No. _____

# In The Supreme Court of the United States

UTE DISTRIBUTION CORPORATION,

*Petitioner,*

v.

SECRETARY OF THE INTERIOR OF THE UNITED STATES, in his official capacity; UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

This case presents recurring issues regarding funds and property held in Indian trusts by the federal government as to when a statute of limitations bars a trust beneficiary's claims, including barring requests for administrative action under the Administrative Procedures Act to determine composition of the trust res.

1.

Is 28 U.S.C. § 2401(a) a jurisdictional statute?

2.

Is it contrary to *United States v. Taylor*, 104 U.S. 216 (1881), for a limitations period to accrue against a beneficiary before funds are placed in trust and before the trustee repudiates the trust?

3.

Where a beneficiary alleges mismanagement and loss, is it contrary to Pub. L. 108-108, 117 Stat. 1241, for a limitations period to expire even though the trustee has never provided an accounting?

**QUESTIONS PRESENTED** – Continued

4.

Is it contrary to *Morley Construction Co. v. Maryland Casualty Co.,* 300 U.S. 185 (1937), and *United States v. American Railway Express*, 265 U.S. 425 (1924), for the court of appeals to reverse an adverse limitations ruling against an appellee, where appellee failed to cross-appeal, and reversal on the limitations issue enlarges appellee's rights and lessens appellant's rights?

5.

Is it contrary to *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986), and Fed.R.Civ.P. 12(b)(6) & 56, for the court of appeals to reverse an unappealed adverse limitations ruling against appellee, where facts establishing accrual are disputed and dependent on outcome of the substantive issue appealed by appellant, and the appellate court did not review the substantive issue?

## RULE 14.1(b) STATEMENT

A list of parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

*Plaintiff-Appellant and Petitioner*: Ute Distribution Corporation, a Utah corporation organized and incorporated pursuant to Congressional requirement set forth in the Ute Partition Act, 25 U.S.C. §§ 677, *et seq.*, and trust beneficiary under the Ute Partition Act.

*Defendants-Appellees and Respondents*: Secretary of the Interior of the United States, in his official Capacity and as trustee under the Ute Partition Act; Ute Indian Tribe of the Uintah and Ouray Reservation, as Intervenor and trust beneficiary under the Ute Partition Act.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Ute Distribution Corporation is a Utah corporation. It has no parent company, and there is no publically held company that owns 10% or more of the Ute Distribution Corporation's stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Ute Distribution Corporation respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The October 19, 2009, opinion of the U.S. Court of Appeals for the Tenth Circuit is officially reported at 584 F.3d 1275 (10th Cir. 2010), and reproduced at App. 1.

The June 2, 2008, opinion of the U.S. District Court for the District of Utah is officially reported at 624 F. Supp. 2d 1322 (D. Utah 2008), and reproduced at App. 24.

The July 26, 1996, unpublished opinion of the U.S. District Court for the District of Utah is reproduced at App. 57.

The December 15, 2009, unpublished order of the U.S. Court of Appeals for the Tenth Circuit, which denies petitioner's petition for rehearing or alternatively for en banc review, is reproduced at App. 84.

## JURISDICTION

The district court stated its jurisdiction as under the Administrative Procedures Act, 5 U.S.C. § 704, for review of administrative action.[1] App. 25. The U.S. Court of Appeals for the Tenth Circuit stated its jurisdiction was under 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13(2) because it is filed within 90 days after denial of a timely petition for rehearing.

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2401(a), which addresses limitations periods, states as follows:

> (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal

[1] Petitioner also asserted that the district court had jurisdiction to address the substantive water issue initially as a declaratory judgment under 28 U.S.C. § 2201. *See* App. 61-62. Petitioner asserted in its appeal to the U.S. Court of Appeals for the Tenth Circuit that, in addition to review of administrative action under the Administrative Procedures Act, jurisdiction also was proper under Fed.R.App.P. 4 & 15.

> disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

App. 86.

Department of Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) ("Pub.L. 108-108"), addressing limitations periods in Indian trusts, states as follows:

> Provided further, That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected Tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

App. 87, at 90-91.

## STATEMENT OF THE CASE

This case arises under the Ute Partition Act, 25 U.S.C. § 677, *et seq.*, ("Partition Act"). The Partition Act, one of several congressional efforts in the 1950s and 1960s to "terminate" Indian tribes from federal supervision, was directed at members of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute(s)" or "Tribe"). The Partition Act dictated that

Tribal members with less than 50% Ute blood ("mixed-bloods") would lose tribal membership and be terminated from federal supervision, whereas Tribal members with at least 50% Ute blood ("full-bloods") plus any additional quantum of other Indian blood, would retain tribal membership and remain under federal supervision. 25 U.S.C. § 677a(b). *See also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 134-140 (1972) (discussing Partition Act and UDC's role); *Hackford v. Babbitt*, 14 F.3d 1457, 1462 (10th Cir. 1994) (discussing Partition Act and Uintah Irrigation Project); *United States v. Oranna Felter*, 546 F. Supp. 1002, 1005 (D. Utah 1982) (discussing Partition Act), *aff'd*, 752 F.2d 1505 (10th Cir. 1985).

On August 26, 1961, the Secretary of the Interior ("Secretary") issued a proclamation finalizing "termination" of the mixed-bloods. Dividing Tribal assets between the mixed-bloods (27.16186%) and full-bloods (72.83814%) was part of the termination process. *Affiliated Ute Citizens*, 406 U.S. at 134. The Partition Act required that all Tribal assets "not susceptible" of being "equitably and practicably distributed" to each separate mixed-blood must remain in government trust with the Secretary as trustee and the Tribe and a mixed-blood corporation as trust beneficiaries. *Ute Distribution Corp. v. United States,* 938 F.2d 1157, 1162 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 2273 (1992). The Ute Distribution Corporation ("UDC") was incorporated as trust beneficiary to represent the mixed-bloods' interests in undivided Tribal assets. *Id.* Each of the 490 mixed-bloods received ten shares in

the UDC to reflect ownership of undivided Tribal assets. *Id.* The UDC and the Tribal Business Committee of the Tribe jointly manage these trust assets subject to Secretarial approval and direction. *Affiliated Ute Citizens*, 406 U.S. at 136.

As trust beneficiaries, the Ute Tribe and UDC respectively hold 72.83814% and 27.16186% interests in the trust res, which consists of all "undivided" assets of the reservation, regardless of whether such assets had been identified at the time of partition or might be identified thereafter. 25 U.S.C. § 677i. Monies flowing from or derived from undivided assets go into federal trust, and the Secretary is required to proportionally distribute the net proceeds from that trust to the Tribe and UDC. *Id.*

Under *Winters v. United States*, 207 U.S. 564 (1908), all Indian tribes potentially "own" water rights, and those rights date from the establishment of a tribe's reservation. Since water must be "appropriated" via a state process in most western states, such Indian water "rights" are only "claims" to water when they have not yet been quantified or actually appropriated to a tribe by the state, or determined by compact. The State of Utah had determined in two 1923 state adjudications brought by the United States on behalf of the Ute Tribe, that some water that went into the Uintah Irrigation Project ("Project") "belonged" to the Tribe pursuant to *Winters*. *See Hackford*, 14 F.3d at 1461 (discussing 1923 adjudications and general nature of Indian water rights-claims under *Winters*). The Project irrigates Tribal

lands, and no one disputes that a right of user to Project water is appurtenant to some land tracts that are now or originally were owned by the Tribe. The Secretary holds title to the Project in trust, and the Secretary's position has been that, based on the Partition Act and assuming the Project as an undivided asset, the UDC and Tribe would have a joint right to manage the Project. *Id.* at 1465 (adopting Secretary's position).

Unlike water in the Project, other water rights-claims of the Tribe have never been quantified or decided by the State of Utah, nor agreed to by compact. The UDC's position is that under the Partition Act, such rights-claims under *Winters* are assets that were not at the time of partition "susceptible to equitable and practicable distribution" to each separate mixed-blood, that they remain in Secretarial trust, and that along with the Tribe, the UDC is a trust beneficiary entitled to manage its respective percentage of such water rights-claims and to receive its respective percentage of all monies or net proceeds derived or flowing from that asset.

In 1992, Congress enacted the Ute Indian Rights Settlement, Title V of Public Law 102-575 ("Title V"). App. 95. The Title V Committee Report states that the legislation must "be interpreted as being neutral" with respect to disputes or conflicts between mixed-bloods and full-bloods regarding their respective "rights and privileges," and that Title V "should be interpreted as being neutral with respect" to disputes and controversies, and is not meant to "deny any

underlying rights or privileges of any one group with regard to another." App. 100.

Title V provides millions of dollars as compensation for deferring development of Tribal water rights-claims and deferring adjudication of Tribal water rights-claims, which funds are in Secretarial trust. It is undisputed that the Secretary has released some Title V funds to the Tribe, whereas the UDC has received nothing.

On January 26, 1995, the UDC sent a letter to the Secretary's representative requesting inclusion in a meeting on Tribal water. There was no response from the Secretary and the UDC was not included in the meeting. In April 1995, the UDC filed a declaratory judgment action against the Secretary and Tribe seeking a declaration that the trust created pursuant to the Partition Act includes the UDC's portion of Tribal water rights, including the *Winters* water rights-claims on which Congress based Title V funds. App. 33. On September 22, 1995, the Tribe filed a motion to dismiss the declaratory judgment, based on sovereign immunity and statute of limitations. On July 23, 1996, the Secretary similarly moved for dismissal based in part on the six-year statute of limitations in 28 U.S.C. § 2401(a).

On July 26, 1996, District Judge David Winder denied the Tribe's motion to dismiss, finding there was no conceivable limitations period that would apply to bar the action:

> if this court were to conclude that certain tribal water rights were not partitioned and were an indivisible asset, then the Ute Tribe and the Secretary of the Interior would each be found to have an ongoing duty to ensure the UDC was properly included in the joint management of that asset. Thus, any breach at any time of the continuing responsibility of the Secretary or the Tribe could trigger a cause of action, a declaratory judgment defining a party's rights under the UPA may properly be sought at any time while the federally supervised joint management scheme is in effect.

App. 79-83, at 82-83. Referencing the adverse ruling against the Tribe on its motion to dismiss on limitations grounds, the Secretary's reply brief to District Judge Winder supporting its own motion to dismiss conceded that the court's rationale in denying the Tribe's motion to dismiss would also apply to the Secretary's § 2401(a) limitations argument.

With the denial of the Tribe's motion to dismiss on limitations grounds, the Secretary's argument for dismissal shifted focus to the Administrative Procedures Act ("APA"). On October 25, 1996, the UDC had filed an Amended Complaint under the APA requesting the same relief as in the declaratory judgment action, and asserting that the Secretary's refusal to respond to the UDC and include the UDC in water rights negotiations, including the UDC's January of 1995 request, was "action and inaction" constituting final agency action under the APA. In argument to

District Judge Winder regarding whether a limitations defense would apply if there was a declaratory judgment sought under the APA based on Secretarial inaction as alleged by the UDC, the Secretary's counsel stated this was "impossible at this point to determine." In oral argument in 1996 on what the district court called the Secretary's "motion to dismiss for failure to obtain final agency action or to exhaust administrative remedies," the Secretary's counsel asked the district court to remand the matter to the Secretary for final action, informing the court that the Secretary had never made a "final determination" on whether the UDC had an interest in the water rights, claims, and Title V funds at issue. The Secretary's counsel's position was that "allowing any of the joint management parties to go around the dispute resolution process would interfere with the agency's ability in the long run and in the short run to do what it is required to do under the act to do in an orderly fashion, address its responsibilities and manage those assets."

District Judge Winder did as the Secretary requested, and in 1997 remanded the water issue to the Secretary for decision under the APA. App. 33. After remand, the Secretary issued decisions in 1998 and 2004 finding that the water rights-claims at issue were not part of the trust res of which the UDC was a beneficiary. *See* App. 33-34. The UDC then filed a Second Amended Complaint on June 14, 2004, seeking review of agency action or, in the alternative, a declaratory judgment on the water issue. *See* App.

34-35. The Second Amended Complaint included an equitable claim requesting an accounting of Title V funds in Secretarial trust. The claim stated the Secretary failed to account for any such monies to the UDC including "for realization of the monetary potential," and that the Tribe had already used and spent some Title V funds and accrued interest, whereas the UDC had received nothing from the Secretary.

After remand to the Secretary, the case had been transferred to District Judge Dee Benson. By that time the Tenth Circuit had determined the Tribe's sovereign immunity was not waived by the Partition Act for claims by the UDC regarding undivided assets. *See Ute Distribution Corp. v. Norton*, 149 F.3d 1260, 1269 (10th Cir. 1998). The Tribe then waived sovereign immunity and intervened as a defendant.

The administrative record before the Secretary and district court contains hundreds of pages of historical evidence. *See* App. 34-50. The UDC provided copies of an appraisal and other Partition Act documents from the 1950s describing "rangelands" divided to the mixed-bloods which are a focus of this case. Relying only on the language of the Plan for Division, the Secretary has contended the rangelands had appurtenant *Winters* rights-claims. However, the UDC's evidence shows the rangelands had no appurtenant *Winters* rights-claims and that such water was not even considered by the mixed-bloods and full-bloods in making the rangelands division between the full-blood and mixed-blood groups. For example, the

UDC submitted as evidence the actual depositions of government employees Frank Moore (B.I.A. appraiser) and Cornelius Jenkins in a Utah federal district court case, in which they testify that the value of the rangelands divided to the mixed-bloods (which they had initially assessed) included only stock water, which means the value did not include the *Winters* claims at issue here. *See Hackford v. First Security Bank*, 521 F. Supp. 541, 557 (D. Utah 1981), *aff'd,* 1983 WL 20180 (10th Cir., Jan. 31, 1983). In addition, Partition Act sales documents in the record show that prices reflect only user rights to Uintah Irrigation Project water, and not *Winters* claims. Indeed, in *First Security Bank,* the Utah federal district court found there was no evidence that the price set for mixed-blood rangelands shares, where the price actually was set by the Secretary and purchase was by the Tribe, included appurtenant water. *Id.* at 558 (rejecting argument that intangible rights went with rangelands and stating "[a]t the least, the water and timber rights were arguably unsusceptible to practicable distribution").

On administrative review of the Secretary's action under the APA, District Judge Benson: (1) rejected the Secretary's argument that the UDC's Complaint for review of administrative action is barred by the six-year statute of limitations in 28 U.S.C. § 2401(a) (App. 50-52); (2) upheld the Secretary's administrative decision that the UDC is not a beneficiary of the water rights-claims at issue and is not entitled to reimbursement of Title V funds

derived from that water and held in Secretarial trust (App. 52-53). District Judge Benson also stated he would have made the same decision if he had been deciding the issue de novo. App. 52-53.

The UDC timely appealed the district court's decision on review of administrative action as to whether the UDC is a joint beneficiary with the Tribe of *Winters* water rights-claims in Secretarial trust.[2] The UDC's appeal argued alternatively that the district court had authority to make that decision on declaratory judgment. Neither the Secretary nor

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[2] The court of appeals' opinion appears to misapprehend the UDC's appeal and even the issues in the case, stating appeal was from a "decision of the district court denying the UDC's claim for a declaration that the Secretary's implementation of the [Partition Act] did not provide for an equitable and practicable division and distribution of water rights between the 'mixed-blood' and 'full-blood' members of the Ute Indian Tribe. . . ." App. 2. This is an incorrect statement of the case. The thrust of the UDC's appeal was from the district court's review of an administrative decision. App. 24. The UDC did not allege fault with the Partition Act or the Secretary's "implementation" of that Act. Instead, the issue was whether the unquantified and unadjudicated water at issue (*Winters* rights-claims) was an asset susceptible to equitable and practicable distribution so that an equal portion was distributed to each separate mixed-blood, or whether those *Winters* rights-claims were an asset that could not be distributed to each separate mixed-blood and were to remain in Secretarial trust with the UDC as a trust beneficiary. The UDC also does not contend the government did not divide the assets properly, as the court of appeals assumes. The UDC contends only as stated above, *i.e.*, that the water at issue could not be equitably and practicably distributed to each separate mixed-blood, and is part of the Secretarial trust res.

Tribe cross-appealed the district court rulings against them on statute of limitations. However, the bulk of the Secretary's appellate response brief was an argument seeking reversal of the district court's adverse statute of limitations rulings. The Tribe used its separate appellate response brief to address the substantive water issue appealed by the UDC.

The court of appeals' ruling addressed only the Secretary's statute of limitations argument, reversed the district court's ruling on that issue, and affirmed dismissal of the UDC's Second Amended Complaint on that basis alone. *See* App. 1-21. Specifically, the court of appeals found that "[d]efendants assert, and we agree, that the threshold question we must address is whether the district court erred in denying defendants' motions to dismiss UDC's action as untimely under 28 U.S.C. § 2401(a)." App. 17. By holding this was a "threshold question" that it "must address" even though there was no cross-appeal, the court of appeals acknowledged that it viewed 28 U.S.C. § 2401(a) as jurisdictional. This was confirmed by its later citation of *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996), and *Forest Guardians v. United States Forest Service*, 579 F.3d 2009 (10th Cir. 2009), *en banc rev. granted*, 2010 WL 761053 (Mar. 8, 2010), as supporting that jurisdictional conclusions are reviewed de novo. App. 17.

Apparently in conjunction with its jurisdictional approach, the court of appeals cited *El Paso Natural Gas v. Netzsosie*, 526 U.S. 473 (1999), and stated an appellant could, without filing a cross-appeal, "'urge

in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may not 'attack a decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary.'" App. 17 (quoting *El Paso*, 526 U.S. at 479). The court of appeals concluded the § 2401(a) limitations issue was "merely an alternative rationale" for affirming "dismissal of UDC's claims for relief" and "neither intended to enlarge defendants' own rights or lessen the rights of UDC." App. 17.

