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

UTE DISTRIBUTION CORPORATION, a Utah Corporation, Plaintiff, 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, UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, and RED ROCK CORPORATION, a Utah Corporation, Defendants-Interveners.	Civil No. 2:95CV 0376B FEDERAL DEFENDANTS' AND DEFENDANT-INTERVENER UTE INDIAN TRIBE'S MEMORANDUM IN SUPPORT OF JOINT MOTION TO DISMISS Chief Judge Dee Benson Magistrate Judge David O. Nuffer

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TREATISE

Defendants Secretary of the Interior ("Secretary"), and other federal officials acting under or in concert with her ("Federal Defendants") and the Defendant-Intervener Ute Indian Tribe ("Tribe") of the Uintah and Ouray Reservation ("Reservation") by and through their undersigned counsel, hereby submit this Memorandum in Support of their Joint Motion to Dismiss the Plaintiff Ute Distribution Corporation's (the "UDC") Second through Sixth Claims for Relief as set forth in its Second Amended Complaint ("SAC")[Doc. No. 177], filed on June 1, 2004.

STATEMENT OF BACKGROUND FACTS

This case is presently before the Court pursuant to its jurisdiction under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, specifically the Court's authority to review final agency action under § 706(2). *See* March 24, 2001 Order at ¶ 2 [Doc. No. 148] (Ex. A). The "final agency action" subject to the Court's review is the Secretary's determination that the Tribe's "water and water rights claims were susceptible to equitable and practicable distribution under the UPA [Partition Act, 25 U.S.C. §§ 677 *et seq.*] and in fact were so divided and distributed pursuant to the UPA." Secretary's Final Decision for the Department of the Interior, dated February 3, 2004 at 16 ("Secretary's 2004 Decision") (Ex. B). *Accord* Secretary's Final Decision for the Department of the Interior, dated October 2, 1998 at 22 ("Secretary's 1998 Decision") (Ex. C). Although the UDC did not initially file this case until 1995, the relevant statute was passed and actions at issue occurred nearly 50 years ago.

The UDC's recently filed SAC raises six claims, all but one of which, the First Claim, is beyond the Court's limited scope of review under the APA. As it did in its original [Doc. No. 1] and amended [Doc. No. 47] complaints, the UDC persists in its attempts to circumvent the APA review

process and have this Court address issues never raised before the Secretary and long barred. To the extent those claims are beyond this Court's jurisdiction under the APA, they must be dismissed for stating claims over which the Court lacks subject matter jurisdiction, *see* Fed.R.Civ.P 12(b)(1), and/or for failure to state claims upon which the Court can grant relief, *see* Fed.R.Civ.P. 12(b)(6).

A. Historical Background[1]

The "Ute Indians of Utah: Distribution of Assets Between Mixed-Blood and Full-Blood Members; Termination of Federal Supervision Over Property of Mixed-Blood Members," Act of August 27, 1954, 68 Stat. 868, *codified at* 25 U.S.C. §§ 677-677aa (the "Partition Act" or the "UPA") (Ex. D), enacted in 1954, initiated a seven year process for terminating mixed-blood (former) members of the Tribe and partitioning and distributing the Tribe's assets between the mixed-bloods and the full-bloods who remained members of the Tribe. Initially, a final roll was created listing 1,314 full-bloods and 490 mixed-bloods. *See* 21 Fed.Reg. 2208-12 (April 5, 1956). From that point, the Tribe consisted exclusively of the full-blood members, *see* 25 U.S.C. § 677d, *see also* 25 U.S.C. § 677g. The Tribe was represented by its governing Tribal Business Committee, 25 U.S.C. § 677i. The division of assets between the Tribe, as so reduced in membership, and the mixed-bloods proceeded based upon the relative number of persons comprising each of the two

[1] The history of the Partition Act has been addressed and summarized by the courts on numerous occasions. *See Hackford v. Babbitt,* 14 F.3d 1457, 1461-64 (10th Cir. 1994)(and cases cited therein). The history has been summarized on three occasions within the context of this litigation. *See Ute Distribution Corp. v. Norton,* 43 Fed.Appx. 272, 2002 WL 1722061 (10th Cir. 2002)(unpublished decision attached at Ex. E); *Ute Distribution Corp. v. Ute Indian Tribe,* 149 F.3d 1260 (10th Cir. 1998); *Ute Distribution Corp. v. Secretary of the Interior,* 934 F.Supp. 1302 (D.Utah 1996). *See also* Secretary's 1998 Decision at 4-5.

groups. *Id.*

The same day the final roll was published, April 5, 1956, the mixed-bloods created the Affiliated Ute Citizens (the "AUC") to act as that group's authorized representative. Thereafter, the AUC and the Tribal Business Committee agreed to and adopted the "Plan for Division of Assets" which was approved by the Bureau of Indian Affairs (the "BIA") on October 9, 1956. The Plan addressed the division of cash (Section III), loan receivables and credit program assets (Section IV), accounts receivable (Section V), equipment (Section VI), materials and supplies (Section VII), buildings (Section VIII), tribal enterprises (Section IX) and land (Section X). The land or real property was classified into six categories: A. land unsatisfactory for division; B. assigned land; C. range lands; D. timber lands; E. other lands; and, F. water rights. With respect to water rights, the Plan stated in Section X.F:

> 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 lands.

See also Secretary's 1998 Decision at 6-7 (discussing the Plan).

In 1958, following agreement between the full and mixed-bloods on the division and distribution of the Tribe's assets, the AUC created three separate corporations to manage the mixed-bloods' affairs. One of those, the UDC, was created under the laws of the State of Utah for

> managing 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 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). *See also* 25 U.S.C. § 677i; *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 134-39 (1972). Each mixed-blood received ten shares of fully alienable stock in the UDC. Additionally, the AUC formed two non-profit grazing corporations (the "Range Corporations") under the laws of the State of Utah (entirely separate entities from the UDC): the Rock Creek Cattle Corporation and the Antelope Sheep Range Corporation. *See Hackford v. First Security Bank of Utah,* 521 F.Supp. 541, 543-49 (D.Utah 1981), *aff'd* 1983 WL 20180 (10th Cir. Jan. 31, 1983), *cert. denied* 104 S.Ct. 100 (1983) (describing the creation and ultimate dissolution of the Range Corporations). Each individual mixed-blood surrendered his undivided interest in 172,000 acres of the former Tribal range land which had been divided and distributed to the mixed-blood group, and in exchange received one share of stock in each of the two Range Corporations. By May, 1963, the Tribe had purchased over 90% of the stock in the two Range Corporations and proceeded to dissolve them pursuant to state law. *Id.* at 548.[2]

On August 26, 1961, the Secretary completed the termination process, proclaiming that:

> the federal trust relationship to such individual [mixed-bloods] 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.

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[2] Individual non-selling mixed-bloods retained ownership of over 15,000 acres of former Tribal range land most of which is owned today by the Red Rocks Corporation which intervened in this case.

