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

UTE DISTRIBUTION CORPORATION, a Utah corporation,

Plaintiff/Petitioner,

vs.

SECRETARY OF THE INTERIOR OF THE UNITED STATES, in her official capacity; and agents and employees, and those working in concert with her,

Defendants/Respondents,

UTE INDIAN TRIBE OF THE UINTAH AND OURAY AGENCY,

Intervener/Defendant/ Respondent,

RED ROCK CORPORATION, a Utah corporation,

Intervener.

UTE DISTRIBUTION CORPORATION'S MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' AND UTE INDIAN TRIBE'S JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT

Case No. 2:95CV376B

Chief Judge Dee Benson

Magistrate Judge David O. Nuffer

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Plaintiff/Petitioner Ute Distribution Corporation ("UDC") respectfully submits this memorandum in opposition to the Federal Defendants' and Ute Indian Tribe's Joint[1] Motion to Dismiss the UDC's Second Amended Complaint ("Motion" or "Motion to Dismiss").

STATEMENT OF ISSUES

The Federal Defendants' (the "government") and Ute Indian Tribe's (the "Tribe") (collectively "defendants") Motion to Dismiss is based on the following arguments: (1) all Claims except the First are time-barred; (2) there is subject matter jurisdiction only over the First Claim because the Secretary of the Interior ("Secretary") has made no decision about the UDC's claim to funds pursuant to Title V of Public Law 102-575 ("Title V"); (3) the government and Tribe have waived sovereign immunity only for the First Claim; (4) laches bars the Fourth, Fifth and Sixth Claims; (5) the Second Claim for declaratory judgment is improper; and (6) the UDC cannot bring a claim for breach of trust and/or fiduciary duties.

These arguments ignore the previous Order of Judge David Winder in this case, as well as defendants' own previous admissions. The arguments also misstate the findings of the Secretary in her February 3, 2004 decision, and reflect a misunderstanding of the basis of the UDC's Second Amended Complaint ("Amended Complaint").

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[1]With this Motion, the government and Tribe have abandoned any pretense that they are operating separately in this case. Whereas in the past in this case they have only joined in each other's motions, they have drafted and signed this Motion jointly, including making joint arguments regarding sovereign immunity, stating the UDC "seeks to raid the Tribe's accounts" (Defs' Mem. Supp. Mot. Dismiss, p. 17), and asserting "[t]he Tribe and Secretary have negotiated and worked with Congress to assure that annual appropriations were made and deposited *in the Tribe's accounts*" (*Id.* (emphasis added)). In light of this, it should be apparent why the UDC has asserted a claim against the Secretary for breach of trust/fiduciary duties.

The Amended Complaint is a vehicle for notifying the Court of the UDC's petition for review of the Secretary's October 2, 1998 and February 3, 2004 decisions (collectively "Secretary's Order"), and for pleading various claims related to the Secretary's Order. Furthermore, Judge Winder's July 26, 1996 Order ("July 26, 1996 Order") (Docket No. 33) specifically held that the UDC's claims are not time-barred, and this is the law of the case. The government has admitted that the July 26, 1996 Order is the law of this case, and has also admitted there is no statute of limitations that would bar the UDC's "complaint" if there is final agency action to be reviewed. The Tribe is likewise bound by the law of the case regarding the statute of limitations. In fact, the July 26, 1996 Order was the outcome of the Tribe's Motion to Dismiss (Docket Nos. 7 & 9). The Tribe and government have also argued repeatedly that the UDC cannot go forward with its claims until after this matter is decided by the Secretary, which the UDC has now done.

Moreover, contrary to defendants' contention that the Secretary has not decided whether the UDC is entitled to funds under Title V, the Secretary's Order addressed that issue and found the UDC was not so entitled. The Tribe's submission to the Secretary also addressed the Title V funds issue. With regard to the laches argument, defendants' recitation of how the Tribe has spent Title V monies since the filing of this lawsuit in 1995 is important only for its admissions that the Secretary abandoned trust and fiduciary duty to the UDC even before the Secretary's Order,[2] and instead expended all of its efforts on behalf of the Tribe. All of the claims in the

[2]The government's position before this Court in 2000 (and Judge Winder in 1996) was that it was mandatory that this matter be remanded to the Secretary because she had never before "decided" the issue of whether water/rights claims had been divided. *See* UDC's Addition Facts, ¶ 8. This begs the question of why the Secretary was assisting the Tribe with Title V funds in 1993 while at the same time ignoring that the UDC would be entitled to a portion of those funds.

Amended Complaint therefore are timely and proper, as is the UDC's request for review of the Secretary's Order. Defendants' Motion accordingly should be denied.

RESPONSE TO DEFENDANTS' STATEMENT OF BACKGROUND FACTS

The Court should summarily deny defendants' Motion because they have failed to comply with the requirements of DUCivR 56. Although defendants have styled their Motion as a motion to dismiss, it is one for summary judgment since it relies on evidence outside the pleadings. *See* Fed.R.Civ.P. 56. Defendants therefore were required to begin their memorandum with a numbered statement of facts to which they contend there is no dispute. *See* DUCivR 56. Defendants have not done this, and instead have simply included a "Statement of Background Facts" ("Defendants' Facts") which consists in large part of argument. That said, although Defendants' Facts are generally irrelevant to this Motion and the UDC does not for the most part dispute the historical portions of those Facts, the following facts tell part of the rest of the story.

1. Defendants correctly state that this Court has jurisdiction under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2), to review the Secretary's Order finding that the Tribe's water rights/claims were susceptible to equitable and practicable distribution under the Ute Partition Act, 25 U.S.C. §§ 677 *et seq.*, and that these rights and claims were in fact equitable divided and distributed. *See* First Dec. of Sec. (Oct. 2, 1998), p. 22 ("1998 Order"), attached as Ex. C to Defs' Mem. Supp. Mot. Dismiss; Final Dec. of Sec. (Feb 3, 2004), p. 16 ("2004 Order"), attached as Ex. B to Defs' Mem. Supp. Mot. Dismiss. However, the UDC has also asserted subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 2201, and waiver of sovereign immunity under the APA, 5 U.S.C. §§ 701-706, for declaratory and injunctive relief due to the Secretary's breach of trust and fiduciary duties. *See* Amd. Comp. ¶¶ 1-2. Moreover,

the Tribe has waived sovereign immunity with regard to the Secretary's Order, which Order covers every claim pleaded against the Tribe. *See* UDC's Add. Facts, ¶¶ 1-3, below.

2. The Partition Act specifically provides for and recognizes that both mixed-bloods and full-bloods will be terminated, with the mixed-bloods to be terminated first. 25 U.S.C. §§ 677, 677d, 677g, 677w. Although the full-bloods have not yet been terminated, the fact that the plan was that they would be terminated is significant to assessing the mixed-bloods' argument that water rights/claims were not divided and are subject to joint management.

3. The mixed-bloods' shares in the UDC were not, as defendants' contend, "freely alienable." *See* Defs' Mem. Supp. Mot. Dismiss, p. 4. Mixed-bloods could not freely alienate or dispose of their "interest in tribal assets" until August 27, 1964, which was three years after final termination. *See* 25 U.S.C. § 677n; *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). Before August 27, 1964, the government controlled the sale of mixed-bloods' assets and they first had to offer their interests in undivided Tribal assets (*i.e.*, shares in the UDC and Range Corporations) for sale to "members of the tribe." *See id.*

4. Termination was not, as defendants contend, supposed to be completed in seven years. The actual timetable for termination was ten years, *i.e.*, August 27, 1964. The government proclaimed final termination in seven years--three years earlier than full-bloods and mixed-bloods had planned. One year before termination, the following dialog took place in a meeting of the Affiliated Ute Citizens: "Lula asks about the water. She is answered that it is a problem and will not be done prior to termination, it cannot be done that fast. [John] Boyden [attorney for Tribe and UDC] thinks we can protect our interest without having counsel for you as it is the

same as the fullbloods and we have to do everything else but the water." *See* AUC Minutes (Aug. 8, 1960), attached hereto as Ex. A.

