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

Chief Judge Dee Benson

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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 (collectively "Movants"), by and through their undersigned counsel, hereby submit this Reply to the Plaintiff, Ute Distribution Corporation's ("UDC") Memorandum in Opposition to Federal Defendants' and Ute Indian Tribe's Joint Motion to Dismiss Second Amended Complaint [Doc. No. 191] ("UDC Mem.").

REPLY

The Court's jurisdiction in this case derives from the provisions of the Administrative Procedures Act ("APA"), 5 U.S.C. § 551, *et seq.*, applicable to review of a final agency decision, in particular 5 U.S.C. § 706(2). *See* March 24, 2001 Order at ¶ 2 [Doc. No. 148](Movants' Mem. at Ex. A). The Court's review is limited to applying the standards set out in § 706(2)(B) to the Secretary's final determination of "whether tribal water rights in question were or were not an asset susceptible to equitable and practicable distribution, and, if susceptible, whether the water and water rights were divided and distributed as between the full-blood and mixed-bloods groups in accordance with the Partition Act." March 24, 2001 Order at ¶ 1; *see also id.* at ¶ 2.[1]

The fundamental issue properly presented in the Movants' Motion to Dismiss is whether the claims set forth in the Second Amended Complaint [Doc. No. 177] ("SAC") procedurally meet the jurisdictional threshold for review adopted in this Court's March 24, 2001 Order. They do not, as demonstrated in the Movants' Memorandum,. The UDC's new claims have not been presented to

[1] The Secretary's two Decisions on this issue are attached to the Movants' Memorandum in Support of Joint Motion to Dismiss ("Movants' Mem.") at Exs. B & C.

or finally determined by the Secretary and, therefore are not properly before this Court for review under the APA. That review, as the UDC admits, *see* UDC Mem. at 16, proceeds as an appeal in accord with the principles set out in *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). In its appellate role, this Court cannot address issues that were not presented to and decided by the Secretary, or consider evidence that is not part of the administrative record. *See* Movants' Mem. at 20-30.[2]

A. Determination of the issue is committed by statute to the Secretary's discretion.

This Court must first determine whether its jurisdiction to review the Secretary's Decisions is statutorily prohibited or if the Secretary's action here is committed to agency discretion as a matter of law. 5 U.S.C. § 701(a)(1), (2). *See Olenhouse,* 42 F.3d at 1572. The UDC argues that there is a body of law applicable to the issue presented to the Secretary that overcomes the Secretary's discretionary authority under the Partition Act, 25 U.S.C. §§ 677-677aa. *See* UDC Mem. at 14-15. This argument ignores the fact that § 677aa of the Partition Act commits to the Secretary the authority to determine disputes between the two groups "in any manner deemed by him to be in the best interest of the two groups." In carrying out that discretionary authority, the Secretary has reviewed the volumes of evidence presented and determined that, in accordance with § 677i, the full-blood and mixed-blood groups agreed over 40 years ago to divide and distribute the Tribe's water and water rights, and did so. *See* Secretary's 1998 and 2004 Decisions. That determination is

[2] The UDC's Memorandum contains "factual allegations" to which the movants do not respond point by point. *See* UDC Mem. at 3-13. The choice not to respond separately to each factual allegation is not, and should not be construed as an admission of any of those allegations.

committed to the Secretary's discretion under the Partition Act, and this Court's review should be limited to claims that the process provided by the Secretary failed to meet the minimal requirements under the APA.

B. The Court's scope of review under the APA is limited to review of the issue presented to and finally decided by the Secretary.

The UDC's persistent argument that it is not required to obtain final agency action before presenting its claims for judicial review has been rejected by this Court on at least two occasions: initially by Judge Winder when he remanded to the Secretary "[t]he issues raised by plaintiff's Amended Complaint with regard to whether certain Ute Indian Tribal water rights are 'assets not susceptible to equitable and practicable distribution' and therefore subject to joint management by the Tribal Business Committee and the board of directors of Ute Distribution Corporation pursuant to the Ute Partition Act . . .." March 5, 1997 Order at ¶ 1 (Movants' Mem. at Ex. H); and, again when the Court issued its March 24, 2001 Order. Now, having obtained the Secretary's final decision on that issue, the UDC varies its theme arguing that a final decision on that issue confers on this Court the jurisdiction to hear and decide in the first instance a series of other issues that have not been presented to or decided by the Secretary. *See* SAC at Second - Sixth Claims. However, the UDC admits that these claims "go beyond review of the agency action," UDC Mem. at 37. Therefore, they are beyond this Court's APA jurisdiction, 5 U.S.C. § 706(2)(B).