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

More than 33 years after the Termination Proclamation, the UDC initiated this suit seeking a declaratory judgment that certain of the Tribe's water rights had not been divided under the Partition Act and were therefore subject to joint management by the Tribal Business Committee and the UDC's board of directors pursuant to 25 U.S.C. § 677i. *See* Complaint [Doc. No. 1] filed on or about April 25, 1995. *See also UDC v. Norton,* 43 Fed.Appx. at 273 (Ex. E); *UDC v. Ute Indian Tribe,* 149 F.3d at 1262, *citing UDC v. Secretary of the Interior,* 934 F.Supp. at 1306. Over the course of that 33 year period the UDC had failed to assert or exercise its alleged interests in any of the Tribe's water or water rights, despite on-going events significantly affecting those rights, none of which included or even suggested any continuing interest or right held by the UDC in water or water rights of the Tribe. Such events included:

1. The Decker Report, completed and submitted to the State in 1960, with some subsequent amendments, *see* Secretary's 1998 Decision at 10 (Ex. C);

2. The Deferral Agreement of September 20, 1965, *see* Secretary's 1998 Decision at 20-21;

3. Litigation of the AUC's claimed interest in "intangible property rights" including water rights in *Affiliated Ute Citizens v. United States,* 566 F.2d 1191 (Table), 215 Ct. Cl. 935 (unpublished disposition), 1977 WL 25897 (1977), *see* Secretary's 1998 Decision at 14;

4. The State of Utah's approval and enactment of the Ute Indian Water Compact, U.C.A. §§ 73-21-1 *et seq.* (1980), *see* Secretary's 1998 Decision at 21;

5. Passage of Title V of the Central Utah Project Completion Act ("CUPCA"), Pub. Law 102-575, 106 Stat. 4600, 4650 (Oct. 30, 1992) ("Title V")(Ex. F)(providing Congress' ratification of the 1990 revised version of the Ute Indian Compact quantifying the Tribe's water rights using the practicably irrigable acreage (PIA) standard, *see* § 503), *see* Secretary's 1998 Decision at 21-22;

6. Title V also provides for payments explicitly to "put the Tribe in the same economic position it would have enjoyed had the features contemplated by the September 20, 1965 [Deferral]

Agreement been constructed." Title V, § 501(b)(3). Title V at §§ 502, 504, 505, 506 provides funding explicitly to the Tribe or the Secretary for the benefit of the Tribe for various specifically identified Tribal purposes and projects. Finally, § 507 only seeks a waiver from the Tribe);

7. On October 1, 1993, the first annual § 502 payment was made to the Tribe and Congress appropriated the first payment to the Tribe in fulfillment of the obligations under §§ 504, 505 and 506. Annual appropriations continued until this fiscal year, FY 2004, when the final appropriation was made; and,

8. In 1994, the Court of Appeals for the Tenth Circuit issued *Hackford v. Babbitt,* 14 F.3d 1457 (10th Cir. 1994), holding that the Uintah Indian Irrigation Project was owned by the United States in trust for "the Indians" and not "the Tribe," and was not an "asset" intended to be addressed under the Partition Act. *Id.* at 1468. In reaching that conclusion the court also held that "[f]or the purpose of division, water rights were treated as appurtenant to the lands that were divided between the two groups." *Id.* at 1463.

B. Recent Procedural History Before the Court

In the 1998 Decision (Ex. C), the Secretary held that "tribal water rights of the Ute Indian Tribe were an asset susceptible to equitable and practicable distribution and that this asset was in fact divided and distributed." *Id.* at 22. Thereafter, the Court heard argument on the United States' and Tribe's Joint Motion to Dismiss the UDC's Amended Complaint [Doc. No. 122]. *See* Transcript of Proceedings, September 26 and 28, 2000 ("Transcript at _") (Ex. G).[3] After hearing argument on September 26, 2000, the Court asked the parties to return on September 28, 2000, and started that portion of the proceedings with a summary of its proposed ruling on the Joint Motion to Dismiss:

1. That the Secretary of the Interior was given "almost plenary power if not plenary power" under 25 U.S.C. §§ 677i and 677aa, to determine whether assets of the Ute Tribe were or were not subject to equitable and practicable distribution.

[3] The procedural history of this case leading up to that Motion set out in the Memorandum in Support of the Joint Motion to Dismiss filed with the Court on March 31, 2000 at 1-6, and is not repeated here.

Transcript at 58-60 (Ex. G).

2. That the APA applies to this case with the possible exception of claimed constitutional violations, and that the Court only has jurisdiction if the UDC seeks review based upon the APA.

Id. at 60.

3. That the Secretary's October 2, 1998 Decision constitutes final agency action which is subject to judicial review under the APA.

Id. at 60-62.

4. The Court would grant the defendants' motion to dismiss, with the possible exception of constitutional allegations, and would give plaintiff's leave to amend to assert the jurisdiction of the Court under the APA. "This Court has no discretion not to be governed by Rule 706."

Id. at 62-64.

Thereafter, the Court heard arguments from the parties in response to its proposed rulings. As those arguments proceeded, despite the Court's concern regarding its jurisdiction if the Secretary's 1998 Decision was not "final agency action," *see* Transcript at 66-67 (Ex. G), it was agreed that the UDC would have the opportunity to complete a search of the records and to submit additional documentation and argument to the Secretary for further consideration. The Court concluded the hearing with a summary of its ruling, *see* Transcript at 100-102, which was subsequently memorialized in the Court's March 24, 2001 Order (Ex. A). In its Order, the Court defined the issue before the Secretary as follows:

> The Secretary of the Interior (the "Secretary") has the authority under the Ute Partition and Termination Act (the "Partition Act"), 25 U.S.C. §§ 677 et seq., to determine whether 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 in accordance with the Partition Act.

Id. at ¶ 1. Additionally, the Court ordered that

> The parties will complete the document review now underway. Thereafter, plaintiff and the Ute Indian Tribe shall submit to the Secretary any additional documentation or evidence, including argument or explanation regarding additional documentation or evidence, which they believe should be considered by the Secretary. The Secretary may take any further steps she deems appropriate in response thereto.

Id. at ¶ 3.

The UDC's and Tribe's submissions to the Secretary of additional documentation and argument was completed on or about April 30, 2002. In its opening submission, the UDC described the issues before the Secretary as follows:

> This case presents three fundamental issues. . . . The issues are:
>
> 1. The Ute Partition Act required that "All unadjudicated or unliquidated claims against the United States, all gas, oil, and other mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representative of the mixed-blood group . . . ." 25 U.S.C. § 677i. This case involves unadjudicated and unliquidated claims to reserved water rights which had not been identified, described, or quantified as of the time of division or distribution; and which are still subject to change. Were the water rights claims in issue "susceptible to equitable and practicable distribution" in 1956 when the Plan for Division of Assets was agreed upon?
>
> 2. Did the parties to the Plan for Division of Assets agree to distribute the water rights claims, and were the claims actually distributed?
>
> 3. Is the Government estopped from contending that unadjudicated water rights claims were divided as appurtenant to divided Tribal Lands, or that they are assets susceptible to equitable and practicable distribution, or that the rights were actually divided and distributed"

UDC's Submission to Secretary of Interior Pursuant to Court's March 24, 2001 Order ("UDC's Submission"), at 1-2 (November 29, 2001).