5. Defendants' recitation of how the Tribe came into possession of 90% of Range Corporation shares does not tell the full story. *See* Defs' Mem. Supp. Mot. Dismiss, pp. 3-4. Although the sale of these shares is not relevant to the instant Motion, other facts related to the sale of these shares are contained in the UDC's November 29, 2001 submission to the Secretary, including methods used by the government ensure that only the Tribe would be able to purchase from First Security Bank the shares of mixed-blood minors and non compos mentis. *See* UDC's Submission to Secretary (Nov. 29, 2001), Additional Documentation & Evidence, ¶¶ 8-9, 13-16, 22-29, 34-35, 38-39, 41-82, 84-87, 138-189, attached hereto as Ex. B.

6. The lands for which water rights were deferred pursuant to the Deferral Agreement were identified in the 1960 Decker Report. *See* UDC's Submission to Secretary, Additional Facts ¶¶ 113, 119; *see also* Deferral Agreement, attached hereto as Ex. C; Letter from Reid W. Nielsen (Regional Solicitor, DOI) to Regional Director, Upper Colorado River Region BR (June 16, 1983), attached hereto as Ex. D.

7. The UDC paid its proportionate share of E.L. Decker's expenses for his work on Indian water rights. *See* UDC's Submission to Secretary, Additional Facts ¶ 110. The Tribe billed and collected from the UDC for the UDC's share of Mr. Decker's expenses. *See id.*; *see also* UDC Resolution No. 62-UDC-17 (Aug. 27, 1962), attached hereto as Ex. E; UDC Meeting Minutes (Sept. 24, 1962), attached hereto as Ex. F.

8. The UDC was kept informed by Mr. Decker and government officials of planning on the Central Utah Project. On April 25, 1962, at Mr. Decker's invitation, UDC Board

members attended a conference on the Duchesne River Land and Water Review, Bonneville Unit, Central Utah Project, that was conducted by the Duchesne River Area Study Committee. UDC's Submission to Secretary, Additional Facts ¶ 108; *see also* Minutes of UDC Directors Meeting (Apr. 25, 1962), attached hereto as Ex. G. On that same day, Mr. Decker, Bureau of Indian Affairs Area Director F.M. Haverland, and Superintendent Zollar of the Uintah & Ouray Agency attended a meeting of the UDC Board of Directors. UDC's Submission to Secretary, Additional Facts ¶ 109; *see also* Minutes of UDC Directors Meeting (Apr. 25, 1962). The purpose of the meeting was to assure that Mr. Decker would be able to continue his work and that sufficient funds would be on deposit at the Agency for this. *See id.* "A vote of thanks and appreciation was given to Mr. Decker by the Board for the past work done." *Id.*

9. The United States' position in *Affiliated Ute Citizens v. United States* included that the value placed on the range lands represented the land and all water claims related to the land. In its briefing in that case, the government asserted that "[n]o amount was paid to any Mixed-Blood which was separately designated as a value attributable to water rights [on the range lands] but the United States contends the value placed upon the land included water rights related to it." *See* UDC's Submission to Secretary, Additional Facts ¶ 129; *see* also Defs' Brf. in *AUC*, relevant pages attached hereto as Ex. H.

10. In the *Hackford v. First Security* case, the government employees who valued the Range Lands testified under oath that the value placed on those lands included only incidental stock water. UDC's Submission to Secretary, Additional Facts ¶¶ 41-57; *see also* Deposition of Charles Moore, relevant pages attached hereto as Ex. I; Deposition of Cornelius Andrew Jenkins,

relevant pages attached hereto as Ex. J; *accord Hackford v. First Security*, 521 F. Supp. 541 (D. Utah 1981), *aff'd*, 1983 U.S.App. LEXIS 30924 (10th Cir. 1983).

11. The United States' position in *Affiliated Ute Citizens v. United States* was that reserved water claims **could** be an asset not susceptible to equitable and practicable distribution or an unliquidated and unadjudicated claim against the United States, and the UDC would jointly manage that asset:

> As for reserved water rights necessary for mineral development, the defendants' position is as follows: The UDC . . . was created to (1) manage jointly with the Tribal Business Committee all unadjudicated or unliquidated claims against the United States and assets not susceptible to equitable and practicable distribution to which the mixed-bloods are entitled, and (2) to receive the proceeds therefrom and to distribute the same to the stockholders of the corporation . . .. *In the event that the Supreme Court, at some future time, should hold that Winters Doctrine Rights include such waters as are necessary to develop mineral interests on the Indian Reservation, then the UDC would be the funnel through which any proceeds from such waters would be distributed to its stockholders, and title to such waters would remain in the United States, along with title to the minerals. . .* . Defendant submits that the UDC is empowered to jointly manage such an asset.

See UDC's Submission to Secretary, Additional Facts ¶ 130; *see* also Defs' Brf. in *AUC v. United States* (emphasis added), relevant pages attached hereto as Ex. K.

12. In *Affiliated Ute Citizens v. United States*, the Court of Claims did not directly decide **how** reserved water rights were distributed to individual mixed-bloods, just that they **were**. The court found that this class of intangible asserts (which included reserved water rights/claims) was distributed by August 1961, "being conveyed *either in the form of shares in the Ute Distribution Corporation or as appurtenant to land.*" *Affiliated Ute Citizens v. United States*, 215 Ct. Cl. 935 (unpublished opinion), 1977 WL 25897 (Ct. Cl.) (emphasis added).

13. Defendants concede that the first payment under Title V was made to the Tribe October 1, 1993, approximately 18 months prior to the filing of this lawsuit. Defs' Mem. Supp. Mot. Dismiss, p. 6. Defendants admit the Tribe has received funds from 1993 through 2004. *Id.*

14. The UDC was not a party to *Hackford v. Babbitt*, and that case (which dealt only with the Uintah Irrigation Project) is not a subject of the Amended Complaint. *See Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994). Moreover, the Tenth Circuit pointed out in *Hackford* that the Secretary had stated that the Uintah Irrigation Project itself was not a tribal asset, but that he admitted that if it was it would be subject to the joint management and control of the UDC and Tribal Business Committee. *Id.* at 1465.

UDC'S STATEMENT OF ADDITIONAL FACTS

1. The Tribe specifically addressed Title V funds in its September 25, 1995 memorandum supporting its Motion to Dismiss. Tribe's Mem. Supp. Mot. Dismiss (Sept. 25, 1995) (Docket No. 9). Thus, when the Tribe voluntarily moved to intervene in this lawsuit on October 27, 1998 (Docket Nos. 85 & 86), it knew restitution of Title V funds to the UDC would be an issue.

2. The Tribe's February 27, 2002, submission to the Secretary specifically addressed the Title V funds issue which the Tribe now contends was not decided by the Secretary. *See* Tribe's Submission to Secretary, Response to the UDC's Additional Documentation and Evidence (Feb. 27, 2002), pp. 76-78 (discussing Title V), relevant pages attached hereto as Ex. L. The Tribe noted therein that the administrative record already included documentation regarding Title V, and stated as follows:

> The Tribe did not defer "Tribal reserved water rights claims on Group 5 lands." *See* Response to No. 111 above. The Ute Indian Rights Settlement, Title V of P.L. 102-575 is

already included in the Administrative Record, AR at Tab M. The purposes of the Act are set out in § 501(b) as follows:

> (1) quantify the Tribe's reserved water rights;
> (2) allow increased beneficial use of such water; and
> (3) put the Tribe in the same economic position it would have enjoyed had the features contemplated in the September 20, 1965 Agreement been constructed.

The Settlement compensates the Tribe for the failure of the government to construct the water delivery projects contemplated by the Deferral Agreement. It does not compensate the Tribe for water rights or water rights "claims." The Settlement is not an issue before the Secretary. Its terms do not provide any evidence relevant to the issue before the Secretary. That being said, we note that the UDC is not mentioned in the Act, and the purposes of the Act do not include the UDC. Moreover, the UDC fails to provide any evidence that at any time throughout the history of the negotiations pertaining to the Settlement, it sought to participate, sought to have its alleged interests recognized or sought to assert its interests. . . .

