation had “parted with title to more than forty thousand acres of the grant.” *Id.* at 540. The Pueblo Lands Act is not applicable to those lands.

Most importantly, in the only other New Mexico case considering land defined by a call to the bank that we could identify, the court came to a very different conclusion from that in *Westlands*. In an unpublished federal district court decision that addressed the meaning of a call to the west bank of the Pecos River, the court found that the conveyance instrument clearly indicated that a call to the bank did not mean a call to the center of the river. *Shannon v. United States Forest Service*, Case No. CIV 02-717 BB/WDS, Court's Amended Findings of Fact and Conclusions of Law (D.N.M. Aug. 26, 2005). The plaintiff, Shannon, owned land fronting the east bank of the Pecos River across the river from land acquired by the United States Forest Service. *Id.* Amended Findings of Fact ¶ 2. The underlying deed of the property purchased by the Forest Service included multiple references of the boundary as being "along the West bank of the Pecos River." *Id.* ¶ 3. The parties did not contest that Shannon's deed granted him the tract on the east side of the river up to the river's centerline. *Id.* ¶ 12. Shannon, however, maintained that the eastern boundary to the Forest Service property was a livestock fence some distance farther west from the west bank of the river, based on an understanding Shannon had with the previous owners of the property acquired by the Forest Service. *Id.* The Forest Service's Land Surveyor who investigated the boundary between the Forest Service and the Shannon properties determined that:

The deed to the United States calls not for the center of the Pecos River, but the 'West bank.' That is the limiting call that tells us the Federal boundary is the west bank of the Pecos River and not the centerline If the deed to the U.S. had stated, 'to the Pecos River,' or said, 'bounded on the east by the Pecos River.' [sic] The property line would be the center of the Pecos River.

Id. ¶ 7. The Surveyor went on to state that "If asked to locate the property of the United States I would interpret the title line to be the mean high water mark of the west bank of the Pecos River." *Id.* ¶ 8. The court found that "[t]he deed's language with reference to the west bank is limiting language that means exactly what it says. The west bank of the Pecos River is the eastern boundary of the Forest Service property." *Id.* ¶ 9. The court also concluded that "[t]he deeds in the Forest Service chain of title are not ambiguous. The terminology 'along the west bank of the Pecos River' is a call evidencing the clear intention of the original grantor to establish the line along the bank of the river as the boundary." *Shannon*, Amended Conclusions of Law ¶ 5. The court's decision in *Shannon* interpreted a call to the bank as not qualifying for extension of the common law rule adopted in the BLM Riparian Policy.

Cases involving Indian lands that appear to grant riparian rights to lands described at least in part by a call to the bank of the river reveal important factual differences from those found on Pueblo land grants. In *Choctaw and Chickasaw Nations v. Seay*, the Tenth Circuit found that lots acquired by an individual from the sale of Choctaw and Chickasaw Nation tribal lands included riparian rights where the underlying conveyances from the United States included calls to the Red River along with calls such as "beginning on the north bank of the Red River," or bounded by a line running "down Red River" or "up Red River." *Choctaw and Chickasaw Nations*, 235 F.2d at 34. The determination that

title to the lots on the north bank of the Red River also conveyed the riverbed to the south bank of the Red River was not based, however, on the court's interpretation of a call to the bank of the river. The court adopted the common law rule that "when . . . the grantor owns the entire bed of the stream, but no part of the upland on the opposite side, in the absence of a clear indication to a contrary intention from the terms of the grant and the attendant circumstances, the grant will be construed to convey to the grantee the entire bed of the stream." *Id.* at 35. However, regardless of whether the Nations' owned title the riverbed originally, the court concluded that the Act of July 1, 1902 "clearly indicated a purpose and intent on the part of Congress to dispose of all of the residue of lands . . . in keeping with a policy . . . which looked to the allotment of tribal lands to individuals and the gradual termination of the tribes as entities." *Id.* at 36.

The court explained its decision by noting that all tribal lands of the Choctaw and Chickasaw Nations were to be distributed through allotment of the land in severalty to the members of the two tribes, with sale by the United States of any excess remaining after all allotments were distributed. *Id.* at 34 (citing the Act of July 1, 1902, 32 Stat. 641, §§ 12, 13, 14). The facts of the *Choctaw and Chickasaw Nations* case therefore differ markedly from those presented by the adverse possession claims within Pueblo land grants on all three counts discussed above in our review of *Westlands*. First, the purchaser of the lots at issue in the *Choctaw and Chickasaw Nations* case was not adverse to the tribes, but rather purchased the lots at a publicly advertised sale. *Choctaw and Chickasaw Nations*, 235 F.2d at 34-35. Second, the deed and survey descriptions were predominantly calls to the Red River, rather than to the bank of the river. Third, the court concluded that the Nations did not retain any ownership in the riverbed because all tribal land was to be allotted to tribal members or sold by the United States after all the allotments were made. Nothing in the language of the deeds or the circumstances of the lands sales would rebut the presumption that title to the center of the river was conveyed to individuals. These facts are distinct from the situation here where a federally-recognized tribe has present ownership held in trust by the United States and a private owner holds title to a parcel of land within that tribe's congressionally recognized boundaries.

