

Sandia's New Buffalo Ideology: a casino, an old land grant, compromises and conservationism

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Sandia Pueblo, New Mexico, is located on the eastern bank of the Rio Grande, north of Albuquerque. The Tiwa pueblo has almost 500 members. It was founded around 1300 and belonged to the Tiguex pueblos. During Coronado's campaign of 1540-1542, several pueblos of the Tiguex group were besieged and destroyed.¹ Sandia is first mentioned by name when the mission of San Francisco de Sandia was established in 1617; it also appears in the 1630 Memorial of Fray Alonso de Benavides.² In the 1680 revolt the pueblo was destroyed and during the first –unsuccessful- reconquest expedition in 1681 Sandia was burned, by mistake it seems.³ Some of the inhabitants fled to the Hopis while others were absorbed in neighboring Pueblos. None of the original 3000 inhabitants in 1680 were left in the Pueblo. In 1742, to resettle the Pueblo of Sandia, the Franciscans brought back 441 Indians from the Hopi who identified their Pueblos of origin as Sandia, Alameda, and Pajarito. In 1748, the King of Spain granted land to 350 converted Indians, "a mixed group of refugees", to resettle the abandoned Pueblo.⁴ Today, the Pueblo of Sandia still is in possession of the original land grant document and claims to have lost approximately 10.000 acres (4050 hectares) in a U.S. survey in 1859.

This paper deals with the pragmatic American treatment of indigenous rights. The Sandia Pueblo land grant case will be seen in the wider context of Indian rights and economy. When the Federal government became the sole provider for the tribes, it also became their "New

¹ Flint, 2002. 96, 131, 338.

² Benavides, 1630. 12.

³ Memorial of Juan Dominguez de Mendoza. November 18, 1685. Hackett, 1937. 355.

⁴ Brandt, 1979. 345.

Buffalo.” With the advent of the casino economy another revenue producing entity vies for the title. The central question of this paper is whether the land grant claim participates in the “New Buffalo” economy and whether there are -historical, ideological, economic- links, between the land claim and the casino economy.

1- Early land grant history

The typical Spanish land grant to the pueblos was centered on the church, comprising a square area of one league in each cardinal direction, approximately 69 km², the so-called “formal pueblo”.⁵ Sandia being located to close to the Rio Grande to be granted a full mile on the western side, the pueblo was compensated with land to the north and the south in the alluvial farmlands. While the river formed the western boundary, the other boundaries are defined by the Act of Possession with markers placed:

“on the north facing the point of the Cañada commonly known as del Agua; and the south facing the mouth of the Cañada de Juan Tabovo, and on the east the Sierra Madre called Sandia, within whose limits are the advantage of pasture, woods, water and watering places for livestock, in abundance to maintain cattle, sheep, and horses.”⁶

While the northern and southern borders “face” a distinctive landmark, the definition of the eastern border remains vague.

After the 1848 treaty of Guadalupe Hidalgo, the Spanish land grants had to be confirmed by Congress. The position of Surveyor General was created in 1854 to report on the validity of all claims under Spanish and Mexican law. The report led to the congressional confirmation of the land grant of Sandia Pueblo in 1858. For the confirmation, the text of the Act of Possession had been “overtranslated” by the official translator, David V. Whiting, who

⁵ One league is 2.6 miles or 4.16 km; the formal pueblo is thus 8.32 x 8.32 km.

⁶ Hordes, 1996. 10-11.

removed the ambiguity of the eastern border by stating that it was located on the crest of the mountain: “on the east, the main ridge called Sandia.” Moreover words inserted into the translation by Whiting either show pueblo input, point to the existence of another source-document for the translation, or a bias in favor of the pueblo.⁷

In 1859, Reuben E. Clements, filling in for the official surveyor, surveyed Sandia Pueblo, leaving its eastern border at the foot of the mountain with one unexplainable southeastern wedge of land pointing to the mountain without reaching the summit. Although his work has been otherwise described as “suspect” and “inept”, the survey was notarized by Whiting in his capacity of notary public⁸ who, if he ever tried to defend the Pueblos, showed great inconsistency. It seems unnecessary to give too much meaning to the discrepancy between Whiting’s contradictory positions; they illustrate the careless way land grant records were treated in the early territorial period. The patent issued to Sandia Pueblo in 1864 by President Abraham Lincoln is based upon the 1859 survey.