See id.

3. Not only did the Tribe's submission to the Secretary specifically address restitution of Title V funds, the Secretary's 2004 Order expressly addressed and made a finding regarding the UDC's claim to restitution pursuant to Title V, including recognizing that the UDC raised the issue of its entitlement to a portion of the funds:

> The [UDC's] third exhibit is a copy of Title V of Public Law 102-575, the Ute Indian Rights Settlement. The UDC claims it is entitled to a proportionate share of monies provided to the Tribe under Section 502 of Title V. To the extent that the UDC bases this assertion on the theory that the Tribal water rights and water rights claims were not divided and distributed pursuant to the UPA, the UDC's assertion is rejected, based upon the findings and determinations in the 1998 and 2004 Decisions. Congress clearly sought to benefit the Tribe, not others, through the settlement provisions of Title V. Moreover, the legislative history supporting Title V further states that the monies provided under section 502 is based on the *Tribe's* deferred irrigation over 15,000 acres of Group V lands, lands retained by the Tribe subsequent to the partition. S. Rpt. No. 102-267, at 102-03, 121, 124; *see also* 1998 Decision at 20-21. Nothing supports the UDC's claim here.

2004 Order, pp. 15-16 (emphasis in original).

4. On or about September 22, 1995, the Tribe filed a Motion to Dismiss on grounds of sovereign immunity and argued therein that this case is barred by the Tribal Court's statute of limitations. *See* Tribe's Mem. Supp. Mot. Dismiss, pp. 13-14 (Docket No. 9). The UDC's response memorandum argued that the Tribal Court's statute of limitations did not apply, and asserted that its claims were not subject to any statute of limitations whether Tribal, state or federal. *See* UDC's Mem. Opp. Tribe's Mot. Dismiss, pp. 25-28 (Docket No. 15). In its reply memorandum, the Tribe addressed the UDC's statute of limitations argument including whether the action was barred by state or federal limitations periods. *See* Tribe's Reply Mem. Supp. Mot. Dismiss, pp. 6-11 (Docket No. 20).

5. On or about July 25, 1996, Judge Winder issued an Order which is the law of this case on whether the UDC's claims are time-barred. The Order denied the Tribe's September 25, 1995 Motion to Dismiss. *See* Mem. Dec. & Order Denying Def. Tribe's Mot. Dismiss (Docket No. 33). Judge Winder rejected the Tribe's arguments about state, federal, and Tribal statutes of limitation and held that the UDC's case was not time-barred:

> there is no single, discrete event associated with the [Partition Act] that has given rise to a cause of action and triggered any attendant limitations period foreclosing this action. . . . [The Complaint alleges that] the Ute Tribe and the Secretary of the Interior . . . each have an ongoing duty to ensure the UDC was properly included at all times in the joint management of [water rights/claims]. 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.

Id. at 30-31.

6. On or about July 23, 1996, the government filed a Motion to Dismiss alleging the UDC's claims are time-barred pursuant to 28 U.S.C. § 2401(a). *See* Govt.'s Mem. Supp. Mot.

Dismiss (July 23, 1996), pp. 7-8 (Docket No. 32). The UDC opposed the Motion (Docket No. 41). In its reply memorandum the government admitted the July 26, 1996 Order is the law of the case and that the UDC's claims are not time-barred, including under 28 U.S.C. § 2401(a):

> The Court concluded in its Memorandum Decision and Order that "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 that UDC was properly included at all times in the joint management of that asset" and that a declaratory judgment under the UPA could be brought "at any time while the federally supervised joint management scheme is in effect." Memorandum Decision and Order at 31. While not abandoning the argument in its opening Memorandum that the statute of limitations bars UDC's claims, *the United States recognizes that the Court's rationale would apply to the United States' Motion to Dismiss on limitations grounds, as well as to the Tribe's.*

See Reply to Plts' Mem. Opp. to Sec. of Int.'s Mot. Dismiss, pp. 8-9 (emphasis added) (Docket No. 44). The government further conceded that the statute of limitations is six years for review of final agency actions. *See id.* (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (citing 28 U.S.C. § 2401(a) as basis of six-year limitations period for review of agency action under APA)).

7. In this lawsuit, the government has insisted that the UDC must first "exhaust administrative remedies." *See* Reply to Plts' Mem. in Opp. to Sec. of Int.'s Mot. Dismiss, pp. 9-10, Docket No. (Docket No. 44). The Tribe has likewise contended that this matter must be remanded to the Secretary for agency action, has participated in the briefing to the Secretary, and has voluntarily intervened in this lawsuit.

8. The government stated in the September 26, 2000, hearing before this Court that the issue of whether water rights/claims were divided had "never been addressed by the secretary before and that was our position. . . . The remand was not for the secretary to decide whether he

decided these things before, and I don't think that the decision can be fairly read directly as making that decision because it was not before him." Hearing Trans. (Sept. 26, 2000), p. 15, attached as Ex. G to Defs' Mem. Supp. Mot. Dismiss. In response, this Court commented:

> That may be beyond his authority . . . I don't know of any grant, statutory grant of Congress that tells the Secretary of the Interior that you are also empowered to look at the historical record and decide whether this was decided back then. . . He would be more akin to a witness to help the Court in arriving at its final decision than a decision maker in the executive branch who was acting on a grant of power from Congress to which legal deference was entitled.

Id., pp. 15-16. The government responded "[t]hat is correct." *Id.*, p. 16.

9. The government argued in the September 26, 2000, hearing before this Court that the Secretary "clearly does have the authority [to make the decision] and the agency has interpreted the exercise of the authority at least in this particular instance *to be subject to judicial review under the APA once there is a final decision.*" Hrg. Trans. (Sept. 26, 2000), p. 40 (emphasis added).

10. This Court made the following comments at the September 26, 2000, hearing:

> And I say by way of comment and not any holding or finding by the Court, but it does seem to me at this juncture that the Secretary of the Interior under this act was required when there is a division of property and where there has been a disagreement between the two groups as to the proper division of property, that the Secretary is required to conclude that it was done fairly and equitably.
> . . .
> Second, if it is found to be contrary to constitutional right, power, privilege or immunity. So even if later I find that the constitutional question is not a separate issue to be governed not by the APA and if I were to find . . . that there was a violation of constitutional rights including the right to procedural due process, it would seem that the act contemplates that that would be sufficient grounds to set aside the agency action and conclusion.

Hrg. Trans. (Sept. 26, 2000), pp. 63-64.

11. The government's attorney admitted at the September 26, 2000 hearing that once the Secretary has made a decision, it is subject to judicial review:

> If it is flawed then the option would be to send it back for one that meets muster, the process that meets muster, resulting in either a new decision or a confirmation of the old one. And then after that issue is resolved then we would meet the merits of whether the decision was arbitrary or capricious or not. So I see that in that particular process.
>
> . . .
>
> Send it back and have those factors considered. Because under the ruling the Court is inclined to make here, it is the secretary's authority and responsibility to make this decision and then the Court has review jurisdiction that has some limitations under the APA, and one of those limitation is that the Court can't make the decision for the agency, it just must see that it follows the right process and considers the right factors and that its decision is a rational one. So I think that basically once we are in this process, the process itself allows the discovery to go on and the process allows the Court to consider the constitutional issues and whether there were constitutional safeguards, and then to decide on the merits whether the decision was based on all of the relevant factors and was rational.

Hrg. Trans. (Sept. 26, 2000), pp. 72-73, 76.

12. The government's attorney admitted in the September 26, 2000, that the Court has authority to consider evidence outside the record:

> The Court can consider documentation or evidence outside the record under certain circumstances in arriving at the Court's decision as to whether the agency looked at all of the factors that it should have and rendered a rational decision.

Hrg. Trans. (Sept. 26, 2000), p. 78.

13. At the September 26, 2000 hearing, the government answered "Right" to this comment by the Court: "The United States is standing by ready, willing and able to manage the assets which the court concluded were indivisible." Hrg. Trans. (Sept. 26, 2000), p. 48.