The Secretary's 2004 Decision was issued on February 3, 2004 (Ex. B). Therein, the

Secretary concluded:

> The UDC has submitted thousands of pages of documents in its attempt to prove its assertions. In doing so, however, the UDC disregards the plain language of key documents contemporaneous with the division and distribution of Tribal assets under the UPA. . . . Those documents, as well as numerous other documents included in the administrative record for each decision, clearly show 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.
>
> In conclusion, I find nothing to warrant changing the reasoning or conclusions of the 1998 Decision. The 1998 Decision is hereby reaffirmed and supplemented by this 2004 Decision. This Decision is final for the Department.

Secretary's 2004 Decision at 16.

C. The UDC's Second Amended Complaint

The UDC filed the SAC on June 1, 2004 [4] Therein, the UDC attempts to raise six claims for relief:

1. That the Court review the Secretary's administrative action in the two Secretarial Decisions of 1998 and 2004, and rule that the Secretary's Decisions were "unlawful," *see* SAC at pp. 29-30;

2. That the Court issue a declaratory judgment that water rights and/or claims were not divided, *see* SAC at pp. 31-33;

3. That the Court find that the Secretary has breached trust and fiduciary obligations to the UDC, *see* SAC at p. 34;

4. That the Court provide an accounting of all funds paid for the use of Tribal water rights or claims, including $178,000,000.00, *see* SAC at pp. 35-36;

5. That the Court enjoin the transfer of $178,000,000.00 out of trust, *see* SAC at pp. 37-38; and,

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[4] Pursuant to an agreement between the United States, Tribe and UDC, initial responses of Defendants to that further amended complaint are due on or before August 3, 2004.

6. That the Court equitably apportion Tribal funds, *see* SAC at pp. 38-39.

Except for the First Claim, these claims are subject to dismissal because each is beyond this Court's jurisdiction under the APA.

ARGUMENT

A. The Court previously determined that the Secretary has the authority to decide the issues presented, and the UDC's claims that the Secretary lacks that authority should be dismissed.

1. The Court previously recognized that the Secretary may have plenary authority to determine the issues presented in this case.

In an APA review proceeding, the district court first must determine whether "there is a statutory prohibition on review or [whether] agency action is committed to agency discretion as a matter of law, 5 U.S.C. § 701(a)(1), (2) . . .," *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1572 (10th Cir. 1994), before it proceeds to review an agency's final decision. In response to the United States' and Tribe's prior motion to dismiss, the UDC argued that the Secretary lacked the authority to determine the issues presented in the March 5, 1997 Order at ¶ 1 [Doc. No. 61] (Ex. H). *See, e.g.*, Transcript at 32-34 (Ex. G). The Court rejected that claim: "In fact, as I [the Court] read the four corners of this act the Secretary of the Interior was given almost plenary power if not plenary power over this process." *Id.* at 59. Moreover, where the Secretary has determined that the mixed and full-blood groups agreed to and did divided and distribute water and water right claims, *see, e.g.*, Secretary's 1998 Decision at 13, there may be no law to apply. *See* 5 U.S.C. § 701(a)(2); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1970) (Section 702(a)(2) 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.'" The court must determine whether in the particular case there is law to apply.)

If in fact the Secretary has plenary authority, the Secretary's 1998 and 2004 Decisions are not subject to judicial review and this case should be dismissed.

2. The Court previously held that the Secretary has the authority to decide the issues submitted by the Court.

In finding that the Secretary's authority to decide the issues may be plenary, the Court clearly recognized that the Secretary had the authority to decide the issues the Partition Act, specifically §§ 677aa and 677i. *See* March 24, 2001 Order at ¶ 1 (Ex. A). Despite the Court's prior ruling, the UDC persists in claiming that the Secretary is without the authority and expertise to decide the issues presented in this case. *See* SAC at ¶¶ 128, 130, 131, 139. Assuming that the Secretary's authority under the Partition Act is not plenary, *but see* discussion above, the Court's ruling that the Secretary has the authority to decide the issues presented, *see* March 24, 2001 Order at ¶ 1, is the law of this case. The law of the case holds that "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. The rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" 18 *Moore's Federal Practice* ¶ 134.20[2] (Matthew Bender 3rd ed.), *quoting Christianson v. Colt Indus. Operation Corp.*, 486 U.S. 800, 816 (1988), *citing Arizona v. California,* 460 U.S. 605, 618-19 (1983). A*ccord Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1536, n.4 (10th Cir. 1995). *See also Chrysler Credit Corp. v. County Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991).

Unquestionably this Court has determined that the Secretary has the authority, if not the exclusive authority, to decide the issues presented here. The UDC's claims that the Secretary lacks

that authority, *see* SAC at ¶¶ 128-131, must be dismissed.

B. The Court previously determined that its jurisdiction is limited to review of the Secretary's Decisions pursuant to § 706(2) of the Administrative Procedures Act.

The Court previously determined that its jurisdiction over this case is limited, having found that the Administrative Procedures Act:

> is the sole waiver of sovereign immunity by the United States applicable to this case. . . . [T]his case will proceed under the provisions of the APA applicable to the review of final agency action, in particular 5 U.S.C. § 706(2). The final agency action to be reviewed will be the final decision of the Secretary as to the issues outlined in paragraph 1 above.

March 24, 2001 Order at ¶ 2. *See also id.* at ¶ 5 (Ex. A).

The Tenth Circuit has defined the scope of review under § 706 as follows:

> Under section 706 of the Administrative Procedures Act (APA), 5 U.S.C. § 706, we cannot set aside any agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." id. [at] 706(2)(A), or unless it is "in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right." Id. [at] § 706(2)(C). See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994) ("[T]he essential function of judicial review is a determination of (1) whether the agency acted with the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion.") (citations omitted).

Public Lands Council v. Babbitt, 167 F.3d 1287, 1293 (10th Cir. 1999). *See Olenhouse v. Commodity Credit,* 42 F.3d at 1574, *citing CF&I Steel Corp. v. Economic Dev. Admin.,* 624 F.2d 136, 139 (10th Cir. 1980); *American Petroleum Inst. v. EPA,* 540 F.2d 1023, 1029 (10th Cir. 1976).

