United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 5 2000

M-37000

MEMORANDUM

TO: Secretary

FROM: Solicitor

SUBJECT: Boundary Dispute Between Santa Ana Pueblo and San Felipe Pueblo: The Secretary's Authority to Correct Erroneous Surveys, Revisiting Part IV of Solicitor's Opinion on "Pueblo of Sandia Boundary," 96 I.D. 331 (1988).

On December 22, 1989, the Pueblo of Santa Ana filed a petition with the Department to correct the survey of the boundary between it and the Pueblo of San Felipe in Sandoval County, New Mexico. Disagreement over the location of this boundary has plagued use of the disputed territory for many years. In 1980, the Bureau of Indian Affairs (BIA) granted the New Mexico State Highway Department an easement through the area for the construction of Interstate Highway I-25 between Albuquerque and Santa Fe. BIA put the right-of-way compensation in escrow until the ownership could be resolved, and won a court challenge to the escrow arrangement brought by the Pueblo of San Felipe. Pueblo of San Felipe v. Hodel, 770 F.2d 915 (10th Cir. 1985). The underlying boundary dispute remains unresolved, and the escrow continues to grow. The balance as of August 3, 2000, is $890,410.33.

The petition filed by the Pueblo of Santa Ana in 1989 was precipitated by a decision from the federal court of appeals, Pueblo of Santa Ana v. Baca, 844 F.2d 708 (10th Cir. 1988). This decision affirmed a federal district court ruling that an 1813 Spanish adjudication of the boundary of the El Ranchito Grant governed the Santa Ana claim of title to lands held by certain individuals pursuant to a patent issued by the General Land Office (GLO). The El Ranchito Grant had been purchased by the Pueblo of Santa Ana in the 18th century. The conflicting federal patent that overlapped with the El Ranchito Grant had been issued as a result of the 1928 Report of the Pueblo Lands Board on the San Felipe Pueblo Grant. That Report had relied, in turn, on 1859 and 1907 government surveys of the San Felipe Pueblo Grant. Thus, the 1859 and 1907 surveys had put the effect of the 1813 Spanish adjudication in doubt. The Pueblo of San Felipe was not a party to the lawsuit decided in 1988, however, and is thus not bound by the judgment in that case.

Santa Ana's petition calls for the Department to exercise its authority over surveys found in 25 U.S.C. § 176. This statute, first enacted in 1864,[1] reads, in its entirety:

> Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same 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.[2]

In Part IV of a 1988 Opinion, then-Solicitor Ralph Tarr ruled (and Secretary Hodel concurred) that the Department did not have the authority to consider an Indian boundary claim which pre-dates 1946, notwithstanding that the Department's statutory survey authority extends to Indian lands, that other statutes give the Secretary the authority to correct patents, and there has been a longstanding practice to exercise this authority on Indian lands. Pueblo of Sandia Boundary, M-36963, 96 I.D. 331, 357-361 (December 9, 1988) (hereafter, Tarr Opinion). This Opinion would not permit resurveying to correct allegedly erroneous surveys where boundary claims of Indians were involved, even if a claim that lands were unlawfully excluded from an Indian reservation is meritorious. The Solicitor found that such resurveying was barred by the Quiet Title Act (QTA), 28 U.S.C. § 2409a, and "more definitive[ly]" by the Indian Claims Commission Act of 1946 (ICCA), 60 Stat.1049 (formerly codified as 25 U.S.C. § 70).[3]

San Felipe argues that the Tarr Opinion would bar consideration of Santa Ana's petition. It also argues that 25 U.S.C. § 398d, a 1927 enactment which prohibits changes in the boundaries of Indian reservations without an Act of Congress, also forecloses consideration of the Santa Ana's petition. Santa Ana disagrees, arguing that the Tarr Opinion is either distinguishable or simply

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[1] Rev. Stat. § 2115; Act of April 8, 1864, c. 48, §6, 13 Stat. 41.

[2] Originally the statute made the GLO responsible for the survey, but the Bureau of Land Management (BLM) was substituted for the GLO when the latter was combined with the Grazing Service to form the BLM in 1946.

[3] On July 18, 1998, the U.S. District Court for the District of Columbia vacated the Tarr Opinion, and remanded the Sandia boundary matter back to the Department. Pueblo of Sandia v. Babbitt, Civ. No. 94-2624. The U.S. and intervenor parties filed notices of appeal. The U.S. moved to dismiss the appeals earlier this year. The U.S. Court of Appeals very recently granted that motion, observing that the Department must "reconsider its position that it lacks the legal authority to issue a corrected survey." Pueblo of Sandia v. Babbitt, Nos. 98-5428 and 98-5451 (D.C. Cir., Nov. 17, 2000), slip op. p. 7.