The Movants cite several cases in support of the proposition that this Court's APA review is limited to the issue presented and finally determined by the Secretary. *See* Movants' Mem. at 22-25. The UDC does not seriously contest this standard, rather it asserts that its claims for: (a) an

accounting of funds appropriated for the Tribe in Title V, Pub. L. No. 102-575, 106 Stat. 4650 (Oct. 30, 1992)(" Title V") (Movants' Mem. at Ex. F) and other funds, *see* SAC, Fourth Claim; (b) an injunction on the transfer of those funds, *see* SAC, Fifth Claim; and, (c) a partition of those funds, *see* SAC, Sixth Claim, are all "grounded" in the Secretary's alleged determination of the UDC's purported claim for "restitution."[3] *See* UDC Mem. at 19-22. Ignoring for the moment that a claim for "restitution" has never been raised, the UDC fails to recognize that the Court's scope of review was previously determined in its March 24, 2001 Order at ¶ 2, wherein the Court clearly identified the issue be decided by the Secretary, *id.* at ¶ 1. *Accord* March 5, 1997 Order at ¶ 1. None of the UDC's previously-unasserted claims to the Tribe's Title V funds are inexorably "grounded" in the Secretary's determination of that issue, nor were any such claims presented to the Secretary.

The UDC's newly-asserted basic premise, that it previously sought "restitution" of Title V funds, does not withstand scrutiny. It is telling that the UDC fails to quote any document in which it alleges "restitution" or any other claim (prior to the SAC) to the Tribe's Title V funds. Neither its Complaint [Doc. No. 1] nor Amended Complaint [Doc. No. 47] mentions or even alludes to a claim to the Tribe's funds. *See also* Movants' Mem. at 23, n.10; Winder's Decision at 6 (defining the issue

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[3] The UDC's use of the term "restitution" is Orwellian. Neither the term nor a claim for "restitution" appears in any document filed by the UDC with this Court or with the Secretary until its most recent Memorandum [Doc. No. 191]. A claim for "restitution" does not appear in any of the three complaints filed by the UDC. Likewise, the UDC's use of the term "water rights/claims" throughout its Memorandum is an equally misleading attempt to suggest that the UDC has previously asserted a claim to the Tribe's Title V or other funds. The UDC even substitutes its revisionist nomenclature for the actual language used in various quotations. *Compare, e.g.,* UDC Mem. at 10, ¶ 5 & 23, *with* the actual language used by Judge Winder in his Memorandum Decision and Order at 30-31 (July 26, 1996) ("Winder's Decision") [Doc. No. 33].

presented in the Complaint). The issue submitted to the Secretary by this Court on two occasions, *see* March 5, 1997 Order at ¶ 1; March 24, 2001 Order at ¶¶ 1 & 2, did not mention a claim to Title V funds. The UDC did not mention the Tribe's Title V funds in its own description of the "fundamental issues" presented in the final round of submissions to the Secretary, *see* Movants' Mem. at 8 (quoting from UDC's Brief submitted to the Secretary),[4] and only hints of a claim to the Tribe's § 502 funds in an attachment entitled "Additional Documentation and Evidence," at paragraph 124 of 197 (attached to UDC Mem. at Tab C). *See also* Movants' Mem. at 15, n.7.[5] The Tribe's response to this singular reference, quoted at UDC's Mem. at 8-9, ¶ 2, explicitly denied that the Settlement or the funds provided under the Settlement (Title V funds) were at issue before the Secretary. The UDC's Reply, which was submitted to the Secretary on April 29, 2002, included an attachment with a specific reply to the Tribe's response to paragraph 124, that did not mention the Tribe's Title V funds or dispute that the funds *were not at issue*.