ARGUMENT

I. THIS MATTER IS NOT "COMMITTED TO AGENCY DISCRETION," AND THE UDC'S FIRST TWO CLAIMS ARE NOT BARRED.

A. THERE IS LAW FOR THIS COURT TO APPLY.

Defendants contend the Order is not reviewable and that the First and Second Claims should be dismissed because "there may be no law to apply," and because this Court stated in a hearing that "the Secretary of Interior was given almost plenary power if not plenary power over this process." These arguments should be rejected.

With regard to review of agency action, the Tenth Circuit has instructed that "[s]ection 701 of the APA provides that agency action is subject to judicial review except where there is a statutory prohibition on review or where agency action is committed to agency discretion as a matter of law." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1572 (10th Cir. 1994) (citing 5 U.S.C. § 701(a)(1), (2)), as construed in *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641-42 (10th Cir. 1990)). "[A]gency discretion" is a "very narrow exception" and "[t]he legislative history of the [APA] indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 91 S. Ct. 814, 821-22 (1971)(quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

Neither of these exceptions to judicial review apply here. First, defendants do not contend that there is a statute that precludes review. Second, there clearly is law to apply, including: (1) the Partition Act, 25 U.S.C. §§ 677, *et seq.*; (2) the Winter's Doctrine (*Winters v. United States*, 207 U.S. 564 (1908)), and related case law including *Arizona v. United States*, 373 U.S. 546 (1963); (3) Utah water law; (4) the Deferral Agreement; (5) Title V of Public Law 102-

575 and its legislative history; and (6) cases dealing with the Partition Act and mixed-bloods' rights, including *Affiliated Ute Citizens v. United States,* 1977 WL 25897 (Ct. Cl.), *Hackford v. First Security Bank*, 521 F. Supp. 541 (D. Utah 1981), *aff'd*, 1983 U.S. App. LEXIS 30924 (10th Cir. 1983), and *Hackford v. Babbitt*, 14 F.3d 1437 (10th Cir. 1994).

Furthermore, the provisions of the Partition Act which defendants cite for their argument that there "*may* be no law to apply" (25 U.S.C. §§ 677i and 677aa), say no such thing. Section 677i states that if mixed-bloods and full-bloods cannot agree on a division "within twelve months of the date of said commencement . . . the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable and fair to both groups." 25 U.S.C. § 677i. The time is long past for that alleged division, and there has never been any allegation that the Secretary made such division. Indeed, the government's position is that the Secretary did not make that decision (*see* UDC's Additional Facts ¶ 8), and it is clear from the Secretary's Order that she does not contend that any Secretary ever made that decision. Similarly, § 677aa states that when agreement of the mixed-bloods and full-bloods cannot be obtained, "the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups." 25 U.S.C. § 677aa. With regard to water rights or claims, there is no allegation the Secretary has ever "proceeded" and she does not contend she has. The Secretary's Order thus is not protected from review by § 677aa.

In sum, defendants have failed to show that the Secretary's Order is not reviewable or that there "may not be any law to apply."

B. THE FIRST CLAIM OF THE AMENDED COMPLAINT AMOUNTS TO A NOTICE OF APPEAL, AND PARAGRAPHS 128-131 & 139 ARE NOT SUBJECT TO DISMISSAL.

In support of their Motion to Dismiss, defendants state that the Secretary has "the authority to decide the issues presented," and that this is the law of the case, and that ¶¶ 128-131 & 139 (in the First Claim) of the Amended Complaint therefore should be "dismissed." There is no merit to this argument.

Although the Court has instructed that the Secretary has authority to decide the issues here, that does not mean defendants can control the UDC's request for review. In fact, defendants misconstrue the referenced paragraphs as "claims." *See* Defs' Mem. Supp. Mot. Dismiss, pp. 10-11 (seeking dismissal of ¶¶ 128-131 of Amended Complaint). These paragraphs are not "claims" in the sense of being causes of action subject to dismissal. The paragraphs referenced simply state the UDC's position, and are not "causes of action" in and of themselves.

Defendants also misapprehend the UDC's intentions and the process related to the UDC's First Claim. This Court has stated it will review final agency action, and the UDC accordingly has complied and proceeded to seek judicial review of the Secretary's Order. As discussed in *Olenhouse*, this action will proceed like an appeal (*see Olenhouse*, 42 F.3d at 1580), and the Amended Complaint accordingly functions in part as a notice of appeal or petition for review.

Olenhouse also instructs that "[m]otions to affirm and motions for summary judgment are conceptually incompatible with the very nature and purpose of appeal" because this permits the issues to be defined by the appellee (*i.e.*, Tribe and government). *Id.* In light of *Olenhouse*, the procedure for reviewing agency action appears to be that the UDC would file an "appellate brief" asserting its grounds for agency's error, defendant(s) will then respond, and the UDC will reply.

For defendants to file a motion to dismiss this review of agency action accordingly is improper.

In addition, defendants' argument that the challenged paragraphs must be "dismissed" is contrary to the APA, which gives the following instruction regarding the authority of the district court on review of agency action:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

5 U.S.C. § 706 (cited in *Olenhouse*, 42 F.3d at 1573 & n.23). In fact, some of the paragraphs to which defendants object actually track APA language. *Compare* Amd. Compl. ¶ 139 *with* 5 U.S.C. § 702(2)©) (district court may "hold unlawful and set aside agency action, findings and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). Another of the paragraphs to which defendants object is simply a statement that it is improper for the Secretary to determine that this issue was decided prior to August of 1961, when the United States Senate admitted in 1992 that it did not know the answer. *See* Amd. Compl. ¶ 129. The UDC contends that if the issue was decided prior to termination, the Senate would have not included this statement in 1992 legislation, and further contends that the Court is entitled to consider this when determining whether the Secretary's Order should be reversed.

Finally, even if the Secretary had exclusive authority to decide whether the water asset could be divided, which even defendants do not contend[3] and the UDC does not concede, the Secretary does not have exclusive authority to decide whether that asset actually **was** divided.

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[3]Defendants state that "[u]nquestionably this Court has determined that the Secretary has the authority, *if not the exclusive authority*, to decide the issues presented here." Defs' Mem. Supp. Mot. Dismiss, p. 11.

Although defendants cite this Court's use of the word "plenary" in their vague argument that there "may not be any law to apply," they ignore that this Court also stated in the September 26, 2000 hearing that it was not aware of any grant by Congress that would allow the Secretary to "decide whether this was decided back then":

> I don't know of any grant, statutory grant of Congress that tells the Secretary of the Interior that you are also empowered to look at the historical record and decide whether this was decided back then. . . He would be more akin to a witness to help the Court in arriving at its final decision than a decision maker in the executive branch who was acting on a grant of power from Congress to which legal deference was entitled.

See Hrg. Trans. (Sept. 26, 2000), pp. 15-16. The government responded: "[t]hat is correct." *Id.*, p. 16. Defendants also ignore that both Judge Winder and this Court maintained jurisdiction over this action during the time the issues were before the Secretary, which would have been nonsensical if this district had no authority to review the agency action.

In short, the challenged paragraphs in the Amended Complaint are not "claims" and are not subject to dismissal on summary judgment, and the First and Second Claims are not subject to dismissal on the grounds alleged by defendants.

II. THIS COURT CAN REVIEW CLAIMS THAT WERE DECIDED BY THE SECRETARY OR THAT LIE WITHIN THE ZONE OF INTERESTS OF THE SECRETARY'S ORDER.

The Court should reject defendants' contention that the only Claim in the Amended Complaint that the Court can consider is the First Claim. Defendants base this argument on this Court's statement that the APA is the "sole waiver of sovereign immunity by the United States applicable to this case," as well as on their argument that the Tribe has waived immunity only with regard to "review of the Secretary's Order." The reality is that the Secretary decided the Title V issue, and the challenged Claims are grounded in issues decided by the Secretary's Order.