On the underlying Sandia boundary dispute, further proceedings are pending. The United States and the Sandia Pueblo and the Sandia Peak Tram Company have reached an agreement to settle the Sandia boundary matter, and have submitted a legislative settlement proposal to the Congress. This Opinion does not deal further with the Sandia boundary matter.

wrong, and that the 1927 statute is inapplicable. This Opinion addresses whether the Department retains the authority to survey the boundary of Indian lands and therefore whether we may address the merits of the Santa Ana petition.

I. Does the Tarr Opinion Apply?

Part IV of the Tarr Opinion discussed "the fundamental authority of the Department to consider and act upon" the Pueblo of Sandia's claim that the eastern boundary of its 1748 Spanish land grant had been incorrectly located in an 1859 federal survey by one R.E. Clements, and that the Department should adjust the boundary to reflect the land grant boundaries accurately. 96 I.D. at 357. Solicitor Tarr concluded that "the Secretary has no authority to take the type of action requested by the Pueblo" because the "Department would, in our view, indisputably be barred by the ICCA from taking administrative action on it and possibly by the Quiet Title Act as well." 96 I..D. at 332, 360.

The Pueblo of Santa Ana first seeks to distinguish the context of the Tarr Opinion from its situation. It argues that unlike Sandia, (1) the Pueblo of Santa Ana is not seeking to "add" lands to its reservation; (2) the Santa Ana claim had been adjudicated at an earlier time (in 1813), so that all it is seeking is correction of subsequent erroneous federal surveys; and (3) the Santa Ana claim involves an overlap with another Pueblo, and affects no other federal lands or private lands.

These proferred distinctions are unpersuasive. First, although there are differences in the history of the two claims, the Pueblo of Sandia is, like the Pueblo of Santa Ana, not claiming to "add" lands to its grant. Rather, it too is arguing that federal surveys had erroneously excluded a portion of the grant.[4] Second, nothing in the Tarr Opinion suggests that a prior adjudication of the Sandia claim (akin to the 1813 Spanish adjudication of the Pueblo of Santa Ana boundary) would have made a difference in the outcome. Third, and likewise, nothing in the Tarr Opinion suggests a different outcome had the Sandia dispute been between the Pueblo and another tribe. Instead, the Opinion strongly indicates that boundary disputes with any other party (federal, tribal, state, or private) which arose prior to 1946 are barred by the ICCA, and probably by the 12-year limitation period in the QTA as well.[5]

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[4] The Pueblo of Sandia asserts that the 1858 Congressional confirmation of the Surveyor-General's 1856 report that its eastern boundary was "on the . . . main ridge called Sandia" recognized Pueblo title to the greater area.

[5] Regarding the QTA, it would seem easier to construe the QTA as a bar to the exercise of the Department's survey authority where a boundary dispute is between two tribes, because the QTA expressly bars claims to trust or restricted Indian lands (*see* 28 U.S.C. § 2409a(a)), and Santa Ana's petition is in effect a claim to land which it says was erroneously added to the San Felipe Pueblo Grant.

Santa Ana also suggests that the relevant discussion in Part IV of the Tarr Opinion is *dicta.* The statements of the Opinion's conclusions at both the beginning (page 332) and the end (page 361) of the Opinion are clear, however, that the question of the "fundamental authority" of the Secretary to resolve boundary claims was squarely addressed and was an independent ground for the ultimate outcome - the rejection of the Sandia claim.

II. Part IV of the Tarr Opinion Reconsidered

We are left with the Pueblo of Santa Ana's final argument, that the Tarr Opinion is wrong in its construction of the ICCA and the QTA. The question presented is whether the Secretary retains his authority under 25 U.S.C. § 176, and other statutes governing surveys of Indian and public lands and the correction of patents, to correct the boundaries of Indian reservations. Implicit in this authority is review by the Office of the Solicitor whether the correct legal instructions are being used in the conduct of surveys. See, e.g., State of Alaska, 127 IBLA 1, 8 (1993).[6]

After careful consideration, for the reasons expressed below, we believe the conclusion in Part IV of the Tarr Opinion -- that the Department may not exercise its statutory authority to survey lands where an Indian tribe claims that its boundary was incorrectly surveyed -- is inconsistent with the applicable statutes, as informed by past practice and judicial guidance, and leads to anomalous results. Therefore, Part IV of the Tarr Opinion is overruled and should no longer be relied upon to deny the continuing authority of the Secretary to survey and resurvey Indian reservations.[7]