Addressing § 2401(a), the court of appeals noted the importance of determining the accrual date of an action. App. 18. The court of appeals cited the UDC's original Complaint cited by the Secretary in his appellate argument, and not the Second Amended Complaint on which the district court had ruled. App. 18. In the context of that initial Complaint and its statute of limitations discussion, the court of appeals referred to and rejected the "continuing wrong doctrine" and concluded that the initial Complaint "did not in any way allege that the Secretary mismanaged assets in his possession or otherwise violated his fiduciary duties to the mixed-bloods." App. 18-19. This was confusing, since it was the Secretary who had raised the "continuing wrong" doctrine, whereas the UDC actually had contended the Secretary had an ongoing duty regarding the trust assets, not that there was a "continuing wrong."

In reversing the district court and finding the § 2401(a) six-year limitations period accrued in 1961,

the court of appeals stated it "found the Secretary's arguments compelling" that a cause of action had accrued with the "Secretary's approval of the Plan for Division." App. 20. It is significant that in order to reach this conclusion, the court of appeals would have had to resolve the substantive question appealed by the UDC which was grounded in part on a dispute between the Tribe and UDC as to the meaning of the Plan for Division, including ignoring all evidence cited and submitted by the UDC that refuted the Tribe's and Secretary's position on the Plan for Division. However, the court of appeals did not address the substantive questions the district court had addressed in its review of the Secretary's administrative decision, and did not mention the APA. The court of appeals also cited as support a 1969 Court of Claims case. App. 20. That Court of Claims case actually was from 1977, and had concluded, in contrast to the court of appeals, that Tribal water right-claims were either distributed as shares in the UDC *or* as appurtenant to land. *See Affiliated Ute Citizens v. United States*, No. 156-69, 1997 WL 25897 (Ct. Cl. Oct. 28, 1977).

## REASONS FOR GRANTING THE PETITION

For over fifty years, the Secretary has been trustee[3] of assets divided and placed into trust as required by the Partition Act, as well as the funds derived from or flowing from those assets. With regard to the undivided assets, the mixed-bloods retain their federal status (App. 82), and the Ute Tribe and UDC are beneficiaries of this Indian trust. The Secretary's responsibilities as trustee sometimes result in disputes with the UDC, and it is crucial that this Court conclusively determine whether the Secretary's trust obligation to the UDC is ongoing or whether, six years after the 1961 termination occurred, the UDC forever was barred by 28 U.S.C. § 2401(a) from requesting administrative decisions from the Secretary, or information, accountings, or questioning virtually anything about the Partition Act or the composition of the trust res.

The issues presented by the court of appeals' ruling impact not only the Secretary's duties as trustee under the Partition Act but also virtually every case brought against the federal government in court or as an administrative action, including cases brought by tribes or individual Indians regarding trust accounts.

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[3] *See* Ute Partition Act, 25 U.S.C. § 677 *et seq.*; *Affiliated Ute Citizens,* 406 U.S. at 138 (undivided assets in trust); *Ute Distribution Corp. v. Norton*, 149 F.3d 1260, 1262 (10th Cir. 1998) (Secretary supervises undivided assets).

For example, the court of appeals applied 28 U.S.C. § 2401(a) as jurisdictional, even though § 2401(a) is not jurisdictional under this Court's decisions[4] and those of at least two courts of appeal. This is significant because the § 2401(a) jurisdictional issue is raised by the government as a matter of course, and even repeatedly in the same litigation, and parties' attempts to resolve the issue contribute to the seemingly endless cost and burden of litigation. It thus is critical for courts and those litigating against the government, or requesting administrative decisions from the government, to know with certainty whether § 2401(a) is jurisdictional with all that implies or whether it is a limitations statute to be treated as an affirmative defense like many other limitations periods.

The court of appeals also has departed from the accepted and usual course of judicial proceedings by reversing the district court and imposing its own "time of accrual," even though facts that might establish accrual are in dispute as are the inferences to be drawn therefrom. For the court of appeals to assess the accrual issue it would first have had to decide the UDC's substantive water appeal, and it did not do so. This approach by the court of appeals is contrary to

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[4] *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

settled law,[5] and the Court should exercise its supervisory powers to rectify that situation. This petition also should be granted because the court of appeals' decision conflicts with this Court's decisions (as well as Tenth Circuit decisions) in its application of the "enlarge non-appealing party's rights" or "decrease appealing party's rights" standard as to when a court may review matters not cross-appealed,[6] and it accordingly departs from the accepted and usual course of judicial proceedings in its application of that standard. In fact, the court of appeals' application of that standard could be viewed as eliminating the need for cross-appeals.

Furthermore, this petition involves questions of exceptional importance to the ongoing trust relationship among the Secretary, Tribe and UDC, since the court of appeals' decision conflicts with decisions by this Court, the Tenth Circuit, and other courts of appeals as to when a § 2401(a) statute of limitations begins to accrue against a trustee.[7] This petition also should be granted because the court of appeals' decision adversely impacts not only the UDC, but

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[5] Fed.R.Civ.P. 12(b)(6) & 56; *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

[6] *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185 (1937); *United States v. American Ry. Express.*, 265 U.S. 425 (1924); *The Maria Martin*, 20 L.Ed. 251 (12 Wall.) (1870); *Fischer-Ross v. Barnhart*, 431 F.3d 729 (10th Cir. 2005); *Hutchinson v. Pfeil*, 208 F.3d 1180 (10th Cir. 2000); *Hackney v. Newman Mem. Hosp.*, 621 F.2d 1069 (10th Cir. 1980).

[7] *United States v. Taylor*, 104 U.S. 216 (1881).

also tribes, individual Indians, and beneficiaries of government-run Indian trust accounts, in that it defies Pub.L. 108-108, which states that where mismanagement or loss of funds are alleged in an Indian trust account, a limitations period does not accrue until the trustee provides an accounting. The UDC contended in its Second Amended Complaint that Title V funds in Secretarial trust were mismanaged and lost, including when the Secretary gave the Tribe access to the funds and failed to provide the UDC with its respective portion.

## I. THIS COURT SHOULD DECIDE CONCLUSIVELY WHETHER 28 U.S.C. § 2401(a) IS JURISDICTIONAL.

The court of appeals' reference to 28 U.S.C. § 2401(a) as jurisdictional and as being a "threshold question" that must be answered, conflicts with this Court's decisions and with decisions of two other courts of appeal. The question of whether § 2401(a) is jurisdictional is of importance to those litigating or considering litigation against the federal government, and it should be settled by this Court.

"Statutes of limitations generally fall into two broad categories: affirmative defenses that can be waived and so-called 'jurisdictional' statutes that are not subject to waiver or equitable tolling." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 140 (2008) (Stevens, J., dissenting). In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this

Court had opened the door for statutes of limitations to be treated as affirmative defenses in lawsuits against the government by holding "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. Post-*Irwin*, in *John R. Sand & Gravel Co. v. United States*, this Court concluded that *Irwin* applies except where the Court, prior to *Irwin*, has given a "definitive interpretation" of the statute at issue. *John R.*, 552 U.S. at 137. Since this Court has never interpreted § 2401(a), it is jurisdictional and its limitations period is simply an affirmative defense.

By contrast with Court precedent, the court of appeals in this case and two unpublished Tenth Circuit decisions have found § 2401(a) jurisdictional. One unpublished decision, *Cherry v. Department of Agriculture,* 2001 WL 811737 (10th Cir. 2001), cites as support a 1992 case construing 28 U.S.C. § 2401(b). The second Tenth Circuit unpublished decision finding § 2401(a) jurisdictional is *Urabazo v. United States*, 1991 WL 213406 (10th Cir. Oct. 21, 1991), which cites as support the pre-*Irwin* cases *Spannaus v. Department of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987), and *Sisseton-Wahpeton Sioux Tribe v. United States,* 766 F.2d 449 (10th Cir. 1985). Similarly, the published court of appeals decision in this case relies on *UOP v. United States*, 99 F.3d 344, 347 (9th Cir. 1996), which is a 1996 Ninth Circuit case effectively overruled one year later in *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997).

Further, district courts in the Tenth Circuit addressing § 2401(a) reach different conclusions based on citation of pre- or post-*Irwin* cases. In *Pelt v. Utah*, 611 F. Supp. 2d 1267, 1281 (D. Utah 2009), the Utah district court found § 2401(a) jurisdictional and cited as support: (1) the pre-*Irwin* case *Christensen v. United States*, 755 F.2d 705 (9th Cir. 1985); and (2) *Urabazo v. United States*. By contrast, in *Barclay v. United States*, 351 F. Supp. 2d 1169, 1175 (D. Kan. 2004), the Kansas district court relied on *Irwin* and found that § 2401(a) is not jurisdictional.

Other courts of appeal also are in conflict. The Fifth Circuit and Ninth Circuit find § 2401(a) is not jurisdictional. *See Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000); *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). The Eleventh Circuit finds § 2401(a) jurisdictional, relying as support on a pre-*Irwin* case. *See Center for Biolog. Diversity v. Hamilton*, 433 F.3d 1331, 1334 (11th Cir. 2006) (citing *Spannaus*).

This petition should be granted in order to resolve this dispute.

## II. THIS COURT SHOULD CLARIFY THAT REPUDIATION OF A TRUST MUST OCCUR BEFORE ACCRUAL OF A LIMITATIONS PERIOD CAN BEGIN.

Discussing the Partition Act, this Court has held that the termination proclamation "did not purport to terminate the trust status of the undivided assets."

*Affiliated Ute Citizens,* 406 U.S. at 139. This petition should be granted because the court of appeals used an erroneous standard to determine when a limitations period accrues in trust situations. This is a question of exceptional importance to the ongoing trust relationship mandated by the Partition Act, as well as to other trust situations, including other Indian trusts such as the one at issue here.

In trust situations, this Court has stated that a limitations period does not accrue until the trustee unequivocally repudiates the trust. *United States v. Taylor*, 104 U.S. 216, 222 (1881) (statute of limitations begins to run only when "trustee unequivocally repudiates the trust," and the repudiation is "brought to the knowledge" of the beneficiary "in such a manner" that "he is called upon to assert his rights, and not before"). The court of appeals' opinion ignores the trust relationship between the Secretary and UDC. It also ignores Tenth Circuit precedent on trusts.[8]

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[8] The Tenth Circuit agrees and also has concluded accrual time can be intertwined with the substantive question. *In re Taylor,* 133 F.3d 1336 (10th Cir. 1998) (accrual starts when trustee affirmatively repudiates trust, which can be intertwined with substantive question); *United Mine Workers v. Utah*, 229 F.3d 982, 991 (10th Cir. 2000) (something must occur to give beneficiary "clear indication" trustee has repudiated trust) (citing Bogert & Bogert, *The Law of Trusts and Trustees*, § 951 (2d ed. 1995) (whether act shows intent to repudiate trust is question of fact)). Other courts of appeal agree. *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004)

(Continued on following page)

The court of appeals' decision here also ignores that this matter is not a "claim against the government" and instead is a review of an administrative order, and that under the Partition Act, the Secretary has an ongoing duty to ensure the UDC is included in joint management. The Secretary did not issue his final decision until 2004, which was the first time he repudiated that the Secretarial trust res includes the water rights-claims at issue. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 508, 514-15 (1967) (claim accrues on date of final board decision). In fact, in oral argument before District Judge Winder, the Secretary's counsel admitted there had been no prior repudiation by the Secretary, stating that the Secretary had never before decided this issue. The Secretary's counsel then requested remand for administrative review so that the Secretary could make that decision. Agreeing to remand, District Judge Winder informed the Secretary's counsel he could not make such statements to the court if they were not true and that the Secretary was "stuck with that argument."

In sum, this petition should be granted so that the Court can conclusively determine when a cause of action accrues in a government trust situation, including whether this applies in situations where an administrative decision has been sought, such as in this case.

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(accrual begins when trustee repudiates trust and "beneficiary has knowledge of that repudiation").

## III. PUBLIC LAW 108-108 REQUIRES AN ACCOUNTING IN INDIAN TRUSTS BEFORE A LIMITATIONS PERIOD CAN ACCRUE.

The petition should be granted because the court of appeals' decision conflicts with the Department of Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003) ("Pub.L. 108-108"). *See* App. 87, at 90-91. This issue should be clarified in this Court because it is critical to the UDC's position as a trust beneficiary of an Indian trust account. It also is critical to all tribes and individual Indians wishing to challenge the government regarding Indian trust accounts.

Pub.L. 108-108 states regarding an Indian trust account that where mismanagement or loss is alleged, a limitations period cannot start to run until the government provides an accounting, including in situations where litigation was pending at the time of enactment of that law. App. 90-91.

The court of appeals did not apply Pub.L. 108-108 here, even though the UDC argued that it should be applied, and even though the UDC is beneficiary to an Indian trust where mixed-bloods still have federal Indian status with regard to undivided assets. App. 82. By contrast, other courts recognize and apply Pub.L. 108-108 to Indian trusts. For example, in *Felter v. Salazar*, ___ F. Supp. 2d ___, 2010 WL 165700

(D. D.C. Jan. 15, 2010),[9] the district court rejected the government's argument that § 2401(a) barred plaintiffs' claims and instead applied Pub.L. 108-108 to extend the limitations period. *Id.* at ** 5-6. The district court also found that Pub.L. 108-108 applies retroactively. *Id.* Significantly, *Felter* was brought by mixed-bloods who claimed to have been improperly terminated under the Partition Act. Based on Pub.L. 108-108 and because there had been no accounting of assets that the mixed-bloods claimed they had been denied, the *Felter* court rejected the Secretary's argument that the mixed-bloods' claim of improper termination had accrued in 1967, six years after termination. The approach of the district court in *Felter* is in direct conflict to the approach of the court of appeals here. This is significant because both cases involve the Partition Act and mixed-bloods.

As a trust beneficiary, the UDC requested an accounting in the fourth claim in its Second Amended Complaint, filed June 14, 2004. The UDC asserted that it had never been provided an accounting, that there were millions of dollars in the trust account obtained pursuant to Title V and based on water rights-claims, and stated the Tribe had been receiving Title V funds but the UDC had not. The UDC also argued to the district court and court of appeals that,

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[9] *Felter* was on remand from *Felter v. Kempthorne*, 473 F.3d 1255 (C.A. D.C. 2007), where the court had ordered the district court to consider whether Pub.L. 108-108 applied to extend the limitations period.

under Pub.L. 108-108, any limitations period could not have accrued or expired against the UDC regarding *Winters* water rights-claims unless an accounting had been provided. In reversing the district court, the court of appeals failed to even reference Pub.L. 108-108.

Accordingly, this petition should be granted because it works an injustice for the UDC to be deprived of the benefit of a law that applies to all beneficiaries of Indian trusts.

## IV. THE COURT OF APPEALS MISAPPLIED A SETTLED SUPREME COURT STANDARD.

The court of appeals' consideration of the unappealed statute of limitations issue here misapplies the "enlarging his own rights" and "lessening the rights of his adversary" standard established by this Court, which is a departure from usual and accepted judicial practices.

In *Morley Construction Co. v. Maryland Casualty Co.,* this Court found that an appellee that fails to cross-appeal may not be heard on its own complaint of error in the court below:

> Without a cross appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it." What he

> may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." The rule is inveterate and certain. Findings may be reversed at the instance of the appellant if they are against the weight of the evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. . . . "Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

*Morley,* 300 U.S. at 191 (quoting *American Ry.,* 265 U.S. at 435; *The Maria Martin*, 20 L.Ed. 251 (12 Wall 31)).

District Judge Benson's decree denied defendants'-appellees' motion to dismiss on limitations grounds, and also ruled against plaintiff-appellant on the water issue. App. 50-53. By arguing in favor of reversing District Judge Benson's ruling on statute of limitations but failing to file a cross-appeal, the

Secretary sought to enlarge its own rights and lessen those of the UDC. However, under *Morley*'s standard, the Secretary was bound by the statute of limitations issue, although he could argue on appeal anything in the record that would support District Judge Benson's ruling against the UDC on the water issue, even if the matters argued by him on appeal conflicted with the reasoning of the district court on the water issue or were matters not even considered by the district court on the water issue. By misapplying *Morley* and effectively ruling that once one party appeals an issue which resulted in dismissal of the case against that party, another party then can raise and have considered any issue that it lost, the court of appeals gutted the cross-appeal requirement. If a party is not required to cross-appeal an adverse decree against it, where another party already has appealed its own adverse decree, there is never a need to cross-appeal.

This petition should be granted so that the Court can address the cross-appeal requirement and clarify when a cross-appeal is needed. This is a matter of supreme importance because the court of appeals' published decision reflects a departure from the accepted and usual course of judicial proceedings, and can be interpreted as eliminating the need for cross-appeals.

## V. THE COURT OF APPEALS COULD NOT "DECIDE" THE FACTS ESTABLISHING ACCRUAL OF A LIMITATIONS PERIOD BECAUSE ACCRUAL IS INTERTWINED WITH THE SUBSTANTIVE ISSUE.

This petition should be granted because the court of appeals' decision is a departure from the accepted and usual course of judicial proceedings in that it conflicts with Fed.R.Civ.P. 12(b)(6) & 56, and also conflicts with this Court's decisions. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986), *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

Neither summary judgment nor motions to dismiss on limitations grounds can be granted when facts establishing an accrual date are in dispute. *See* Fed.R.Civ.P. 12(b)(6) & 56(d). The facts as to accrual are in dispute here, and the underlying substantive issues raised in the UDC's appeal must be decided before it can be determined when (or if) a limitations period accrued. The court of appeals concluded that the date of the Secretary's approval of the Plan for Division was the time of accrual, and accepted the Secretary's argued date of 1961 as the date. App. 20. In order to make that determination, the court of appeals would have had to construe the Plan for Division and find no ambiguity or factual dispute about its meaning. However, in support of the underlying appeal on review of administrative action, the UDC presented a vast amount of evidence showing that the Plan for Division did not direct that *Winters* rights-claims be divided, and also presented evidence

showing that those rights-claims were not divided and could not have been. The UDC even submitted deposition testimony from *Hackford v. First Security Bank* of two government employees who testified that the only water appurtenant to the rangelands that went to the mixed-bloods was stock water, which is not the *Winters* rights-claims at issue in this lawsuit. If those *Winters* rights-claims were not divided, they were an undivided asset that went into the Secretarial trust of which the UDC is a trust beneficiary.