Finally, based upon her determination that the UDC had no interest in the Tribe's water or water rights, the Secretary concluded that any claim the UDC proffered to the Tribe's § 502 funds

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[4] The UDC's 44 page principal Brief is devoid of any argument pertaining to the Tribe's Title V funds. The Brief is attached to the UDC Mem. at Tab C.

[5] Its purported "claim" consists of a single sentence; a startling brief articulation of a claim the UDC's now alleges includes in excess of $178 million appropriated under § 506 of Title V. Even were one to conclude that this cryptic reference constitutes a claim, it is on its face limited to a claim for a proportional share of funds paid to the Tribe under § 502 of the Settlement Act. *See also* Secretary's 2004 Decision at 15. Those funds are distinct from funds appropriated by Congress and paid to the Tribe under §§ 504, 505 and 506, which are not mentioned in the UDC's purported claim. *See also* n.10 below.

based upon that theory necessarily failed. *See* Secretary's 2004 Decision at 15.[6] The Secretary, however, did not and did not have to finally decide the UDC's purported claim to § 502 funds because her determination of the issue that this Court had presented for her determination made it unnecessary. Additionally, the claim the UDC now asserts to the Tribe's Title V funds premised upon the 1965 Deferral Agreement, *see, e.g.,* SAC at ¶¶ 169, 171, has never been presented to or decided by the Secretary.[7]

The UDC's belated and all too brief assertion of a right to a proportion of § 502 funds, and the Secretary's denial of the premise on which that claim was based, does not constitute either the presentation or final determination of the UDC's newly asserted claims to an accounting, injunction and partition of over $178 million of the Tribe's § 506 funds. Those claims must be dismissed because they go beyond this Court's jurisdiction under the APA.

C. Neither the United States nor the Tribe have waived their immunity from suit to the UDC's new claims.

The United States' waiver under the APA is strictly construed and only extends to the claims presented and finally decided by the Secretary. *See* Movants' Mem. at 20-22. "The . . . APA . . . is the sole waiver of sovereign immunity by the United States applicable to this case." March 24, 2001

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[6] The Secretary's 2004 Decision was issued on February 3, 2004, approximately 10 days after the UDC had filed a Motion [Doc. No. 166] in which, for the first time in any court filing, it articulated a claim to the Tribe's Title V funds and requested that the Court enjoin the Tribe's proposed transfer of those funds to management by the Tribe.

[7] Even if this Court reversed the Secretary, the issue of whether the UDC's interest in certain tribal water rights constitutes an interest in the Tribe's Title V funds would have to be presented to and decided, in the first instance, by the Secretary.

Order at ¶ 2. That waiver only extends to "the final decision of the Secretary as to the issues outlined in paragraph 1, above." *Id.* As discussed above at 1-2, the issue submitted by the Court to the Secretary did not include any claims to the Tribe's Title V funds - no claim for an accounting, injunction, partition or "restitution." The United States has not waived its immunity from the UDC's claims to the Tribe's Title V and other funds and those claims must be dismissed.

Any waiver of the Tribe's immunity also must be clear and unequivocal. *See UDC v. Ute Indian Tribe,* 149 F.3d 1260 (10th Cir. 1998); *see also UDC v. Norton,* 43 Fed.Appx. 272, 275 (10th Cir. 2002). The UDC groundlessly asserts that the discussion of Title V in the Tribe's Memorandum in Support of its original Motion to Dismiss [Doc. No. 9] constitutes a waiver of its immunity from the UDC's newly devised claims to the Tribe's funds. *See* UDC Mem. at 21-22. As discussed in Movants' Mem. at 21, the UDC's original Complaint which the Tribe sought to dismiss, did not mention, let alone claim an interest in the Tribe's Title V funds. *See also* Movants' Mem. at 23, n.10. The Tribe's discussion of Title V within the context of its Motion to Dismiss the Complaint addressed only the UDC's alleged "ownership" interest in the Tribe's water rights. *See* Tribe's Mem. In Supp. at 2-8; Tribe's Reply Brief [Doc. No. 20].