In the years following the American conquest of New Mexico, the status of Pueblo Indians remained uncertain. Under U.S. laws, Indians were protected as wards of the government, but the treaty of Guadalupe Hidalgo did not specify their status as Indians since Mexico had professed theoretical equality of its inhabitants as citizens. In 1876, *United States v. Joseph* ruled that Pueblos were not Indians and were therefore not protected by the Federal Government and could sell or alienate their land. The ruling was reversed in 1913 with *United States v. Sandoval* granting Indian status to the Pueblos.⁹ The large number of non-Indian encroachers on Pueblo lands risked eviction and Senator Bursum initiated a bill bearing his name that would have granted title to long-time tax-paying encroachers, but it was defeated in

⁷ Hordes, 1996. 27-30.

⁸ Leshy, 2000. 19.

⁹ Deloria and Lytle, 1983. 72.

Congress. The Pueblo Lands Board was created in 1924 with authority to “determine the exterior boundaries” of the pueblo land grants.¹⁰

2- Urban growth, Indian renewal, and the casino economy

The disputed area in 1983: recreation and wilderness

The 10,000 acres that are claimed by Sandia Pueblo are a steep mountainside, often exceeding 40%. The elevations range from 1830 meters to 3230 meters. Permanent surface water is rare and the vegetation is characteristic of high desert areas with piñon and juniper at lower altitudes and ponderosa at higher altitudes. Urban growth close to pueblo land can be seen as one reason for Sandia Pueblo’s land claim. Before the 1950s, approximately 20 km of high desert separated urban development from the Sandia Mountains. After WW2, with an increase of the defense sector and a trend to move high tech towards the Sun Belt, Albuquerque started to spread over the arid plateau towards the Sandia Mountain. In 1965, an aerial tramway was built from the outskirts of the city to the top of the mountain over its (not yet disputed) west face. In the early 1980s, subdivisions were created along the pueblo boundary, at least one of them (Sandia Heights North) was linked to the Tram Company and had access across pueblo land.

Conservationists, worried about the increasing pressure on the mountain, had part of it protected as the Sandia Mountain Wilderness, under the Endangered American Wilderness Act of 1978 (P.L. 95-237). By 1983, the recreational uses of the land had multiplied with easy access to popular picnic areas and hiking trails. The La Luz trail, with a vertical rise of over 1000 meters, bisecting the western flank of the mountain, became a major attraction. Heavy user impact has created unofficial and non-mapped trails.

¹⁰ Sando, 1992. 114-119.

Indian renewal

Another, and possibly even more compelling reason for Sandia Pueblo's land claim, can be seen in the general trend of Indian renewal. After 1917, tribal demography was on the upswing. In 1933 John Collier became Commissioner of Indian Affairs and his *Indian Renewal Act* (1934) initiated a pro-Indian policy trend. The termination period of the 1950s represented a temporary setback but Native American activism reversed the movement in the late 1960s.¹¹

In the following decade, the 1975 *Indian Self-Determination and Education Assistance Act* [Public Law 63-638, 88 Stat. 2217] modified the way tribes were administered, giving them control over federally funded programs, guaranteeing tribal preference in all Indian-related policy-making ventures undertaken by the Department of the Interior and by the Indian Health Service (IHS). In education and health tribes could use BIA or IHS funds to contract for services from any source. Tribes started to exercise their sovereignty by calling themselves nations according to the wording of *Cherokee Nation v. Georgia* (1831)¹² granting them the status of "domestic dependent nations." While the pueblos do not use the term nation in their official name, they refer to themselves as nations. Joe Sando, who published *The Pueblo Indians* in 1976, changed the title of the 1992 updated version of his book to *The Pueblo Nations*.¹³

In 1978, the *American Indian Religious Freedom Act* (AIRFA) [Public Law 95-341, 92 Stat. 469] was the first law to address the specific reality of Native American religions. It required public officials to consider Indian interests in matters of access to sacred sites and directed government agencies to review their procedures for possible interference with religious practices.¹⁴ In 1990, the *Native American Graves Protection and Repatriation Act* (NAGPRA)

¹¹ Smith and Warrior, 1996.

¹² *Cherokee Nation v. Georgia*,¹² 30 U.S. (6 Pet.) 1, 20 (1831).

¹³ Sando, 1992.

¹⁴ O'Brien, 1985. Reprint, 1992. 54-55.

[Public Law 101-601, 25 U.S.C. 3001] provided for the repatriation of Native American burial remains and funerary objects possessed by Federal agencies or museums. The years preceding NAGPRA saw a tremendous amount of Native American activism. Contrary to AIRFA, NAGPRA made provisions for civil penalties, and gave an unprecedented power to the tribes against the Federal government. In 1993, the *Religious Freedom Restoration Act* [Public Law 103-141] stated that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” The act was passed to “provide a claim or defense to persons whose religious exercise is substantially burdened by government,” thus reaffirming the Free Exercise Clause of the First Amendment. President Clinton’s 1996 Executive Order (13007) reinforced the text of AIRFA, stating that Federal agencies had to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites” (my emphasis). The wishes of Native Americans were taken into account with sensitivity because the agencies had to maintain “confidentiality of sacred sites” thus preventing unwanted cultural tourism.