Moreover, to even address accrual, the court of appeals would have had to address the substantive appeal brought by the UDC on this issue, and conclude on review that water rights/claims at issue *were* distributed to each mixed blood as the Secretary and Tribe contend. The court of appeals failed to do this, and did not even address review of the administrative action. It simply accepted the Secretary's appellate brief arguments and statements at face value and with no assessment whatsoever of the substantive issue involved.

## CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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|---|---|
| UTE DISTRIBUTION CORPORATION,<br>Plaintiff-Appellant,<br>RED ROCK CORPORATION, a Utah Corporation,<br>Plaintiff-Intervenor,<br>v.<br>SECRETARY OF THE INTERIOR OF THE UNITED STATES, in his official capacity; UTE INDIAN TRIBE,<br>Defendants-Appellees. | No. 08-4147 |

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**APPEAL FROM THE**
**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF UTAH**
**(D.C. No. 2:95-CV-0376-DB)**

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(Filed Oct. 19, 2009)

Shawn E. Draney, (Max D. Wheeler, Camille N. Johnson, and Judith D. Wolferts with him on the briefs), of Snow, Christensen & Martineau, Salt Lake City, Utah, for Plaintiff-Appellant.

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Tod J. Smith of Whiteing & Smith, Boulder, Colorado, for Defendant-Appellee Ute Indian Tribe.

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Before **HENRY**, Chief Circuit Judge, **BRISCOE**, and **LUCERO**, Circuit Judges.

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**BRISCOE**, Circuit Judge.

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Plaintiff Ute Distribution Corporation (UDC) appeals from a decision of the district court denying UDC's claim for a declaration that the Secretary's implementation of the 1954 Ute Partition and Termination Act, 25 U.S.C. §§ 677 et seq., did not provide for an equitable and practicable division and distribution of water rights between the "mixed-blood" and "full-blood" members of the Ute Indian Tribe, and

that, consequently, such rights are currently held in trust by the Secretary for the mixed-blood members.[1] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that UDC's action was untimely filed. Accordingly, we affirm the district court's dismissal of UDC's claim and remand only so that the district court may amend its judgment to reflect this as the basis for the judgment.

## I

### *Factual background*

Between 1953 and the mid-1960's, a period commonly referred to as the "termination era," Congress "endeavored to terminate [the federal government's] supervisory responsibilities for Indian tribes." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986). Consistent with that policy, on August 27, 1954, Congress enacted the Ute Partition and Termination Act (UPA), 25 U.S.C. §§ 677 et seq. The express purpose of the UPA was "to provide for the partition and distribution of the assets of the Ute Indian Tribe [(Tribe)] of the Uintah and Ouray Reservation [(Reservation)] in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of

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[1] The legislation at issue, the parties, and the court below used the terms "mixed blood" and "full blood." We repeat those terms solely for consistency.

said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." 25 U.S.C. § 677. At the time of the UPA's enactment, the Tribe owned "cash, accounts receivable, and land" estimated to be worth $20,702,885, as well as "additional assets consisting of oil, gas, and mineral rights (principally oil shale deposits underlying the reservation), and unadjudicated and unliquidated claims against the United States." *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 134 (1972).

Implementation of the UPA began with the preparation and submission, by the Tribe, of "roll[s] of [its] full-blood" and "mixed-blood members . . . [that were] living on August 27, 1954." 25 U.S.C. § 677g. Those membership rolls were finalized and published on April 5, 1956. 21 Fed. Reg. 2208-20 (Apr. 5, 1956). "The rolls listed 490 mixed-bloods and 1,314 full-bloods, a total of 1,804. The ratio was 27.16186% mixed-bloods and 72.83314% full-bloods." *Affiliated Ute Citizens,* 406 U.S. at 135 n.5. The UPA provided that, "[e]ffective on the date of publication of the[se] final rolls," membership in the Tribe "consist[ed] exclusively of full-blood members," and "[m]ixed-blood members" were deemed to "have no interest [in the Tribe] except as otherwise provided" in the UPA. 25 U.S.C. § 677d.

The next step in the implementation of the UPA was the "division of the assets of the [T]ribe that [we]re then susceptible to equitable and practicable

distribution." 25 U.S.C. § 677i.[2] This step was to be carried out by "[t]he [T]ribal [B]usiness [C]ommittee representing the full-blood group, and the authorized representatives of the mixed-blood group. . . ." *Id.* Pursuant to authority granted by the UPA, the mixed-bloods created an unincorporated association, Affiliated Ute Citizens of the State of Utah (AUC), to act as their authorized representative. 25 U.S.C. § 677e; App. at 130. In October 1956, the AUC and the Tribal Business Committee agreed upon a "Plan for Division of Assets" (Plan for Division). App. at 127-141.

Section X of the Plan for Division, entitled "Land," provided for the division of the Tribe's land. *Id.* at 133-135. It identified five categories of land (i.e., "Land Unsatisfactory for Division," "Assigned Lands," "Range Lands," "Timber Land," and "Other Lands") and made specific provision for each. Subsection F thereof, entitled "Water Rights," provided as follows:

> *All water and water rights pertinent to the lands* involved or generally used in

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[2] Section 677i also provided that "[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution [were to] be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as [wa]s otherwise required by law," for the benefit of both the full-bloods and the mixed-bloods. 25 U.S.C. § 677i.

> connection therewith whether represented by shares of stock in a corporation or otherwise and all potential water rights that may subsequently attach to the lands to be divided shall be considered in arriving at the fair value of the lands divided and *shall be considered as running with the lands*.

*Id.* at 135 (emphasis in original).

In November 1956, the Secretary, through the Acting Commissioner of the Bureau of Indian Affairs, approved, with minor changes, the Plan for Division. *Id.* at 142-44. In doing so, the Secretary made the following recommendation to the Tribal Business Committee and the AUC's Board of Directors:

> [W]e recommend to you, in fact urge you, to give serious consideration to the obtaining of unimpeachable qualified independent advice in the matter of review of proposed plans for division of the lands falling within [the "Other Lands"] classification, and such similar review as you may deem advisable covering your entire real estate partition.

*Id.* at 143. In late 1957 and early 1958, the Tribal Business Committee, AUC's Board of Directors, and AUC membership adopted resolutions approving the Plan of Division. *Id.* at 1162-1179. The resolutions adopted by the AUC board and membership confirmed that the division of assets outlined in the Plan of Division was "satisfactory, equitable, practicable and based upon the relative number of persons comprising the final membership roll of each group."

*Id.* at 1169, 1174-75. On March 24, 1958, the Commissioner of Indian Affairs, acting on behalf of the Secretary, approved the division of assets, finding that it was "made in a manner equitable to the two groups and within the legal authority of the" UPA. *Id.* at 1209.

Following the adoption and approval of the Plan for Division, the mixed-bloods, as required by the UPA, 25 U.S.C. § 677*l*, prepared and ratified a Plan for Distribution of the mixed-bloods' assets among the members of the mixed-blood group. *Id.* at 147. In accordance with the Plan for Distribution and the UPA, the mixed-bloods in turn formed three corporations to manage their assets. Two of those were nonprofit grazing corporations (Range Corporations) created to manage approximately 172,000 acres of former tribal range lands that, pursuant to the Plan for Division, belonged exclusively to the mixed-bloods. Each mixed-blood member surrendered his or her individual interest in the range lands in return for stock in the Range Corporations (which shares could, in the discretion of each member, be leased or sold). *Id.* at 161. Fee patents were then issued conveying to the Range Corporations all of the range lands, as well as "all the rights, privileges, immunities, and appurtenances, of whatsoever nature," that were connected therewith.[3] *Id.* at 1261-74. The only exceptions to

[3] By May of 1963, the Tribe "had purchased all but 48 [R]ange [C]orporation units. . . ." *Hackford v. First Sec. Bank of Utah,* 521 F. Supp. 541, 548 (D. Utah 1981). The Range

(Continued on following page)

these conveyances were "all minerals and mineral rights, including oil and gas," which were "reserved to the . . . Tribe . . . and the [AUC]. . . ." *Id.*

The third corporation created by the mixed-bloods in connection with the Plan for Distribution was the UDC. *Id.* at 652. UDC was created to

> manage jointly with the Tribal Business Committee . . . all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets susceptible to equitable and practicable distribution to which the mixed-blood members of said tribe . . . [were then], or m[ight] thereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of [UDC]. . . .

*Id.* at 654 (UDC Articles of Incorporation).

Shortly after the Plan for Distribution received final approval, the Tribe and AUC jointly hired an engineering consultant named E.L. Decker to study and produce a report regarding the water rights on the Reservation. *Id.* at 2724. In doing so, both the Tribe and the AUC acknowledged that "before a distribution of lands and assignment of lands c[ould] be fully completed many irrigation problems ha[d] to be

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Corporations "were eventually dissolved and the 39 mixed-bloods whose shares had not been sold to the tribe received individual interests in grazing land." *Id.*

solved. . . ." *Id.* Decker completed his report on December 12, 1960. The report identified all practicably irrigable acreage within the Reservation, and in turn used this as the basis for quantifying the tribal reserved water rights.

On August 26, 1961, the Secretary issued a proclamation finalizing the termination of the mixed-blood group from the Tribe. The proclamation stated, in pertinent part, "that effective midnight August 27, 1961," mixed-blood members of the Tribe would "not be entitled to any of the services performed for Indians because of [their] status as . . . Indian[s]," and "[a]ll statutes of the United States which affect Indians because of their status as Indians [would] no longer be applicable to [mixed-bloods] . . . , and the laws of the several States shall apply to [mixed-bloods] in the same manner as they apply to other citizens within their jurisdiction." *Id.* at 1432 (26 Fed. Reg. 8042 (Aug. 24, 1961)).

On March 14, 1969, AUC filed suit in what was then known as the United States Court of Claims alleging generally "that the Federal Government failed to divide the . . . Tribe's assets properly pursuant to the [UPA], and that they received less than that to which they were entitled." *Affiliated Ute Citizens of Utah v. United States,* 199 Ct. Cl. 1004 (Ct. Cl. 1972). AUC's petition alleged, in particular, that the UPA "expressly required the United States to convey to the individual 'mixed-blood' members their share of [the Tribe's] water rights," but that those members "ha[d] not been granted, either directly or

indirectly, their undivided 27.16186% of said water and water rights, nor any water or water rights whatsoever. . . ." App. at 2767.

On October 28, 1977, after eight years of litigation, the Court of Claims issued a final decision granting summary judgment in favor of the United States. *Affiliated Ute Citizens of Utah v. United States,* No. 156-69, 1997 WL 25897 (Ct. Cl. Oct. 28, 1977). In doing so, the Court of Claims stated:

> We find nothing in the record to shake our conviction that any acts for which the Federal Government might have been liable occurred by 1961, leaving plaintiffs' 1969 filing untimely. The purpose of the termination act was to end the tribal status of mixed-blood Utes and to convert their status to that of ordinary American citizens. The division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the Ute Distribution Corporation or as appurtenant to land; whatever claims plaintiffs may have had matured then and became barred by the statute of limitations in 1967. Plaintiffs contend that their rights matured in 1966, when the range corporations were dissolved and certain of their assets were acquired by the tribe. But, whatever rights the mixed-bloods took were fixed in 1961, after which the Federal Government took no actions affecting the parties' division of assets. The later payment of money by the Government to the Ute Distribution

> Corporation does not affect this conclusion, since the relative shares of that corporation were finally fixed by 1961. Neither do we find merit to plaintiffs' contention that they did not know and could not have known that all assets were being divided by the termination procedures. Defendant's numerous citations to the statute, to pre-termination correspondence, and to the plans for division and distribution, leave us no doubt that the mixed-bloods had notice of the finality of the termination procedures. In short, plaintiffs have pointed to no evidence, and we can find none ourselves, establishing a continued federal responsibility for claimed assets of the mixed-bloods beyond the time of the termination proclamation.

*Id.*, 1997 WL 25897 at *1.

*Procedural background*

On April 24, 1995, UDC filed the instant action against the Secretary and the Tribe seeking a declaration of "the parties' rights and obligations under the" UPA. App. at 57. UDC alleged that "[t]he Plan for Division . . . did not provide for an equitable and practicable distribution of water rights, with the possible exception of rights of use of water which were then being beneficially used on the lands distributed," and "did not and could not fully address tribal water rights, because the nature and extent of tribal water rights was unknown." *Id.* at 62. UDC further alleged that, "[a]t the time of distribution, tribal water rights

were not adjudicated, liquidated, defined or quantified, and they remained under the trust responsibility of the United States in accordance with the" UPA. *Id.* Continuing, UDC alleged that "[f]rom time to time since the passage of the [UPA], the UDC and its agents ha[d] asserted mixed-blood rights to water on the Ute Reservation and ha[d] been informed . . . that the Secretary d[id] not acknowledge such rights." *Id.* at 67. Based upon these allegations, UDC sought a declaration "that certain water rights were not partitioned; that they remain in trust for the benefit of mixed-blood and full-blood members of the Tribe; and that they are subject to joint management by the [UDC] and the Tribal Business Committee under the supervision of the Secretary. . . ." *Id.* at 69-70.

The Tribe and the Secretary each moved to dismiss the action arguing, in pertinent part, that UDC's claims were time-barred. On July 26, 1996, the district court denied the Tribe's motion[4], stating, in pertinent part:

> [T]here is no single, discrete event associated with the UPA that has given rise to a cause of action and triggered any attendant limitations period foreclosing this action. . . . [I]f this court were to conclude that certain tribal water rights were not partitioned and are an indivisible asset, then the Ute Tribe and

[4] Although the district court ruled on the Tribe's motion to dismiss, there is no indication in the record on appeal that the district court ever ruled on the Secretary's motion to dismiss.

> the Secretary of the Interior would each be found to have an ongoing duty to ensure the UDC was properly included at all times in the joint management of that asset. Thus, any breach at any time of the continuing responsibility of the Secretary or the Tribe could trigger a cause of action; hence, a declaratory judgment defining a party's rights under the UPA may properly be sought at any time while the federally supervised joint management scheme is in effect.

*Ute Distr. Corp. v. Sec'y of Interior,* 934 F. Supp. 1302, 1313 (D. Utah 1996).[5]

On March 5, 1997, the district court remanded UDC's claims to the Secretary "for final action and decision," and "retain[ed] jurisdiction of th[e] matter pending final decision by the" Secretary. App. at 50. On remand, the Secretary, after reviewing the parties' supplemental submissions, issued a twenty-two page letter "conclud[ing] that the tribal water rights of the Ute Indian Tribe were an asset susceptible to

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[5] The Tribe appealed a separate portion of the district court's order "ruling that the Tribe's immunity was waived by provisions of the" UPA. *Ute Distrib. Corp. v. Ute Indian Tribe,* 149 F.3d 1260, 1261 (10th Cir. 1998). On July 29, 1998, this court reversed that ruling and remanded the matter to the district court "to determine whether the tribal corporate entity [wa]s both a named and proper defendant in this case." *Id.* at 1269. That issue was rendered moot shortly thereafter when the Tribe moved and was allowed by the district court to intervene as a matter of right, and alternatively by permission.

equitable and practical distribution and that this asset was in fact divided and distributed." *Id.* at 1370.

Upon return to the district court, UDC challenged the Secretary's decision, in pertinent part, on the grounds that "the Bureau of Indian Affairs . . . failed to provide the UDC access to various documents that the UDC believed would affect the outcome of the 1998 decision." *Id.* at 1311. On March 24, 2001, the district court again remanded the case for further proceedings before the Secretary. *Id.* at 1578.

On February 3, 2004, the Secretary issued a second decision (the 2004 Decision) concluding that "UDC failed to provide any evidence or argument which warrant[ed] changing the rationale or conclusions of the 1998 Decision." *Id.* at 1312. In particular, the Secretary rejected UDC's argument that the Tribe's unquantified *Winters*[6] water rights were water rights "claims" not susceptible of division, and instead concluded that such water rights were vested rights, established when the reservation was created, and that they were capable of being partitioned in a

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[6] The term "*Winters* water rights" derives from the case of *Winters v. United States*, 207 U.S. 564 (1908). Such rights "are federally created and spring from the act of reserving lands for a particular purpose, such as transforming nomadic Indians into productive agrarians or promoting Indian self-sufficiency." *Hackford v. Babbitt*, 14 F.3d 1457, 1461 n.3 (10th Cir. 1994). Thus, such rights "have a priority date as of the date of establishment of the reservation. . . ." *Id.* Further, such rights, "[u]nlike most other water rights, . . . are neither created by use nor lost by nonuse." *Id.*

reasonable manner based on the division and distribution of the reservation's lands. The Secretary further concluded that the documents in the administrative record "clearly show[ed] that Tribal water rights and water rights claims were susceptible to equitable and practicable distribution under the UPA and in fact were so divided and distributed pursuant to the UPA." *Id.* at 1326.

The matter again returned to the district court. UDC amended its complaint to add claims challenging the Secretary's 2004 Decision. The Tribe and the Secretary responded, in part, by filing a joint pleading reasserting that UDC's action was time-barred. District Court Docket # 272 at 9-11.

On June 2, 2008, the district court issued a memorandum decision affirming the Secretary's 2004 Decision. In doing so, the district court concluded that the tribal reserved water rights were both an asset susceptible to equitable and practicable distribution in 1961 and were in fact divided pursuant to the UPA. The district court also, in the final section of its memorandum opinion and decision, rejected the defendants' statute of limitations arguments, concluding that the earlier denial of the Tribe's motion to dismiss represented the law of the case.[7]

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[7] Due to the length of time that elapsed between the filing of UDC's original complaint and the ultimate resolution of the case in district court, the district judge who issued the June 2, 2008 memorandum opinion and decision was different than the one who initially ruled on the Tribe's motion to dismiss in 1996.

(Continued on following page)

Supp. App. at 76-77. On June 3, 2008, the district court entered judgment in favor of defendants. On July 22, 2008, the district court entered an amended judgment affirming the Secretary's 1998 and 2004 decisions, and dismissing with prejudice UDC's second amended complaint.