Likewise, the Tribe's response to paragraph 124 of the UDC's "Additional Documents and Exhibits," *see* discussion above at 5, states that "[t]he Settlement is not an issue before the Secretary. Its terms do not provide any evidence relevant to the issue before the Secretary." Certainly not the clear and unequivocal language required to constitute a waiver of the Tribe's immunity from any

claim to the Tribe's Title V funds.[8]

D. Judge Winder's 1996 Memorandum Decision does not apply to the UDC's new claims and both the statute of limitations and laches bar those claims.

The UDC asserts that all claims in the SAC are timely because Judge Winder's prior determination [Doc. No. 33] that the claims raised by the UDC in its original Complaint [Doc. No. 1] were not barred by statutes of limitation is law of the case. *See* UDC Mem. at 22-27. Law of the case "is not an 'inexorable command' but is to be applied with good sense." *Major v. Benton,* 647 F.2d 110, 112 (10th Cir. 1981), *citing White v. Murtha,* 377 F.2d 428, 431-32 (5th Cir. 1967). *See generally Unioil, Inc. v. H.E. Elledge,* 962 F.2d 988, 993 (10th Cir. 1992) ("[w]hen a lower court is convinced that an interlocutory ruling it has made is substantially erroneous, the only sensible thing to do is to set itself right to avoid subsequent reversal." *quoting Major v. Benton, supra.*).

1. Statues of limitation apply to the claims raised in the Second Amended Complaint.

The UDC conveniently ignores the fact that none of the issues raised in the SAC (except possibly those in the Second Claim) were before Judge Winder. *See* Winder's Decision at 6 stating the issue before the Court; *see also* Complaint at 14-15 (Prayer for Relief).[9] Therefore, his ruling that statutes of limitation did not bar the UDC's action for a declaration that certain water rights were

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[8] That the Tribe may have suspected or anticipated that the UDC would ultimately seek to obtain a portion of the Tribe's funds does not constitute a waiver of immunity. Those funds are not presently subject to this Court's jurisdiction and the Tribe's waiver here only encompasses any issues properly before the Court under the APA.

[9] Judge Winder's decision denying the Tribe's Motion to Dismiss was reversed by the Tenth Circuit Court of Appeals on the grounds that the Partition Act did not waive the Tribe's immunity from suit. *See UDC v. Ute Indian Tribe,* 149 F.3d 1260.

indivisible assets subject to joint management, does not apply and is not law of the case with respect to the issues raised in the newly asserted claims for: (a) an accounting of the Tribe's Title V funds, SAC, Fourth Claim; (b) an injunction of the transfer of those funds, SAC, Fifth Claim; or, (c) a partition of those funds, SAC, Sixth Claim. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988)("[W]hen a court decides upon a rule of law, that decision should continue to govern *the same issues* in subsequent stages of the same case." (citations omitted, emphasis added).). Judge Winder's ruling on statutes of limitation does not preclude the Court's determination that the issues raised by the UDC's new claims are barred for the reasons set forth in Movants' Mem. at 13-15. *See also* 25 U.S.C. § 677v (Movants' Mem. at Ex. F) discussed below at 10-11.

Moreover, Judge Winder's underlying analysis is inapplicable to the UDC's new claims for the partition and distribution of money which it alleges was obtained pursuant to the 1965 Deferral Agreement, and Title, *see, e.g.*, SAC at ¶¶ 161, 169, 177, in which Congress unambiguously authorized and appropriated in Title V *only* for use by the Tribe or Secretary for the benefit of the Tribe.[10] The UDC does not assert, indeed it could not in light of its demand for partition, that the