The Court's review here is limited, therefore, to determining whether the Secretary's Decisions 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," Secretary's 2004 Final Decision at 16 (Ex.B), *see also* Secretary's 1998 Final Decision at 23 (Ex. C), were arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law, 5 U.S.C. § 706(2)(B). Any claims beyond that of unlawfulness on such APA grounds as asserted in the First Claim for Relief of the SAC are outside the Court's jurisdiction and state claims for which the Court cannot grant relief. Such claims must be dismissed.

C. The UDC's Fourth, Fifth and Sixth Claims to funds appropriated by Congress for the Tribe under Title V of the CUPCA are time-barred.

1. Title V was enacted on October 30, 1992, and any claim to Title V funds asserted in the SAC, filed on June 1, 2004, are barred by the statute of limitations.

The Court lacks jurisdiction to address the UDC's claims to Tribal funds because those claims are barred by the statute of limitations. "[U]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *United States v. Hess,* 194 F.3d 1164, 1175 (10th Cir. 1999). A cause of action based upon a statute accrues on the date the statute is adopted and its "objective meaning and effect" are fixed. *See Seldovia Native Association, Inc. v. United States,* 144 F.3d 769, 777 (Fed.Cir. 1998), *quoting Catawba Indian Tribe v. United States,* 982 F.2d 1564, 1570 (Fed.Cir.), *cert. denied* 509 U.S. 904 (1993). *See also Menominee Tribe of Indians v. United States,* 726 F.2d 718, 720-21 (Fed.Cir. 1984) (fact that claimant is unaware of effect of statute does not toll the statute of limitations when relevant facts were not inherently unknowable). Here, the UDC asserts rights to funds appropriated by Congress under Title V, which was adopted on October 30, 1992, for the explicit purpose of "put[ting] the *Tribe* in the same economic position it would have enjoyed had the features contemplated by the September 20, 1965 [Deferral] Agreement been constructed." Title V, § 502 (b)(3) (Ex. F).

On October 30, 1992, the UDC was on notice that neither the United States nor the Tribe recognized any right of the UDC to Title V funds. The legislation is clear and unambiguous. *See generally Public Lands Council v. Babbitt,* 167 F.3d at 1306 ("Courts should not resort to legislative history in order to ascertain Congress' intent when the plain language of the statute is unambiguous.")[5] Each section of Title V provides funds to *the Tribe* or to the Secretary *for the benefit of the Tribe* for specific purposes and projects. *See* §§ 502, 504, 505 and 506 (Ex. F). It makes no mention of the UDC and recognizes no interest of or right to participate by the UDC in the funds or authorized projects.[6] Furthermore, since October 1, 1993, all funds paid under § 502, or appropriated under §§ 504, 505 and 506, have been deposited by the Secretary in the Tribe's accounts. *See, e.g.,* Memorandum from Program Director, CUPCA, dated Oct. 18, 1994 (Ex. M)

Any UDC claim to Title V funds accrued on the date the legislation became effective and its

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[5] The language in a Committee report, S. Rep. No.102-267, 102nd Cong., 2nd Sess. 103 (1992), expressing "*neutrality*" with respect to "*underlying* rights or privileges" of either the full or mixed-bloods, does not support the UDC's claim that "Congress" intend to recognize the UDC's claims to the Tribe's water or Title V funds. *See* SAC at ¶¶ 97, 100, 129. However, even if that language evinces the Committee's recognition of potential UDC claims, the statute of limitations necessarily began to run on the date of the Committee Report or, at the latest, the date the legislation was enacted, October 30, 1992.

[6] Congress clearly states when the UDC is entitled to appropriated Tribal funds. For example, in the Distribution of Judgment Funds to the Confederated Bands of Ute Indians, 25 U.S.C. § 676a, Pub.Law 90-60, 81 Stat. 164 (1967), Congress explicitly identified the UDC's interest: "The Secretary of the Interior is hereby authorized and directed to divide the trust funds belonging to the Confederated Bands of Ute Indians . . . by crediting 60 per centum to the Ute Indian Tribe of the Uintah and Ouray Reservation *and the Ute Distribution Corporation . . ..*" (emphasis added) If Congress intend for the UDC to share in the Title V funds, it would have provided a similar explicit statement.

"objective meaning and effect" was fixed: October 30, 1992. *See Seldovia v. U.S.*, 144 F.3d at 777. Under 28 U.S.C. § 2401, the UDC's claims against the Secretary asserting rights to Title V funds were barred after October 30, 1998, six years after Title V was adopted. With respect to the Tribe, the UDC's claims were barred after October 30, 1996, under U.C.A. § 78-12-25, the State of Utah's applicable four-year statute of limitations. *See South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 507 & n.8 (1986) ("[F]ederal claims are subject to state statute of limitations unless there is a federal statute of limitations or a conflict with federal policy."); 25 U.S.C. § 677v (Ex. F) ("[T]he laws of the several States shall apply to such [mixed-blood] member in the same manner as they apply to other citizens within their jurisdiction.").

The UDC did not assert a claim or seek a declaration of rights to Title V or any other Tribal funds until it filed the SAC.[7] Only on June 1, 2004, 11½ years after Title V became law and 10½ years after funds were first appropriated and deposited by the Secretary in the Tribe's accounts, did the UDC actually assert its claims. But, the statute of limitations had long since run, and the UDC's claims of a right to the Tribe's funds, for an accounting (Fourth Claim), an injunction on the Tribe's proposed transfer of funds (Fifth Claim), and a partition of funds (Sixth Claim) must be dismissed.

2. The UDC has been dilatory in asserting claims to Tribal funds appropriated under Title V, and its brand-new claims are barred under the doctrine of laches.

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[7] The UDC did reference §§ 501 and 502 in paragraph 124 of 197 paragraphs in the 71 page "Additional Documentation and Evidence," it submitted to the Secretary on November 29, 2001. In that sole paragraph, the UDC stated: "[t]he UDC is entitled to its proportional share of such monies." The UDC did not submit argument in support of the lone statement and the Secretary was not asked to and did not consider the issue. *See Kleissler v. USFS,* 183 F.3d 196, 203 (3rd Cir. 1999) (refusing to review claims that were only "vaguely or cryptically referred to, if at all, during the administrative appeal.")

Any claims to the Tribe's Title V funds also are barred by the doctrine of laches because of the UDC's "(a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) [the] prejudice to the party asserting the defense as a result of this delay." *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1337 (10th Cir. 1982). Whether the UDC's delay be measured from 1965, when the Deferral Agreement was entered, or 1992, when CUPCA was adopted, the UDC's delay in claiming Tribal funds is more than unreasonable. Furthermore, allowing the UDC's dilatory claims to proceed would severely prejudice both the Secretary and the Tribe, undermining over 35 years of constant effort to assure that the Tribe obtained the benefits of the projects promised to it in 1965 (four years after termination of the mixed-bloods was complete).

