

Case No. 06-4164

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**JAKE PELT, et al.,**

Plaintiffs/Appellees,

v.

**STATE OF UTAH,**

Defendant/Appellant.

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**On Appeal from the United States District Court  
for the District of Utah**

**The Honorable Tena Campbell  
District Judge**

**D.C. No. 2:92-cv-00639-TC-SA**

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**PLAINTIFFS/APPELLEES' ANSWER BRIEF**

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**ORAL ARGUMENT IS REQUESTED IN THIS APPEAL**  
*ATTACHMENTS SUBMITTED IN PDF FORMAT*

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- B. Plaintiff's Appeal of District Court Order entered November 29, 2001, U.S. Court of Appeals for the Tenth Circuit, Case No. 02-4010;
- C. Parker Neilson's Petition for Writ of Mandamus: In re Neilson: Matter of J. Campbell and Cassell, U.S. Court of Appeals for the Tenth Circuit, Case No. 03-4056;
- D. Utah's Appeal of District Court's Amended Order and Memorandum Decision entered April 27, 2006, U.S. Court of Appeals for the Tenth Circuit, Case No. 06-4046.

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**PLAINTIFFS/APPELLEES' ANSWER BRIEF**

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Plaintiffs/Appellees, **JAKE C. PELT, et al.**, by and through counsel,  
submit the following **ANSWER BRIEF**:

## INTRODUCTION

Plaintiff-Appellees, a class of trust fund beneficiaries (“Beneficiaries”), hereby submit this answer brief in opposition to Defendant-Appellant’s, State of Utah’s (“Utah’s”), appeal of the district court’s grant of summary judgment denying Utah’s *res judicata* defense.

## JURISDICTION

The Beneficiaries agree with Utah that the Court has jurisdiction of this appeal under 28 U.S.C. § 1292(b). While Utah asserts that this Court also has jurisdiction over Utah’s related appeal under 28 U.S.C. § 1292(a)(1) and “under a practical application” of 28 U.S.C. § 1291, *see* Utah’s Br. at 2, this is irrelevant because the two appeals are distinct and the Court has denied Utah’s motion to consolidate them. Order, *Pelt v. Utah*, No. 06-4164 (Aug. 8, 2006).<sup>1</sup>

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<sup>1</sup> As fully explained in briefing in Case No. 06-4046, neither 28 U.S.C. § 1292(a) nor a practical application of 28 U.S.C. § 1291 provides a basis for appellate jurisdiction in Utah’s related appeal. *See generally* Plaintiffs/Appellees’ Mot. to Dismiss Appeal, *Pelt v. Utah*, No. 06-4046 (Feb. 22, 2006); Plaintiffs/Appellees’ Reply in Supp. of Mot. to Dismiss Appeal and Resp. to Court’s Order to Show Cause, *Pelt v. Utah*, No. 06-4046 (Apr. 20, 2006); Plaintiff/Appellees’ Supplement to Mot. to Dismiss Premature Appeal, *Pelt v. Utah*, No. 06-4046 (Feb. 10, 2006). This issue has been referred to the panel in Case No. 06-4046 for decision.

## **RELATIONSHIP BETWEEN UTAH'S TWO PENDING APPEALS**

This appeal and Utah's related appeal both challenge the same District Court order. To avoid duplicate proceedings, the Beneficiaries moved to dismiss the related appeal. The Beneficiaries moved to dismiss rather than to consolidate because only dismissal would have avoided expenditure of individual and Court resources on an outstanding jurisdictional question in the related appeal. In opposing the Beneficiaries' motion to dismiss, Utah argued that the related appeal should be maintained because it provided a broader scope of review than this one. *See* Utah's Supp. Mem. Re: Jur. on Appeal, *Pelt v. Utah*, Case No. 06-4046 (July 19, 2006) at 5. Specifically, Utah argued that this Court might be more likely to exercise "supplemental" appellate jurisdiction over a prior 2001 order in the related appeal because that appeal, unlike this one, would not be dependent upon certification by the district court. *See id.* Utah has not, however, raised this supplemental jurisdiction argument in either appeal. Utah's Br. at 10 n.1.