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[10] *See* Title V, § 502 (a)(2)(B) ("The monies received by the Tribe under this title *shall be utilized by the Tribe* for governmental purposes, shall not be distributed per capita, and shall be used to enhance the educational, social, and economic opportunities *for the Tribe.*"); § 504 (Amounts authorized "for the Secretary to permit the Tribe to develop . . .."); § 505(a) (Amounts authorized "shall be available to the Secretary, in cooperation with the Tribe, to . . ..); § 505(b)(Amounts authorized shall be available to the Secretary, in cooperation with the Tribe . . . to . . .."); § 505(c)(Amount authorized "shall be available to permit the Secretary to clean the Bottle Hollow Reservoir . . .."); § 505(f)(Amount authorized "shall be available for the Secretary, in cooperation with the Tribe, to permit the Tribe to . . .."); § 505(g)(Amount authorized "shall be available to the Secretary for participation by the Tribe . . .."); § 506(a)(Amount authorized paid "to the Tribal Development Fund which the Secretary is authorized and directed to establish *for the Tribe.*"); § 506(c)(Economic projects which "are deemed to be reasonable, prudent and likely

Title V funds are indivisible assets or that they are subject to the joint management scheme. Therefore, the bases upon which Judge Winder applied the policy considerations set out in *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 240-45 (1985), *see* Winders' Decision at 30-31, do not apply to the UDC's claims for its purported share of the Tribe's monies. Additionally, his analysis that there is no "discrete event" that triggers the statute of limitations if water is an indivisible asset subject to on-going joint management, *id.*, does not apply to these new claims which are premised upon discrete events: 1) the parties conclusion of the Deferral Agreement on September 20, 1965, *see* Movants' Mem. at 5; and, 2) passage of Title V on October 30, 1992. Claims based upon these events are barred by the statutes of limitation which was triggered on September 20, 1965, or, at the latest, October 30, 1992. *See* Movants' Mem. at 13-15. *See Industrial Contractors Corp. v. Bureau of Reclamation,* 15 F.3d 963, 968-69 (10th Cir. 1994)(Federal law controls when federal cause of action accrues and "statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of injury which is the basis of the action." (citations omitted).). *See also Doit, Inc. v. Touche, Ross & Co.,* 926 P.2d 835, 843 (Utah 1996)("[A] cause of action accrues when a plaintiff could have filed and prosecuted an action to successful completion.").

Moreover, the Supreme Court's analysis in *South Carolina v. Catawba Indian Tribe, Inc.,* 476

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to return a reasonable investment *to the Tribe.*"). These clearly articulated statutory requirements stand in stark contrast to the UDC's extraordinarily broad reliance on a single sentence in the report issued by the Committee on Energy and Natural Resources, S. Rep. No. 102-267, 102nd Cong., 2nd Sess. 103 (1992). *See* Movants' Mem. at 14, n.5. *See generally Phillips Petroleum Co. v. Lujan,* 4 F.3d 858, 861 (10th Cir. 1993)("The best evidence of Congressional intent is the text of the statute itself and where the language is unambiguous, our inquiry is complete." *citing West Virginia Univ. Hospitals, Inc. V. Casey,* 499 U.S. 83, 98-99 (1991).

U.S. 498, 505-509 (1986), mandates the application of statutes of limitation to the UDC's claims to the Tribe's Title V funds. There, the Catawba Tribe, which had been terminated and, like the UDC, was acting in a corporate capacity, sought to establish its title to land which it alleged had been taken in violation of the Non-Intercourse Act and, therefore, remained Indian land. *Id.* at 500-01. Like the UDC here, the Catawbas claimed that they were Indians seeking to establish their title to Indian property. *Id.* at 505. The Court examined language from the Catawba Termination Act, 25 U.S.C § 935, *quoted* at 476 U.S. at 505, that is virtually identical to the language in the Partition Act, 25 U.S.C. § 677v, and rejected the Catawba's claim:

> Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statute of limitations unless there is a federal statute of limitations or a conflict with federal policy. Although federal policy may preclude the ordinary applicability of a state statute of limitations to this type of action in the absence of a specific congressional enactment to the contrary, *County of Oneida*[, *supra*] . . . , the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in *County of Oneida*, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. at 507-08.

The Partition Act, 25 U.S.C. § 677v, similarly redefines the mixed-bloods' relationship with the Federal Government and makes it unmistakably clear that statutes of limitation apply to the UDC's claims for partition of the Tribe's funds. The polices applied in *County of Oneida, supra.*, as well as *Mille Lac Band v. Minnesota,* 853 F.Supp. 1118, 1124-25 (D. Minn. 1994), to claims made by *Indian tribes* are inapplicable when the United States has redefined its relationship with the mixed-

bloods, and Title V expresses Congress' unassailable determination that the Tribe, and only the Tribe, shall receive all the benefits provided. *See* n.10, above. Any claim the UDC might assert to those funds was triggered on October 30, 1992, at the latest, and, under any applicable statute of limitations, was barred by the time the UDC filed its SAC.