The UDC asserts that the Title V funds derive from the Deferral Agreement in which the UDC alleges an interest based upon its alleged rights to the Tribe's water. *See, e.g.,* SAC at ¶¶ 99, 100, 157-63, 169. The UDC was clearly aware of the Deferral Agreement, but during the over 25 years in which the Tribe expended thousands of hours and dollars (more likely hundreds of thousands of dollars) demanding, negotiating with the United States and lobbying for the construction of the promised projects, the UDC sat quietly despite, according to the SAC at ¶ 100, having a beneficial interest in the projects promised in the Deferral Agreement.[8] When it was

[8] During the May 5, 2004 hearing on the UDC's motion to enjoin a proposed transfer from trust management of Title V funds, the Court asked UDC's counsel where money generated from the water in the projects promised in the Deferral Agreement would have gone if the projects had been built. As the Court inferred, the answer is the water would have been delivered from the projects to the "deferred lands" which were and are owned by the Tribe. (The UDC owns no land.) The money generated from use of the water on and development of the Tribe's land would have gone to the Tribe. As recognized in § 502(b)(3), the purpose of Title V was to put "*the Tribe*" in the same economic position it would have been had those projects been built.

apparent that the projects promised in 1965 would not be built, the Tribe turned its efforts to obtaining substitute compensation. Once again, that effort entailed a substantial dedication of Tribal time and financial resources, including negotiating extensively with the Bureau of Reclamation and Congress, culminating in the passage of Title V on October 30, 1992. And, once again, the UDC remained quiet failing to assert any claims or rights throughout the negotiation and legislative process. Finally, following passage of Title V, which, on its face unambiguously identified the Tribe as the *sole* beneficiary of the legislation, the UDC failed to assert its claims.

Now, 11½ years after enactment of Title V, and 10½ years after funds were first appropriated and deposited in the Tribe's accounts, the UDC asserts its claims and seeks to raid the Tribe's accounts. Even if we ignore the preceding 25+ years, the UDC's claims are equally tardy and the prejudice imposed if such eleventh-hour claims are allowed to proceed is made all to clear by the extensive efforts undertaken by the Secretary and Tribe to implement Congress' directives in Title V over that period.

The Tribe and Secretary have negotiated and worked with Congress to assure that annual appropriations were made and deposited in the Tribe's accounts. The Secretary transferred annually and the Tribe has utilized § 502 funds for governmental purposes and to provide governmental services to its members. With § 504 funds, the Secretary has approved and the Tribe has constructed buildings, purchased machinery and developed an extensive administrative infrastructure to carry out the authorized projects, including construction and operation of a feedlot, *see* § 504(1), construction and funding of improvements for tribal lands served by the Uintah Indian Irrigation Project, *see* § 504(2), and establishment of an extensive program which provides farm upgrade

funding to individual tribal members, *see* § 504(3). The Tribe, in coordination with the Secretary, has constructed buildings and developed an extensive administrative infrastructure to facilitate development of the environmental and recreational programs and project authorized under § 505, and presently implements several fish and wildlife programs and improvements called for in that section. Finally, the Secretary, as directed by Congress, established a Development Fund "for the Tribe," § 506(a), with which the Tribe has developed numerous economic projects including construction and operation of an on-Reservation grocery store, two mini-mart/gas stations, a computer data processing business, water bottling plant, water hauling business and purchase and operation of a shopping mall. It has hired and retains several economic development advisors as well as an in-house advisors to assist it in the planning and development of economic projects which will, in the words of § 506(c) "return a reasonable investment *to the Tribe.*" (Emphasis added). Throughout the entire 11½ years in which the Secretary and Tribe have implemented Title V, the UDC has failed to assert any claim to those funds.

The UDC has been dilatory in its failure to assert any right or interest in projects promised in the Deferral Agreement for over 30 years and its more recent 11½ year failure to assert any interest in the Title V funds. Its brand-new claims to Title V funds set forth in its Fourth through Sixth Claims in the SAC are barred by the doctrine of laches and should be dismissed.

D. The UDC's Fourth, Fifth and Sixth Claims to the Tribe's funds are all remedies which are contingent upon the UDC establishing a right first to the Tribe's water and second, a corresponding right to Tribal funds. The UDC has failed to establish either of these fundamental prerequisites and the remedies it seeks must be dismissed.

The UDC has failed on two separate occasions to demonstrate to the Secretary that the UDC

has any interest in or right to the Tribe's water or water rights claims. *See* Secretary's 1998 and 2004 Decisions (Exs.C&B). Moreover, the UDC has never claimed or established that its claimed but unproven rights to the Tribe's water would correspond to an interest in any Tribal funds. A relationship which, in fact, it cannot establish because Title V funds are not authorized as compensation for the Tribe's water rights, rather they are authorized as compensation for the failure to construct the projects promised to the Tribe in the Deferral Agreement. *See* Title V, § 501(a)(2)&(3), (b)(3). Despite this failure, the UDC now asks the Court to: order an accounting of Tribal funds, *see* SAC, Fourth Claim at ¶¶ 155-164; enjoin the Tribe from transferring its funds out of trust management by the United States, *see* SAC, Fifth Claim at ¶¶ 165-173; and, partition the Tribe's funds between the Tribe and the UDC, *see* SAC, Sixth Claim, at ¶¶ 174-177. Each of these claims is, however, a remedy premised and entirely dependent upon the UDC demonstrating first, a right to Tribal water and, second, that such a right to water corresponds to a right to Tribal funds. While the first issue, the UDC's belatedly-asserted right to Tribal water, has been presented to the Secretary on two occasions in the course of this case and now is claimed to be subject to this Court's review under the APA; the second issue, the UDC's claimed right to a portion of the Title V funds, has never been submitted to the Secretary. Concerning the claim to Title V funds, if not foreclosed by Congress in its 1992 passage of CUPCA, there has not been any recent agency action within any unexpired period remaining under any applicable statute of limitations addressing such claims, let alone the final agency action necessary to provide the Court with the authority to review that claim under the APA, 5 U.S.C. § 702. *See also* March 24, 2001 Order at ¶ 2 (Ex. A). For lack of such a presentation and establishment of a right to Tribal funds which corresponds with the UDC's yet

unproven claimed right to Tribal water, the UDC's claimed remedies are not proper for the Court's consideration, and the UDC's Fourth, Fifth and Sixth Claims should be dismissed.

1. The Court's APA jurisdiction is dependent upon waivers of sovereign immunity which must be narrowly construed and do not waive immunity to claims on which there has been no final agency action.

The Court already has held that "[t]he Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq., is the sole waiver of sovereign immunity by the United States applicable to this case. . . . The final agency action to be reviewed will be the final decision of the Secretary as to the issues outlined in paragraph 1, above." March 24, 2001 Order at ¶ 2. *See Sierra Club v. Lujan,* 931 F.2d 1421, 1423 (10th Cir. 1991), *vacated on other grounds* 504 U.S. 902 (1992) ("A court must strictly construe a waiver in favor of the sovereign and may not extend it beyond what the language of the statute requires."(citations omitted)) *See also United States v. Sherwood,* 312 U.S. 584, 586 (1941) (The "United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." (citations omitted).)