## II

*Timeliness of UDC's action – 28 U.S.C. § 2401(a)*

Defendants assert, and we agree, that the threshold question we must address is whether the district court erred in denying defendants' motions to dismiss UDC's action as untimely under 28 U.S.C. § 2401(a). Although UDC asserts that the issue is moot due to defendants' failure to file a cross-appeal challenging the district court's rulings, UDC is mistaken. An appellee may, without filing a cross-appeal, "'urge in

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The second judge expressly stated that he found the defendants' statute of limitations argument "compelling," Supp. App. at 76, but nevertheless concluded he was bound, under the law of the case doctrine, by the first judge's ruling. *Id.* at 77.

We need not decide whether the second judge was somehow bound by the first judge's ruling because, in any event, "a district court's adherence to law of the case cannot insulate an issue from appellate review. . . ." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1998). In other words, as there has been no prior ruling by this court or the Supreme Court in this case regarding the statute of limitations issue, we are not bound by any restriction that the law of the case doctrine may impose. *See United States v. Monsisvais*, 946 F.2d 114, 115-16 (10th Cir. 1991) (explaining the law of the case doctrine; citing *Arizona v. California*, 460 U.S. 605, 618 (1983)).

support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Natural Gas v. Neztsosie,* 526 U.S. 473, 479 (1999) (quoting *United States v. Am. Ry. Express Co.,* 265 U.S. 425, 435 (1924)); *see* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §3904, at 199-201 (1992) ("Cross-appeal is unnecessary even with respect to matters that have been put aside by the district court, or matters that have been explicitly rejected by the district court."). Defendants' statute of limitations argument falls within the former category because, although it involves an attack on the district court's reasoning in denying the defendants' motions to dismiss, it is neither intended to enlarge defendants' own rights or lessen the rights of UDC. Instead, defendants' statute of limitations argument merely provides an alternative rationale, based on materials well developed in the record, for affirming the dismissal of UDC's claims for relief. We therefore proceed to review the § 2401(a) issue de novo. *UOP v. United States,* 99 F.3d 344, 347 (9th Cir. 1996) (holding that § 2401(a) statute of limitations issue "must be reviewed de novo"); *see Forest Guardians v. United States Forest Serv.,* ___ F.3d ___, 2009 WL 2915022 at *4 (10th Cir. Aug. 26, 2009) ("We review de novo the district court's jurisdictional conclusion.").

Section 2401(a) provides, in pertinent part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Determination of the accrual date of an action is critical for purposes of applying § 2401(a). "A claim against [the] United States first accrues on the date when all events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Izaak Walton League of Am., Inc. v. Kimbell,* 558 F.3d 751, 759 (8th Cir. 2009) (internal quotation marks and alterations omitted); *see Felter v. Kempthorne,* 473 F.3d 1255, 1259 (D.C. Cir. 2007) ("Actions usually accrue when they come into existence.") (internal quotation marks and brackets omitted).

UDC argues, as it did below, that its action is necessarily timely because the Secretary had, and continues to have, a continuing duty to properly manage any undistributed assets, including what UDC claims were the undistributed water rights and water rights claims, which it asserts are now held in trust for the mixed-bloods. We reject this argument. UDC's original complaint sought a declaration "that certain water rights were not partitioned; that they remain in trust for the benefit of mixed-blood and full-blood members of the Tribe; and that they are subject to joint management by the [UDC] and the Tribal Business Committee under the supervision of the Secretary. . . ." App. at 69-70. Assuming, for purposes of argument, that this constitutes a valid claim, it does

not in any way allege that the Secretary mismanaged assets in his possession or otherwise violated his fiduciary duties to the mixed-bloods. Indeed, this allegation effectively concedes, consistent with the language of the UPA itself, that UDC itself was responsible, together with the Tribal Business Committee, for directly managing any undivided assets. 25 U.S.C. § 677i (providing that "all other assets not susceptible to equitable and practicable distribution [were to] be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group," i.e., UDC). Moreover, as noted by the Secretary, "the continuing wrong doctrine 'cannot be employed where the plaintiff's injury is definite and discoverable and nothing prevented plaintiff from coming forward to seek redress.'" Sec'y Br. at 34 (quoting *Tiberi v. Cigna Corp.,* 89 F.3d 1423, 1431 (10th Cir. 1996) (internal quotation marks omitted)). Thus, UDC cannot rely on the continuing wrong doctrine to save its action from being dismissed as untimely. *Cf. Catawba Indian Tribe of S.C. v. United States,* 982 F.2d 1564, 1572-73 (Fed. Cir. 1993) (rejecting similar continuing duty argument).

The Secretary argues that "UDC's claim regarding the division or lack thereof of tribal water rights came into existence no later than the Secretary's termination of the mixed-bloods in 1961," by which time "the full-blood and mixed-blood groups had agreed which assets were susceptible to division and had developed plans to divide and distribute the assets equitably, and the Secretary had approved the

plans." Sec'y Br. at 31. Further, the Secretary notes, "numerous actions from 1960 forward put UDC on notice that the United States and the Tribe did not recognize UDC as holding an interest in the Tribe's water and water rights. . . ." *Id.* at 32.

We find the Secretary's arguments compelling. Contrary to the conclusion reached by the district court, there was, indeed, a "single, discrete event associated with the UPA that has given rise to a cause of action and triggered any attendant limitations period foreclosing this action. . . ." *Ute Distr. Corp.*, 934 F. Supp. at 1313. That event was the Secretary's approval of the Plan of Division. At that point in time, all of the Tribe's assets were either divided between the mixed-bloods and the full-bloods, or retained by the United States on behalf of, and to be jointly managed by, the mixed-bloods and full-bloods. As a result, the mixed-bloods knew or should have known that any claims asserting improper division of those assets would need to be filed within six years of the date of the Secretary's approval of the Plan of Division. *Cf. Catawba Indian Tribe,* 982 F.2d at 1572-73 ("The breach of the Government's duty would have been evident in the way in which the Government implemented the [Catawba Indian Tribe Division of Assets] Act.").

Moreover, as asserted by the Secretary, numerous events have occurred since the time of the Secretary's approval that establish UDC either knew or should have known of the claim it originally sought to assert in this action. Most notably, in March of 1969, AUC

(the mixed-bloods' representative in the UPA's division process) filed suit in the United States Court of Claims alleging that the federal government had failed to properly divide under the UPA the Tribe's assets including, in particular, the Tribe's water rights. In other words, an entity closely aligned with UDC and acting on behalf of the mixed-bloods filed suit alleging a claim similar, if not identical, to the one now asserted by UDC.

Because we conclude that UDC's action was untimely, we AFFIRM the district court's dismissal of UDC's action with prejudice and REMAND only for the district to amend its judgment to reflect this as the sole basis for the judgment.

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| UTE DISTRIBUTION CORPORATION,<br>Plaintiff-Appellant,<br>RED ROCK CORPORATION, a Utah Corporation,<br>Plaintiff-Intervenor,<br>v.<br>SECRETARY OF THE INTERIOR OF THE UNITED STATES, in his official capacity; UTE INDIAN TRIBE,<br>Defendants-Appellees. | No. 08-4147<br>(D.C. No. 2:95-CV-0376-DB) |

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**JUDGMENT**

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Before **HENRY**, Chief Circuit Judge, **BRISCOE**, and **LUCERO**, Circuit Judges.

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(Filed Oct. 19, 2009)

This case originated in the District of Utah and was argued by counsel.

We affirm the district court's dismissal of UDC's claim. The case is remanded to the United States

District Court for the District of Utah for further proceedings in accordance with the opinion of this court.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

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| UTE DISTRIBUTION CORPORATION, a Utah Corporation,<br>Plaintiff/Appellant,<br>vs.<br>SECRETARY OF THE INTERIOR OF THE UNITED STATES, in his official capacity; and agents and employees, and those working in concert with him,<br>Defendants/Appellees,<br>UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,<br>Defendant Intervenor/ Appellee,<br>and<br>RED ROCK CORPORATION, a Utah Corporation<br>Defendant-Intervenor. | **MEMORANDUM OPINION AND ORDER**<br>Judge Dee Benson<br>Case No.: 2:95-CV-376<br>(Filed Jun. 2, 2008) |

This case arises out of the Secretary of the Interior's determination that tribal water rights of the Ute Indian Tribe were divided and distributed in 1961 pursuant to the Ute Partition and Termination

Act ("UPA"). 25 U.S.C. §§ 677 *et seq.* Plaintiff Ute Distribution Corporation ("UDC") has appealed the Secretary's decision, and the issue is now before the Court pursuant to the judicial review procedures of the Administrative Procedures Act ("APA"). 5 U.S.C. § 701, *et seq.*

## Factual Background

In the 1950s, Congress initiated a policy now known as the "termination era," during which Congress sought to terminate federal recognition of Indian tribes and assimilate tribal members into the general population by passing a series of termination statutes. *See generally,* Cohen's Handbook of Federal Indian Law, § 1.06 (2005 ed.). The UPA was one such statute. 25 U.S.C. §§ 677 *et seq.* It established a process to terminate federal supervision over the so-called "mixed-blood" members of the Ute Indian Tribe.[1] Through the UPA, Congress provided for the partition and distribution of the assets of the Ute

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[1] Under the Partition Act, the "full-blood" group was comprised of those individuals with at least "one-half degree of Ute Indian blood and a total Indian blood in excess of one-half." 25 U.S.C. § 677a(b). The "mixed-blood" group was comprised of those individuals who either did not possess sufficient Indian or Ute Indian blood to qualify as "full-bloods" or who became a mixed-blood member by choice under section 677c after having been initially classified as a full-blood member. 25 U.S.C. §§ 677a(c), 677c. *Hackford v. Babbitt,* 14 F.3d 1457, 1462 (10th Cir. 1994).

Indian Tribe between the full-blood group, for whom federal supervision would continue, and the mixed-blood group, for whom such supervision would end. *Id.*

One of the first steps in this process was the creation of a final membership roll dividing the two groups. 25 U.S.C. § 677g. The final membership roll was published on April 5, 1956, 21 Fed. Reg. 2208-12 (1956), and listed 1,314 full-bloods (72.84% of the total group) and 490 mixed-bloods (27.16% of the total). *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 135 n.5 (1972) (*"AUC I"*). Thereafter, the Ute Tribe consisted exclusively of the full-blood members. 25 U.S.C. §§ 677d and 677g.

After the two groups were divided, section 10 of the UPA, 25 U.S.C. § 677i, required the division and distribution of tribal assets then susceptible to equitable and practicable distribution based upon the relative number of persons comprising each of the two groups. This section further provided that all assets not susceptible to equitable and practicable distribution – categorized as "[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution" – were to be managed jointly by the Tribal Business Committee (representing the full-blood members) and the authorized representative of the mixed-blood group. 25 U.S.C. § 677i. The mixed-blood group created the Affiliated Ute Citizens of Utah

("AUC") to act as their authorized representative. 25 U.S.C. § 677e.

In October 1956, the AUC and the Tribal Business Committee agreed to and adopted criteria governing how the tribal assets were to be divided in the "Plan for Division of Assets" (the "Plan"). AR 127-36. The Plan identified those tribal assets the two groups agreed were then susceptible to equitable and practicable distribution and adopted a ratio of division pursuant to their numbers and section 10 of the UPA (72.84% to the full-bloods and 27.16% to the mixed-bloods). 25 U.S.C. § 677i. This ratio was then used to achieve a division of tribal assets, including loans and accounts receivables of the Tribe, materials, supplies, buildings, and equipment. Sections II-IX of the Plan for Division, AR 1352. Section X of the Plan memorialized the two groups' agreement with regard to the division of tribal land, including water, water rights, and potential water rights appurtenant to the land:

> All water and water rights pertinent to the lands involved or generally used in connection therewith whether represented by shares of stock in a corporation or otherwise and all potential water rights that may subsequently attach to the lands to be divided shall be considered in arriving at the fair value of lands divided and shall be considered as running with the land.

Plan for Division, Section X.F., AR 135.

In November 1956, the Secretary of the Interior, through the Acting Commissioner of the Bureau of Indian Affairs ("BIA"), approved the Plan. AR 138-44. In approving the Plan, the BIA specifically cautioned both groups to seek independent advice about dividing the lands, stating: "we recommend to you, in fact urge you, to give serious consideration to the obtaining of unimpeachable qualified independent advice in the matter of review of proposed plans for division of the lands ... covering your entire real estate partition." AR 143.

The implementation of the Plan and final division of tribal assets was approved by the AUC Board of Directors and the Ute Indian Tribe on December 18, 1957. *See* AUC Resolution No. 57-234, AR 1167-71; Resolution No. 57-238, AR 1173-76. The AUC Membership approved the plan on January 10, 1958. AUC Resolution No. 58-G2, AR 1179. Each resolution confirmed that the division of assets was "satisfactory, equitable, practicable and based upon the relative number of persons comprising the final membership roll of each group." AR 1169, 1174-75; *see also* AR 1179. The division of assets between the two groups was approved by the Commissioner of Indian Affairs on behalf of the Secretary on March 24, 1958, wherein he found that the division was "made in a manner equitable to the two groups and within the legal authority of the [Ute Partition] Act." AR 1208-09.

Subsequent to the division of the tribal assets, the mixed-bloods were required to "devise a plan for the distribution of its share of the tribal assets to the

individual members of the mixed-blood group." *Hackford v. First Sec. Bank of Utah,* 521 F. Supp. 541, 544 (D. Utah 1981). *See also* 25 U.S.C. § 677l; Plan for Distribution, AR 147. Pursuant to this plan, and in accordance with the UPA, the AUC established three separate corporations to manage the mixed-bloods' assets. One of those corporations, the UDC, was created to

> manage jointly with the Tribal Business Committee . . . all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of said tribe . . . are now, or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation. . . .

UDC Articles of Incorporation (November 13, 1958), AR 654. *See also* 25 U.S.C. § 677i.

Additionally, the AUC formed two separate nonprofit grazing corporations ("Range Corporations"), to maintain 172,000 acres of former tribal range lands that now belonged exclusively to the mixed-bloods. *Hackford,* 521 F. Supp. at 544. Each mixed-blood surrendered his individual interest in the range lands in return for stock in the Range Corporations. *Id.* Fee patents were then issued conveying the land to the Range Corporations together with "all the rights, privileges, immunities, and appurtenances, of

whatsoever nature, thereunto belonging. . . ." Fee Patents Issued to Range Corporations, AR 1261-74. Only "minerals and mineral rights, including all oil and gas together with the right to lease, extract and retain the same pursuant to [the UPA]," were reserved from the conveyance as indivisible assets. *Id.* By May 1963, however, the Tribe had purchased over 90% of the stock in the two Range Corporations and subsequently dissolved both corporations pursuant to state law. *Id.* at 548.

Shortly after obtaining final approval on the Plan for Distribution, the Ute Indian Tribe and AUC jointly hired E.L. Decker to study and produce a report regarding the water rights of the Reservation. Both parties understood that distribution of the lands could not be fully completed until all irrigation problems were solved. *See* Tribe's Resolution No. 58-231 (Oct. 14, 1958), AR 2724. Accordingly, Mr. Decker prepared a report, which was completed on December 12, 1960, identifying all practicably irrigable acreage ("PIA") within the Reservation, and used this as the basis for quantifying the tribal reserved water rights. *See* Decker Report (Dec. 12, 1960), AR 693-831.

Thereafter, on August 26, 1961, the Secretary completed the termination of the mixed-blood group, proclaiming that:

> the federal trust relationship to such individual [mixed-blood] is terminated and that effective midnight, August 27, 1961, such individual shall not be entitled to any of the services performed for Indians because of his

> status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several states shall apply to such members in the same manner as they apply to other citizens within their jurisdiction.

Termination Proclamation, 26 Fed. Reg. 8042 (August 26, 1961), AR 1432. *Accord* 25 U.S.C. § 677v.

In 1965, four years after termination of the mixed-blood group was complete, the Ute Indian Tribe entered into an agreement with the United States and the Central Utah Water Conservancy District ("CUWCD"), whereby the Tribe agreed to defer irrigating 15,242 acres of tribal land. The land at issue was previously classified as "range land" and had been included in the division of assets among the mixed-bloods and full-bloods.[2] In exchange, the United States and CUWCD agreed to construct water conveyance facilities that would ultimately deliver water to Ute Indian tribal lands from the Green River. Deferral Agreement (Sept. 20, 1965), AR 1067-1106. Neither the UDC nor any other authorized representative of the mixed-bloods was a party to this agreement.

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[2] Some of the deferred lands had been owned by the Range Corporations but, as explained above, by 1965 were owned and controlled by the Tribe. *See supra* p. 5.

In 1969, the AUC filed *Affiliated Ute Citizens v. United States,* 199 Ct. Cl. 1004 (Ct. Cl. 1972), seeking compensation from the United States for certain assets, including water rights, that they alleged were not properly conveyed to the mixed-bloods pursuant to the UPA. During this litigation the United States took the position that "the reserved water rights were divided between the mixed and full-blood groups by August, 1961," and that such water rights were appurtenant to the lands divided and distributed to the mixed-blood group. Defendant's Brief in Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply Brief to Plaintiffs' Opposition, *Affiliated Ute Citizens v. United States,* No. 156-69, at 4-5 and 9-10 (May 16, 1977), AR 3113-14 and 3118-19. Ultimately, the court agreed, holding that "[t]he division and distribution of assets of which plaintiffs complain were effected by 1961, all intangible assets being conveyed either in the form of shares in the [UDC] or as appurtenant to land." *Affiliated Ute Citizens v. United States,* 215 Ct. Cl. 935, 935 (Ct. Cl. 1977).

The Tribe and the United States have repeatedly taken the position that Ute Tribal water rights run appurtenant to tribal land and that such water rights are owned exclusively by the Tribe – not in trust as the UDC contends. In 1980 and 1990, the Ute Indian Tribe and the United States negotiated a compact to specifically quantify the reserved water rights for the tribal land. Ute Indian Water Compact (1980), AR 892-970; Ute Indian Water Compact (1990),

AR 973-1045.[3] Again, the UDC was not a party to either agreement.