Looking first at the QTA, as the Tarr Opinion observes, Congress enacted the QTA in 1972 as a limited waiver of the United States' sovereign immunity to allow it to be sued in civil actions to adjudicate title disputes involving real property. The QTA contains a 12-year statute of limitations. 28 U.S.C. § 2409a(g). Nothing in the QTA, however, mentions the Department's statutory authority over surveys. This is not surprising. The QTA deals exclusively with federal court jurisdiction and the sovereign immunity of the United States. At least absent compelling indications in the statute or its legislative history, which are absent here, it seems reasonable to assume that a statute solely concerned with judicial jurisdiction ought not be construed to repeal by implication an existing statute that gives the executive the power to conduct surveys.

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[6] "Survey authority" refers to the Department's authority to create or reestablish boundaries of tracts of lands. The correction of an existing boundary is call a "resurvey," and is generally conducted through a two-step process. First a resurvey is conducted in accordance with the BLM's survey manual. See Manual of Instructions for the Survey of Public lands of the United States (1973). Second, the results of the survey are accepted by the Director of the BLM. See 43 CFR § 9180.0-3 (1999). The acceptance of a resurvey establishes a new boundary except where the resurveyed boundary conflicts with private property rights.

[7] The Tarr Opinion, including Part IV, has been vacated by court order in connection with the Sandia boundary dispute. See footnote 3, above.

Yet the Tarr Opinion makes (or at least strongly suggests) just such an unfounded logical leap: "[B]ecause the Quiet Title Act involves only a limited waiver of sovereign immunity, it is possible that administrative consideration of the Pueblo's claim would also be precluded by the 12-year statute of limitations." 96 I.D. at 358. Congress made the QTA the exclusive basis for jurisdiction over suits that challenged the United States' title to real property, Block v. North Dakota, 461 U.S. 273, 285-86 (1983), and included within it a statute of limitations so as to bring to a close within a reasonable time the opportunity for entities outside the government to contest title to federal lands. But that is a quite different thing from limiting or abolishing a pre-existing power in the Department of the Interior to determine whether it has itself made survey mistakes in the past and to move to correct them. There is no persuasive evidence that, in doing the former, Congress also implicitly did the latter. The QTA ought not to be construed as effectively ending a longstanding congressionally delegated power in the Executive Branch to survey federal lands, which includes the power to correct alleged mistakes in earlier surveys.[8]

Turning now to the ICCA, it is, as the Tarr Opinion notes, more specific than the QTA. Enacted in 1946 (Public Law 79-726, 60 Stat. 1049), it created the Indian Claims Commission (ICC) to adjudicate a broad range of claims by Indian tribes against the United States for past unfair treatment. Its legislative history is replete with statements by Members of Congress that it was intended to be a final accounting by the United States for its previous dealings with Indian tribes.[9] The Tarr Opinion specifically rests on Section 12 of the Act, which states:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act [August 13, 1946] and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

60 Stat. 1052.[10] The Tarr Opinion construed this section as meaning that the ICC would be the

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[8] The position of the United States in Pueblo of Sandia v. Babbitt is that the United States has not waived its sovereign immunity in the QTA (or anywhere else) to permit a suit to force the Department to exercise its survey authority to correct allegedly erroneous boundary locations. This does not mean, however, that the Department may not act on its own to exercise its survey authority in such circumstances.

[9] Although the ICCA did not explicitly address the question, the ICC construed it as limiting the available relief to money damages, rather than return of land deemed improperly taken. See generally Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455, 1461 (10th Cir. 1987).

[10] The last clause in the quoted portion of the statute has not prevented subsequent Congresses from enacting new laws allowing further consideration of Indian claims. See, e.g., Act of September 18, 1996, P.L. 104-198, 110 Stat. 2418, which confers jurisdiction on the U.S. Court of Federal Claims to hear the claims of the Pueblo of Isleta "notwithstanding ... section 12

exclusive forum to hear any and all claims by tribes against the federal government which arose prior to 1946. It emphasized the section's prohibition on "administrative agency" consideration of an Indian claim in concluding that the ICCA precludes exercise of the Department's statutory authority to resurvey the Pueblo of Sandia's Spanish land grant. See 96 I.D. at 359.