In summary, none of the cases identified applies specifically to Pueblo lands or bars an interpretation that a call to the bank presupposes that title is conveyed to the middle of the river. In fact, case law supports the position that any assumption that lands bounded by a river are riparian and therefore convey title to the middle of the river is rebuttable by the terms of the title documents and the circumstances of the conveyance. Where survey descriptions uniformly set the boundary at a point on the bank of a river, or otherwise restrict boundary calls to the bank and not to the river itself, this may be understood as evidence of an intent to limit the conveyance to a defined point on dry land. Here, the purpose and intent of the Pueblo Lands Act and the field surveys and notes relating to the Chacon property in sections 34 and 35 support our conclusion that a call to the bank creates a fixed boundary and rebuts application of the common law rule set forth in the BLM Riparian Policy. As the federal district court in *Shannon* declared, "the intention of the parties 'as gathered from the four corners of a deed, is the pole star of construction, and . . . all parts of the deed must be examined together, for purpose of ascertaining the

intention.”’ Shannon, Amended Conclusions of Law ¶ 4 (quoting *Atlantic Refining Co. v. Beach*, 436 P.2d 107, (N.M. 1968), which in turn quoted *Sharpe v. Smith*, 360 P.2d 917, 918 (N.M. 1961)).

V. Conclusion

The BLM Riparian Policy is informed by the common law rule that when a grant conveys a parcel of land bounded by a non-navigable river, the grant generally includes the exclusive right and title to the center of the stream, unless the terms of the grant and the attendant circumstances clearly denote an intention to stop at the edge or margin of the river. However, there are circumstances where federal law should control the determination of property boundaries. Moreover, extension of the common law rule embodied in the BLM Riparian Policy is rebuttable by evidence in the language used in the survey descriptions and title documents, or from the circumstances of the conveyance. Thus, if evidence of an intent to limit the conveyance to the physical boundaries is found, the applicable exceptions in the BLM Riparian Policy must apply.²⁸

Accordingly, it is our legal position that federal law controls in this instance, evidenced by the Treaty of Guadalupe Hidalgo and Congress’ clear intent expressed in the Pueblo Lands Act of 1924, which limited non-Indian claims and protected the Pueblos from future alienation of additional lands within Pueblo grant boundaries without consent of the Secretary. Moreover, the land descriptions in the field notes referring to the bank of the Rio Grande, and the requirement that non-Indian title could only be founded upon proof of adverse possession and tax payment for specific lands, effectively rejects any conclusion that a call to the bank or other river related component of the river indicates riparian ownership. Thus, the association of a call to “the bank” of the river with a call to the river itself in the BLM Riparian Policy is not justified for the Chacon lands located within sections 34 and 35 of the Santa Clara Pueblo. It is our conclusion that Congress did not intend to convey any part of the bed of the river to non-Indian claimants, where the surveys underlying the patents issued by the Pueblo Lands Board contained specific metes and bounds descriptions and included a call to the bank of the river or related component of the river, rather than a call to the river itself.

We therefore advise the BLM to not apply its Riparian Policy to private claims to lands within sections 34 and 35 of the Santa Clara Pueblo as federal law controls and indicates an intention to impose a fixed boundary.

Attachments

²⁸ See *supra* at p. 7.

POLICY STATEMENT

The following statement is the New Mexico State Office policy for riparian boundaries of Small Holding Claims and similar grants within the State of New Mexico.

I. Background

Small Holding claims are private land claims originally granted by the sovereigns of Spain and Mexico to their citizens in areas of what is now the American Southwest. At the conclusion of the war with Mexico, the United States recognized these foreign grants in Article VIII of the 1848 Treaty of Guadalupe Hidalgo. Although title to these grants was recognized, locating the boundaries and determining the extent of ownership of these grants has proved difficult when river boundaries comprise a portion of the grants' descriptions and the difference in law between the United States, Spain, and Mexico.

Spanish and Mexican law held that the sovereign owned both the water and the bed in which it lay or flowed, whether navigable or not.¹ Under American legal theories, only the water and the bed under waters navigable in fact or in law belonged to the States. For non-navigable water bodies, the upland owners own the bed to the center of the water body proportional to their upland frontage.