## Procedural History

The present litigation, brought by the UDC in 1995, seeks a declaratory judgment that the tribal water rights were not divided and distributed in 1961; "that they remain in trust for the benefit of mixed-blood and full-blood members of the Tribe; and that they are subject to joint management by the UDC and the Tribal Business Committee." *Ute Distribution Corp. v. Secretary of the Interior,* 934 F. Supp. 1302, 1306 (D. Utah 1996). In 1997, this Court issued an Order remanding the water rights issue to the Secretary of the Interior for "final action and decision." Order, March 5, 1997, Dkt. No. 61, AR 49-51. After reviewing the UPA, the Plan for Division, and all other records associated with the mixed-bloods termination, the Secretary issued a decision on October 2, 1998, finding that the tribal water rights of the Ute Indian Tribe were an asset susceptible to equitable and practicable distribution and that they were in fact divided and distributed as appurtenant

[3] Neither Compact has been fully approved. The 1980 version was ratified by Utah and codified in Title 73 of the Utah Code. The 1990 version was ratified and approved by Congress in 1992, Ute Indian Rights Settlement, Pub. L. No. 102-575, 106 Stat. 4650, 4652 (1992), AR 834-39, but has not yet been approved by either the State or Tribe.

to the land in 1961 pursuant to the UPA. Secretary of the Interior's 1998 Decision at 5, AR 1353.

After the Secretary issued the 1998 Decision, the UDC asserted that the Secretary failed to provide them with access to relevant documents prior to her initial consideration of the issues. In response, the Court issued an Order on March 24, 2001 authorizing the parties to submit additional evidence and argument to the Secretary for further review and consideration. Order, March 24, 2001, Dkt. No. 148, AR 1577-78. On February 8, 2004, the Secretary issued a second decision, affirming the 1998 Decision, explaining that the UDC provided "no evidence to rebut the clear language of the Plan for Division . . . which reflects [the mixed and full-bloods] intent to divide and distribute 'all water rights pertinent to the lands involved . . . and all potential water rights that may subsequently attach to the lands divided. . . .'" Secretary of the Interior's 2004 Decision at 4, AR 1311-26 (quoting the Plan for Division, Section X.F., AR 135).

Following the 2004 Decision, the UDC filed a Second Amended Complaint, Dkt. No. 177, which the Tribe and the Secretary moved to dismiss, Dkt. No. 184. On April 19, 2006, the Court issued an Order denying Defendants' motion to dismiss and holding that the Court would address the UDC's first claim for relief in its Second Amended Complaint by reviewing the Secretary's Decisions pursuant to the judicial review procedures of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, *et seq.* Order, April 19, 2006, Dkt. No. 211. Claims Two through Six, however,

including the UDC's claim for declaratory judgment, were stayed pending resolution of the administrative appeal. Accordingly, the only claim presently before the Court is the administrative appeal of the Secretary's decision.

## Analysis

The issue before the Court, which the Secretary of the Interior has already examined, is "whether [the] tribal water rights in question were or were not an asset susceptible to equitable and practicable distribution, and, if susceptible, whether the water rights were divided and distributed as between the full-blood and mixed-blood groups. . . ." Order, March 24, 2001, Dkt. No. 148. The UDC contends that not only were the water rights not divided and distributed in 1961, but they could not be. By definition, the UDC argues, tribal reserved water rights are not an asset susceptible to practicable and equitable distribution and, therefore, could not be divided under the UPA. 25 U.S.C. § 677i. Furthermore, the UPA only authorized the Secretary to approve the agreed upon division of assets between the mixed-blood and full-blood groups, it did not give the Secretary the authority to adjudicate which assets were susceptible to division, nor did it give the Secretary the authority to interpret the Plan for Division and determine which assets were actually divided. Therefore, the UDC argues that the Secretary's determination that the water rights were divided in 1961 exceeds the

Secretary's administrative authority and is null and void.

The Defendants respond that the plain language of the UPA, the Plan for Division, the Plan for Distribution, and the conduct of the parties all demonstrate that the tribal water rights were divided in 1961. The Secretary's 1998 and 2004 decisions further support this conclusion and are squarely within the authority provided to the Secretary by the UPA. Not only did the UPA make the validity of the Plan for Division subject to the Secretary's approval, it also gave the Secretary the authority to divide tribal assets where agreement could not be reached. *Id.* Implicit in this, Defendants argue, is the ability to determine which assets were subject to division and which assets were divided.

The Defendants also contend that while the Secretary had the authority to determine what happened in 1961, this Court is without jurisdiction to review that determination. Section 2401(a) of Title 28 requires that every civil action against the United States must be brought "within six years after the right of action first accrues." Because this statute of limitations has been found to be jurisdictional, Defendants argue that this Court lacks jurisdiction to review what occurred in 1961 and, therefore, the case must be dismissed.

## I. Implementation of the UPA: 1956-1961

The Act of Congress anticipated that water rights would be divided among the mixed-bloods and full-bloods and, therefore, were an asset "susceptible to equitable and practicable distribution." 25 U.S.C. § 677i. In section 13 of the UPA, Congress directed the mixed-bloods to prepare a Plan for Distribution of the divided tribal assets, specifically including "the handling of water and water rights." *Id.* § 677l.

In implementing the UPA, the parties followed this directive from Congress and did in fact divide the tribal water rights. The Plan for Division, which was drafted jointly by both parties, specifically referenced the inclusion of water or water rights in the evaluation and division of tribal assets. Section X.F. of the Plan for Division, entitled "Water Rights," provided:

> All water and water rights pertinent to the lands involved or generally used in connection therewith whether represented by shares of stock in a corporation or otherwise and all potential water rights that may subsequently attach to the lands to be divided shall be considered in arriving at the fair value of the lands divided and shall be considered as running with the land.

AR 135. A clearer statement of intent to divide the reserved water rights with the lands to be divided can hardly be imagined. The parties' agreement unquestionably demonstrates their awareness and understanding that: a) the water rights could be divided; b) there were "potential water rights," not

yet quantified, that might someday attach to the lands then being divided; and c) that it was fair and equitable to divide the water rights, including potential water rights, with the lands described.[4]

The Plan for Distribution, which was prepared exclusively by the mixed-bloods, further provided for the handling of water rights. It specifically stated:

> If the property distributed to the mixed blood group requires the organization of irrigation companies in order to provide for an equitable or advantageous distribution of water, such companies shall be organized prior to the transfer of water rights and the land to be irrigated.

Plan for Distribution, Section VIII, AR 161. Thus, in 1956 the mixed-bloods understood that the division of assets included the distribution of water rights, and that these water rights were to be distributed with the land, including some land that was yet to be irrigated.

In approving the division of tribal assets in 1958 and later effectuating it through termination in 1961,

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[4] Moreover, the Summary of the Division of Assets, which sets out parcel by parcel lands that were to be transferred or purchased by both the mixed-bloods and full-bloods, demonstrates that water rights were considered as appurtenant to the lands being divided. It identifies the value of each parcel, showing that those parcels where a water right attached were considerably more valuable than those with no such right. Summary of Division of Assets, AR 362-409.

the Secretary did everything the Act required of him. But because there were no disputes regarding the division of assets, no decision was ever explicitly made by the Secretary regarding the susceptibility of water rights to equitable distribution. It is on this basis that the UDC has brought the present action seeking a declaratory judgment. The UDC argues that with no affirmative declaration by the Secretary in 1961 that tribal water rights were an asset susceptible to division and were in fact divided, it is entitled to know if the tribal reserved water rights were actually divided in 1961.

## II. The Secretary's 1998 and 2004 Decisions

As previously explained, in 1997 the Court remanded the water rights issue to the Secretary of the Interior for final agency action and decision. Order, March 5, 1997, Dkt. No. 61, AR 49-51. After reviewing the record and receiving input from the parties, the Secretary ultimately determined that the tribal water rights of the Ute Indian Tribe were an asset susceptible to equitable and practicable distribution and that they were in fact divided and distributed as appurtenant to the land in 1961. 2004 Decision, AR 1311-26.

The Court, on April 19, 2006, determined that it would review the Secretary's decision pursuant to appellate review procedures of the Administrative Procedures Act ("APA"). 5 U.S.C. § 706(2)(A)-(D). Order, April 19, 2006, Dkt. No. 211. The APA provides the courts with jurisdiction to review final agency

action. 5 U.S.C. § 704. Section 706 of the APA explains that this judicial review is deferential, with courts setting aside final agency action only when it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706(2)(A). Section 706 further provides, however, that agency action must be set aside when that action exceeds the agency's statutory authority. *Id.* at § 706(2)(C).

The UDC now contends that none of the provisions of the UPA authorize the Secretary to decide on the basis of the historical record what happened fifty years ago. The Secretary's 1998 and 2004 decisions are plainly adjudications of what happened in the past, not initial determinations of present agency action within the scope of the Secretary's statutory authority. Accordingly, the UDC argues that the Secretary's action is a nullity. Rather than review the Secretary's decisions under the standards of appellate review, the UDC argues that the Court should review this issue de novo following appropriate presentation of the evidence.

But the UPA expressly provides that the Secretary had the authority to make any division of assets which might have become necessary if the two groups could not agree. *Id.* at 677i. Similarly, § 677aa provides that when an agreement is required by the two groups that cannot be reached, "the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups." *Id.* at § 677aa. These provisions make clear that the

Secretary has more authority under the UPA than just that necessary to approve the division of assets agreed upon between the full-bloods and mixed-bloods. Finally, if the Secretary had the authority to resolve disputes in 1961, undoubtedly he has the authority to do so now.

The Court finds that to the extent the Secretary did not specifically address the water rights issue in 1961,[5] the Court's 1997 remand to the Secretary to determine which assets were susceptible to equitable distribution and to determine which assets were actually divided was proper and was within the statutory authority of the UPA. The Court's review of that decision, therefore, should be deferential, applying an "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). But under either standard of review, whether it be de novo or arbitrary and capricious, the Court reaches the same conclusion. Therefore, the Court will address the issue under both standards.

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[5] At a hearing in 1996 before Judge Winder, the Secretary's attorney explained that the United States' position was that the issue "has never been presented to the United States in a way that the resources and expertise of the Secretary in particular in Indian matters and specifically within the administration of this act has been brought to bear" and that "it's our position essentially that the Secretary has not made a final determination." (Tr. of December 17, 1996 Hrg., pp. 6-8).

### A. De Novo Review

A complete review of the administrative record, giving no deference to the recent decisions of the Secretary, demonstrates that the tribal reserved water rights of the Ute Indian Tribe were both an asset susceptible to equitable distribution and were in fact divided in 1961.

#### 1. Susceptibility of Water Rights to Equitable Distribution in 1961

The UDC argues that in 1961 the tribal water rights were of an unknown quantity and thus by definition could not have been susceptible to equitable distribution. *See* 25 U.S.C. § 677i. In 1961, it was generally understood that when Indian tribes reserved a portion of their lands by treaty they impliedly reserved a water right sufficient for the reservation. *Winters v. United States,* 207 U.S. 564, 577 (1908). These reserved water rights – which are often referred to as *Winters* water rights – had no fixed quantity, no fixed place of use, and no risk of forfeiture for non-use. They simply reserved for Indians enough water to sustain the Reservation.

It was not until 1963 – long after the division of the Ute Range Lands – in the case of *Arizona v. California,* 373 U.S. 546 (1963), that the United States Supreme Court defined the scope and extent of Indian reserved water rights. In *Arizona v. California,* the Supreme Court was forced to determine the water rights belonging to Indian tribes along the

Colorado River. Competing water users contended that the Indian reserved water rights should be limited only to amounts likely to be needed by the sparse Indian populations. The Supreme Court, however, ruled that the tribes were entitled to enough water to irrigate all the practicably irrigable acreage ("PIA") on the reservation, thereby finally annunciating a means to quantify *Winters* water rights. *Id.* at 600-01.

The UDC contends, that given the uncertainty surrounding the legal standards to be applied in determining the extent of Indian reserved water rights in 1961, the Tribal water rights could not have been an asset susceptible to equitable distribution as required by the UPA. Equitable division requires some level of certainty so that assets can be quantified and valued.

But by 1956, when the mixed-bloods and full-bloods agreed to divide the Tribe's water asset, the nature and scope of *Winters* reserved water rights "was well recognized." *United States v. Adair,* 723 F.2d 1394, 1412 n.21.[6] For example, as early as 1928,

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[6] *Conrad Investment Co. v. United States,* 161 F. 829, 831-32 (9th Cir. 1908) (finding an Indian reserved water right "to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes"); *Skeem v. United States,* 273 F. 93, 95 (9th Cir. 1921) (explaining that the reserved water right pertained not only to those lands currently cultivated by the Indians, but also to those lands that would be cultivated in the future); *United States ex rel. Ray v. Hibner,* 27 F.2d 909 (D. Idaho 1928); *Anderson v. Spear-Morgan*

(Continued on following page)

the federal district court in *United States v. Hibner* held that under *Winters,* Indian reserved water rights consisted of as much water as was required "for the irrigation of that portion of their lands which the evidence discloses is susceptible to irrigation" (i.e. PIA). *United States ex rel. Ray v. Hibner,* 27 F.2d 909, 911 (D. Idaho 1928). *Hibner* further held that purchasers of Indian land acquired "the same character of water right with equal priority as of those of the Indians," except that their water right, unlike the Indians, was subject to forfeiture for non-use. *Id.* at 912.

This position was upheld in 1939 by the United States Supreme Court in *United States v. Powers,* 305 U.S. 527 (1939). In addressing a similar issue, the Court held "that when allotments of [Indian] land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." *Id.* at 532. Additionally, *Arizona v. California* was filed in 1952, and the United States intervened in 1953 arguing on behalf of the five Indian tribes that reserved water rights should be measured by PIA.

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*Livestock Co.,* 79 P.2d 667, 669 (Mont. 1938) ("This [water] right is appurtenant to the land upon which it is to be used by the allottee. . . . [A] conveyance of the land, in the absence of contrary intention, would operate to convey the right to use the water as an appurtenance."); *Lewis v. Hanson,* 227 P.2d 70, 72 (Mont. 1951) ("Upon conveyance of the land by an Indian, the water right passes to the grantee as an appurtenance unless a contrary intention appears.").

Thus, by 1956 when the full-bloods and mixed-bloods began their division of tribal assets under the UPA, there was an established body of case law supporting the principle that reserved water rights under *Winters,* ran with and were viewed as appurtenant to the irrigable reservation lands and that said reserved water rights were susceptible to be divided with such reservation lands, even though not measured or quantified as to amount. Although the Supreme Court did not confirm the PIA standard until 1963 in *Arizona v. California,* lower courts had consistently been recognizing *Winters* rights based on agricultural purposes and their relationship to irrigable lands for years.

The language of the UPA, the Plan for Division, and the Plan for Distribution all anticipated that water rights would be included in the division of tribal assets. The idea that reserved Winter rights could be equitably divided as appurtenant to land in 1961 was adequately supported by the case law as it existed at the time of partition. Therefore, upon a de novo review of the record, the Court finds that the tribal water rights were an asset susceptible to equitable and practicable distribution in 1961.

### 2. Division and Distribution of Water Rights in 1961

As detailed above, the plain language of the UPA and its implementing documents demonstrate that both Congress and the parties envisioned that the

Tribe's water rights would be part of the assets divided under the UPA. A review of the parties' conduct during and after termination provides even further support for this position.

When the range lands were distributed under the UPA to the Range Corporations for the benefit of the mixed-bloods, the agreements explicitly stated that the lands were being conveyed "together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging." AR 1261 and 1262. The only assets the agreements retained, to be held in joint management pursuant to the UPA, were "all minerals and mineral rights, including oil and gas." *Id.* Water rights were not mentioned.

The Decker Report, which was commissioned by both the full-bloods and the mixed-bloods, further confirms that in 1961 the two groups understood that the tribal water rights ran with the land being divided. It identified PIA as the basis for quantifying the reserved tribal water rights and was prepared to assist the parties in the irrigation of the divided lands. Decker Report (Dec. 12, 1960), AR 693-831.

In 1965, the full-bloods entered into an agreement with the United States whereby they agreed to defer the irrigation of 15,242 acres of their land. Deferral Agreement (September 20, 1965), AR 1067-1106. In essence, this meant that the full-bloods were temporarily relinquishing a portion of their tribal water rights. The mixed-bloods were neither a party to this agreement nor were they ever consulted. Then

again in 1980 and 1990, the full-bloods negotiated a compact with the United States to specifically quantify the reserved water rights for their tribal land. Again, the mixed-bloods were not a party to these negotiations.

In 1971, during litigation between the two groups involving similar issues, *Affiliated Ute Citizens v. United States,* 215 Ct. Cl. 935 (Ct. Cl. 1977), the mixed-bloods and full-bloods entered into a stipulation as to what occurred in the implementation of the Plan for Division. In this stipulation, the parties agreed that section X of the Plan for Division covered "the division of land, timber and water rights." Stipulation Summarizing Implementation of Plan for Division of Assets at 4 (January 7, 1971), AR 348-57. Thus, the conduct of the parties both during termination and after is a clear indication that the parties did in fact divide and distribute the tribal reserved water rights with the land in 1961.

The UDC argues, however, that if the tribal water rights had been divided in 1961 as appurtenant to the range lands, then one would expect those water right claims to be substantially the same today. Instead, they are substantially different. For example in 1980, as part of an overall proposed settlement of water rights on the Reservation, the Tribe began negotiating with the United States for a 10,000 acre-foot municipal and industrial water right. Ute Indian Water Compact (1980), AR 892-970. This claim is not based upon irrigation and is not related to any particular land. Rather, it is in addition to the irrigation

acreage and is designated to meet the municipal, commercial, and industrial needs of the Tribe and reservation residents. *See id. See also* Ute Indian Water Compact (1990), AR 973-1045.[7] The UDC argues, therefore, that because this water right was not considered at the time of division, it could not have been divided and thus remains in trust.