Utah now admits, contrary to its prior assertions, that "the issues in the two appeals are identical." Utah's Br. at 2-3. Accordingly, Utah explains, "the facts and arguments in [Utah's Brief in this case] are identical to those in [Utah's] Brief filed in Case No. 06-4046 on July 28, 2006." *Id.* The Beneficiaries agree that the relevant facts and issues are largely identical. The Beneficiaries, therefore, submit

this Answer Brief for which the Factual Statement and Argument sections are substantively identical to those in the Answer Brief submitted in Case Number 06-4046 on August 30, 2006. Section I(A), however, has been altered to reflect that this case, unlike Case Number 06-4046, was pursued *via* petition for interlocutory appeal under 28 U.S. C. § 1292(b).

### **STATEMENT OF THE ISSUES**

The Beneficiaries agree with Utah that all elements of Utah's *res judicata* defense, except that of privity, have been appropriately established. The Beneficiaries further agree that in this case, the question of privity depends on whether the Beneficiaries were virtually or adequately represented in the three prior cases. The only questions in this appeal, therefore, concern how and whether privity, through virtual or adequate representation, has or has not been established—namely: (1) whether Utah has the burden of proof on the privity issue; (2) whether privity or lack thereof was appropriately established under the virtual representation theory; (3) whether the District Court performed the appropriate adequate-representation analysis; and (4) whether privity or lack thereof was appropriately established under the adequate representation theory.

## SUMMARY OF THE ARGUMENT

Utah's appeal should be rejected because the District Court correctly determined that Utah had the burden to establish the privity element of its *res judicata* defense and Utah failed to meet that burden. Indeed, the District Court appropriately placed the burden of proving privity on Utah because privity is an element of Utah's affirmative defense. In any event, allocation of burdens cannot be considered here because Utah failed to pursue that issue below.

In addition, the District Court correctly determined that privity between the Beneficiaries and the plaintiffs in three prior cases was not established under the theory of virtual representation because that theory does not apply to the two previous class actions, is not recognized in the Tenth Circuit, requires more than simply an identity of interests and a public right, and was not established here.

Finally, the District Court correctly concluded that privity was not established through adequate representation because the Beneficiaries' interests were not vigorously pursued and protected in the prior proceedings. Indeed, the two class actions, *Sakezzie* and *Jim*, were not properly noticed, produced little relief, were ultimately dismissed for failure to prosecute, and were not appealed. The third case, *Bigman*, was not pursued as a class action, was settled after only seven months of negotiations, produced little result, and was originally prosecuted

by an attorney who switched sides in the midst of the litigation. Under these circumstances, the District Court did not clearly err in concluding that the Beneficiaries' interest here—an interest in pursuing a \$150,000,000 accounting claim—was not vigorously pursued and protected in any of the three prior cases.

## **BACKGROUND**

In this case, the Beneficiaries have sought a full accounting of the Navajo Trust Fund (the “Trust Fund”), an oil and gas royalty fund that Utah, the Fund Trustee, is required by federal statute to administer on the Beneficiaries' behalf. The Beneficiaries seek a traditional trustee's accounting. Specifically, the Beneficiaries seek an accounting that: (1) details all income to the Trust Fund; (2) verifies that the Fund in fact received all income that it was due; (3) lists the date, payee, amount, and purpose for each disbursement from the Trust Fund; and (4) provides supporting documentation for each disbursement so that the Beneficiaries can readily determine whether such disbursements were in fact made in furtherance of the trust purposes. *See generally* Appellant's Appendix (“AA”) 1298-1323; AA0657-64. The Beneficiaries also seek reimbursement to the Trust Fund for any improper or unaccounted for disbursements and any income which should have been but was not received. *Id.* The Beneficiaries' accounting claim is estimated today to have a value of approximately \$150,000,000. Exhibit A at 11.



While the District Court has yet to decide whether Utah will be required to account for and verify income to the Trust Fund, in 2001, it ruled that in all other respects, the Beneficiaries are entitled to the type of detailed fiduciary accounting they seek. *See generally* AA0657-64.

In proceedings below, Utah admitted that it was required to account, but asserted that such accounting need not cover the entire life span of the Trust Fund. AA2837. Instead, it argued, the Beneficiaries' accounting claim is partially precluded, under the theory of *res judicata*, by three prior cases concerning the Navajo Trust Fund—*Sakezzie, Jim, and Bigman*.<sup>2</sup> *Id.* In the order on appeal here, the District Court rejected this *res judicata* defense on the ground that Utah had failed to prove privity between the Beneficiaries and the plaintiffs in each of the three prior cases. *See generally* AA02837-61. Specifically, it found that privity could not be established because the plaintiffs in the prior cases failed to adequately or virtually represent the Beneficiaries' interests.