The U.S. Supreme Court ruled in *United States v. Rio Grande Dam & Irrigation Company et. al.*, (19 Sup. Ct. 770), that the Rio Grande was non-navigable within the territory of New Mexico. No subsequent Supreme Court cases have overruled this decision.

Although these Small Holding Claims are in the United States, the Acts of Congress of July 22, 1854 and March 3, 1891, required application of Spanish and Mexican law. These Acts stated "it shall be the duty of the Surveyor General, and such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain or Mexico;" and "nor a greater quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim", respectively.

II. Authorities

Extensive examination and research has found no conclusive documentation as to exactly how the United States Government intended to treat Small Holding Claims' water boundaries. This policy statement relied on the following resources:

- 1) Holly H. Baca, Estate of Anthony K. Baca, Interior Board of Land Appeals, #85-839, decided April 30, 1987, IBLA 126.
- 2) Bureau of Land Management, Manual of Surveying Instructions, 1973.
- 3) Numerous examples of United States case law which universally attach riparian rights to upland adjoiners unless specifically restricted by the grantor.

- 4) Discussions with Department of the Interior Field Solicitors and past and present Bureau of Land Management Riparian Boundary Specialists.
- 5) Annual reports of the Secretary of the Interior and the Commissioner of the General Land Office to Congress between the years 1848 to 1930.
- 6) Clark on Surveying and Boundaries, 3d edition, by John S. Grimes.

III. Riparian Nature of Claims

From the above resources, two major conclusions are reached and will be considered policy for this office:

- 1) All claims with boundary calls in the original field notes to a river bank or a related component of the river, e.g., gravel bars, water, or bed, will be considered riparian.
- 2) With no river related calls, even though the claim was originally located in the vicinity of a river and a portion of the boundary approximately traversed the waters edge, the claim boundary is considered fixed. Later erosion of the claim by river movement will not create riparian rights in the formerly upland claim other than allowing future accretions to restore the original area of the claim.

If a claim is determined riparian, the final question is to what line along or within the river does title extend. "Where a description touches in water, the boundary line may be either (a) the meander line; (b) the high-water mark; (c) the low-water mark; (d) the center line of the water at the time the boundary was first established (medial line); or (e) the thread or center of the main current of a flowing stream."²

IV. Bed Ownership

The following three probable scenarios are individually described with bed ownership identified on New Mexico's non-navigable streams.

- 1) A single Small Holding Claim is located on both banks and crosses the river within the claim lines.

In this case, the owner of the Small Holding Claim owns the bed of the river within the claim lines.

- 2) A Small Holding Claim is located on one bank with a government lot on the opposite bank appearing to extend across the river.

This situation requires the establishment of a median line between new meanders on the left and right bank. This line will be the ambulatory boundary dividing the bed between the private holding and the government lot.

3)The land on both banks of the river are defined and lotted individually, and in addition, the river bed is lotted, separate and apart from the upland.

"The government conveyance of title to a fractional subdivision fronting upon a non-navigable stream, unless specific reservations are indicated, either in the patent from the federal government or in the laws of the state in which the land is located, carries ownership to the middle of the stream"³ (emphasis added). When parcels of land meet Part III-1, described above, Cadastral Survey recognizes riparian ownership to the medial line. When parcels of land meet Part III-2, described above, the upland owner would not enjoy riparian rights.

1

Hamilton's Mexican Law, 1882, pgs. 110-111.

2

Clark on Surveying and Boundaries, section 608, p. 701.

3

Ibid., section 608, p. 701.

PLAT
of the
PUEBLO DE SANTA CLARA

PLAT
OF THE
PUEBLO de SANTA CLARA
FINALLY CONFIRMED
Surveyed under Contract with the
SURVEYOR GEN. of NEW MEXICO
BY John W. Garrison
DEP. SUR.
Containing 17368.52 Acres

Scale 40 chains to one inch.

PUEBLO GRANTS						
Letter	Name of Confirmer	Date of Report	By what law confirmed	Description	Area	
K	Santa Clara	Sept. 20 th 1856	Dec. 22 ^d 1858	571 20-21 N. 8 E.	17368.52	

Boundaries

No.	Course	Dist ^s
1	South	2. 45. 00
2	East	2. 48. 33 1/2
3	North	5. 14. 53
4	West	5. 18. 66 1/2
5	South	5. 15. 19
6	East	2. 52. 61
		Aggregate 25. 35. 00

Variation 15° 29' N.

The field notes of the "Pueblo de Santa Clara" and from which this plat has been made out, have been examined and approved, and are on file in this Office.
U. S. Surveyor General's Office
Santa Fe New Mexico
September 15th 1860.

J. P. Wilbur
Surveyor General, New Mexico.



K