2. Laches applies to the claims raised in the Second Amended Complaint.

Similarly, the policy considerations discussed by Judge Winder do not insulate the UDC from the application of laches. *See* discussion above at 9-12; Movants' Mem. at 15-18. Moreover, the UDC's suggestion that the Secretary or the Tribe are somehow responsible for the UDC's delay in bringing its claims is a ruse. *See* UDC Mem. at 28-29, 31. The SAC does not provide one allegation that since 1961 and prior to 1995, the UDC asserted or presented any claimed interest in the Tribe's water or water rights. Nor does the SAC provide any factual allegation that the UDC asserted a claim to benefits provided in Title V, either while it was being considered by Congress or after enactment in 1992, until, according to the UDC, November, 2001.[11]

Events cited by the UDC provide further evidence of its unreasonable delay. First, the UDC alleges it paid a share of E.L. Decker's services in developing and producing the Decker Report. *See* UDC Mem. at 5-6, ¶¶ 7-8. *But see* Secretary's 2004 Decision at 11. Even if the UDC was correct, why should it be allowed to wait 34 years to assert its claims while the Tribe and United States proceeded to address the Tribe's water right issues without any inclusion of or reference to the UDC? *See* Movants' Mem. at 5-6. The UDC cannot be heard to complain that the Secretary or Tribe did

[11] Movants contest the UDC's claim that the UDC even asserted a claim to the Tribe's funds until it filed the SAC in June, 2004. *See* discussion above at 5-7.

nothing to assure that the mixed-bloods obtained benefits from the 1965 Deferral Agreement, *see* UDC Mem. at 5, ¶ 5 & 31, when it failed for 30 years to assert that its shareholders paid for the underlying analysis and were entitled to their share of the benefits provided in that Agreement.

Second, the UDC alleges that the Court of Claims recognized that the Tribe's water and water rights may have been distributed as shares in the UDC. *See* UDC Mem. at 7, ¶ 12, *citing Affiliated Ute Citizens v. United States,* 215 Ct.Cl. 935, 1977 WL 25897 (1977). The question then is why did the UDC subsequently fail for the next 18 years to assert the rights allegedly recognized by the court but ignored by the Secretary and Tribe?

Finally, in 1992, Congress explicitly and unambiguously directed how the Secretary and the Tribe must utilize all Title V funds. *See* n.10 above; Movants' Mem at 14. The UDC failed over the course of the next 12 years to challenge Congress' directive before the Secretary, this Court or in Congress.[12]

The UDC's argument that the Tribe will not be prejudiced by the UDC's claim because it is only asking for 27.16% of over $178 million ($48.35 million) is absurd. *See* UDC Mem. at 30-31. Most simply, the distribution of Title V funds to the UDC would require the Tribe and the Secretary to violate Congress' directives in Title V. Moreover, since 1965, the Tribe has worked to obtain the benefits promised *to the Tribe* in the Deferral Agreement. The United States worked for years to construct the projects promised in the Deferral Agreement that would have delivered water to the

[12] How Title V funds must be used is unambiguously directed by Congress, and neither the Secretary nor the Tribe can act in violation of Congress' clear directive. *See* n.10 above. The UDC's claim that it is entitled to receive benefits based upon its alleged interest in the Tribe's water and water rights is appropriately pursued in Congress, not before this Court.

Tribe's lands, and negotiated with the Tribe to resolve its claims when it became clear the promised projects would not be constructed. *See* Title V, § 501. Both parties to that nearly 40 year process would be severely prejudiced by the UDC's 2004 claims.

The UDC's extended and unexplained delays in asserting its claims, and its continual refrain that the failure of others to act in its stead relieves it of the obligation to assert its own claimed rights is the epitome of laches and the UDC's Fourth through Sixth Claims should be dismissed.