The Opinion cites no judicial or administrative precedent for the proposition that the Secretary's survey authority under 25 U.S.C. § 176 is repealed by implication or otherwise barred by the ICCA. It relies generally on the court of appeals' decision in Navajo Tribe v. State of New Mexico, 809 F.2d 1455 (10th Cir. 1987), characterizing it as "dispositively put[ting] to rest all stale historical claims such as Sandia Pueblo's . . .." 96 I.D. at 359. There the court held that the Tribe's claim -- that the government had never effectively extinguished the Tribe's title to lands that had been added to its reservation in 1907 by executive order -- was barred by the Tribe's failure to pursue the claim before the ICCA. Significantly, however, the case involved no question of alleged erroneous surveys, and therefore did not implicate the Department's authority to survey lands as a matter of executive discretion. For that reason, the court did not consider the question whether the ICCA had repealed that authority by implication. Thus, the court's decision is not strong support for the Tarr Opinion.

The only case cited in the Tarr Opinion which actually addressed the Department's statutory authority to conduct surveys of Indian land is Pueblo of Taos v. Andrus, 475 F.Supp. 359 (D.D.C. 1979), which in fact upheld the exercise of the Department's authority. The Tarr Opinion tersely characterized that decision as "questionably reasoned," and regarded it as "inapposite because the Taos Pueblo's claim was not a pre-1946 claim." 96 I.D. at 360, n.20. In fact, however, uncertainty over the boundary of the Taos Pueblo dated from the United States' condemnation of a tract of land for the Pueblo in proceedings begun in 1939 and completed in 1941. The survey of the land acquired had been conducted for the United States by one Walker in 1893. In 1945, shortly after the U.S. had acquired the land for the Pueblo, the U.S. Geological Survey prepared a map which located the boundary in question in a different place from the Walker survey. The Forest Service acquired the adjacent tract in 1950. In 1976 the Acting Solicitor of the Department concluded the Walker survey was in error and recommended that the boundary be corrected, and the Secretary agreed in early 1977. 83 I.D. 529. The new survey was completed in 1978 and located the boundary in the Pueblo's favor. Attorney General Bell then opined that the condemnation proceedings completed in 1941 had actually rested on the Walker survey and effectively set aside the resurvey. 43 Op.A.G. 130 (1978). The Pueblo sued. The district court held that the QTA was no bar to reviewing the action of the Department in ordering a resurvey and the Attorney General in setting it aside.[11]

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of the [ICCA] ...."

[11] For the reasons stated in the U.S. brief on appeal in the Pueblo of Sandia case, see footnote 8, above, we believe the court's decision in Pueblo of Taos v. Andrus allowing the Pueblo to review the executive branch's actions under the QTA is wrong. But the court's error did not undermine its view of the continued viability of the Department's statutory survey

For present purposes, the pertinent facts of the Taos Pueblo matter are these: The Department decided in 1976 that it had authority to initiate a resurvey to reexamine what was claimed to be an erroneous government survey conducted in 1893, and put in question by the acquisition of land for the Pueblo in 1941. Neither the Solicitor of the Department of the Interior nor the Attorney General of the United States[12] nor the reviewing court questioned the authority of the Department to conduct a resurvey of the boundary in question. 475 F.Supp. at 366.

Furthermore, the Tarr Opinion does not cite any legislative history of the ICCA suggesting that the Secretary's longstanding survey authority was being curtailed or repealed, and we have found none. What became section 12 of the ICCA appeared in early bills; see, e.g., S. 2731 (74th Cong. 1st sess.) § 4 (1935), and there were insignificant changes in its language up to enactment. Then Representative Henry Jackson, Chair of the Indian Affairs Committee, briefly discussed section 12 on the floor of the House shortly before it was adopted. While Jackson spoke broadly of section 12 applying to "all Indian claims," and dealing with "the entire problem as it now exists," he did not say anything that would indicate section 12 was repealing, as far as Indian tribes were concerned, the Secretary's longstanding authority to correct erroneous surveys. 92 Cong. Rec. 5313 (1946).

The Tarr Opinion reasons that the ICCA broadly bars all "claims" by a tribe for federal land, other than in accordance with its procedures. So viewed, the ICCA was deemed to repeal not the statute vesting the Department with authority to survey lands, but to repeal the exercise of that authority in circumstances in which an Indian claim is implicated. But nothing in the ICCA or its legislative history sweeps so broadly. Nor is there anything in the jurisprudence of the Indian Claims Commission which suggests such a conclusion. The ICCA creates a forum for adjudicating tribal claims of federal wrongdoing, including, some fragments of legislative history indicate, claims of erroneous surveys.[13] But it is a considerable stretch to read it as nullifying a longstanding authority in the Department of the Interior (dating from 1864) to exercise administrative authority over land surveys, with the ability to reexamine and if appropriate correct factual mistakes in surveys, whether or not they involve land to which Indians have claims. Put another way, land surveys practically always stem from some "claim" to the land in

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authority.