Meanwhile the *Native American Language Act* was passed in 1990. For the Pueblos, even more than for than for other tribes, religion and language are linked. The law favors tribal identity, recognizing the special status of endangered languages and the responsibility of the Federal government protecting them.¹⁵ While the *Leave No Child Behind Act* of 2001 [Public Law 107-110] emphasizes proficiency in English and abolishes bilingual education, Native American children still have the possibility to receive an instruction in their language because the “unique status of Native American languages under Federal law” is recognized (Section 3202).¹⁶

¹⁵ Zepeda and Hill, 1991. 135-55.

¹⁶ Berthier-Foglar, Publication pending.

In the 1990s, the issue of indigenous identity theft through the public domain was raised for the first time on a large scale. Two examples from the Southwest show the extent of the problem. The Hopis feeling offended by past anthropologists want to reclaim ethnographic field notes and photographs in the possession of public institutions or at least restrict their use.¹⁷ Zia Pueblo tries to regulate the use of its sun symbol, a circle with four perpendicular radiating groups of rays, which today is on New Mexico's State flag and on products and company logos associated with the state. The discussions are centered on a nebulous concept of "supertrademark" and on the possible protection of designs and approximate versions thereof.¹⁸ This is the ideological and legal context of Sandia Pueblo's land claim.

Sandia's casino economy

In the middle of the 1980s, the New Mexican pueblos close to I-25 started to experiment with the ancestors of today's casinos. They were makeshift bingo halls along the interstate in the middle of dusty parking lots. The legislation, lagging behind, attempted to impose some state control over Indian gaming. When the *Indian Gaming Regulatory Act* (IGRA) was passed in 1988 many New Mexican tribes were already active in the sector.¹⁹ IGRA required tribes to sign a compact with the state for class III gaming (the casino gaming proper). Negotiations between gaming pueblos and the State of New Mexico started and led to the first compact in 1995 stating that the tribes pay 5% of their gaming revenue to the State. The Pueblo of Sandia felt its sovereignty impinged on, claiming that in international law no government could impose a tax on another government.²⁰

Meanwhile the provisional bingo halls had been replaced by more permanent structures and the State Supreme Court argued that the compacts signed by the governor were

¹⁷ Brown, 2003. 41-42.

¹⁸ *Issues Surrounding Trademark Protection*, 1999.

¹⁹ *Indian Gaming Regulatory Act*, 1988, P.L. 100-497, 25 U.S.C. 2701.

²⁰ Pueblo of Sandia, *Political and Legal Background of New Mexico Tribal Government Gaming*, 2001.

unconstitutional. The 1997 *Gaming Control Act* gave the governor the necessary powers but implemented a legislation requiring a 16% payback to the State. The Department of the Interior felt that this percentage was too high and stated that, if a tax was required, the State should guarantee gaming exclusivity to the tribes. New Mexico, on the contrary, extended gaming, creating a state lottery and authorizing other forms of non-Indian gaming. The 2001 compact modified the tax. Casinos with yearly revenue under \$4 million have to pay a 3% tax while those with higher revenue pay 8% to the State.²¹ Despite a Federal discourse in favor of the Native American tribes, on the local level the relationship between the tribes and the state is ambiguous prompting Pojoaque Pueblo governor, Jacob Viarrial, to lament that “they keep changing the rules.”²²

In New Mexico, 11 pueblos have casinos and the Sandia Pueblo Casino is among the larger ones also providing entertainment. The State is well endowed with gaming facilities. Driving from Isleta (south of Albuquerque) to Taos, a three hour drive, one encounters a casino on the average every 23 minutes, not counting non-Indian racetracks and “racinos.” Pueblos find casinos interesting because the facilities need little land, do not destroy natural resources, and do not intrude upon tribal privacy as would other forms of tourism. Besides, casinos are in demand and still attract customers, despite mounting anti-gaming protest. Therefore only a minority of casino owning pueblos expand into the resort sector.

The pueblos emphasize the fact that their casinos are “not-for-profit”, thereby stretching the meaning of the word. Profits are made but they are shared by the tribe. Sandia Pueblo has become a major economic force in the Albuquerque area, employing 1300 people in the casino and the tribal government.²³ According to the 2000 census, the pueblo has 344 inhabitants and 473 people are registered tribal members. Therefore Sandia Pueblo employs at least 1000 people who are non-members of the tribe. The casino revenue paid to the State by

²¹ ‘State Receives \$8.4M in Q2 tribal gaming payments’, *New Mexico Business Weekly*, August 7, 2003.

²² Mattson, 2004.