But this municipal and industrial water right was a water right that the two groups anticipated and provided for in the Plan for Division. It is a "potential water right that may subsequently attach to the lands [that were] divided." Plan for Division, AR 135. The parties determined in 1961 that all of the Tribe's water and water rights, including a subsequently negotiated for potential municipal and industrial water right, were divisible and would be divided in accordance with the UPA.[8]

The overwhelming evidence supports the conclusion that the tribal reserved water rights were an asset susceptible to equitable and practicable

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[7] As has been explained previously, neither the 1980 Compact nor the 1990 Compact has been fully approved. *See* supra note 3, at 7.

[8] The UDC makes the same argument with regard to the range lands, specifically that the claims to reserved water rights on the range lands today only remotely resemble the claims postulated by Decker in his 1960 Report. But the parties agreed to divide "[a]ll water and water rights . . . and all potential water rights," clearly understanding that the source of the water rights for the range lands might change over time. Plan for Division, Section X.F., AR 135.

distribution and were distributed in 1961. The plain language of the UPA and the terms of the implementing documents demonstrate the parties' intent to so distribute the tribal water asset and the case law as it existed at the time of partition supports the idea that reserved water rights could be equitably divided. Furthermore, since termination occurred in 1961, both groups have acted consistent with the understanding that the tribal water rights were divisible assets that ran with the land previously divided. Accordingly, after a complete review of the facts and the administrative record, giving no deference to the Secretary's recent decisions, the Court finds that the tribal reserved water rights were both an asset susceptible to equitable and practicable distribution in 1961 and were in fact divided.

### B. Arbitrary and Capricious Review

To be upheld under the arbitrary and capricious standard, agency decisions must demonstrate a "rational connection between the facts found and the decisions made." *Olenhouse,* 42 F.3d at 1574. The scope of this review is narrow – confined to "ascertaining whether the agency examined the relevant data and articulated a satisfactory explanation for its decision." *Colorado Wild, Heartwood v. United States Forest Service,* 435 F.3d 1204, 1213 (10th Cir. 2006). Having found that the tribal water rights were an asset susceptible to equitable distribution and were in fact divided under a de novo review, the Secretary's decision is easily upheld under this deferential

standard. The Secretary referenced throughout his decisions the most relevant data pertaining to the UPA and its implementation and clearly articulated the reasons for his findings. The Secretary's Decision is supported by "substantial evidence" and, therefore, must be upheld. *Olenhouse,* 42 F.3d at 1576.[9]

## III. Jurisdiction

Both parties agree that the Court has jurisdiction under the APA to review final agency action. 5 U.S.C. § 704. The Defendants contend, however, that for such jurisdiction to persist, the request for review must be timely raised. Section 2401(a) of Title 28 provides that: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Accordingly, because final agency action occurred in 1961, the Defendants argue that the statute of limitations has long since expired and this Court is barred from review. *See Block v. North Dakota,* 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); *Felter v. Norton,* 412

[9] "Evidence is generally substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion." *Colorado Wild, Heartwood v. United States Forest Service,* 435 F.3d 1204, 1213 (10th Cir. 2006) (quoting *Hoyl v. Babbitt,* 129 F.3d 1377, 1383 (10th Cir. 1997)).

F. Supp. 2d 118, 124 (D.D.C. 2006) (finding that § 2401(a) is a jurisdictional bar to claims for review of agency informal rulemaking).

The UDC responds that the present litigation is not challenging what was done in 1961. Rather, it seeks a declaration *describing* what was done – whether the water rights were divided in 1961, or whether they remain in joint management by the Tribe and the UDC. The UDC argues, therefore, that the Defendants' statute of limitations argument is circular. It depends on the proposition that the water rights claims at issue were distributed in 1961, which is the core issue in this case.

Although the Court finds the Defendants' argument that the parties' actions both during and after partition put the UDC on notice that the tribal reserved water rights were divided in 1961 compelling, the statute of limitations issue has previously been decided in this case. In 1996, Judge Winder held that:

> [T]here is no single, discrete event associated with the UPA that has given rise to a cause of action and triggered any attendant limitations period foreclosing this action. . . . [I]f this court were to conclude that certain tribal water rights were not partitioned and are an indivisible asset, then the Ute Tribre and the Secretary of the Interior would each be found to have an ongoing duty to ensure the UDC was properly included at all times in the joint management of that asset. Thus any breach at any time of the continuing

> responsibility of the Secretary or the Tribe could trigger a cause of action; hence, a declaratory judgment defining a party's rights under the UPA may properly be sought at any time while the federally supervised joint management scheme is in effect.

Order, July 26, 1996, Dkt. No. 33; also published at 934 F. Supp. 1302 (D. Utah 1996) (reversed on other grounds). Accordingly, this is the law of the case – which the Court has upheld throughout the litigation – and the Court finds no reason to disturb it now. *See* Order, March 5, 1997, Dkt. No. 61 (remanding the water rights issue to the Secretary of the Interior "for final action and decision"); Order, March 24, 2001, Dkt. No. 148 (reiterating that review of the Secretary's final decision would "proceed under the provisions of the APA applicable to the review of final agency action"). Therefore, the Court finds that the statute of limitations imposed by 28 U.S.C. § 2401 is not a bar to this Court's jurisdiction to review the final agency action at issue.

## Conclusion

For the foregoing reasons, the Court finds that the tribal reserved water rights of the Ute Indian Tribe were both an asset susceptible to equitable and practicable distribution in 1961 and were in fact divided. Although the Court finds that the Secretary's recent decisions are within the statutory authority provided under the UPA and is thus entitled to deference, under either standard of review, whether it

be de novo or arbitrary and capricious, the conclusion is the same. The Secretary's decision is AFFIRMED.

IT IS SO ORDERED.

DATED this 2nd day of June, 2008.

/s/ Dee Benson
Dee Benson
United States District Judge

**United States District Court**

Central Division for the District of Utah

Ute Distribution Corporation

v.

Secretary of the Interior et al

**JUDGMENT IN A CIVIL CASE**

(Filed Jun. 3, 2008)

Case Number:
2:95 cv 376 DB

IT IS ORDERED AND ADJUDGED

that the decision of the Secretary is affirmed.

June 3, 2008
*Date*

D. Mark Jones
*Clerk of Court*

/s/ Louise York
*(By) Deputy Clerk*

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

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| UTE DISTRIBUTION CORPORATION, a Utah Corporation,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>SECRETARY OF THE INTERIOR OF THE UNITED STATES, in her official capacity; and agents and employees, and those working in concert with her,<br><br>Defendants/Appellees,<br><br>UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, and<br><br>RED ROCK CORPORATION, a Utah Corporation,<br><br>Defendants-Interveners/ Appellees. | Civil No. 2:95CV0376DB<br><br>Judge Dee V. Benson |

**~~PROPOSED~~ ORDER CORRECTING JUDGMENT**

THE COURT, having reviewed the Motion of the Defendant-Intervener/Appellee Ute Indian Tribe, and finding good cause,

IT IS HEREBY ORDERED that the Judgment issued by the Court on June 3, 2008, shall be amended to state as follows:

> IT IS ORDERED AND ADJUDGED that the stay earlier imposed as to the Second through Sixth Claims of Second Amended Complaint is lifted. The Secretary's 1998 and 2004 Decisions are affirmed and the Second Amended Complaint is dismissed with prejudice.

DONE this 22 day of July, 2008

BY THE COURT:

/s/ Dee Benson
Dee Benson
District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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|---|---|
| UTE DISTRIBUTION CORPORATION, a Utah Corporation,<br><br>Plaintiff,<br><br>-vs-<br><br>SECRETARY OF THE INTERIOR OF THE UNITED STATES, in his official capacity; and his agents and employees, and those working in concert with him, and the UTE INDIAN TRIBE,<br><br>Defendants. | MEMORANDUM DECISION AND ORDER DENYING DEFENDANT UTE INDIAN TRIBE'S MOTION TO DISMISS<br><br>Civil No. 95-C-376 W |

This matter is before the court on Defendant Ute Indian Tribe's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) which was argued on June 5, 1996. At the hearing, plaintiff Ute Distribution Corporation was represented by Max D. Wheeler and Camille N. Johnson, defendant Ute Indian Tribe was represented by Robert S. Thompson, III and John R. Lehmer, and defendant Secretary of the Interior of the United States was represented by Stephen Roth and William R. McConkie. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The court has further considered the

law and facts relevant to the defendant's motion. Now being fully advised, the court enters the following memorandum decision and order.

## I. BACKGROUND

From the late 1940s until about 1961, Congress pursued a federal Indian policy of terminating or reducing the federal supervision of several Indian tribes. Felix S. Cohen, *Handbook of Federal Indian Law* 170-80 (Rennard Strickland et al. eds, 1982 ed.). Intended to reduce federal involvement in tribal affairs, termination legislation also sought to assimilate Indians into the majority society, and provided for the distribution of land and tribal assets among the individual members of terminated tribes. David H. Getches et al., *Cases and Materials on Federal Indian Law* 229-37 (3d ed. 1993).

In 1954, Congress passed legislation terminating a number of Indian tribes,[1] including the mixed-blood Utes of the Uintah and Ouray Reservation in Utah ("Ute Indian Tribe" or "the Tribe"). Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868 (the "Ute Partition Act" or "UPA") (codified as amended at 25 U.S.C. §§ 677-677aa). Unlike legislation terminating other tribes or bands, *see, e.g.,* Act of June 17, 1954, ch. 303, 68 Stat.

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[1] For a list of terminated tribes, see Cohen, supra, at 173-74 & nn. 224-37. Beginning in the early 1970s, Congress repealed some of the termination legislation, restoring tribes' federal status. *See id.* at 186-87.

250 (repealed 1973) (terminating the Menominee Tribe of Wisconsin), *but see* 25 U.S.C. § 564d(a)(2) (giving individual members of Klamath Tribe option to withdraw from tribe and be paid for interest in tribal property), the Ute Partition Act did not terminate the federal Indian status of the entire Ute Indian Tribe but instead divided the tribe into two groups: mixed-bloods and full-bloods, and terminated federal supervision only as to the mixed-blood members. 25 U.S.C. § 677. A "full-blood" is defined as "a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half." *Id.* § 677a(b). "Mixed-blood" is defined to encompass "member[s] of the tribe who [do] not possess sufficient Indian or Ute Indian blood to fall within the full-blood class . . . and those [full-bloods] who become mixed-bloods by choice under the Provisions of [the UPA]." *Id.* § 677a(c).

In 1956, the Secretary of the Interior published, Pursuant to 25 U.S.C. § 677g, final rolls listing 1,314 full-blood members of the Ute Tribe (72.84%) and 490 mixed-blood members (27.16%). The UPA provided that upon publication of the Final membership rolls, "the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in [the UPA]." 25 U.S.C. § 677d. Following the publication of the rolls, tribal assets "then susceptible to equitable and practicable distribution" were partitioned, according to the relative number of each group as reflected in the final membership rolls, by the Tribal

Business Committee representing the full-bloods and the authorized representatives of the mixed-bloods. *Id.* § 677i. Tribal assets are defined by the UPA to include "any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe." *Id.* § 677a(f). Approximately 27.16 percent of the divisible assets susceptible to equitable and practicable distribution, e.g., land and trust funds, were then distributed to individual mixed-blood members and federal supervision of the mixed-bloods and their individually held property was terminated. *See id.* § 677o. The Tribe retained a beneficial interest in the remaining 72.84% of the divisible assets and continued its trust relationship with the United States.

The Ute Partition Act further provided that indivisible tribal assets were to remain in government trust: "All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group." *Id.* § 677i. The Secretary of the Interior continues to maintain a supervisory role over the joint management of indivisible tribal assets, even though the individual mixed-bloods' tribal and federal Indian status has been terminated with respect to all other assets and rights.

In 1956, the mixed-bloods organized the Affiliated Ute Citizens ("AUC") as an unincorporated

association to act as their representative pursuant to 25 U.S.C. § 677e, and empowered its board of directors to delegate to one or more corporations the authority to manage the mixed-bloods' assets. *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 135-36 (1972). Such authority was delegated to the Ute Distribution Corporation ("UDC") upon its incorporation in 1958 with the stated purpose

> to manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe . . . are now, or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of th[e] corporation.

*Id.* at 136 (quoting Articles of Incorporation of UDC, art. IV). In 1959, by resolution, the AUC permanently delegated to the UDC the authority to manage the mixed-bloods' share of indivisible tribal assets. *Id.* The UDC issued ten shares of capital stock to each mixed-blood Ute, a total of 4900 shares. UDC stockholders share in 27.16% of the proceeds from the indivisible assets, such as lease payments for gas, oil, and mineral rights.

This lawsuit, brought by the Ute Distribution Corporation on April 24, 1995, seeks a declaratory

judgment pursuant to 28 U.S.C. § 2201 that certain tribal water rights were not partitioned; that they remain in trust for the benefit of mixed-blood and full-blood members of the Tribe; and that they are subject to joint management by the UDC and the Tribal Business Committee under the supervision of the Secretary of the Interior. Defendant Ute Indian Tribe filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) & 12(b)(7). The Tribe asserts that it has sovereign immunity from suit and has not waived its immunity by consenting to be sued; that it is a necessary and indispensable party to this lawsuit under Fed. R. Civ. P. 19 and as such its immunity from suit requires the dismissal of this action; that the rules of comity require this action first be heard in tribal court; and that any applicable statute of limitations has run, barring this action.

## II. STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule 12(b)(1) is a motion to dismiss for lack of subject matter jurisdiction. In such a motion, Plaintiff has the burden of establishing jurisdiction. *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991). "'A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking.'" *Tuck v. United Servs. Auto. Ass'n*, 859 F.2d 842, 844 (10th Cir. 1988) (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974), *cert. denied*, 489 U.S. 1080 (1989)).

"Whether the federal district court ha[s] jurisdiction of the action must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler,* 442 F.2d 674, 677 (10th Cir. 1971).

A motion to dismiss pursuant to Rule 12(b)(7) is a motion to dismiss for failure to join a party under Rule 19. "The proponent of a motion to dismiss under 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." *Citizen Band Potawatomi Indian Tribe v. Collier,* 17 F.3d 1292, 1293 (10th Cir. 1994). "The proponent's burden can be satisfied by providing 'affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence.'" *Id.* (quoting *Martin v. Local 147, Int'l Bhd. of Painters,* 775 F. Supp. 235, 236-37 (N.D. Ill. 1991)).

## III. DISCUSSION

### A. Tribal Sovereign Immunity

Defendant Ute Indian Tribe argues that it must be dismissed from this action because as a sovereign entity it may not be sued without its consent. The Tribe asserts it has not consented to this suit, nor has Congress or the Tribe itself otherwise waived the Tribe's sovereign immunity from suit. The UDC, on the other hand, contends that Congress limited the Tribe's sovereign immunity with respect to the

adjudication of issues concerning the joint management of indivisible assets under the Ute Partition Act. This court agrees.

Courts have long recognized the sovereign status of Indian tribes. They "are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832)). "Although no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.'" *Id.* (quoting *United States v. Kagama,* 118 U.S. 375, 381-82 (1886)). As such, Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58. Tribal sovereign immunity is, however, subject to Congress's plenary power over Indian affairs which includes the power to waive tribal sovereign immunity. While Congress may exercise such power, the Supreme Court has observed that "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* (citations omitted).

The Ute Tribe contends that the Ute Partition Act is devoid of any express language limiting or waiving the Tribe's sovereign immunity, and that the Tribe therefore cannot be made a party to this action. In support of its position, the Tribe cites a number of cases holding Indian tribes immune from suit, including *Santa Clara Pueblo v. Martinez,* 436 U.S. 49,

72 (1978) (upholding tribal sovereign immunity from federal suit involving alleged violation of Indian Civil Rights Act ("ICRA")); *Bank of Oklahoma v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1171 (10th Cir. 1992). (upholding sovereign immunity from suit in federal interpleader action and related cross-claim); *Nero v. Cherokee Nation,* 892 F.2d 1457, 1461 (10th Cir. 1989) (finding provision of ICRA does not waive tribal sovereign immunity); *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890, 892 (10th Cir. 1989) (finding sovereign immunity a bar to federal court's consideration of plaintiff's prayer for injunctive and declaratory relief in contract dispute); *State of Oklahoma ex rel. Oklahoma Tax Comm'n v. Graham,* 822 F.2d 951, 956 (10th Cir. 1987) (affirming dismissal on basis of sovereign immunity of state's suit against tribe for failure to pay state taxes); *White v. Pueblo of San Juan,* 728 F.2d 1307, 1313 (10th Cir. 1984) (finding tribal sovereign immunity from suit in ICRA action). None of the case law relied on by the Tribe, however, is controlling in the instant action.

No case cited by the Tribe as supporting its assertion of sovereign immunity involves the Ute Partition Act. The only federal statute examined in the cited cases is the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301-1303 ("ICRA"). *See, e.g., Santa Clara Pueblo,* 436 U.S. 49. The ICRA provides members of Indian tribes with protection against tribal authority similar, but not identical, to the constitutional guarantees of the Bill of Rights and the Fourteenth Amendment.

*See* 25 U.S.C. § 1302. Thus, ICRA actions often arise from the relationships between tribes and their members or other individuals, and from internal matters that historically are within the scope of sovereign self-government.

For example, in *Santa Clara Pueblo,* the Supreme Court found the defendant tribe immune from an equal protection suit brought under the ICRA by a female tribe member seeking declaratory and injunctive relief against enforcement of a tribal ordinance denying membership to the children of female members who marry non-members, while granting membership to the children of male members who marry outside the tribe. *Santa Clara Pueblo,* 436 U.S. at 59. Similarly, in *Nero v. Cherokee Nation* the Tenth Circuit Court of Appeals found that sovereign immunity barred the district court's consideration of the plaintiffs' claim that the tribal defendants violated their rights under the ICRA by denying them tribal membership. 892 F.2d at 1460, 1461. In *White v. Pueblo of San Juan,* 728 F.2d 1307 (10th Cir. 1984), the Tenth Circuit held that tribal sovereign immunity barred a suit brought pursuant to the ICRA's takings clause by non-Indians for damages related to their sale of land located within the reservation boundaries. *Id.* at 1313. The court in *White* upheld the trial court's dismissal, in part because the plaintiffs failed to exhaust tribal remedies as required by an earlier Tenth Circuit decision finding a narrow exception to sovereign immunity in cases brought under the ICRA by non-Indians where there is an "absolute

necessity" of federal adjudication. *See id* at 1309-12 (discussing *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes,* 623 F.2d 682 (10th Cir. 1980), *cert. denied,* 449 U.S. 1118 (1981)).