[12] The Attorney General's opinion recognized an executive responsibility to determine the geographical extent of the government's trust responsibility. 43 Op.A.G. 130, 138 (1978).

[13] Rep. Jackson at one point referred to "a boundary ... incorrectly drawn under the treaty" as an example of a claim which might be brought before the ICC under Section 2 of the ICCA for a failure of the U.S. to conduct "fair and honorable dealings". 92 Cong. Record at 5313 (1946). See also testimony of Joseph C. McCaskill, Assistant Commissioner of the Bureau of Indian Affairs, Hearing before the House Committee on Indian Affairs on H.R. 1198 and 1341, 79th Cong., 1st. Sess., March 28, 1945, at p. 72.

question. A request that the Department exercise its survey authority is presumably based on the requester's belief that a boundary has been drawn against the interest of the requester. Of course, a resurvey may have the opposite result, confirming the original survey or even redrawing the boundary against the interest of the requester. It would, of course, be difficult, if not bizarre, to find that the Department has continuing authority to conduct surveys depending on the results; *i.e.,* if a resurvey of the boundary of Indian lands concluded no lands should be added to a reservation, or that lands should be subtracted from a reservation, the Department would have the authority to conduct the resurvey, but if the resurvey would add lands to the reservation, then the Department had no authority to conduct it.

The statutory authority of the Department to conduct surveys and resurveys of public lands and Indian reservations is an important, if usually low profile, component of its land management and trust responsibilities. See, e.g., Knight v. Land Association, 142 U.S. 161 (1891). Incorrectly placed fence lines and other boundaries based on erroneous surveys are common enough, especially in the West where most federal and Indian land is found. See, e.g., First American Title Ins. Co. v. BLM, Fort Mojave Tribe, 9 OHA 17, 98 I.D. 164 (1991) (river movements called into question the continuing utility of a 1905 survey, and a new survey was done in 1961, which was challenged in this administrative litigation); Appeal of Continental Oil Co., 68 I.D. 337 (1961) (involving accuracy of boundary between two oil and gas leases on the Navajo Reservation). In Lane v. Darlington, 249 U.S. 331 (1919), the Supreme Court upheld the Secretary's authority to resurvey a Mexican land grant which had been patented by the United States, in order to locate the boundary of contiguous public land. The Court held that the resurvey did not constitute an adjudication of the rights taken by the patentee, observing:

> So long as the United States has not conveyed its land, it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as a result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right."

249 U.S. at 333 (citation omitted). See also 43 U.S.C. § 772, discussed below.

The Tarr Opinion's conclusion that the ICCA (and probably the QTA) have deprived the Department of its longstanding authority where Indian land is involved would render the Department powerless to address minor adjustments as well as major errors in land boundaries where Indians happen to be involved. We should be reluctant to imply such a result without more persuasive evidence in the text or history of these statutes of such a purpose. To the contrary, it is not difficult to read those statutes as being consistent with a continued vitality of the Department's ability to survey and resurvey lands.

The Tarr Opinion contains little discussion of the various statutes which authorize the Secretary

to perform these various land management and trust responsibilities. In addition to 25 U.S.C. § 176, which is one of the oldest existing authorizations, the Secretary retains authority under 43 U.S.C. § 772 (retracements and resurveys of public lands), 16 U.S.C. § 488 (establishment of exterior boundaries of national forests), and 43 U.S.C. § 1746 (correction of patents and conveyance documents).[14] These statutes recognize a continuing power to address errors made in earlier surveys or patents, a power which may not be exercised against the rights of patentees or good faith purchasers of public lands. Cragin v. Powell, 128 U.S. 691 (1888). Congress has from time to time put express limitations on the exercise of this authority, such as the proviso in 43 U.S.C. § 772, which states that "no such resurvey or retracement [of public lands] shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." 35 Stat. 845 (1909). It did not do anything like this in enacting the ICCA.