The United States' waiver in this case, *see* 5 U.S.C. § 702, is limited to a review of the issue that the Court submitted to Secretary, *see* March 24, 2001 Order at ¶ 1 (Ex. A); March 5, 1997 Order at ¶ 1 (Ex.H), and finally determined by the Secretary in the 1998 and 2004 Decisions (Exs. C&B). That issue did not raise, and the Secretary's Decisions did not address or decide any claim by the UDC to Tribal funds. Therefore, the United States' waiver of its immunity from suit under § 702 of the APA does not extend to the UDC's claims to Tribal funds, or for an accounting, prohibition on transfer or a partition of Tribal funds in which the UDC has yet to claim or establish an interest

before the Secretary.

With respect to the Tribe's immunity from suit, this Court originally determined that the Tribe's immunity had been waived by the Partition Act, *see UDC v. Secretary,* 934 F.Supp. at 1307-11. On appeal, that decision was reversed by the Tenth Circuit, which held that the Partition Act did not have the requisite "unequivocal expression of congressional intent to subject to Tribe to suit in federal court actions . . .." *UDC v. Ute Indian Tribe,* 149 F.3d at 1269. Like the United States, a waiver of an Indian tribe's common-law immunity from suit must be unequivocally expressed and is strictly construed. *See id.* at 1263-68; *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *Sac and Fox Nation v. Hanson,* 47 F.3d 1061, 1063 (10th Cir. 1995); *Bank of Oklahoma v. Muscogee Nation,* 972 F.2d 1166, 1169 (10th Cir. 1992); *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Commission,* 969 F.2d 943, 948 (10th Cir. 1992). The Supreme Court has held that sovereign immunity bars even compulsory counterclaims against an Indian tribe in federal court. *See Oklahoma Tax Commission v. Potawatomi Indian Tribe,* 498 U.S. 505, 509-10 (1991).

The Tribe intervened in this case only after the Tenth Circuit upheld its immunity from suit in *UDC v. Ute Indian Tribe, supra.,* and the Secretary issued the 1998 Decision. As the Tenth Circuit recognized the Tribe's re-entry into the case was subject to a limited waiver of immunity: "[T]he Ute Tribe waived its sovereign immunity and re-entered the case by an unopposed motion to intervene. Its waiver of immunity was expressly limited to review of the Secretary's administrative decision." *UDC v. Norton,* 43 Fed. Appx. at 275 (Ex. E). The Secretary's 1998 Decision (Ex. C), and the subsequent 2004 Decision (Ex. B), are limited to a determination that the Tribe's water and water rights had been divided and distributed under the Partition Act and that the

UDC retained no interest in the Tribe's water and water rights. *See also UDC v. Norton,* 43 Fed.Appx. at 274-75 ("On October 5, 1998, the Secretary issued an opinion that the water rights had been distributed under the UPA.") Review of that final agency determination is the extent to which the United States and Tribe have waived their respective immunity from suit. Any claims seeking to establish rights to Tribal funds, an accounting of Tribal funds, *see* SAC, Fourth Claim at ¶¶ 155-164, a prohibition on the transfer of those funds, *see* SAC, Fifth Claim at ¶¶ 165-173, or a partition of the Tribe's funds, *see* SAC, Sixth Claim, at ¶¶ 174-177, are beyond the scope of those waivers and must be dismissed.

2. The UDC did not raise a claim to the Tribe's funds before the Secretary and cannot now raise them in this APA review proceeding of "final agency action".

A district court reviewing an agency decision sits in an appellate role and refers to the Federal Rules of Appellate Procedure for guidance when it reviews an agency's decision. *Olenhouse v. Commodity Credit,* 42 F.3d at 1580. Appellate courts cannot address issues not raised in the proceedings below. *See In re Walker v. Mather,* 959 F.2d 894, 896 (10th Cir. 1992) (Defendant failed to articulate a reason to depart from the general rule that an appellate court does not consider an issue not passed on below.); *Singleton v. Wulff,* 428 U.S. 106, 120 (1976). Consistent with its appellate role and the Court's March 24, 2001 Order at ¶ 2 (Ex. A), the APA's waiver of the United States' immunity from suit provides this Court with jurisdiction only to review "final agency action."

> The dictates of that statute [the APA] require that judicial review may only be undertaken following "final" agency action. This includes all administrative relief accorded such as appeal to a superior agency authority or petition for agency reconsideration pursuant to the prescribed administrative rules. Generally, then, judicial review is limited to final decisions following the agency's application of its expertise and its steps to correct its own errors its own errors in making a proper

record, all of which are within the agency's independent administrative process. *Franks v. Nimmo,* 683 F.2d 1290, 1294 (10th Cir. 1982). *See also Catron County Board of Commissioners v. U.S. Fish & Wildlife Service,* 75 F.3d 1429, 1434 (10th Cir. 1996) (Plaintiff seeking judicial review must identify some final agency action.) Likewise, issues that were not presented to and passed on by the agency in its final action cannot be reviewed. *See The Utah Environmental Congress v. Zieoth,* 190 F.Supp.2d 1265, 1272 (D.Utah 2002) (holding that court had jurisdiction over claim finally determined by agency under National Forest Management Act but no jurisdiction over claim presented under National Environmental Policy Act which had not been raised before the agency), *citing Holy Cross Wilderness Fund v. Madigan,* 960 F.2d 1515, 1528, n18 (10th Cir. 1992); *Trout Unlimited v. United States Dept. of Agriculture,* 320 F.Supp.2d 1090, 1099 (D.Colo. 2004) ("[C]laims 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 an opportunity to consider and decide, the same claims now raised in federal court."), *quoting Kleissler v. USFS,* 183 F.3d at 202.

The UDC has never raised a claim to Tribal funds in the proceedings before this Court prior to filing the SAC.[9] More importantly, the Secretary has never been asked to address a claimed right

[9] *See* Complaint, April 5, 1995, Prayer for Judgment at 14-15 [Doc. No. 1]; Amended Complaint, October 25, 1996, Prayer for Judgment at 14-15 [Doc. No. 47]. The list of "tribal assets" to which the UDC asserted its claim, set out in both complaints, identified only tribal water and water rights. *Compare* Amended Complaint at 13-14, ¶ 42 *with* Complaint at 13-14, ¶ 39. There is no mention of Tribal funds or a right to Tribal funds in either complaint. The UDC did seek to enjoin the transfer of the Tribe's funds from trust management in its Motion filed with the Court on January 23, 2004 [Doc. No. 167], and heard on May 5, 2004. It had, however, never before asserted a claim to any tribal funds in the proceedings before the Secretary or in a

to the Tribe's funds or to the remedies now sought in the UDC's Fourth - Sixth Claims.[10] The UDC's second-round submission to the Secretary, *see* UDC's Submission to the Secretary, November 29, 2001 at 1-2, sets forth the UDC's interpretation of the issues presented to the Secretary but, that statement does not even allude to a claim to Tribal funds.[11] Its subsequent Reply to the Tribe's Response, dated April 29, 2002, is equally devoid of any reference to, discussion of or claim to any Tribal funds.[12] Most importantly, the Secretary's second Decision (Ex. B), addressed only the issue defined by the Court and does not consider or determine whether the UDC has a right to Tribal funds.