²³ Sandia Pueblo, November 2003.

the tribes contributes to its economic health. In 2002, more than \$31 million have been paid to the state by the casinos out of a global income of almost \$400 million.²⁴ Since FY 2001-2002, the Albuquerque area is in a recession, for the first time in 20 years, losing jobs over three consecutive terms (4th term of 2001, 1st and 2nd terms of 2002). Thanks to the large casinos of Sandia and Isleta the figures are not as bleak as they could be.²⁵

Sandia Pueblo uses the casino income to maintain tribal cohesiveness, employing a large percentage of its members in government related activities. The Pueblo maintains departments and agencies in the manner of a much larger country. It has for instance an environmental department employing 4% of the pueblo population.²⁶ It also uses casino revenue to lobby for a more favorable gaming legislation. According to Sandia Pueblo's governor, Stewart Paisano, "when you dish out money, people come lining up."²⁷ And money has also been used to buy land. This is the economic context for the land grant claim.

3- Legal action and settlement negotiations

The timing of Sandia Pueblo's land grant claim

Neither the 1859 Clements survey, nor the ensuing patent, were challenged by Sandia Pueblo. In the 19th century the pueblo was involved in a lengthy lawsuit over the southern border,²⁸ and in a fight against the private canal that would have bisected pueblo land in the 1890s.²⁹ Apparently at the same time, Francisco Duran established a homestead on 65 hectares of forest, on the west side of the Sandia Mountains, in the disputed area.³⁰ When the Pueblo Lands Board was established, the Pueblo of Sandia made no claim that the eastern boundary was incorrect. In 1933, the Superintendent of the Southern Pueblos Agency of the BIA wrote

²⁴ Billingsley, 2003.

²⁵ 'Duke City saw first recession in 20 years', *New Mexico Business Weekly*, April 21, 2003.

²⁶ Daniel K. Inouye. Joint Senate Hearing, April 24, 2002.

²⁷ Robertson, 2000.

²⁸ Hordes, 1996. 15-21.

²⁹ Brandt, 1979. 349.

³⁰ Guy Riordan, Joint Senate Hearing, April 24, 2002. 82-83.

in a letter to Commissioner John Collier that the Pueblo was not interested in using Pueblo Lands Board Funds to purchase additional lands. Sandia Pueblo did not bring its case before the Indian Claims Commission created in 1946. Sandia Pueblo did not oppose the incorporation of the disputed area into the National Forest system in 1906. When the Pueblo had to obtain a permit to hunt for ceremonial and religious purposes within the disputed area, ownership was not mentioned. Sandia Pueblo officially approached the Department of the Interior in 1983 to request a resurvey of the land grant. According to then solicitor of the Interior, Ralph W. Tarr, “the failure to challenge the patent until 1983, some 120 years after its issuance, is the most troubling circumstantial evidence involving its claim.”³¹ Demographics and economic hardship offer a partial explanation of the pueblo’s failure to act. Sandia’s population decreased steadily from 216 in 1860 to 73 in 1910.³² The pueblo leased land to the Sandia Peak Tram Company in 1965 in the absence of any other source of income besides outside wage work. Nevertheless, during the same period neighboring pueblos experiencing similar conditions (Isleta, Santo Domingo, San Felipe) were actively involved in land claims. Sandia Pueblo had a cultural existence attested by its continued religious and traditional uses of the mountain.³³ Up to 1979, the Pueblo of Sandia still used the foothills for communal rabbit hunts, deer hunts, collecting piñon nuts, but the use of sacred shrines became more and more difficult due to urban encroachment and increased recreational use of the area.³⁴

In New Mexico land grants were issued by the King of Spain to Indian pueblos as well as to other settlers. Most (75%) of the land grants to Hispanics were lost in the territorial years and the issue flared up in New Mexico, first in the 1960s with the revolutionary movement of Tijerina reclaiming the communal land grants of dispossessed Hispanics, later, in 1980, on a

³¹ Tarr, 1988. 26-28.

³² Brandt, 1979. 345-346.

³³ Frank Paisano, Sandia Pueblo Council Member, quoted by Kelley. 2000.

³⁴ Brandt, 1979. 343, 347.

legal basis with the unsuccessful drive by Hispanics to regain the San Joaquin Land Grant.³⁵ The claim of Sandia Pueblo has to be seen in the light of what seems like a general movement of reclaiming Federal land.