E. UDC's Third Claim Does Not Allege a Presently-Justiciable Claim for Federal Breach.

UDC's new third claim alleges that the Secretary breached fiduciary and trust duties not specified in the SAC and supposedly owed to 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." SAC at ¶ 153. This new claim is outside the scope of the present judicial review under the APA. Such attempted expansion of the proper scope of review is now implicitly acknowledged by UDC when it recently stated this third claim "is contingent on the Court's reversing the Secretary's order." UDC Mem at 33.

But even the reversal thus sought by UDC may go further than the Court may properly proceed. The Court's only duty, if there is anything remaining under the first claim of the SAC, is to determine whether the Secretary's 1998 and 2004 Decisions violate procedural minima required by the APA. If the Court were to find those Decisions arbitrary or otherwise in violation, the Court should then remand for a new determination by the Secretary in light of the Court's findings. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). As the Court there noted:

If the record before the agency does not support the agency action, . . . the proper

> course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

A finding by this Court that the Secretary's Decisions were somehow not proper does not necessarily lead immediately to the conclusion that the Decisions must be reversed on their merits, but rather only that a new administrative inquiry by the Secretary must be made to determine if UDC is right.

Without the reversal by this Court that UDC seeks, because of the contingent nature of its third claim, UDC has conceded that there is no basis for the Court to ever reach the breach of trust claim.

Further, the third claim of the SAC does not identify any statute or other law providing the basis for the claimed trust or fiduciary duty. While UDC's latest memorandum attempts to partly supply that missing critical element of the SAC, the memorandum is not part of the pleadings. Even if the Court were to accept that the statute (25 U.S.C. § 677i) and regulation (25 C.F.R. Pt. 217) identified in UDC's memorandum did establish a proper basis for recognition of limited statutory federal supervisory responsibility over indivisible assets (secondary to the primary right of joint management of such assets by the Tribe and UDC), and could be implied in the statement of the claim, further problems remain. The asserted third claim still does not adequately allege on its face what specific federal duty(ies) may have been breached by the Secretary. Nor does it allege any factual basis for any claim of breach, other than the making of the decisions submitted for review to the Secretary by the Court. Such a vague, incomplete and contingent claim is simply not presently susceptible to judicial review by this Court.

Finally, UDC asserts that by its third claim it only seeks an order to the Secretary to assume her (unspecified) duties in an impartial manner. UDC Mem. at p. 33. But there is no adequate basis shown by UDC under the circumstances here presented to assume that the Secretary will do otherwise, even without such an order. The Court should simply dismiss this contingent third attempted claim of the SAC.

F. The Court has previously recognized that it does not have jurisdiction to hear the UDC's claim for a declaration of the UDC's right to the Tribe's water.

The Court has twice rejected the UDC's claim for a declaratory judgment and held that its jurisdiction is limited to review of the Secretary's final decision of the issue presented to her under § 706(2) of the APA. *See* March 24, 2001 Order at ¶¶ 1, 2. *See also* March 5, 1997 Order. Because the Declaratory Judgment Act cannot alter the scope of this Court's review, *see* Movants' Mem. at 25, *quoting City of Albuquerque v. Browner,* 865 F.Supp. 733,737 (D.N.M. 1993), the Court is limited to determining whether the Secretary's two Decisions, are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, *see* 5 U.S.C. § 706(2)(B), and cannot issue a declaration of the UDC's purported "rights" outside the scope of those two Decisions and the record presented to the Secretary. The UDC apparently admits that it seeks no more than it can obtain pursuant to review under the APA, *see* UDC's Mem. at 32, and a stand-alone claim for declaratory judgment should be dismissed.

The UDC's attempt to circumvent the APA and this Court's jurisdiction under that statute is revealed by its position here. The UDC asserts that a ruling that the Secretary's Decisions do not meet the standards of § 706(2)(B), leads to "an immediate finding" that the Tribe's water rights are

subject to joint management. UDC's Mem. at 32. That is patently incorrect and, depending upon the Court's decision, any number of issues may have to be addressed by the Secretary. *See* discussion above at 14-15. The UDC subsequently asserts that the Court's automatic declaration then requires a judicial partition of the Tribe's Title V funds. *See* UDC's Mem. at 31-32. Again, whether an interest in the Tribe's water and water rights creates an interest in the Tribe's Title V funds involves a broad array of issues never before presented to or addressed by the Secretary. Until then, they are not properly before this Court and must be dismissed.