The thrust of the Tarr Opinion is that section 12 repealed by implication the Department's authority in 25 U.S.C. § 176 to conduct surveys in order to resolve boundary disputes where Indian lands were involved (but not where Indian lands were not involved). Principles of statutory construction disfavor repeals by implication. See, e.g., Morton v. Mancari, 417 U.S. 535, 549 (1974). Further, the courts have treated a later enactment as having the effect of implicitly repealing an earlier statute only when the two are absolutely incompatible. See id., at 550; see also Colorado River Conservation Dist. v. United States, 424 U.S. 800, 808 (1976). Here the ICCA's bar of future adjudications of Indian claims against the United States is not incompatible with the Department unilaterally deciding to exercise its survey authority to address boundary disputes involving Indian reservations, the same as it may do with boundary disputes that implicate federal surveys where Indian lands are not involved. See Lane v. Darlington, supra.

The Supreme Court has also recognized the principle that where there are two statutes on the same subject, the earlier having a special purpose and the later more general in scope, and there is no express repeal or absolute incompatibility, the earlier special statute is presumed to remain in force and be treated as an exception to the general statute. See Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976). These canons of construction strongly militate against repeal by implication of 25 U.S.C. § 176, which is a specific provision that permits the Department to survey Indian reservations (as well as other lands, but Indian reservations are specifically identified in the statute, being listed first). Given the difference in the purpose and subject matter of the two statutes, and the fact that any ambiguity in either statute ought to be resolved in favor of Indians, Montana v. Blackfeet Tribe, 471 U.S. 759, 766-67 (1985), it would be unreasonable to conclude that the ICCA had any effect on the Secretary's statutory authority to survey Indian reservations, or on executive discretion to correct an Indian reservation boundary which

[14] The Tarr Opinion briefly discusses the last statute, and concludes that it does not provide authority to resurvey the Sandia boundary. 96 I.D. at 361.

erroneously excluded lands owned by a tribe.[15]

Finally, the Tarr Opinion barely acknowledges, much less gives any significant weight to, a longstanding executive branch practice to the contrary. The Department's use of its statutory survey authority in the context of the Taos Pueblo, recounted above, is scarcely the only time it has been used when boundaries of Indian reservations are involved since enactment of the ICCA in 1946. Other examples are discussed in earlier Solicitor's Opinions which either expressly or implicitly recognized that the Department's authority to survey Indian reservations to correct pre-1946 mistakes survived enactment of the ICCA.

The earliest one we have found is a 1955 Opinion of Solicitor Armstrong, M-36275, II Op.Sol. Indian Affairs 1663, who was construing a 1917 Executive Order regarding the boundaries of the Cocopah Reservation on the Colorado River. The issue was whether lands which accreted to certain sections of land prior to the issuance of the Executive Order should be included in the reservation. While the Solicitor ruled that the Cocopah Tribe had no right to the accreted lands, nothing in the Opinion suggested the Solicitor thought the Department lacked the legal authority to consider a resurvey. This opinion was reversed on December 21, 1972, by Acting Solicitor Coulter, M-36867, II. Op.Sol. Indian Affairs 2050, who held that the Tribe did acquire the disputed lands under the 1917 Executive Order, and ordered a resurvey. Although neither opinion discusses the legal authority to conduct surveys of Indian reservations, the discussion of the history of the tracts in question makes it clear that both Solicitors believed the Secretary had the authority to make corrections in the reservation boundary.

A January 17, 1969, Memorandum Opinion of Solicitor Weinberg to the Secretary, M-36770, II Op.Sol. Indian Affairs 1977, determined that the south boundary of the Salt River Indian Reservation in Arizona was, under an 1879 Executive Order, the south channel of the Salt River. The boundary reflected in the issuance of patents and rights-of-way to the State of Arizona and others used the north riverbank (which had been surveyed in 1888 and again in 1910) as the boundary. The Solicitor found that the two earlier surveys were only intended to meander the river, not to establish the boundary of the reservation, and his opinion made clear that additional lands should be included within the Salt River Indian Reservation.[16]

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[15] Section 25 of the ICCA, 60 Stat. 1056, states that all provisions of law inconsistent with the Act are repealed. Such general "repealer" provisions have been viewed as adding little to rules of statutory construction that implicit repeals are disfavored. See generally Sutherland Statutory Construction § 23.08 (5th Ed.).

[16] The Solicitor recommended that new survey instructions be given to the BLM, and suggested that "in the event the survey by the Bureau of Land Management discloses that the United States issued patents to or rights-of-way across lands already reserved for Indian use, remedial legislation be recommended to exclude the patented and rights-of-way areas from the reservation and confirm the titles thereto." Id., at 1982.