History of legal action

The request for a resurvey started 20 years of legal battles involving the Federal government (Interior and Agriculture), the New Mexican counties of Bernalillo and Sandoval, the private landowners (represented by the Sandia Mountain Coalition), and the Sandia Peak Tramway Company.³⁶ When Sandia Pueblo sought to regain land in 1983, the claim included 280 hectares of private land. In case of a Pueblo victory, the private landowners might have lost ownership or would have been subjected to Pueblo jurisdiction in matters of civil law, criminal law, and taxation. Pueblos have the right to exclude individuals from entering their land, a measure that is taken only to exclude non-members from the pueblos with a closed village policy or by more open pueblos on ceremonial days with restricted attendance. On at least one occasion in recent years a researcher was excluded from a pueblo and on another occasion Pueblos threatened to block Interstate 25 on pueblo land.³⁷ When the claim became public, in 1994, the private landowners moved to intervene in the case and the Pueblo expressly excluded claims on private land within the disputed tract.³⁸ The coalition of homeowners remained intervenors in the claim because their access was through the disputed area.

In the course of the legal action, at least four historians were called upon to help define the meaning of the original land grant papers as well as the accompanying documents clarifying

³⁵ Subcommittee on Forests and Public Land Management, 1998.

³⁶ The history of the legal action can be found in Leshy 2001 (1-2); the testimony of the Sandia Mountain Coalition, Joint Senate Hearing, April 24, 2002, gives additional details.

³⁷ Mattson, 2004.

³⁸ Anita Miller. Joint Senate Hearing, April 24, 2002.

the intent of the Spanish authorities.³⁹ Since the meaning of the description of the eastern boundary (“...and on the east the Sierra Madre called Sandia”) remains ambiguous, historians tried to define the intent of the Spanish authorities at the time the land was granted, giving rise to two conflicting theories. Stanley Hordes states that since three out of four boundaries of Sandia Pueblo conform –with local adaptations- to the “formal pueblo”, the eastern boundary had to be located within one league east of the pueblo church. An opinion comforted by the decree of Governor Codallos y Rabal specifying that the reconstructed pueblo be “a formal Indian pueblo”.⁴⁰ Moreover 12 out of 22 pueblos in New Mexico were “formal pueblos” granted a four league square at the time their land grant was established.⁴¹ According to the formal pueblo theory, the 1859 survey granted too much land to Sandia pueblo on its eastern side. On the other hand, the dissenting historians stated that there was no express law requiring pueblo land grants to be on the formal 4 league square pattern.⁴² The dissenting historians also remarked that the Act of Possession mentioned the resources of the land, obviously intended for use by the pueblo:

“...and on the east the Sierra Madre called Sandia, within whose limits are the advantage of pasture, woods, water and watering places for livestock, in abundance to maintain cattle, sheep, and horses.”

Nevertheless ownership of the land including the resources is not specified and -what is more important- has not been claimed by the pueblo during the 120 years preceding 1983.

Historians also tried to find intent in the general documents of the era, stating that since the destroyed pueblo had to be reconstructed, it made sense to include the Sandia Mountain with its resources.⁴³ Comparisons with three other neighboring land grants south of Sandia Pueblo

³⁹ Minge, W., The Pueblo of Sandia: Issues and Encroachments (January 1983); Jenkins, Myra, The Pueblo of Sandia and its Lands (1988) (96 I.D. at 348?); M. Jenkins, E. Brandt, The Sandia Eastern Boundary (October 1988); Hordes, Stanley. *History of the Boundaries of the Pueblo of Sandia, 1748-1760*. Prepared for U.S. Forest Service, Southwestern Region, Albuquerque, N.M. 1996.

⁴⁰ Hordes, 1996. 8-9.

⁴¹ Leshy, 2001. 13. On the importance of the one league rule, see: Cutter, Charles R. *The Legal Culture of Northern New Spain, 1700-1810*. Albuquerque: University of New Mexico Press, 1995. Reprint, 2001. 38-39.

⁴² Leshy, 2001. 12.

⁴³ Leshy, 2001. 11.

were used, all of them on the west flank of the mountains. The Elena Gallegos Land Grant, the Lo de Padilla Tract, and the Pueblo de Isleta Land Grant, all reach to the crest of the mountain but only the last one is an Indian land grant. Land grants have different histories and were created at different times and Hispanic land grants never conformed to the “formal pueblo” layout. Therefore statistics cannot be used to claim that since three neighboring land grants reach to the crest, the Sandia land grant must be similar. Moreover, in the case of Isleta, the pueblo immediately contested the survey and confirmed the historic land grant with ample oral history.⁴⁴

4- Conservationism, private land, and public access

“Sacredness” for Indians and others

While the affair was pending, the Pueblo bought private property in the disputed area with casino revenue. The acquired land comprised large undeveloped tracts such as the La Luz tract near the crest, a large portion of the undeveloped area of the Evergreen Subdivision and a number of small tracts in other subdivisions. All of the fee lands the Pueblo owns in the claim area were purchased to protect them from development.⁴⁵ In the process, the discourse of Sandia Pueblo was centered on the sacredness of the land and its importance for the pueblo. Meanwhile, the “sacredness” became an issue for other people too, an acceptable argument in the United States where the Constitution and its interpretations accept a broad definition of religion. According to the Counsel of the Department of Agriculture, the Sandia Mountain has “religious and cultural significance for Native Americans and others”⁴⁶ (my emphasis). While the religious experience in mountains and awesome natural sites has previously been claimed

⁴⁴ Tarr, 1988. 26.