The only "final agency action"properly before the Court for review are the issues decided in the Secretary's two Decisions holding 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." Secretary's 2004 Final Decision at 16 (Ex.B); *accord* Secretary's 1998 Final Decision at 22 (Ex. C). The Secretary was not asked and did not decide whether to undertake an accounting, *see* SAC at Fourth Claim, ¶¶ 155-64; whether to enjoin transfers of Tribal

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complaint filed with the Court.

[10] *See* March 5, 1997 Order at ¶ 1 (Ex.H); Secretary's 1998 Decision (Ex. C); March 24, 2001 Order at ¶ 1 (Ex. A); Secretary's 2004 Decision (Ex. B). While the Administrative Record has not yet been submitted to the Court, a review of the UDC's submissions leading up to the 1998 Decision are devoid of any such claims. *See* UDC's Original Statement of Complaint, dated June 6, 1997; UDC's Response to Tribe's Answer, dated October 9, 1997; UDC's Objection to Tribe's Supplemental Response, dated November 4, 1997.

[11] The UDC's statement of the issues before the Secretary is quoted at page 8 above.

[12] See n. 7 above.

funds from trust management by the United States, *see id.* at Fifth Claim, ¶¶ 165-73; or, whether to partition Tribal funds between the Tribe and UDC, *see id.* at Sixth Claim, ¶¶ 174-78. The Court does not have jurisdiction to hear these claim under the APA until they are presented to and decided by the Secretary. That has not been done, and the Forth - Sixth Claims must be dismissed.

E. The UDC's claim for a declaration of its rights (Second Claim) is beyond that permitted under the APA and must be dismissed.

The UDC asserts the Declaratory Judgment Act, 28 U.S.C. § 2201, as an independent basis for this Court's jurisdiction, *see* SAC at ¶ 1; *but see* March 24, 2001 Order at ¶ 2, and seeks a declaration of the UDC's rights under the Partition Act independent of the Secretary's Decisions. *See* SAC, Second Claim, ¶¶ 140-47. "The Declaratory Judgment Act is not an independent grant of jurisdiction and does not enlarge the parties' substantive rights. Action brought under the Declaratory Judgement Act does not alter the scope of review." *City of Albuquerque v. Browner,* 865 F.Supp. 733, 737 (D.N.M. 1993), *aff'd* 97 F.3d 415 (10th Cir. 1996), *cert. denied* 118 S.Ct. 1410 (1997), *citing Davis v. United States Dept. of Housing,* 627 F.2d 942 (9th Cir. 1980). The Court previously determined that § 706(2)(B) establishes the applicable scope of review in this case -- whether the Secretary's two Decisions were "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law." *See* March 24, 2001 Order at ¶ 2 (Ex. A). That determination must be made on and is confined to the record presented to the agency. *See, e.g,, Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326, 331 (1976) ("[W]e have consistently expressed the view that ordinary review of administrative decisions is to be confined to 'consideration of the decision of the agency . . . and of the evidence on which it was based.'

United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-15 (1963)."). *Accord Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402; *Franks v. Nimmo,* 683 F.2d at 1294; *SUWA v. Thompson,* 736 F.Supp 635, 642 (D.Utah 1993).

The UDC cannot circumvent this limited scope of review by asking the Court to declare its rights to the Tribe's water *sans* any administrative record on that point. To the extent the UDC's Second Claim, SAC at ¶¶ 146-47, 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, 5 U.S.C. § 706(2)(B), that claim for declaratory relief must be dismissed.

F. The UDC's Third Claim must be dismissed. The Secretary was not asked to and did not address a breach of trust claim and the UDC fails to identify any statute that establishes a trust relationship between the United States and the UDC.

While not altogether clear, the UDC's third claim appears to be that the decision-making process employed by the Secretary breached fiduciary and trust duties owed to the UDC. *See* SAC at ¶ 153 ("The Secretary of the Interior has breached her fiduciary and trust duties to the UDC by improperly aligning herself with the Ute Indian Tribe and failing and refusing to recognize the UDC's rights with regard to water rights and claims.")[13] The Court previously decided that the Secretary had the authority to proceed as "she deem[ed] appropriate," and to determine the issues

[13] The UDC is a state-chartered corporation which manages its stockholders' (only some of whom are mixed-bloods, *see Hackford v. Babbitt,* 14 F.3d at 1463, n.4) interests in certain assets of the Tribe that were not divided under the Partition Act. The UDC is not an Indian tribe and the Partition Act explicitly redefined the Federal Government's relationship with the original 490 mixed-blood UDC shareholders (and their descendants) by providing for an intentional termination of special federal protections. *See* 25 U.S.C. § 677v; Termination Proclamation, 26 Fed.Reg. 8042.

presented and contested on two separate occasions. *See, e.g.,* March 24, 2001 Order at ¶ 3. *See generally* 25 U.S.C. Part 2 (2002). To claim, as the UDC does now, that the Secretary has breached some undefined duty by deciding the issues is simply another attempt by the UDC circumvent this Court's previous ruling. The Secretary's determination of the issues pursuant to the process agreed to by the parties, *see* discussion at pp. 29-30 below, is not a breach of any trust or fiduciary duty, even if one were owed to the UDC, and should be dismissed.

Claims that the Secretary must act impartially and without bias, *see* SAC at ¶¶ 133, 142, 143, 150-154 do not lead to the conclusion that by deciding the issues presented the Secretary breached trust or fiduciary duties owed to the UDC. *See generally United States v. Navajo Nation,* 537 U.S. 488, 505 (2003) (To establish a breach of trust an *Indian tribe* "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties"), *citing United States v. Mitchell,* 463 U.S. 206, 216-17, 219 (1983). *Accord United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003). While claims of bias and lack of impartiality may go to whether the Secretary acted arbitrarily, capriciously or abused her discretion under 5 U.S.C. § 706(2)(B), they do not raise separate claims for breach of trust.[14] Moreover, a separate claim for breach of trust cannot be raised here because it is beyond this

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[14] In fact, in *Navajo Nation, supra.,* the Supreme Court rejected a claim that the Secretary's bias and a lack of impartiality constituted a breach of trust. The Nation (which is an Indian tribe) claimed that Secretary Hodel's intervention in the appeal process and his *ex parte* meetings with representatives of the Peabody Coal Company (whose proposed lease with the Navajo Nation was under administrative review), ultimately resulted in the Nation receiving a royalty rate far below that which had originally been approved by the Area Director. 537 U.S. at 512-13. The Court held that the Secretary's actions were not explicitly proscribed by a statute and, therefore, did not amount to a breach of trust. Moreover, the Court noted, the administrative

Court's jurisdiction under the APA, *see* March 24, 2001 Order at ¶ 2 (Ex. A), which does not extend to a claim for breach of trust. *See* discussion at pp. 22-25 above (court cannot hear new claims not raised before the administrative agency).