A. THE SECRETARY'S ORDER DECIDES THE UDC'S CLAIM TO A PORTION OF TITLE V FUNDS.

Defendants are incorrect when they contend "the UDC's claimed right to a portion of the Title V funds has never been submitted to the Secretary" (Defs' Mem. Supp. Mot. Dismiss, p. 19), and that "the Secretary's Decisions did not address or decide any claim by the UDC to Tribal funds (*id.*, p. 20). In fact, as set forth above in the UDC's Additional Facts ¶¶ 1-4, the UDC raised the Title V funds restitution issue in its briefing to the Secretary, the Tribe responded to the Title V funds restitution issue in its briefing to the Secretary, and the Secretary decided the Title V funds restitution issue in its 2004 Decision. Thus, there is no merit to arguments or issues raised in Defendants' Motion[4] premised on their allegation that there has been no agency action.

B. ALL CLAIMS IN THE UDC'S AMENDED COMPLAINT ARE GROUNDED IN THE SECRETARY'S ORDER.

Defendants contend that the United States' waiver of sovereign immunity is grounded only in the APA, and that the waiver is limited to a review of the issues determined by the Secretary's Order. Defendants also contend that in light of this, the UDC's claims for restitution, *i.e.*, for an accounting (Fourth Claim), for an injunction prohibiting transfer of Title V funds out of trust (Fifth Claim), and for an apportionment of Title V funds (Sixth Claim), are not properly

[4]These include defendants' arguments that: (1) there has been no waiver of sovereign immunity by the government or Tribe for any claim except the First Claim; (2) the Fourth Claim (request for accounting), Fifth Claim (preliminary injunction regarding Title V funds), and Sixth Claim (equitable apportionment of Title V funds) are time-barred or subject to laches; (3) all claims except the First Claim must be dismissed because there is no final agency action; (4) the UDC's Second Claim, for declaratory judgment, must be dismissed; and (5) the Third Claim, for breach of the Secretary's trust and fiduciary duties, must be dismissed.

before this Court. They base this on their contention that the Secretary has not decided the Title V issue. As discussed above in Part II.A. and in the UDC's Additional Facts, this is incorrect.

First, the Secretary's Order shows that the UDC raised the Title V restitution issue, that the Tribe responded to this issue, and that the Secretary's Order decides this issue. *See* UDC's Additional Facts ¶¶ 1-4.

Second, all three of the claims to which defendants object is properly brought because each involves the Secretary's decision on restitution of Title V funds. This is shown by the cases which defendants cite for their contention that "issues that were not presented to and passed on by the agency in its final action cannot be reviewed."[5] Defs' Mem. Supp. Mot. Dismiss, pp. 22-23. For example, in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), the court noted that a party seeking judicial review "must (i) identify some 'final agency action' and (ii) demonstrate that its claims fall within the zone of interests protected by the statute forming the basis of its claims." *Id.* at 1434. As discussed above, there is final agency action with regard to Title V funds, and the accounting, injunction, and apportionment claims accordingly fall within the Secretary's Order and the Partition Act, which is the basis for the UDC's claims to water rights/claims and Title V funds.

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[5]A case cited by defendants in support of their Motion for More Definite Statement is relevant here. *See Holloman v. Watt*, 708 F.2d 1399 (9th Cir. 1983). In *Holloman,* plaintiffs applied for enrollment as members of the Colville Indian Tribe. *Id.* at 1400. After the BIA subsequently found they did not possess the necessary blood quantum to qualify and suspended their per capita and dividend payments, plaintiffs sued for restitution of the per capita and dividend payments and for damages for loss of tribal privileges. *Id.* at 1400-01. When the BIA later admitted it had made an error and that plaintiffs were eligible for per capita and dividend payments, the magistrate ordered the government to make restitution, and also ordered it to pay monetary damages. On appeal, the court noted that a need for waiver of sovereign immunity would apply only to the money damages. *Id.* at 1401-02. The per capita and dividends (with interest) were "restitution" and no additional waiver of sovereign immunity was needed. *See id.*

Similarly, *Trout Unlimited v. United States Department of Agriculture,* 320 F. Supp.2d 1090 (D. Colo. 2004),[6] cited by defendants, supports the UDC even though *Trout* involves Forest Service regulations, which are not at issue here. The *Trout* court found that "'[t]he claims raised in the administrative appeal and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had the opportunity to consider and decide, the same claims now raised in federal court.'" *Id.* at 1099 (quoting *Kleisser v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999)). Since the Secretary's Order decided the Title V restitution issue, the agency was "on notice of, and had the opportunity to consider and decide, the same claims now raised in federal court," *i.e.*, accounting, injunction, apportionment of Title V funds.

Third, the Tribe has waived sovereign immunity with regard to the UDC's Fourth, Fifth, and Sixth Claims. Those claims are related to the Secretary's Order on Title V funds, and the Tribe addressed the Title V issue in its submission to the Secretary. *See also* UDC's Additional Facts ¶¶ 1-4. The Tribe also addressed Title V funds earlier in this lawsuit--in its September 25, 1995 memorandum supporting its Motion to Dismiss (*see* UDC's Additional Facts ¶ 4 (citing Tribe's Mem. Supp. Mot. Dismiss (Sept. 25, 1995) (Docket No. 9))), which proves the Tribe knew that restitution was an issue when it voluntarily moved to intervene in this lawsuit on October 27, 1998 (Docket Nos. 85 & 86). The Tribe's waiver of sovereign immunity for the

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[6]Defendants' other cited cases also support the UDC or are inapposite. *See Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1528 (10th Cir. 1992) (court will review claims and contentions presented to agency); *Environmental Congress v. Zieroth*, 190 F. Supp.2d 1265 (D. Utah 2002) (agency action was brought under National Forest Management Act ("NFMA"); court allows NFMA claims but rejects those under different act (National Environmental Policy Act) because those were not presented to agency).

challenged claims also applies for the same reasons set forth above regarding those Claims being in the zone of interest protected by the statute addressed by the Secretary.

In sum, defendants admit that their waiver of sovereign immunity includes all issues addressed and decided by the Secretary's Order, and their Motion should be denied on this issue.

III. THE JULY 26, 1996 ORDER ON STATUTE OF LIMITATIONS IS THE LAW OF THE CASE, AND ALL CLAIMS ARE TIMELY.

Defendants seek dismissal of the UDC's Fourth, Fifth, and Sixth Claims on grounds that this Court "lacks jurisdiction to a address the UDC's claims to Tribal [Title V] funds because those claims are barred by the statutes of limitations." Defs' Mem. Supp. Mot. Dismiss, p. 13. This argument is without merit.

First, as discussed above in Part II, these claims are all related to the UDC's claim for restitution of Title V funds, and the Secretary decided that issue in the 2004 Decision. In addition, the government has previously admitted that the limitations period for review of agency actions is six years. *See* UDC's Additional Facts ¶ 6 (citing Reply to Plts' Mem. in Opp. to Sec. of Int.'s Mot. Dismiss, pp. 8-9 (emphasis added) (Docket No. 44)).

Second, the law of the case is that the UDC's claims related to the Tribe's and government's duties under the Partition Act are not time-barred. Under the law of the case doctrine, "[o]nce a court decides an issue, the doctrine comes into play to prevent the relitigation of that issue in subsequent proceedings in the same case." *Pittsburg v. Midway Coal Mining Co.*, 52 F.3d 1531, 1536 n.4 (10th Cir. 1995) (citing *Arizona v. California*, 460 U.S. 605 (1983)). "[T]he doctrine applies as much to the decisions of a coordinate court in the same case as to the court's own decision." *Christianson v. Colt Indus. Operating Co.*, 486 U.S. 800, 816 (1988).

In the July 26, 1996 Order denying the Tribe's Motion to Dismiss, Judge Winder stated the following when rejecting the Tribe's argument that Tribal, state,[7] and federal (28 U.S.C. § 2401(a)) statutes of limitation barred the UDC's claims:

> there is no single, discrete event associated with the [Partition Act] that has given rise to a cause of action and triggered any attendant limitations period foreclosing this action. . . . [The Complaint alleges that] the Ute Tribe and the Secretary of the Interior . . . each have an ongoing duty to ensure the UDC was properly included at all times in the joint management of [water rights/claims]. 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.

See UDC's Additional Facts ¶ 5 (quoting Mem. Decision & Order Denying Tribe's Mot. Dismiss, pp. 30-31 (Docket No. 33)).