In another Opinion that same day, II Op.Sol. Indian Affairs 2096, Solicitor Weinberg addressed ambiguities in an 1876 Executive Order setting the boundaries of the Colorado River Indian Reservation in California, and rejected an erroneous 1912 survey. His Opinion specifically addressed the question of whether a resurvey was appropriate, concluding: "[I]n those areas where the United States has not conveyed its title to the lands abutting the reservation, it may survey and resurvey what it owns and establish and reestablish boundaries." Id. at 2100.

A 1972 Attorney General's opinion, Indian Treaty Reservation Lands, 42 Op. Att'y Gen. 441 (1972), upheld the authority of the Secretary of the Interior to correct the survey of the western boundary of the Yakima Indian reservation in Washington State. The corrected survey added approximately 10,000 acres of Forest Service-administered lands to the reservation. In that situation, the Tribe had filed a claim for the land before the ICC. The Commission had rejected the claim, but the court of claims reversed, and directed the Commission to determine the true location of the reservation boundary. Yakima Tribe v. United States, 158 Ct.Cl. 672 (1962). The Commission then located the boundary in favor of the Tribe, 16 Ind.Cl.Comm. 536 (1966), but did not decide whether the land in the disputed area had been "taken" from the tribe when it had been included in a national forest by executive order. The question of the effect of the executive order eventually ended up in front of the Attorney General, who ruled that the land had not been taken by the Order, and could be restored to the tribe without further action by Congress. Because the Tribe had filed a claim with the ICC, no question of whether the Department's survey authority survived enactment of the ICCA was presented.

The Tarr Opinion mentions the 1972 Attorney General's Opinion, see 96 I.D. at 360, n. 20, viewing it as not relevant because the Yakima Tribe (now the Yakama Indian Nation) filed a timely claim for the land with the ICC. Here the Santa Ana Pueblo did file a claim with the ICC, but that claim did not include any mention of the lands within the El Ranchito Grant or any federal actions relative to the overlap with the San Felipe Pueblo Grant. The 1972 Attorney General's Opinion does not suggest that consideration of the Tribe's claim to national forest lands was dependent on its filing of an ICCA claim, and we decline to make that distinction here, for the reasons discussed above regarding the lack of evidence that Congress ever intended to limit executive survey authority over Indian lands.

There were some Departmental actions addressing Indian reservation boundary issues after the 1972 Attorney General's opinion, but none were mentioned in the Tarr Opinion. In 1974 Solicitor Frizzell issued an Opinion on the boundaries of the Colville and Spokane Indian Reservations along the Columbia River upstream from Grand Coulee Dam in Washington State, M-36887; 84 I.D. 72, II Op.Sol. Indian Affairs 2062, which reversed several conclusions in a 1945 Solicitor's opinion (59 I.D. 147). Secretary Morton immediately directed the agencies of the Department to take "all appropriate steps ... to implement and conform to the legal conclusions reached by the Solicitor ...." Eventually Congress addressed the issue in legislation; see Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act, 108 Stat. 4577 (1994). Similarly, a modern BLM resurvey of the Crow Reservation led to enactment of the Crow Boundary Settlement Act of 1994. 25 U.S.C. §§ 1776, *et seq.*

The continuing exercise by the Department of its authority to survey Indian lands unaffected by enactment of the ICCA in 1946 is also reflected in court decisions other than Taos Pueblo discussed earlier. In Sekaquaptewa v. MacDonald, 626 F.2d 113 (9th Cir. 1980), the court upheld a 1965 corrective resurvey by the BLM of the boundaries of the Hopi Reservation against an argument by the Navajo Tribe that longstanding reliance on the earlier surveys served to fix the boundaries. The court went so far as to say that the Department may not rely on an incorrect survey which omits lands from an Indian reservation. 626 F.2d at 117-18.

In addition to Solicitor's opinions on the boundaries of the Cocopah and Colorado River Indian Reservations, discussed above, the boundaries of other Indian reservations along the Colorado River in California and Arizona have been adjusted and readjusted by surveys conducted by the Department. This exercise of the Department's survey authority has, in part because of its implications for water rights reserved to Tribes under the doctrine of Winters v. United States, 207 U.S. 564 (1908), formed grist for several Solicitor's Opinions and court decisions including, significantly, the U.S. Supreme Court in a half-century-old original action, Arizona v. California. See, e.g., 86 I.D. 3 (1979) (Quechan Reservation boundary); Metropolitan Water Dist. of Southern California v. United States, 830 F.2d 139 (9th Cir. 1987), *affirmed sub nom* California v. United States, 490 U.S 920 (1989) (Fort Mojave Indian Reservation); Arizona v. California, ___ U.S. ___, 120 S.Ct. 2304; 147 L.Ed.2d 374 (June 19, 2000) (consent judgment in a proceeding under the ICCA would not bar water rights claims based on a Secretarial Order resolving a reservation boundary dispute).[17]