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<sup>2</sup> Neither the parties nor the District Court have specifically addressed which portion of the Beneficiaries' accounting claim would be precluded if one or more of the prior cases is determined to have preclusive effect. Accordingly, if this Court decides that preclusion in fact applies, this matter should be remanded to the District Court for argument and determination as to which portion of the accounting claim is precluded.

## STATEMENT OF FACTS

Although Utah's statement of facts accurately recites many facts relevant to the District Court's decision in this case, it omits other relevant facts and inaccurately represents that plaintiffs in each of the three prior cases sought the same accounting relief sought here, vigorously pursued and obtained such relief, and ensured that non-party beneficiaries were informed as to the progress of such litigation. As explained below, additional undisputed facts establish that this is not the case.

### ***Sakezzie v. Utah***

*Sakezzie v. Utah*, Civil No. C-55-61 (D. Utah), was filed in 1961. AA0729. While it sought to proceed as a class action on behalf of all beneficiaries of the Navajo Trust Fund, it was not certified as such under the "current (and more stringent) rules." AA 2840.

In *Sakezzie*, the plaintiffs sought what they termed an "accounting" of the Navajo Trust Fund. AA0734. The requested "accounting," however, did not seek information regarding past disbursements or request backup documentation. *See* AA0733-35; Exhibit B at 12-13. The *Sakezzie* plaintiffs did not seek monetary

relief in connection with the accounting, for improper disbursements and failure to collect income. *Id.*<sup>3</sup>

In the course of the *Sakezzie* litigation, Utah provided answers to interrogatories containing what Utah characterizes as “accounting information.” Utah’s Br. at 14. This “accounting information,” however was summary in nature, totaled only five pages, contained no information regarding income to the Trust Fund or verification thereof, and included no backup documentation such as receipts or vouchers. *See* AA2096-2100.

When the district concluded that these answers to interrogatories and an opportunity to inspect Utah’s records mooted any accounting claim, AA0761-62,<sup>4</sup> the plaintiffs neither objected, AA2842, nor appealed, AA0780.

Thereafter, the *Sakezzie* plaintiffs filed a second petition seeking, among other things, monthly accounting reports for the Navajo Trust Fund. AA0764-70. While this petition was pending, Utah again filed answers to interrogatories containing “accounting information.” *See* AA0107-17. These answers, however,

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<sup>3</sup> In proceedings leading up to this appeal, the District Court expressly declined to rule as to whether information produced in any of the prior cases constituted an accurate fiduciary accounting. AA2860.

<sup>4</sup> *See also* Utah’s Br. at 14 (alleging support for ruling in interrogatories and an opportunity to inspect records).

were summary in nature, totaled only ten pages, and contained no verification of income or supporting documentation such as receipts or vouchers. *See id.* When it ruled on the second petition, the court decried Utah's conscious and intentional refusal to comply with its accounting obligations, explaining that Utah had "an affirmative duty . . . to make reasonably available to the plaintiffs adequate information concerning the administration of the trust. . . . and it is no answer to say that the information could be ferreted out from [Utah's] records by the plaintiffs." AA0783. The Court then ordered Utah to make monthly accounting reports as requested by the plaintiffs. AA0789.

When Utah again failed to comply with its accounting obligations, plaintiffs filed a third petition, which was verified by the named plaintiffs. AA2062-66. The third petition alleged, among other things, continued refusal of fund administrators to provide information as to ongoing receipts and expenditures. AA2061-2062.