⁴⁵ Sandia Pueblo information, http://www.sandiapueblo.nsn.us/mountain/mtn_claim.html, site visited March 2, 2005.

⁴⁶ Senate Report, 107-285.

by recreational users when opposed to Native American tribes,⁴⁷ this testimony is not explicit about it. We can surmise a pervasive religiousness taking its roots in John Muir's ecstatic writings about California's High Sierras and in a New-Age type of reverence for mountains.⁴⁸ While other users of the disputed area such as conservationists and recreational users did not focus on a religious discourse, they feared a possible closure. The main concern of the conservationists was a land use inconsistent with the standards of protection afforded by the Wilderness Act. Moreover they felt that they had not always been adequately defended by the Forest Service who had opposed the original Wilderness designation and allowed the deterioration of the wild character of the mountain⁴⁹ through various projects mostly linked to the Tram and the subdivisions. Hikers, climbers and hang-gliders feared their use of the land would be considered incompatible with the pueblo's traditional ceremonial use. Among climbers it is well known that no climbing area on Indian land has been kept open in recent years. The runners, who had developed a tradition of their own, had also organized to keep it alive. Since 1965, the main trail to the summit had become a yearly competition, the La Luz Trail Run. After the Sandia Mountain became a Wilderness Area, the long history of the event allowed it to be continued but with a 400 runner limit to reduce impact. To avoid losing the right to organize the race, due to a temporary cancellation, a local association, the Albuquerque Roadrunners, decided to take over the direction of the race to ensure its permanence.⁵⁰

Sandia Pueblo's conservationism

Casino income is used to foster tribal welfare, identity and cohesion. In this respect, the conservationist discourse, linked to religious land use, appears as non-controversial, an

⁴⁷ Roberts, 1998, 88-163, quoting professional climber Andy Petefish: "Climbing is my spiritual activity, my church, and my meditation."

⁴⁸ Albanese, 1990. 93-105.

⁴⁹ New Mexico Wilderness Alliance. Joint Senate Hearing, April 24, 2002.

⁵⁰ Albuquerque Roadrunners, Rodger Sack, director of the La Luz Trail Run, personal communication, March 3, 2005.

important feature in pueblo politics. During the duration of the land grant controversy, Sandia Pueblo consciously constructed its discourse on mainstream conservationism avoiding an unpopular stance on traditional use of protected species. Traditional ceremonial hunting techniques, such as the suffocation of deer with corn meal,⁵¹ an unappealing detail for most mainstream urban dwellers, was not mentioned. The pueblo pledged to use the land –if recovered- in accordance with the Wilderness Act. It seems the pueblo wanted to avoid being cast in the same negative light as the Makah of Neah Bay, Washington, who revived the whale hunt in 1998 while conservationists chanted “Big Bad Makah, Killing Baby Whales.” The pueblo used its financial resources to establish an outstanding record of conservationist achievements and has been commended by the Federal authorities. In 1997, the pueblo was the first tribal recipient of the U.S. Environmental Protection Agency’s Partnership for Environmental Excellence Award, for its management of tribal resources. In 1999, the John F. Kennedy School of Government at Harvard University recognized the Pueblo of Sandia with a \$10,000 award for excellence in tribal self-governance in the field of environmental protection. Only 8 of the 556 federally recognized tribes received this award. The Pueblo has a large environmental department.⁵² The T’uf Shur Bien management plan established by the Pueblo -to deal with the disputed area- set goals in accordance with Federal Wilderness areas.⁵³ Unofficial trails will be obliterated and some established trails will be relocated outside the Wilderness area, closer to urban areas, and presumably away from Pueblo shrines. The conservationist-cum-sacredness discourse has the effect of a powerful publicity effort. Polls conducted by the pueblo show that the Albuquerque population is receptive to the discourse and that a large percentage “has a favorable impression of the Sandia Pueblo Indian

⁵¹ Parsons, 1939. Reprint, 1996. 28.

⁵² Statement of Daniel K. Inouye, U.S. Senator, Hawaii, Chairman of Committee on Indian Affairs. *Joint Hearing*, 2002. 1-2.

⁵³ T’uf Shur Bien Preservation Trust Area Management Plan, http://www.sandiapueblo.nsn.us/mountain/mtn_management.html, site visited March 2, 2005.