Furthermore, in its reply memorandum in support of its own Motion to Dismiss on limitations grounds pursuant to 28 U.S.C. § 2401(b), the government admitted the July 26, 1996 Order on limitations is the law of the case:

> The Court concluded in its Memorandum Decision and Order that "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 that UDC was properly included at all times in the joint management of that asset" and that a declaratory judgment under the UPA could be brought "at any time while the federally supervised joint management scheme is in effect." Memorandum Decision and Order at 31. While not abandoning the argument in its opening Memorandum that the statute of limitations bars UDC's claims, the United States recognizes that the Court's

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[7]*See* Mem. Decision & Order Denying Tribe's Mot. Dismiss (Docket No. 33) The Tribe asserts here that the UDC's claims against it are barred by the four-year limitations period in Utah Code Ann. § 78-12-25 (catch-all limitations period). Defs' Mem. Supp. Mot. Dismiss, p. 15. In its reply memorandum in support of its 1995 Motion to Dismiss, however, the Tribe alleged the claims were barred by the seven-year limitations period in Utah Code Ann. § 78-12-5 (adverse possession). *See* Tribe's Reply Mem. Supp. Mot. Dismiss, p. 11 (Feb. 16, 1996).

> rationale would apply to the United States' Motion to Dismiss on limitations grounds, as well as to the Tribe's.

See UDC's Additional Facts ¶ 6 (quoting Reply to Plts' Mem. in Opp. to Sec. of Int.'s Mot. to Dismiss, pp. 8-9 (Docket No. 44)).

Third, the July 26, 1996 Order was proper, and applies to the UDC's Claims in the Amended Complaint. The primary statute at issue that establishes the UDC's rights is the Ute Partition Act, 25 U.S.C. § 677, *et seq.* The UDC's claims to restitution under the Deferral Agreement and Title V are grounded in that Act, and the UDC's position is that the government and Tribe have continuing duties under the Partition Act to deal fairly with the UDC. The Second through Sixth claims in the Amended Complaint are premised on this Court's reversing the Secretary's action on APA grounds. In that event, the UDC seeks declaratory judgment that the rights/claims at issue were not divided (automatic with reversal of the Secretary's Order), an accounting and apportionment of Title V funds (restitution which would result from reversal of the Secretary's Order), and a finding that the Secretary breached fiduciary and trust duties by excluding the UDC from joint management of water rights/claims and its share of Title V funds.

The UDC's position has consistently been 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; that they are subject to joint management by the UDC and Tribal Business Committee under the supervision of the Secretary; and that the UDC is entitled to restitution of its proportionate share of Title V funds. These causes of actions cannot be measured by a statute of limitations because there is no triggering event except for the Secretary's Order which could have commenced the running of a limitations period. That the Secretary should decide these issues first has always been the position of the Tribe and government. Moreover, the UDC asserts equitable claims

related to its continuing rights under a federal statute, the ramifications of which cannot be charted on a time line. Indeed, the water rights/claims that are the subject of the Amended Complaint have never been quantified and, in fact, the proposed 1990 Ute Indian Compact which attempts to quantify Tribal water rights has never been approved by Tribal members or the State of Utah. *See* Tribe's Mem. Supp. Mot. Dismiss (Sept. 22, 1995), p. 8.

The UDC has been purposefully excluded from negotiations over the quantity and value of Tribal water rights/claims and participation in Title V funds, and this Court should take note that the government's and Tribe's position was that the Secretary has the right to take action on those issues in the first instance. She now has done so. Moreover, exclusion by the Tribe and the Secretary from participating in Title V funds does not preclude the UDC from requesting an accounting and apportionment from this Court for its interest in those funds if the Secretary's Order is reversed. Indeed, after termination, mixed-bloods were excluded for more than twenty years from hunting and fishing on the reservation before this District declared in *United States v. Felter*, 546 F. Supp. 1002 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985), that hunting and fishing rights are not susceptible to equitable and practicable distribution, are subject to joint management by the Tribal Business Committee and the authorized representative of the mixed-bloods, and that mixed-bloods are entitled to hunting and fishing privileges within the reservation equivalent to those afforded tribal members. *Id.* at 1023-25.

Further, the July 26, 1996 Order correctly decided that there is no specific federal statute of limitations governing actions like the UDC's claims to enforce Indian property rights.[8] *See*

[8] Water rights are recognized as a property right. *Arizona v. California*, 460 U.S. 605, 619 (1983).

July 26, 2006 Order (citing *Oneida County v. Oneida Indians*, 470 U.S. 226, 240 (1985)). If there is no federal statute of limitations, a state statute of limitations for analogous action is normally borrowed. *Id.* However, a state statute of limitations should not be borrowed if borrowing would be inconsistent with underlying federal policies. *Id.* That is the situation here.

For example, in *Oneida County*, an Indian tribe sued two New York counties seeking damages representing the market value of land occupied by the counties. The counties claimed the applicable statute of limitations had passed. In holding there is no applicable statute of limitations, the United States Supreme Court looked first at 28 U.S.C. § 2415, which established limitations periods for claims brought by the United States on behalf of Indians. When Congress established limitations for certain claims brought by the United States on behalf of Indians, it excluded actions by Indians "to establish the title to, or right of possession of real or personal property" from statues of limitation. 28 U.S.C. § 2415©). According to the *Oneida County* Court:

> The legislative history . . . demonstrates that Congress did not intend § 2415 to apply to suits brought by the Indians themselves, and that it assumed that the Indians' right to sue was not otherwise subject to any statute of limitations.

Oneida County, 470 U.S. at 242. The Court concluded by restating this fundamental federal policy:

> Thus, we think the statutory framework adopted in 1982 [28 U.S.C. § 2415©) as amended] presumes the existence of an Indian right of action [to establish the title to, or right of possession of real or personal property] not otherwise subject to any statute of limitations. It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances.

Id. at 244.

This reasoning was applied in *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F. Supp. 1118, 1125 (D. Minn. 1994), where the court cited *Oneida County* as support for its finding that there is no limitations periods for Indians' claims to usufructuary rights (hunting, fishing, and gathering wild rice) because these are property rights under the Constitution. As the *Mille Lacs Band* court stated: "[b]orrowing a statute of limitations would be inconsistent with the Congressional intent that no statute of limitations would govern a suit by Indians for property rights." *Mille Lacs Band,* 853 F. Supp. at 1125.

With regard to the mixed-bloods, the Secretary still holds their undivided assets in trust premised on their rights as Indians, and the UDC is the mixed-bloods' authorized representative regarding those assets. Thus, using 28 U.S.C. § 2401(a) as the limitations period or borrowing a state statute of limitations, as defendants suggest, would be inconsistent with Constitutional property rights and with Congressional intent that no statute of limitations govern a suit by Indians for property rights. Since this lawsuit involves a claim for Indian water rights/claims and restitution of Title V funds related thereto, it is not barred by any statute of limitations.[9]

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[9]Aside from the fact that *Oneida County* decides this issue and that the July 26, 1996 Order is the law of this case, there is no merit to defendants' arguments that the cause of actions at issue arose on October 30, 1992, the date that Title V legislation became effective (Defs' Mem. Supp. Mot. Dismiss, p. 15), or that the applicable limitations period is six years for claims against the government under 28 U.S.C. § 2401(a) and four years for claims against the Tribe under Utah Code Ann. § 78-12-25 (*id.*). Both the Tribe and government have argued and admitted that this issue must be decided in the first instance by the Secretary, and that took place February 3, 2004. These claims are premised on the Secretary's Order, and the government has admitted that six years from the date of that Order is the applicable limitations period. Moreover, if there is an applicable Utah limitations period, which the UDC disputes, it is determined by the date the action accrues. Under Utah law, the causes of action here would accrue "from the date of the last action proved on either side" (Utah Code Ann. § 78-12-32), *i.e.*, when the Tribe received the Title V payment in 2004.