While any failure by the Secretary to adhere to the applicable procedural process (which is not here conceded) *may* in theory give rise to a claim under §706(2)(B), such a failure does not give rise to an independent claim for breach of trust, and the UDC's Third Claim should be dismissed.

G. The Secretary's Decision is final and the UDC cannot go beyond or submit documents outside the administrative record.

The Secretary's two Decisions (Exs. B&C), must be reviewed upon the evidence presented to the Secretary at the time the Decisions were made, and not upon materials discovered, submitted or developed *after* the Decisions. *See New Mexico Environmental Improvement Dist. v. Thomas,* 789 F.2d 825, 834 (10th Cir. 1986); *FPC v. Transcontinental Gas, supra.,* 423 U.S. at 331; *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 554-55 (1978). *Cf.* Fed.R.App.P. 16(a) (The record for judicial review consists of "the order[s] sought to be reviewed or enforced, the findings or reports upon which it is based, and the pleadings, evidence, and proceedings *before the agency* . . . . (emphasis added)); *Olenhouse v. Commodity Credit,* 42 F.3d at 1580 (A district court reviewing an agency decision sits in an appellate role and refers to the Federal Rules of Appellate Procedure for guidance when it reviews an agency's decision.) Thus, challengers to agency action must make their record before the agency because courts will not

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appeal process set forth in 25 C.F.R. Part 2, established "an administrative appeal process largely unconstrained by formal requirements." *Id.* at 513.

consider new evidence on appeal. *See Airport Neighbors Alliance, Inc. v. United States,* 90 F.3d 426, 432 n.7 (10th Cir. 1996); *Olenhouse, supra.*, 42 F.3d at 1575 (court's review must be framed by record before administrative agency, not by evidence or argument adduced by litigants after the fact); *American Mining Congress v. Thomas,* 772 F.2d 617, 626 (10th Cir. 1995) (agency action must be reviewed on the evidence that was before the agency at the time the decision was made). Despite these rules, the SAC is replete with allegations and claims that the UDC continues to be denied access to documents and records and requires additional "discovery." *See, e.g.,* SAC at ¶¶ 107, 111-118, 135.

In response to these same movants' earlier motion to dismiss, the Court, rather than dismissing the UDC's amended complaint outright, *see* Transcript (Ex. G), provided the UDC (pursuant to agreement by the Secretary) with additional time to complete its document review, submit additional documentation and argument to the Secretary, and again amend its complaint following the Secretary taking any further steps she deemed appropriate. *See* March 24, 2001 Order at ¶¶ 3, 4 (Ex. A). By letter dated June 6, 2000, the Superintendent of the Uintah and Ouray Agency described the review process undertaken up to that point. The letter is included at Ex. I). At the September 26th and 28th hearing, the UDC indicated it only had left a review of documents at the Federal Archives in Laguna Niguel, California, *see* Transcript at 74-75, which it conducted during the week of October 9th. *See* correspondence included in Ex. J. Thereafter, the parties and Secretary's representatives addressed issues regarding possibly destroyed and transferred documents that arose during the review at Laguna Niguel. The correspondence is included in Ex. K. Following resolution of those issues, the parties negotiated a process for making submissions to the Secretary

in accordance with the Court's March 24, 2001 Order at ¶ 3. The correspondence is included in Ex. L. At no point during those negotiations did the UDC raise or claim that it had not completed its document review, that it was entitled to additional "discovery," or that it was being denied access to documents by either the United States or the Tribe. And, the UDC does not now allege that the process adopted by the Secretary, *see* Ex. L, was not followed.

The UDC completed its document review and made its submission to the Secretary without raising a claim that it required access to additional documents or that its rights to "discovery" continued to be denied.[15] Therefore, to the extent the UDC claims the need for yet more "discovery" or that its right to documents were denied, those claims must be dismissed because they were not properly raised and presented to the Secretary.

CONCLUSION

For the foregoing reasons, the Federal Defendants and the Tribe respectfully request that the Court grant their motion to dismiss the Second through Sixth Claims presented in the Ute Distribution Corporation's Second Amended Complaint.

Respectfully submitted this 3rd day of August, 2004.

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[15] In its Submission to the Secretary at 3, dated November 29, 2001, the UDC did contend that its rights to due process *would* be denied *if* the Secretary relied on documents that had not been made available to the UDC without providing the UDC with an opportunity to review and respond to such documents. However, the SAC does not allege or claim that the Secretary relied on documents not made available to the UDC before or during the second administrative review process.

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CERTIFICATE OF SERVICE

The undersigned hereby states that on the 3rd day of August, 2004, a true and correct copy of the Federal Defendants' and Defendant-Intervener Ute Indian Tribe's JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT AND MEMORANDUM IS SUPPORT OF THAT MOTION, together with attachments was mailed postage prepaid to the following:

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EXHIBIT LIST

No.	Exhibit
A	*Ute Distribution Corp. v. Secretary et al.,* Case No. 95CV0376 B March 24, 2001 Order [Docket No. 148]
B	Secretary's Final Decision for the Department of the Interior, dated February 3, 2004
C	Secretary's Final Decision for the Department of the Interior, dated October 2, 1998
D	Ute Partition Act, 25 U.S.C. §§ 677 *et seq.*
E	Unpublished Decision - *Ute Distribution Corportion v. Norton,* 43 Fed.Appx. 272, 2002 WL 1722061 (10th Cir. 2002)
F	Central Utah Project Completion Act, Title V, Pub.Law 102-575, 106 Stat. 4600, 4650 (October 30, 1992)
G	*Ute Distribution Corp. v. Secretary et al.,* Case No. 95CV0376 B Transcript of Proceedings, September 26 and 28, 2000
H	*Ute Distribution Corp. v. Secretary et al.,* Case No. 95CV0376 B March 5, 1997 Order [Docket No. 61]
I	Letter from Superintendent Uintah and Ouray Agency dated June 6, 2000, and related correspondence
J	Correspondence related to document review at Federal Archives in Laguna Niguel, California
K	Correspondence related to possibly destroyed and transferred documents
L	Correspondence related to process for submissions by Ute Distribution Corporation and Ute Indian Tribe to Secretary
M	Memorandum from Program Director, CUPCA, dated Oct. 18, 1994

Exhibits/
Attachments
to this document
have **not** been
scanned.

Please see the
case file.