Community.”⁵⁴ This discourse can be seen as a “New Buffalo” because it is a highly acceptable discourse for the mainstream population and serves the needs of the pueblo. Whether this discourse can be linked to late 20th century ideology or is a historic characteristic of Native Americans has been discussed in a controversial book by Shepard Krech.⁵⁵ What counts here is the positive effect of the statements of Sandia on sacredness:

“Sandia Mountain is sacred to the people of the Pueblo. It contains the holiest of Pueblo shrines... The Pueblo's sacred duty is to protect the mountain.”⁵⁶

Unlike other cases where Native Americans sought to exert rights that were not compatible with wilderness uses, such as using motor vehicles in a Wilderness Area, in the Sandia case all the parties to the agreement sought to protect the Wilderness.

5- The Settlement Agreement, S. 2018 and the 2003 Act

Between 1998 and 2000 the parties engaged in negotiations and a settlement agreement was signed on April 4, 2000, by the tribe, the federal government, on behalf of the Departments of Agriculture, Justice, and the Interior, and The Sandia Peak Tram Company.⁵⁷ The resulting Settlement Agreement represents a negotiated compromise for all the parties and appeared preferable to further litigation⁵⁸ since the pueblo could have lost land extending beyond the one league (4.16km) mark on the east, and the parties challenging the pueblo land claim could have lost their right to use the west face of the Sandia Mountain.

A hard-line stance by Sandia Pueblo over Albuquerque’s backyard would have been particularly unpopular, something the pueblo could not afford in the context of the casino business. Aggressive pueblo lobbying in favor of more favorable gaming compacts started to

⁵⁴ Poll shows public support for current Sandia Mountain Settlement. December 7, 2000. Sandia Pueblo Communication.

⁵⁵ Krech, 1999.

⁵⁶ Sandia Pueblo information, http://www.sandiapueblo.nsn.us/mountain/mtn_claim.html, site visited March 2, 2005.

⁵⁷ Senate Report, 107-285.

⁵⁸ Senate Report, 107-285.

backfire by 1997 with politicians beginning to vote against the tribes.⁵⁹ In gaming as well as in land issues, the Pueblo of Sandia has chosen a middle of the road stance and a good neighbor policy in order not to trigger what could have been a massive reaction against the small pueblo.

In the agreement, the pueblo accepted to relinquish claim to land ownership in fee simple over the disputed area. The pueblo thereby gave up the claim deriving from the 1748 document but also –and this is more important- the aboriginal claim. The land –with the exception of private tracts- will remain under Federal ownership and managed by the National Forest, in part as a Wilderness Area, with participation of the Pueblo of Sandia. Land exchange will take place in order to avoid pueblo ownership of dispersed tracts. The pueblo will have the authority to regulate traditional and cultural uses, as well as access by other tribes for these uses, but they will be permitted only for non-commercial purposes,⁶⁰ and they will have to conform to the Wilderness Act.

Although the pueblo relinquishes ownership of the area, it will have *Indian jurisdiction* (i.e. excluding major crimes) over tribal members engaged in traditional use of the area, as well as Indians of other federally recognized Indian tribes who are present in the area with the pueblo's permission⁶¹. Cases involving non-Indians will be under Federal or State jurisdiction but the Federal government will retain jurisdiction in case of crimes committed by any person in violation of laws pertaining to the management of National Forests.

Bill S. 2018, patterned after the settlement agreement was introduced as H.R. 222 in the 108th Congress and became part of an omnibus spending package in 2003 that addressed the problem of reimbursement of legal fees to the parties of the agreement.⁶² It was finally passed into law as Public Law 108-007 (108th Congress) as: *Joint Resolution Making Consolidated*

⁵⁹ Robertson, 2000.

⁶⁰ Senate Report, 107-285. Section 3-16.

⁶¹ Public Law 108-007. Section 408 (a) (2).

⁶² Hargrove, 2000.

Appropriations for the Fiscal Year Ending September 30, 2003, and for Other Purposes. The *T'uf Shur Bien* Preservation Trust Area Act is found in Division F - Title IV. While the agreement has become a law, the case has not been judged.

The agreement is a victory for both sides. For the landowners, it represents the quasi *statu quo* while for the Pueblo of Sandia it represents more. The wording of the act is centered on indigenous land ownership although paradoxically claim is relinquished. Since the area is to remain undeveloped, and access for ceremonial use is guaranteed, only overuse could threaten pueblo religion. Devil's Tower, another federally controlled area that is significant for tribal religions, has solved the problem by implementing a voluntary climbing ban in June, during the month of ceremonial use of the area by tribes. In my knowledge no such measure has yet been requested by Sandia Pueblo.