IV. THE TITLE V CLAIMS ARE NOT BARRED BY LACHES.

Defendants seek dismissal of the Fourth. Fifth, and Sixth Claims based on their contention that any claim for Title V finds is barred by the doctrine of laches because: (1) the alleged "delay" in bringing the claims is unreasonable, and (2) allowing the claims to proceed would "severely prejudice both the Secretary and the Tribe, undermining over 35 years of constant effort to assure the Tribe obtained the benefits of the projects promised to it in 1965." Defs' Mem. Supp. Mot. Dismiss, p. 16. The Court should reject these arguments.

The Tenth Circuit has provided the following instruction on laches:

> The question whether laches bars an action depends on the facts and circumstances of each case. The issue is primarily left to the discretion of the trial court, but that discretion is . . . confined by recognized standards. The trial court must find (a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay. Mere lapse of time does not amount to laches. When government action is involved, members of the public are entitled to assume public officials will act in accordance with the law.

Jacarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1338 (10th Cir. 1982) (internal citations omitted). "The existence of laches does not depend merely upon the lapse of time, but also upon the equities presented in the case." *Potash Co. of Am. v. International Minerals & Chem. Corp.*, 213 F.2d 153, 154-55 (10th Cir. 1954). Further:

> "'No absolute rule can be laid down by which to determine what constitutes laches or staleness of demand. Each case must be determined according to its own peculiar circumstances. Since laches is an equitable doctrine, its application is controlled by equitable considerations. *It cannot be invoked to defeat justice and will be applied as a defense only where the enforcement of the asserted right would work injustice.*"

Id. (quoting *Hoehn v. Crews*, 144 F.2d 665, 671 (10th Cir. 1944) (emphasis added), *aff'd sub. nom Garber v. Crews*, 324 U.S. 200 (1945)). "If the party which advances the defense of laches

is responsible for the delay or contributes substantially to it he cannot take advantage of it." *Id.* at 155. A court will not grant a wrongdoer "any advantage resulting from the lapse of time." *Id.* "[T]he delay must result in prejudice or an injustice to another." *Socony Mobil Oil Co. v. Continental Oil Co.*, 335 F.2d 438, 441 (10th Cir. 1964). The Tenth Circuit has refused to apply laches where there was no detrimental reliance by the proponent and the proponent would receive a windfall if it was applied. *See Harper v. Continental Oil Co.*, 805 F.2d 929, 930 (10th Cir. 1986). Based on these standards, defendants' laches argument fails.

First, it is troubling that the government would join with the Tribe in making a laches argument in light of the Secretary's trust and fiduciary duties to the UDC regarding undivided assets. It is also troubling that the government would state that the UDC's claims are an attempt to "raid the Tribe's accounts." The UDC has argued before in this case that the Secretary cannot be neutral regarding disputes between the Tribe and UDC. That she now joins in a laches defense and uses the overreaching phrase "raid the Tribe's accounts" is proof of the validity of the UDC's argument. Indeed, for a government trustee to even bring a laches defense in an effort to favor one trust beneficiary over another is improper. Moreover, the two-page listing of what the Secretary has done to assist the Tribe in obtaining and using Title V funds serves more as proof of her breach of trust and fiduciary duties to the UDC than it does as proof of laches.

Second, in light of the July 26, 1996 Order and based on the reasoning in *Oneida County* and *Mille Lacs Band*, laches cannot be applied to the UDC's Claims. If Congress found it improper to time-bar Indians' property rights' claims, with the inevitable conclusion that the Constitution would recognize Indians' property rights in perpetuity, this Court should decline to bar the UDC's claims on laches grounds.

Third, the Tribe cannot be prejudiced by the UDC's Claims because this lawsuit was filed in 1995, and the Tribe raised the Title V funds issue in its 1995 Motion to Dismiss. *See* UDC's Addition Facts ¶ 4. Moreover, the Tribe and government have argued both in this Motion and directly to the Court that the Secretary must decide this issue in the first instance, and the Secretary now has done that. For defendants to now assert a laches defense where they have caused or contributed to any alleged delay is improper and unjust, and would be an injustice to the UDC.

Fourth, the Tribe and government have failed to show how there would be any injustice or prejudice to them if these Claims were to go forward. They cannot have been prejudiced by losing funds because the UDC would be entitled to only 27.16186% of the Title V funds, and defendants admit there is at least $178 million remaining in the government trust account. No doubt this is sufficient to compensate the UDC.[10] The UDC's position is that the Tribe may spend its percentage of the funds as it chooses, and it apparently has done so. There is also no basis for defendants' claim of being prejudiced since even today they oppose the UDC's request that Title V funds be retained in the government's trust. They cannot claim injustice while at the same time attempting to defeat an effort by the UDC to avoid dissipation of the substantial funds remaining in the trust account.

Fifth, defendants' argument that allowing the UDC to proceed would "undermin[e] over 35 years of constant effort to assure that the Tribe obtained the benefits of the projects promised

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[10]If it is not, the Tribe has listed numerous assets purchased with Title V funds, including a shopping center. In light of the facts that defendants contend the Tribe received the funds as compensation for water projects that were not completed, it is difficult to see the connection between this and the fact that the Tribe used the water funds to purchase a shopping center.

to it in 1965" is an odd one for a trustee to make. *See* Defs' Mem. Supp. Mot. Dismiss, p. 16. The UDC's response to this statement is: where were the government's efforts to assure the mixed-bloods also received benefits which arose from **their** claimed right to water rights/claims which were deferred? The government should not be allowed to benefit procedurally from what the UDC contends are the government's own affirmative breach of duties to the UDC.

Finally, a laches defense is not the place to argue **whether** the UDC is entitled to restitution of Title V funds. Defendants' argument regarding who owns which land and "where money generated from use of the water on and development" of land might have gone is more properly made to the Court in the review process, not in deciding whether laches bars the UDC's Claims. *See* Defs' Mem. Supp. Mot. Dismiss, p. 16 n.8.

In sum, defendants' laches defense should be rejected. The equities favor the UDC, and defendants have failed to show undue delay or that they have been prejudiced, or that any failure to apply the defense would cause them an injustice.

V. IT IS IMPROPER TO DISMISS THE TITLE V CLAIMS SIMPLY BECAUSE THE SECRETARY'S ORDER FINDS AGAINST THE UDC.

In a Catch-22-like argument that simply restates their previous arguments, defendants contend the UDC's Title V-related claims are "remedies which are contingent upon the UDC establishing a right first to the Tribe's water and, second, a corresponding right to Tribal funds." Based on this, they argue the Claims must be dismissed because: (1) the Secretary has decided against the UDC on the water rights/claims issue; and (2) the Secretary has not decided the Title V issue. These arguments fail since the Secretary has decided both issues. Moreover, the UDC does not deny that the Title V Claims are remedies related to this Court's reversing the Secretary's Order. However, since this case is before this Court for review of those two issues

and for claims contingent on the Court's findings, the Title V claims should not be dismissed before the Court has even had a chance to issue a ruling on review of the Secretary's Order.

VI. THE SECOND CLAIM FOR A DECLARATION OF ITS RIGHTS IS PROPERLY BROUGHT.

Defendants seek dismissal of the UDC's Second Claim "to the extent [it] seeks an independent declaration of the UDC's rights to and in the Tribe's water and water rights beyond the scope of review set out in the APA." Defs' Mem. Supp. Mot. Dismiss, p. 26. The UDC is not requesting an "independent declaration" in this Claim.[11] If this Court reverses the Secretary's Order, the result will be an immediate finding that the water rights/claims at issue are owned jointly by the Tribe and UDC, and a declaratory judgment to that effect would be appropriate.

VII. THE THIRD CLAIM FOR BREACH OF THE SECRETARY'S TRUST AND FIDUCIARY DUTIES IS PROPERLY BROUGHT.

Defendants contend that the Third Claim for breach of the Secretary's trust and fiduciary duties should be dismissed because: (1) the Secretary's Order did not address a breach of trust claim, and (2) there is no statute that establishes a trust relationship between the UDC and the Secretary. These arguments fail.