The context of the Ute Partition Act is quite different from that of the ICRA. The ICRA defines the rights of individuals in relation to tribal authority, and disputes may properly be adjudicated in tribal forums. *See Santa Clara Pueblo,* 436 U.S. at 65. Further, while remaining silent as to federal causes of action under any of its other provisions, the ICRA specifically allows a person to seek a writ of habeas corpus in federal court "to test the legality of his detention by order of an Indian tribe," thus indicating that by omission Congress chose not to waive tribal sovereign immunity with respect to the enforcement of any other right protected under the ICRA. 25 U.S.C. § 1303; *see Santa Clara Pueblo,* 436 U.S. at 70. Conversely, the UPA does not lend itself to tribal adjudication, nor is there any evidence of congressional intent to limit a plaintiff's cause of action. In fact, it could not have been the intent of Congress to require the mixed-bloods' representative to seek vindication in a tribal forum of its rights regarding assets held in trust by the United States for the benefit of the Tribe and the mixed-blood group, when the UPA expressly calls for the joint management of the assets under the supervision of the Secretary of the Interior.

Other cases cited by the Tribe have found tribal sovereign immunity from suit by States or State entities. *E.g., Oklahoma Tax Comm'n v. Citizen Band*

*Potawatomi Indian Tribe,* 498 U.S. 505, 513-14 (1991) (finding State may not tax tribal sales of goods to tribe members); *State of Oklahoma ex rel. Oklahoma Tax Comm'n v. Graham,* 822 F.2d 951, 956 (10th Cir. 1987) (similar); none are directly applicable here.

Still other cases upholding tribal immunity have concerned commercial or financial relationships between tribes and non-Indian parties. For instance, in *Bank of Oklahoma,* the Tenth Circuit found that tribal sovereign immunity barred the federal district court's consideration of an interpleader action and a cross-claim brought against the Muscogee Nation ("Nation"). The court rejected the plaintiff bank's policy argument that "commercial relations between Indian tribes and banks will be chilled" if sovereign immunity is not waived, "declin[ing] the [plaintiff's] invitation to second-guess the wisdom of the Nation's business decisions under the guise of judicial review." 972 F.2d at 1169. In another case, the Tenth Circuit upheld the district court's dismissal on the basis of sovereign immunity of a suit brought by a non-Indian contractor against the Potawatomi Tribe. *Enterprise Management Consultants,* 883 F.2d at 892. There, the contractor sought the federal approval and enforcement of two bingo management contracts it had with the Tribe. *Id.* The court refused to waive tribal sovereign immunity in the absence of the "highly unusual circumstances" under which the Tenth Circuit had found an exception to tribal immunity under the ICRA in *Dry Creek Lodge, Inc. v. Arapahoe &*

*Shoshone Tribes,* 623 F.2d 682 (10th Cir. 1980). *Enterprise Management Consultants,* 883 F.2d at 892.

The relationship between the Tribe and the UDC stands in stark contrast to the commercial relationships in the cases cited by the Tribe in support of its claim of sovereign immunity. Unlike the plaintiffs in *Bank of Oklahoma* and *Enterprise Management Consultants,* the mixed-bloods and their representative, the UDC, cannot choose whether or not to conduct business with the Tribe and take the concomitant risk of having their choice of forums for resolution of disputes limited by sovereign immunity. *See Bank of Oklahoma,* 972 F.2d at 1169 (recognizing tribe's power of self-determination in conducting its commercial affairs). The UDC is required by statute to jointly manage shared assets with the Tribe and must maintain a business relationship with respect to those assets.

Thus, none of the cases recognizing Indian tribes' right of sovereign immunity has done so in the unique context of the Ute Partition Act.[2] In structuring a federal trust relationship with the Ute Tribe

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[2] In the only other opinion to consider tribal sovereign immunity under the Ute Partition Act, Judge Jenkins of this court concluded that Congress limited the Ute Tribe's immunity when it passed the UPA. *Affiliated Ute Citizens v. Ute Indian Tribe,* No. 85-C-569J, mem. op. and order at 28 (D. Utah Feb. 3, 1987). Without addressing the merits of Judge Jenkins's ruling as to tribal sovereign immunity, the Tenth Circuit vacated it as moot, having upheld his dismissal of the action for lack of standing. 22 F.3d 254, 255-56 (10th Cir. 1994).

and the mixed-bloods in the management of indivisible assets not susceptible to equitable and practicable distribution, Congress waived the Ute Tribe's sovereign immunity with respect to suits concerning those assets.[3]

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1931)). That authority includes the "power to make their own substantive law in internal matters . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978) (citations omitted). The instant case, however, does not involve internal matters or issues concerning traditional sovereign authority over members of the Tribe or territory belonging only to the Tribe. Instead, the dispute here deals with the clarification of rights created solely through congressional action, supervised by the federal government, and shared by the Tribe with a group of people whose status and rights are a product of federal law.

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[3] The legislative history of the Ute Partition Act indicates that the UPA "is the result of proposals initiated by the Ute Tribe," thus suggesting that the Tribe may have waived its own sovereign immunity with respect to jointly managed assets. *See* H.R. Rep. No. 2493, 83d Cong., 2d Sess. 67 (1954).

Although the Ute Partition Act lacks any language expressly authorizing a cause of action in federal court, the structure and purpose of the Act clearly divests the Tribe of some of its sovereign immunity from suit. First, the UPA set forth the procedure whereby the Tribe was divided into the full-blood and mixed-blood groups, and allowed the mixed-bloods to establish a representative organization and adopt a constitution. 25 U.S.C. §§ 677-677g. The UPA then provided for the Tribal Business Committee and the mixed-bloods' representatives to split up the tribe's divisible assets by agreement, subject to the approval of the Secretary of the Interior, *id.* § 677i, and for the mixed-bloods' portion of the divisible assets to then be distributed to individual mixed-bloods, with termination of federal supervision as to those assets. *Id.* § 677*l*.

Finally, as to those tribal assets not susceptible to equitable and practicable distribution, Congress mandated that they "*shall* be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law" with the net proceeds from the indivisible assets distributed proportionally to the two groups. *Id.* § 677i (emphasis added). *See also* 25 C.F.R. §§ 2.17.1-217.7 (1995) (administrative regulations for joint management of tribal assets). Thus, while Congress terminated federal supervision of the mixed-bloods with respect to partitioned and distributed assets, and eliminated the mixed-bloods' federal

Indian status in all other respects, it retained its trust relationship with the mixed-bloods as to the indivisible assets of the tribe. Such assets are therefore not under the traditional sovereign control of the Ute Tribe, but are held in trust by the Government for the benefit of both the Tribe and the Ute Distribution Corporation, who must jointly share the management responsibilities for the indivisible assets.

It therefore would be incongruous with the structure and intent of the UPA to conclude that the Ute Indian Tribe may assert sovereign immunity in actions brought to determine the status of, or rights in, assets held in trust by the Untied States for the benefit of both the Tribe and the mixed-bloods. Such a result would frustrate the purpose of the Act by effectively allowing the Tribe to exclude the mixed-bloods' representative, the UDC, from participating in the joint management of the indivisible assets, and would clearly run counter to the plain language of the UPA requiring that such assets "shall be managed jointly by the Tribal Business Committee and the [UDC]." 25 U.S.C. § 677i.

The Supreme Court has recognized that there may be a divestiture of tribal sovereign immunity "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153-54 (1980). This court believes that to allow the Ute Tribe to assert sovereign immunity in this action would contradict the overriding national

interest of ensuring that federal trust property is managed in an orderly manner according to the joint scheme set forth by Congress in the UPA. Rather than to allow the Ute Tribe to unilaterally exclude the UDC from participating in the joint management of indivisible assets, this court finds that Congress waived the Tribe's sovereign immunity with respect to actions seeking to resolve issues concerning assets not susceptible to equitable and practicable distribution under the UPA.

The UDC asserts that further support for a finding of waiver of sovereign immunity is found in the Ute Indian Tribe's corporate charter's "sue and be sued" provision. The Ute Indian Tribe was chartered in 1938 as a federal corporation pursuant to section 17 of the Indian Reorganization Act, ch. 576, 48 Stat. 988 (1934) (codified at 25 U.S.C. § 477). The tribal corporation was chartered to exercise certain enumerated powers, and in order to further business activity with non-Indian parties the corporation included a provision in its charter allowing itself "[t]o sue and be sued in courts of competent jurisdiction within the United States." The corporate charter's "sue and be sued" provision serves as a waiver of immunity only as to the tribal corporation, not as to the tribal organization established pursuant to section 16 of the Indian Reorganization Act, ch. 576, 48 Stat. 987 (1934) (codified at 25 U.S.C. § 476). *Ramey Constr. Co. v. Apache Tribe,* 673 F.2d 315, 320 (10th Cir. 1982); *Kenai Oil & Gas, Inc. v. U.S. Dep't of*

*the Interior*, 522 F. Supp. 521, 528-30 (D. Utah 1981), aff'd and remanded, 671 F.2d 383 (10th Cir. 1982).

The UDC contends it is suing the Ute Indian Tribe as a federally chartered corporation and that the "sue and be sued" provision is therefore a waiver of sovereign immunity. The tribal defendant is named in the complaint, however, only as "The Ute Indian Tribe," without designation of corporate status. The charter does denote that the tribal corporation is chartered under the name "The Ute Indian Tribe"; however the tribal organization is also known as the Ute Indian Tribe, or as the Ute Indian Tribe of the Uintah and Ouray Reservation. Hence, it is at least facially ambiguous whether the tribal corporate entity is indeed a defendant in this case.

Whether the "sue and be sued" clause of the charter serves as a waiver of sovereign immunity depends on whether the Ute Tribe as constitutional organization or the Ute Tribe as federal corporation is the proper defendant here. The Ute Partition Act specifies that the Tribal Business Committee of the Tribe is to act as joint manager of the indivisible assets on behalf of the Tribe. The Tribal Business Committee was established under the constitution of the tribal organization, and is authorized by charter to exercise all enumerated powers of the tribal corporation. At this stage of the litigation, it is unclear whether the Tribal Business Committee's exercise of its joint management function with respect to the indivisible assets is a corporate activity, or whether the Committee is acting on behalf of the

tribal organization. The court will therefore defer a ruling on this question; however the court nonetheless finds a congressional waiver of the tribal organization's sovereign immunity in any event.

A federal court is the only proper forum for the clarification of rights under the Ute Partition Act and the resolution of such issues as whether certain water rights have been distributed or are indivisible and subject to joint management, or whether the Secretary of the Interior has failed properly to supervise the joint management of indivisible assets. This court finds the UPA to constitute an express waiver of the Ute Indian Tribe's sovereign immunity.

### B. Failure to Join Tribal Defendant

Defendant Ute Indian Tribe contends that as a sovereign entity it cannot be joined as a party to this action, that it is a necessary and indispensable party under Fed. R. Civ. P. 19(a) & (b), and that this action must therefore be dismissed. The plaintiff argues that even if the Ute Indian Tribe is immune from this suit, it is not an indispensable party because the United States, as trustee, can adequately protect the Tribe's legal interests and rights. Having determined that the Ute Indian Tribe's sovereign immunity is limited with respect to the Ute Partition Act and that it is a proper party to this action, there is no need for this court to consider the Tribe's argument for dismissal under Rule 19.

### C. Exhaustion of Tribal Court Remedies

The Ute Tribe asserts that principles of comity dictate that the Ute Distribution Corporation must first bring this action in tribal court before a federal court may properly assert jurisdiction. The court disagrees.

The Tribe cites *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9 (1987), and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985), for the proposition that federal courts are required to defer to the tribal forum for a resolution of disputes over which a tribal court has jurisdiction and in which an Indian tribe is a defendant. The Tribe reads these cases too broadly. Both are distinguishable from the instant action for a number of reasons.

First, in both *LaPlante* and *National Farmers Union,* actions were already pending in tribal courts when the non-Indian parties filed suit in federal district court. In *National Farmers Union,* a tribe member brought a personal injury action in tribal court against a Montana school district, a subdivision of the State. After the tribal court entered a default judgment against the school district, the school district and its insurer filed a complaint in federal court invoking 28 U.S.C. § 1331 as a basis for jurisdiction. The school district and its insurer sought an injunction against execution of the tribal court judgment, asserting as a federal question whether the tribal court had proper subject matter jurisdiction over the tort action. 471 U.S. at 848-49. The Supreme

Court ultimately held that "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians" should be resolved first by the tribal court whose jurisdiction is challenged. *Id.* at 856-58.

In contrast, the instant case involves a federal question of a completely different nature. Here, the plaintiffs seek a declaratory judgment interpreting and clarifying the provisions of a piece of federal legislation, the Ute Partition Act. There has been no action filed in tribal court and therefore no challenge to tribal exercise of jurisdiction is before this court. As the Supreme Court noted in *LaPlante,* "the exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." 480 U.S. at 16 n.8. Thus, *National Farmers Union* does not require this court to abstain from exercising its proper jurisdiction in deciding a federal question where tribal jurisdiction is not at issue.

*LaPlante* dealt with a similar situation, where an insurance company filed a declaratory judgment action in federal court seeking a clarification of its responsibilities to insureds under a policy it issued them. *Id.* at 11-13. The insurance company filed its federal diversity action after the insureds had already sued the insurance company in tribal court and the tribal court had rejected the insurance company's challenge of tribal jurisdiction. *Id.* at 12. The *LaPlante* Court ruled that the insurance company

must first exhaust its remedies in the tribal forum, including available tribal appellate review, before commencing an action in federal court seeking resolution of the same issue pending before the tribal court. *Id.* at 18-19. Again, however, *LaPlante* is clearly distinguishable from the case before this court. In *LaPlante,* the non-Indian plaintiff asserted federal diversity jurisdiction under 28 U.S.C. § 1332, rather than federal question jurisdiction under 28 U.S.C. § 1331, as does the UDC here. In *LaPlante,* the same issue that the non-Indian plaintiff sought to have resolved by the federal district court was already before the tribal court; in the instant case, the tribal court has not been asked to consider the issue before this court, the interpretation and enforcement of the UPA.

Finally, this court has already concluded that it has subject matter jurisdiction over claims relating to those assets which were not susceptible to equitable and practicable distribution at the time of termination of the mixed-bloods, and that the tribal court lacks jurisdiction to consider such claims. Three judges of this court sitting en banc to consider common issues in related cases involving hunting and fishing rights under the Ute Partition Act (also referred to as "the Termination Act") found:

> 4. The Termination Act does not confer jurisdiction upon the tribal courts to clarify rights under the Termination Act, nor to enforce or determine the provisions and the consequences of the Termination Act.

> 5. This court has subject matter jurisdiction over matters concerning rights which are the subject of the Termination Act.
>
> 6. This court has subject matter jurisdiction over matters concerning the interpretation and enforcement of provisions and the consequences of the Termination Act.

*Affiliated Ute Citizens v. Ute Indian Tribe,* No. 85-C-569J (D. Utah Aug. 31, 1990); *Ute Distribution Corp. v. Ute Indian Tribe,* No. 89-C-959W (D. Utah Aug. 31, 1990); *Murdock v. Ute Indian Tribe,* No. 89-C-982G (D. Utah Aug. 31, 1990) (joint findings of fact, conclusions of law, and preliminary injunction issued by Jenkins, C.J., Winder & Greene, JJ.). Therefore, there is no reason why this court may not exercise its jurisdiction, pursuant to 28 U.S.C. §§ 1331 & 2201, and address the issues properly before it in this case.

### D. Statute of Limitations

The Ute Indian Tribe contends that this litigation is barred by any of a number of applicable statutes of limitation, either tribal, state, or federal, claiming that more than thirty years have passed since the UDC's cause of action accrued. The court rejects the Tribe's position and finds that this action is not barred by any statute of limitations.

The Tribe proposes that either section 1-8-7(1) of the Ute Law and Order Code, requiring that "[a]ny action against the Tribe or its officers or employees arising from the performance of their official duties

must be commenced within one year of the date the cause of action accrued," or section 1-8-7(2), requiring that "[a]ny other action must be commenced within three years of the date the cause of action accrued," is applicable and bars this litigation. However, this court has already determined that it, and not the Ute Tribal court, has jurisdiction over this matter. The Tribe has offered no authority or reason why the court should borrow a limitations period from the Ute Law and Order Code, and the court finds none.

The Tribe also contends that a specific federal statute bars this action. Although it recognizes that a declaratory judgment is a procedural device, not cause of action unto itself, and that there is no general statute of limitations for actions seeking declaratory judgments, *see* 22A Am.Jur. 2d *Declaratory Judgments* § 184 (1988), the Tribe argues that the court should apply the statute of limitations of an analogous federal statutory cause of action. The Tribe identifies 28 U.S.C. § 2409a(a), which provides a cause of action against the United States to adjudicate a disputed title to real property in which the United States claims an interest, as creating an analogous cause of action. However, that statutory provision expressly excludes actions seeking to adjudicate water rights or title disputes involving "trust or restricted Indian lands." *Id.* The court therefore declines to apply the twelve-year statute of limitations of 28 U.S.C. § 2409a(g). The court finds no other analogous federal cause of action providing a

statute of limitations; the Ute Partition Act itself is silent as to any limitations period.

The court also declines to borrow a state statute of limitations. The Supreme Court, in *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985), found an exception to "the general rule . . . that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim" in a case involving Indian tribal land claims. *Id.* at 240-44. There, the Court determined that to borrow a state limitations period would be inconsistent with federal policy, *id.* at 241, noting "evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians." *Id.* at 244 (discussing amendments to federal statute authorizing United States to bring suits in tort or contract for money damages on behalf of Indian tribes). *See also* 28 U.S.C. § 2415(c) ("Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property."). This court finds that the same policy considerations apply here.