G. The UDC cannot supplement the administrative record.

The Tenth Circuit consistently has held that the review of agency action must be based upon the administrative record and not upon evidence or arguments submitted after the final agency decision is entered. *See* Movants' Mem. at 28-29, and cases cited therein. In this case, the procedures followed *and agreed to by the UDC, see* Movants' Mem. at 29-30 & Exs. I-L, were comprehensive and extended well beyond the process provided in 25 C.F.R. Part 2 (2002) (Bureau of Indian Affairs - Appeals of Administrative Actions). *See also* 25 U.S.C. § 677aa ("[T]he Secretary is authorized to proceed in any manner deemed by him to be in the best interest of both parties."); March 24, 2001 Order at ¶ 3. As revealed by the correspondence included in Movants' Mem. at Exs. I-L, when provided the opportunity, the UDC did not demand a hearing, demand depositions, demand specific correspondence or demand documents in the Tribe's possession.[13] *See*

[13] The Tribe believes that all documents in its possession related to the division of water and water rights under the Partition Act are included in the administrative record. Also, the Secretary notes that the government is not obligated to search the public archival records for the UDC.

UDC Mem. at 37. The UDC cannot complain now that it was not provided procedures which it never requested.

Finally, the UDC grossly misrepresents the status of the 55 boxes of documents destroyed in accordance with federal regulations in 1983. *See* UDC's Mem. at 37. There is absolutely nothing to suggest that these documents pertained to the Partition Act. In fact, as Mr. Wheeler's letter makes clear, *see* Movants' Mem. at Ex. J, the list is very vague as to the content of the boxes. Moreover, contrary to the UDC's insinuation, the boxes were destroyed in the normal course of business in 1983, which (if any of the included documents pertained to the Partition Act) was 22 years after termination of the mixed-bloods was complete. The destruction of these boxes pursuant to and in accordance with federal regulations only highlights the purpose and reasonableness of applying statutes of limitation and/or laches to the UDC's out-dated and long-stale claims.[14]

CONCLUSION

For the reasons set forth in above and in the Federal Defendants' and Ute Indian Tribe's Memorandum is Support of Joint Motion to Dismiss, the Court should dismiss the Claims raised in the UDC's Second Amended Complaint.

Respectfully submitted this 15th day of October, 2004.

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[14] *See, e.g., Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 578 & n.1 (Utah 1996) ("Statute of limitations 'are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have failed, and witnesses have disappeared.'" *quoting Becton Dickinson & Co. v. Reese,* 668 P.2d 1254, 1257 (Utah 1983). The court noted that those purposes were of more than a theoretical concern where documents had been destroyed only11 years before the case was initiated.

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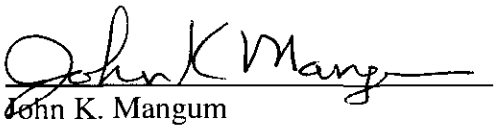

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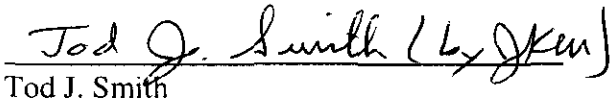

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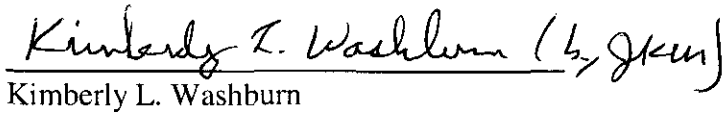

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CERTIFICATE OF SERVICE

The undersigned hereby states that on the 15th day of October, 2004, a true and correct copy of the Federal Defendants' and Defendant-Intervener Ute Indian Tribe's REPLY TO UTE DISTRIBUTION CORPORATION'S MEMORANDUM IN OPPOSITION TO JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT , was mailed postage prepaid to the following:

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