The Tiwa name of the disputed area, *T'uf Shur Bien* (Green Reed Mountain), is written into the law, a visible sign of pueblo victory. The frontier Spanish word Sandia (Watermelon) remains in use for the mountain and the pueblo; only new entities receive tribal names and the Pueblo of Sandia has never revived its ancient name *Nafiat*.⁶³

Another sign of ambiguous wording –indirectly implying a pueblo right over the area- is the word “trust” in “*The T'uf Shur Bien* Preservation Trust Area Act”. During the settlement the Sandia Mountain Coalition has requested a definition of the term since it has a precise meaning in Indian affairs. “Trust” defines the relationship between the Federal government and the tribes; according to Felix Cohen’s *Handbook of Federal Indian Law*, “most Indian lands are held in trust by the United States for the exclusive use and benefit of specific tribes.”⁶⁴ Although the term does not apply to the pueblos who own most of their land in fee simple, the wording of the act introduces an element of doubt. That the trust relationship is alive can be seen in the 2001 Leave No Child Behind Act; Congress declares its commitment

⁶³ Spicer, 1962. Reprint, 1989. 23.

⁶⁴ Cohen, 1982. 209.

to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.

Conclusion: Post-colonial discourse and indigenous rights

The 2003 *T'uf Shur Bien* Preservation Trust Area Act is a hybrid text deriving from an agreement, not from a matter settled in court. Therefore, while the merit of the case has never been judged, the wording of the Act implies previous pueblo ownership that has been relinquished. For the pueblo of Sandia, the Act means that: (1) the pueblo had previous ownership of the area, (2) the area is a “trust area”, (3) the pueblo becomes co-manager of the area, (3) the pueblo has jurisdiction over members in the area, (3) the Tiwa name of the area is written into a Public Law. The other parties (counties, landowners, Tram Company) gained: (1) public access to the area, (2) the permanence of the private ownership of the land, (3) the guarantee of road and utility access to private land, (4) the protection of the area under National Forest and Wilderness standards.

The New Buffalo can be seen in the post-colonial “us versus them” discourse where “them” are those perceived as being the descendants of the perpetrators of conquest and colonization while “us” are a composite of indigenous identities. Historians have commented upon the absence of continuity between the pre-1680 and the post-1748 identities. For Sandia Pueblo, their ancestors are the pre-1680 inhabitants of the pueblo.⁶⁵ This belief can be attributed either to the “structural amnesia”⁶⁶ of oral tradition or to the monolithic indigenous identity characteristic of indigenous rights activists chasing their Buffalo.

⁶⁵ Hordes, 1996. 66.

⁶⁶ Brandt, 1981. 185-95.

While the United Nations' Working Group on Indigenous Populations is definitely not part of the New Buffalo ideology, it has fostered world-wide discussions about the rights of indigenous peoples and created a major New Buffalo issue in the United States. Discussions on the world scene have been going on in the 1980s and 90s. In 1994, a Declaration on the Rights of Indigenous Peoples was drafted. The text addresses diverse situations of contemporary indigenes from ongoing genocide –in Asian or South American countries- to the integration in settler colonies such as the United States. Most of the articles of the draft declaration have already been written into U.S. Federal law. The reason the declaration was rejected (by the U.S. and by France among others) lies in the wording of Articles 26 and 27 stating that indigenous peoples have the right to own their land and if the original land base has been impinged on, compensation with land of equal value should take place. Since the territory of the United States was entirely under indigenous control before contact, the declaration poses an insoluble problem. Sandia's land grant claim is contemporary to the discussions of the indigenous forum and appears as an attempt to recover the indigenous land base rather than recover land granted by the King of Spain.

While New Mexico's pueblos keep a low profile in indigenous world affairs, Ward Churchill, America's most radical (and sometimes controversial) Indian rights activist has his own view on Pueblo lands. His utopian "North American Union of Indigenous Nations" takes away 1/3rd of the continental U.S. for an independent Indian Territory which includes the whole of New Mexico. The territory would be consolidated with purchased land as well as a nationwide exchange of unceded land. The buffalo would roam again on the plains and the old economy would be revived.⁶⁷

⁶⁷ Churchill, 2003. 288-293, extrapolating Frank and Deborah Popper's theory. Map 291.

Sandia Pueblo never mentioned such a radical land claim; nevertheless it is part of the implicit ideological background of the last two decades of the 20th century. Sandia Pueblo's recently acquired buffalo herd is penned up next to an urban subdivision. Although no one mentioned to let them roam in T'uf Shur Bien, the idea that the buffalo economy could be brought back remains a dream for Indian activists. Therefore, while the Indian casino is a New Buffalo, the indigenous land claim represents the Old Buffalo.

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