The Ute Tribe argues that the policy concerns underlying the Supreme Court's ruling in *Oneida Nation* are absent here because the mixed-bloods Utes are not Indians. The court disagrees. Although the Ute Partition Act terminated the mixed-bloods' federal status generally, and terminated federal supervision of divisible and distributed assets specifically, the UPA expressly provided for a continuing federal trust relationship with the mixed-bloods in

the supervision of the mixed-bloods' joint management of indivisible assets with the Tribe. 28 U.S.C. § 677i. Thus, with respect to jointly managed assets "not susceptible to equitable and practicable distribution," the mixed-bloods retain their federal Indian status, and the same concerns about the United States' trust responsibility to protect valuable Indian property rights that guided the Supreme Court in *Oneida Nation* apply here as well. Hence, the court will not borrow an analogous state statute to bar the UDC's declaratory judgment action.

Finally, even were the court to identify an appropriate state or federal statute of limitations, there is no single, discrete event associated with the UPA that has given rise to a cause of action and triggered any attendant limitations period foreclosing this action. The Tribe asserts that a cause of action accrued to the UDC at various times, including when the UPA was enacted in 1954, when tribal assets were partitioned in 1961, or when the United States, the Tribe, and the Central Utah Conservancy District entered into an agreement in 1965 relating to the use and development of Indian water rights. However, if this court, were to conclude that certain tribal water rights were not partitioned and are an indivisible asset, then the Ute Tribe and the Secretary of the Interior would each be found to have an ongoing duty to ensure the UDC was properly included at all times in the joint management of that asset. Thus, any breach at any time of the continuing responsibility of the Secretary or the Tribe could trigger a cause of action; hence, a

declaratory judgment defining a party's rights under the UPA may properly be sought at any time while the federally supervised joint management scheme is in effect.

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that the Ute Indian Tribe's Motion to Dismiss is DENIED.

DATED this 26th day of July, 1996.

BY THE COURT:

/s/ David K. Winder
David K. Winder
Chief Judge

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| UTE DISTRIBUTION CORPORATION,<br>Plaintiff-Appellant,<br>RED ROCK CORPORATION, a Utah corporation,<br>Plaintiff-Intervenor,<br>v.<br>SECRETARY OF THE INTERIOR OF THE UNITED STATES, in his official capacity; UTE INDIAN TRIBE,<br>Defendants-Appellees. | No. 08-4147<br>(D.C. No. 2:95-CV-0376-DB) |

**ORDER**

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[Filed Dec. 15, 2009]

Before **HENRY**, Chief Circuit Judge, **BRISCOE**, and **LUCERO**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and

no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

**28 U.S.C. § 2401. Time for commencing action against United States**

**(a)** Except as provided by the Contract Disputes Act of 1978., every civil action commenced against the United States shall be barred unless the complaint. is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

**(b)** A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

**117 Stat. 1241**

**UNITED STATES PUBLIC LAWS**
**108th Congress – First Session**
**Convening January 7, 2003**

Additions and Deletions are not
identified in this database.
Vetoed provisions within tabular
material are not displayed
PL 108-108 (HR 2691)
November 10, 2003

# DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS ACT, 2004

An Act Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes, namely:

## TITLE I – DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

### MANAGEMENT OF LANDS AND RESOURCES

For necessary expenses for protection, use, improvement, development, disposal, cadastral surveying, classification, acquisition of easements and other interests in lands, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and

their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau, and assessment of mineral potential of public lands pursuant to Public Law 96-487 (16 U.S.C. 3150(a)), $850,321,000, to remain available until expended, of which $1,000,000 is for high priority projects, to be carried out by the Youth Conservation Corps; $2,484,000 is for assessment of the mineral potential of public lands in Alaska, pursuant to section 1010 of Public Law 96-487; (16 U.S.C. 3150); and of which not to exceed $1,000,000 shall be derived from the special receipt account established by the Land and Water Conservation Act of 1965, as amended (16 U.S.C. 4601-6a(i)); and of which $3,000,000 shall be available in fiscal year 2004 subject to a match by at least an equal amount by the National Fish and Wildlife Foundation for cost-shared projects supporting conservation of Bureau lands; and such funds shall be advanced to the Foundation as a lump sum grant without regard to when expenses are incurred; in addition, $32,696,000 is for Mining Law Administration program operations, including the cost of administering the mining claim fee program; to remain available until expended, to be reduced by amounts collected by the Bureau and credited to this

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PAYMENTS IN LIEU OF TAXES

For expenses necessary to implement the Act of October 20, 1976, as amended (31 U.S.C. 6901-6907), $227,500,000, of which not to exceed $400,000 shall be available for administrative expenses: Provided, That no payment shall be made to otherwise eligible

units of local government if the computed amount of the payment is less than $100.

Office of the Solicitor
SALARIES AND EXPENSES

For necessary expenses of the Office of the Solicitor, $50,374,000.

Office of Inspector General
SALARIES AND EXPENSES

For necessary expenses of the Office of Inspector General, $38,749,000, of which $3,812,000 shall be for procurement by contract of independent auditing services to audit the consolidated Department of the Interior annual financial statement and the annual financial statement of the Department of the Interior bureaus and offices funded in this Act.

Office of Special Trustee for American Indians
FEDERAL TRUST PROGRAMS
<< 25 USCA § 4011 NOTE >>

For the operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $189,641,000, to remain available until expended: Provided, That of the amounts available under this heading not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal

accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support: Provided further, That nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004: Provided further, That funds for trust management improvements and litigation support may, as needed, be transferred to or merged with the Bureau of Indian Affairs, "Operation of Indian Programs" account; the Office of the Solicitor, "Salaries and Expenses" account; and the Departmental Management, "Salaries and Expenses" account: Provided further, That funds made available to Tribes and Tribal organizations through contracts or grants obligated during fiscal year 2004, as authorized by the Indian Self-Determination Act of 1975 (25 U.S.C. 450 et seq.), shall remain available until expended by the contractor or grantee: Provided further, That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on

the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss: Provided further, That notwithstanding any other provision of law, the Secretary shall not be required to provide a quarterly statement of performance for any Indian trust account that has not had activity for at least 18 months and has a balance of $1.00 or less: Provided further, That the Secretary shall issue an annual account statement and maintain a record of any such accounts and shall permit the balance in each such account to be withdrawn upon the express written request of the account holder: Provided further, That not to exceed $50,000 is available for the Secretary to make payments to correct administrative errors of either disbursements from or deposits to Individual Indian Money or Tribal accounts after September 30, 2002: Provided further, That erroneous payments that are recovered shall be credited to and remain available in this account for this purpose.

## INDIAN LAND CONSOLIDATION

For consolidation of fractional interests in Indian lands and expenses associated with redetermining and redistributing escheated interests in allotted lands, and for necessary expenses to carry out the Indian Land Consolidation Act of 1983, as amended, by direct expenditure or cooperative agreement,

$21,980,000, to remain available until expended: Provided, That funds provided under this heading may be expended pursuant to the authorities contained in the provisos under the heading "Office of Special Trustee for American Indians, Indian Land Consolidation" of the Interior and Related Agencies Appropriations Act, 2001 (Public Law 106-291).

Natural Resource Damage
Assessment and Restoration
NATURAL RESOURCE
DAMAGE ASSESSMENT FUND

To conduct natural resource damage assessment and restoration activities by the Department of the Interior necessary to carry out the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 et seq.), Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.), the Oil Pollution Act of 1990 (Public Law 101-380) (33 U.S.C. 2701 et seq.), and Public Law 101-337, as amended (16 U.S.C. 19jj et seq.), $5,633,000, to remain available until expended.

ADMINISTRATIVE PROVISIONS

There is hereby authorized for acquisition from available resources within the Working Capital Fund, 15 aircraft, 10 of which shall be for replacement and which may be obtained by donation, purchase or through available excess surplus property: Provided,

That existing aircraft being replaced may be sold, with proceeds derived or trade-in value used to offset the purchase price for the replacement aircraft: Provided further, That no programs funded with appropriated funds in the "Departmental Management", "Office of the Solicitor", and "Office of Inspector General" may be augmented through the Working Capital Fund: Provided further, That the annual budget justification for Departmental Management shall describe estimated Working Capital Fund charges to bureaus and offices, including the methodology on which charges are based: Provided further, That departures from the Working Capital Fund estimates contained in the Departmental Management budget justification shall be presented to the Committees on Appropriations for approval: Provided further, That the Secretary shall provide a semi-annual report to the Committees on Appropriations on reimbursable support agreements between the Office of the Secretary and the National Business Center and the bureaus and offices of the Department, including the amounts billed pursuant to such agreements.

## GENERAL PROVISIONS, DEPARTMENT OF THE INTERIOR

SEC. 101. Appropriations made in this title shall be available for expenditure or transfer (within each bureau or office), with the approval of the Secretary, for the emergency reconstruction, replacement, or repair of aircraft, buildings, utilities, or other

facilities or equipment damaged or destroyed by fire, flood, storm, or other unavoidable causes: Provided, That no funds shall be made available under this authority until funds specifically made available to the Department of the Interior for emergencies shall have been exhausted: Provided further, That all funds used pursuant to this section are hereby designated by Congress to be "emergency requirements" pursuant to section 502 of H. Con. Res. 95, the concurrent resolution on the budget for fiscal year 2004, and must be replenished by a supplemental appropriation which must be requested as promptly as possible.

SEC. 102. The Secretary may authorize the expenditure or transfer of any no year appropriation in this title, in

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**Calendar No. 432**

| 102D CONGRESS *2d Session* | SENATE | REPORT 102-267 |
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# RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992

REPORT

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

TO ACCOMPANY

H.R. 429

together with

ADDITIONAL VIEWS

[LOGO]

MARCH 31 (legislative day, MARCH 26, 1992. –
Ordered to be printed

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WASHINGTON 1992

* * *

| | |
|---|---|
| Upper Provo River improvements | 8,044,501 |
| Syar Tunnel | 531,000 |
| Sixth Water Aqueduct | 32,610,514 |
| Starvation recreation facilities | 673,433 |
| Jordanelle recreation facilities | 17,646,695 |
| Mitigation measures | 32,063,000 |

| | |
|---|---|
| Balance available ..... | -260,926,414 |
| Added ceiling from Public Law 100-563 .... | 46,575,000 |
| Balance available ..... | -214,351,414 |

*B. Environmental issues*

The environmental impacts of constructing the CUP have been extensively studied and documented over at least the past 20 years. The Bureau's first environmental impact statement (EIS) was filed in 1973.[2]

Most of the environmental impacts are associated with Utah's abundant and diverse fish and wildlife resources. Of particular concern are the impacts of project features and their operation on trout fisheries caused by diverting project water from mountain streams. Other major impacts include wetland destruction, loss of riparian habitat, loss of big game winter range, excessive discharges to natural water-courses, and water quality impacts from irrigation drainage flows.

The original 1956 CRSP authorization recognized that project construction would impact fish and wildlife resources. Section 8 of that Act specifically

[2] For the Strawberry Collection System. Other EISs: Municipal and Industrial Water System, 1979, Diamond Fork Power System Final EIS, 1984; draft supplement to final EIS on Diamond Fork System, 1989 No EIS has been filed for the proposed Irrigation and Drainage (I&I) System, despite a Congressional directive that one be prepared no later than December 31, 1989 Pub. L. 100-563.

provides for "facilities to mitigate losses of, and improve conditions for, the propagation of fish and wildlife".

Unfortunately, the Committee has found that the Bureau of Reclamation has done an inadequate job of mitigating fish and wildlife impacts caused by construction of the CUP. The Committee has eliminated authorization of two costly and impractical "pumpback" water recirculation schemes in the Uinta Basin that were proposed for meeting certain instream flows. Certain measures in Title III of this legislation are intended to correct the poor record of fish and wildlife mitigation.

*C. Ute Indian water rights*

The Ute Indian Tribe, occupying the Uintah and Ouray Indian Reservation, is a federally recognized Indian Tribe. Its Reservation is made up of two reservations, one created by act of Congress in 1861 and the second reservation created by Executive Order in 1882. The Reservation is located in the northeast corner of Utah at the foot of the Uinta Mountains. A multitude of streams flow through the Reservation, located in the Uinta Basin, a sparsely settled plateau. The Ute Indian Tribe, composed of approximately 3,400 members, owns 1,000,000 acres of trust land, and occupies a Reservation whose boundary encompasses 4,000,000 acres of trust land, fee land, national forest, and Bureau of Land Management land.

All the Reservation land of the Ute Indian Tribe lies within the drainage of the Colorado River Basin. The Duchesne River and its tributaries, Rock Creek, Lake Fork River, Unita River and Whiterocks River are among the rivers which pass south from the Uinta Mountains through the Reservation to the Green River and then on the mainstream of the Colorado River.

The Bonneville Unit, the principal feature of the Central Utah Project, involves in part, a diversion of water from the Uinta basin (the home of the Uintah and Ouray Indian Reservation) over the Wasatch Mountains to the populated area in and about Salt Lake City and to agricultural lands to the south. In order to find sufficient amounts of water to justify the substantial expense in constructing the Bonneville Unit transbasin facilities, the United States, the Central Utah Water conservancy District acting on behalf of the State of Utah water users, and the Ute Indian Tribe entered into an agreement on September 20, 1965, where the Tribe agreed to defer development of a portion of its Reservation land so as to free up water which could be diverted from the Uinta Basin to the Bonneville Basin. In exchange, the United States agreed to develop, prior to January 1, 2005, the initial phase and ultimate phase components of the Central Utah Project to provide water to all of the lands of the Reservation that were susceptible to irrigation.

In 1968, Congress expanded the initial authorization for the Central Utah Project and

authorized water resource projects to deliver the water promised under the Deferral Agreement (Colorado River Basin Project Act, Pub. L. 90-537). Congress first established the Uintah Unit as a major addition to the initial phase of the Central Utah Project, and in addition, Congress at the same time ordered the Secretary of the Interior to give priority to completion of planning reports on the Ute Indian Unit (an ultimate phase component). Congress expressly stated that the planning report for the Ute Indian Unit was necessary "to enable the United States of America to meet the commitments heretofore made to the Ute Indian Tribe of the Uintah and Ouray Indian Reservation under the Agreement dated September 20, 1965." 43 U.S.C. 620a. *See also* the Act of September 28, 1976, 90 Stat. 1324, authorizing construction of the Uintah Unit.

In the years since 1976, the focus of development for the Central Utah Project has been the completion of the Bonneville Unit, includig the diversion of water from the Uinta Basin to the Bonneville Basin. None of the major Uinta Basin projects intended to assist the Ute Indian Tribe have been built. Engineering problems associated with the dams, the demise of a prosperous oil and gas and oil shale industry, changing national priorities, and the high cost of damming the rivers flowing from the Uinta Mountains have all contributed to the failure to implement the Federal obligations contained in the 1965 agreement. The Ute Tribe has become increasingly frustrated with the failure of the United

States to provide the water facilities expected under the Deferral Agreement of 1965.

The benefits provided the Tribe in Title V in lieu of the projects to improve the natural resources and economic opportunities on the Uintah and Ouray Reservation.

The Committee is aware of certain disputes and controversies that exist regarding the rights and privileges of "Full Blood" and "Mixed Blood" groups belonging to or associated with the Ute Indian Tribe of the Uintah and Ouray Indian Reservation. It is the intent of the Committee that this legislation should be interpreted as being neutral with respect to any such disputes and controversies and in no way should be interpreted to affect, modify, affirm, or deny any underlying rights or privileges of any one group with regard to another.

### C. SECTION-BY-SECTION – TITLE II THROUGH VI

#### *1. Title II – Central Utah project construction*

This title authorizes an increase in the CRSP appropriations ceiling to allow for completion of the Central Utah Project. A table displaying the specific authorizations is included herein as Table 2.

TABLE 2 –
*Authorization of appropriations, titles II-V*

TITLE II – CENTRAL UTAH PROJECT CONSTRUCTION

| | |
|---|---|
| Sec. 201 Total Amount Authorized | $924,206,000 |
| Sec. 201: (a)(1) Authorization Adjustment for Accounting Reforms | $214,352,000 |
| Sec. 20: | |
| (a)(1) Irrigation and drainage | 150,000,000 |
| (a)(2) Groundwater program | 10,000,000 |
| (a)(3) Wasatch County Water Efficiency Project | 10,500,000 |
| (a)(4) Utah Lake salinity study | 1,000,000 |
| (a)(5) Strawberry conveyance study | 2,000,000 |
| (a)(6) Diamond Fork construction | 69,000,000 |
| Sec. 203(a) Uintah Basin Replacement Project | 30,538,000 |
| Sec. 204 Cost-sharing | ..... |
| Sec. 205 DPR and environmental compliance | ..... |
| Sec. 206 Local development in lieu | ..... |
| Sec. 207: | |
| (e)(1) Water management improvement | 3,000,000 |
| (e)(2) Conservation measures | 50,000,000 |
| Sec. 208 Limitation on hydro operations | ..... |
| Sec. 209 Operating agreements | ..... |
| Sec. 210 Jordan Aqueduct repayment | ..... |
| Sec. 211 audit of cost allocations | ..... |
| Sec. 212 Excess crops | ..... |
| Subtotal, Sections 202-212 | 326,038,000 |

TITLE III – FISH, WILDLIFE AND RECREATION MITIGATION

| | |
|---|---|
| From various fish and wildlife project schedules: Subtotal, Title III | 145,316,000 |

TITLE IV – UTAH RECLAMATION MITIGATION ACCOUNT

| | |
|---|---|
| Sec. 401 Findings and purposes | ..... |
| Sec. 402 Federal contribution to account | 40,000,000 |
| Subtotal, Title IV | 40,000,000 |

TITLE V – UTE INDIAN RIGHTS SETTLEMENT

| | |
|---|---|
| Sec. 501 Findings | ..... |
| Sec. 502 Repayments | ..... |

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