The facts and circumstances of these situations differ somewhat from each other, but they add up to decades of recognition of the continuing authority of the Department to take steps, on its own initiative or in response to requests, to survey Indian lands and correct the mistakes of the past. The Tarr Opinion does not reference, much less discuss, this rich history. Indeed, the Opinion appears to be the first occasion since enactment of the ICCA where a Solicitor has questioned the

[17] Seven years after the Tarr Opinion was signed, it was distinguished when the Secretary exercised his statutory authority to set the boundary of an Indian reservation in Alaska. The Metlakatla Tribe claimed an island in the Annette Islands chain in southeast Alaska that was also claimed by the Forest Service. The BLM Director, acting for the Department, decided that the island should be included in the Tribe's reservation, but the Interior Board of Land Appeals reversed. State of Alaska, 127 IBLA 1 (1993). The Secretary thereafter took jurisdiction and overruled the Board in 1995, and adopted the BLM survey, resolving the boundary dispute in favor of the Tribe. The Department distinguished this situation from Sandia and the Tarr Opinion on a variety of grounds, including that the only survey ever done by the Department had found the land in question belonged to the Tribe. See letter from Solicitor of the Department of the Interior to the Under Secretary for Natural Resources and Environment, U.S. Department of Agriculture, September 7, 1995, and Memorandum of Secretary to Director, Office of Hearings and Appeals and Assistant Secretary of Land and Minerals, September 26, 1995.

continuing validity of the Department's survey authority vis-a-vis Indian lands. For the reasons discussed here, I have determined to overturn its anomalous conclusion.

III. 25 U.S.C. §398d Does Not Bar Relief

Finally, San Felipe contends that the Secretary is precluded from acting here by part of 25 U.S.C. § 398d. It provides that "[c]hanges in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." The quoted language became law in 1927 as part of an act to "authorize oil and gas mining leases upon unallotted lands within Executive order Indian reservations." 44 Stat. 1347. Its purpose was to reserve to the Congress "the future determination of any changes of boundaries of Executive-order reservations or withdrawals." S. Rep. No. 1240 (69th Cong. 2d Sess.) p. 3.

The same analysis applies here as to the statutes discussed above. The legislative history of the 1927 act does not suggest any intent to repeal or limit the Department's pre-existing statutory authority to conduct surveys and resurveys. Moreover, the practice referred to in the previous section of this Opinion shows that this statute has long been held inapplicable to corrections of boundaries as a result of surveys, on the rationale that such corrections simply assure that a tribe has what it was originally entitled to under the relevant transactions and title documents. See *e.g.*, Boundaries of and Status of Title to Certain Lands within the Colville and Spokane Reservations, supra, 84 I.D. 72, 76-77 (1974).

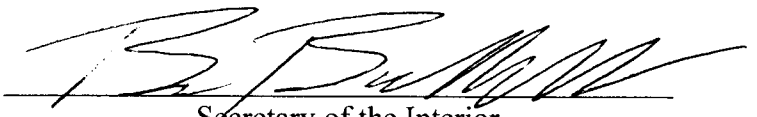
This interpretation is consistent with the brief mention of the statute in footnote 6 of the Tarr Opinion, see 96 I.D. at 343, where it was acknowledged that the prohibition in the statute would not apply unless the United States never acquired title to the land which would be affected by the corrective survey. Our interpretation is also implicitly confirmed in the1972 Attorney General's Opinion discussed above, where the corrected survey added, without further action by Congress, approximately 10,000 acres of land formerly administered by the Forest Service to the reservation.

In short, where the Department is seeking not to redraw the boundaries of a reservation in order to adjust the quantity of lands set aside for Indians, but instead is seeking to use its statutory survey authority to define more accurately what those boundaries are, 25 U.S.C. §398d is not implicated.

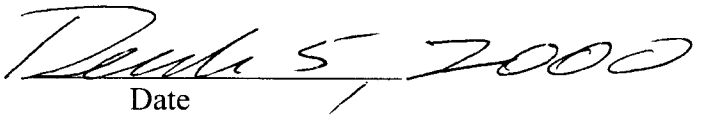
Conclusion

For the reasons set out above, I hereby vacate and withdraw part IV of the Tarr Opinion. Another Opinion on the merits of the Santa Ana petition will follow in due course.

I concur:



Secretary of the Interior



Date