First, the UDC's position is that the assets in question were never divided, and that the Secretary has improperly aligned herself on this issue with the Tribe to the exclusion of the UDC. It would be improper for the Secretary herself to decide whether she breached trust and/or fiduciary duties. This is an issue for this Court to decide after its review of the Secretary's Order.

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[11]In the event of an appeal to the Tenth Circuit, the UDC reserves the right to argue that the declaratory judgment claim in its first Complaint was proper, and that the Secretary was not required to decide this issue in the first instance.

Second, this Claim asks the Court to order the Secretary to assume her duties and responsibilities to the UDC with regard to the water rights/claims and matters related thereto "forthwith and to exercise them impartially." *See* Amd. Compl. ¶ 154. The Partition Act, 25 U.S.C. § 677i, clearly establishes a trust over undivided assets, with commensurate trust and fiduciary duties by the Secretary to both the Tribe and UDC. 25 C.F.R. Part 217 expands on this trust relationship. Both the United States Supreme Court and Tenth Circuit have recognized that there remains a trust relationship between the Secretary and full-bloods/mixed-bloods with regard to undivided assets, and that the UDC is the proper party to bring a claim regarding breach of that duty. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 134-135 (1972) (noting trust status of undivided assets, and that after termination mixed-bloods retained an "interest in tribal property" in the form of undivided assets, and UDC manages these); *Ute Distribution Corp. v. United States*, 938 F.2d 1157, 1159 (10th cir. 1991) (noting termination proclamation of August 27, 1961 "did not purport to terminate the trust status of the indivisible assets" and that UDC manages the asset). The UDC's position is that the Secretary has failed to perform her duties under these sections to the detriment of a beneficiary, the UDC.

Third, this Claim is contingent on the Court's reversing the Secretary's Order. In that event and based on the Court's reasoning in reversing, the Court could find that the Secretary has breached trust and/or fiduciary duties to the UDC.

Fourth, this Claim is in the nature of a request for declaratory judgment since it asks only that the Court find that the Secretary has breached her duties and order the Secretary to assume those duties and exercise them impartially. Based on the July 26, 1996 Order and the reasoning

of *Oneida County* and *Mille Sacs Band*, the UDC is not precluded from bringing a declaratory judgment regarding these matters.

Fifth, defendants' cited cases do not assist their argument. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983). To the extent that these cases seek money "damages" they are inapplicable because the UDC's Third Claim does not. Further, as discussed above, there is a specific statute that establishes the government's trust relationship with the UDC, and case law confirms that trust duty. *Navajo Nation* accordingly is inapposite, since the Court found there that the Secretary's duty to approve mineral leases entered into by the Navajo Nation under the Indian Mineral Leasing Act did not mean that the Secretary had the duty to make sure the Nation received the highest possible rate of return. *See Navajo Nation*, 537 U.S. 506-08. By contrast, the UDC contends here that the Secretary completely barred it from the trust "corpus."

Moreover, *Mitchell* and *White Mountain Apache* support the UDC's position. In *Mitchell*, the Court held that individual allottees of Indian lands could sue the United States for money damages under the Tucker Act based on breach of the Secretary's fiduciary and trust duties to manage Indian resources and land. The Court noted that:

> "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." . . . This Court and several other courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from the breach of trust.

Id. at 224-26 (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). This is significant here because the Secretary may decide when there is conflict between the beneficiaries as to how to manage joint assets. *See* 25 C.F.R. Part 17.

Likewise, in *White Mountain Apache*, the Court pointed out when allowing an Indian tribe to sue the United States for damages, that "'[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.'" *White Mountain Apache*, 537 U.S. at 475 (citing Restatement (Second) of Trusts § 176 (1957)). In this case, the Secretary has refused to allow the UDC any management of or access to the "trust property." The UDC is not suing the United States for money damages for breach of trust and fiduciary duties at this point; the UDC only seeks restitution here. However, there is no reason this Court cannot determine whether the Secretary has breached well-established trust and fiduciary duties to the UDC.

Finally, the Secretary's Order does not state or imply that she or her predecessors "decided" the water issue or "divided" the asset. Defendants' contention that the Secretary can "proceed as she deems appropriate" therefore has no application here. *See* Secretary's Order; Defs' Mem. Supp. Mot. Dismiss, p. 26. In light of the fact that the Secretary contends the water rights/claims were appurtenant to lands from the beginning, if the Court reverses the Secretary's Order it is strong evidence that the Secretary has breached her duty with regard to the UDC.

In sum, the Third Claim is properly brought and should not be dismissed.

VIII. THIS COURT CAN CONSIDER DOCUMENTS OUTSIDE THE ADMINISTRATIVE RECORD.

Defendants contend that this Court cannot consider documents outside the administrative record, and that it is improper for the UDC to contend it may not have had access to all records

impacting on its claim. They argue that in light of this, the UDC is not entitled to discovery. This argument should be rejected.

Case law makes clear that this Court can consider documents outside the administrative record when reviewing the Secretary's Order. In *Olenhouse*, the Tenth Circuit specifically stated that the "reviewing court" can supplement the record "[i]f the agency has failed to provide a reasoned explanation for its action, or if limitations in the administrative record make it impossible to conclude the action was the product of reasoned decisionmaking." *Olenhouse*, 42 F. 3d at 1575.

Furthermore, the government has admitted that the Court can supplement the record. The government's attorney admitted in the September 26, 2000 hearing that the Court can consider documentation or evidence outside the record:

> The Court can consider documentation or evidence outside the record under certain circumstances in arriving at the Court's decision as to whether the agency looked at all of the factors that it should have and rendered a rational decision.

See UDC's Additional Facts ¶ 12 (citing Hrg. Trans. (Sept. 26, 2000), p. 78).

Moreover, supporting case law cited by defendants is inapposite. For example, in *New Mexico Environmental Improvement Dist. v. Thomas*, 789 F.2d 825 (10th Cir. 1986),[12] the challenged agency action was rulemaking, which involved public meetings and exchange of correspondence. *See id.* at 828-29. That is not the situation here.

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[12]*See also FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 579 (1976) (rejecting reviewing court's ordering agency to conduct evidentiary investigation); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (reviewing very limited order); Fed.R. App. P. 16(b) (court may direct that supplemental record be prepared and filed).

It is also significant that in this matter there have been no hearings, no depositions, no opportunity to call or cross-examine witnesses, and an admission from the government that it destroyed 55 boxes of Partition Act documents in 1983. *See* Letter from Max Wheeler to Stephen Roth (Oct. 18, 2000), attached as Ex. J to Defs' Mem. Supp. Mot, Dismiss; Letter from David Allison to Stephen Roth (Feb. 5, 2001), attached as Ex. K to Defs' Mem. Supp. Mot. Dismiss. The government also has failed to provide access to or documents from its local solicitor's office or correspondence related to its communications with the Tribe, and the UDC has never had the opportunity to depose the local solicitor. Nor has the Secretary ever provided specific documents to the UDC of its own accord; she has only granted access to facilities in various parts of the country which might hold records. In addition, the UDC has never had the opportunity to conduct discovery on documents or evidence which may be in the Tribe's possession and this Court should order that the UDC be allowed to do so.

In addition, the Claims in this case go beyond the review of the agency action. The UDC should be granted discovery with regard to those claims, including access to correspondence between the Tribe and government with regard to this lawsuit, and documents and correspondence related to the Deferral Agreement, water rights/claims, and Title V funds.

In sum, this Court clearly has the authority to supplement the record, and the UDC should be granted the right to conduct additional discovery with regard to the above-discussed matters.

CONCLUSION

Based on the foregoing, defendants' Motion to Dismiss should be denied in its entirety.

DATED this 27th day of September, 2004.

SNOW, CHRISTENSEN & MARTINEAU

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AFFIDAVIT OF SERVICE

I hereby certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for the Ute Distribution Corporation herein; that I caused to be served the attached **Ute Distribution Corporation's Memorandum in Opposition to Federal Defendants' and Ute Indian Tribe's Joint Motion to Dismiss Second Amended Complaint;** (Case No. 2:95 CV0376 B, United States District Court, District of Utah, Central Division) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

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and caused the same to be mailed first class, postage prepaid, on the 27th day of September, 2004.

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