The record in *Sakezzie* reveals no further activity for more than a year, AA2844, when the district court ordered plaintiffs to show cause why the third petition should not be dismissed, AA2068. Plaintiffs' counsel did not attend the show cause hearing and the petition was dismissed for failure to prosecute. *Id.*

Thereafter, plaintiffs' counsel filed a motion to reinstate the petition claiming that he had a conflict at the time of the hearing and neglected to request a continuance. AA1577-78. The court denied the motion but "granted leave to the plaintiffs to file an amended petition." AA1580. Plaintiffs' counsel, however, failed to do so. AA2844. This ended the *Sakezzie* litigation. *Id.*<sup>5</sup>

### ***Jim v. Utah***

*Jim v. Utah*, Civil No. 21-70 (D. Utah), was filed February 4, 1970. AA0792. While the *Jim* plaintiffs did seek an accounting of the Navajo Trust Fund, AA0807, they did not seek monetary relief, *see* AA0806-07; AA1869-70 at 11:20-12:5. Instead, the *Jim* litigation was primarily brought to challenge the constitutionality of a 1968 amendment to the 1933 Act, which expanded the beneficiary class. AA2844-45. Accordingly, *Jim* was pursued as a class action on behalf of the original Navajo Trust Fund beneficiaries as defined in the 1933 Act, to the express exclusion of all beneficiaries added by the 1968 amendment.

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<sup>5</sup> Utah speculates that the decision not to refile an amended petition in *Sakezzie* was a reasonable tactical decision because the attorney was waiting to gather more information to support the suit. Utah's Br. at 18. This argument is addressed in Section IV(B) herein.

AA1868-69 at Deposition of Bryce E. Roe, 10:17-11:4<sup>6</sup>; AA1869 at 11:6-7

(characterizing new beneficiaries as “adverse to our position”).

When the *Jim* class was certified, the Court ruled that notice need not be provided to absent class members due to the “notoriety” of the lawsuit. AA0811-12. The attorney for the *Jim* plaintiffs recalls no evidence, written or oral, presented to establish notoriety of the *Jim* litigation, AA1874 at 16:3-21, nor do the court records establish notoriety, *see* AA2857.

In 1972, the district court issued a decision in the *Jim* plaintiffs’ favor on the constitutionality of the 1968 amendment. AA0814-17. On direct appeal, the United States Supreme Court reversed, concluding that the 1968 amendment’s addition of new beneficiaries was constitutionally permissible. AA0819-24. Thereafter, plaintiffs’ counsel gave no thought to providing notice to the newly added beneficiaries, did not provide such notice, and did not discuss voiding or amending the class certification order that defined the plaintiff class to include only the pre-1968 beneficiaries. AA1879-1881 at 21:19-23:8.

After the Supreme Court’s decision, the district court proceeded to address the *Jim* plaintiffs’ accounting claim, ordering the defendants to produce an

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<sup>6</sup> Bryce E. Roe was one of the plaintiffs’ attorneys in *Jim* and one of the deponents in this case. AA1863 at 5:4-15.

accounting of the Navajo Trust Fund dating back to February 25, 1963, to “comply with the decree in *Sakezzie*.” AA0826; AA2846.

On February 7, 1974, Utah produced what it calls an “accounting” and “abstract.” *See* Utah’s Br. at 21-23. This “accounting” and “abstract” consisted of minutes from the Utah Board of Indian Affairs, copies of certain financial and audit statements, and an abstract. AA2012-13 (filing “accounting”) & AA0850-91(recognizing receipt of “accounting” and attaching same); AA0829-0846 (abstract). The parties stipulated that this summary information was being filed in lieu of a formal accounting and would not affect the court’s right to order a full accounting in the future. AA0829; AA2847. Utah’s “accounting and abstract” included no backup or supporting documentation such as vouchers, receipts, cancelled checks, or production records from the oil and gas wells themselves. *See generally* AA0829-46; AA0851-891; AA0657-64; AA1883 at 25:1-13.<sup>7</sup>

In 1976, the court held a hearing on plaintiffs’ counsel’s motion for an award of attorney fees. *See* AA0899. Roe’s co-counsel testified under oath that,

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<sup>7</sup> Plaintiffs’ counsel in *Jim* did not retain a certified public accountant or other expert in finance or economics to look at the so-called “accounting” because, he explained, “I don’t think we regarded that as our job.” AA1883 at 25:18-22. He requested no backup documentation in addition to what Utah produced as a so-called “accounting.” AA1883-84 at 25:23-25-26:1-3. He thought “the Indians” would receive the so-called “accounting” and that they would go over it. AA1882 at 24:14-18.

although the accounting demand was still pending, the court might still grant the fee motion and dismiss *Jim* without prejudice:

Now there has never been an accounting. The case is still pending as far as that accounting is concerned. If the court wants to dispose of it, I suppose the court can dismiss it without prejudice as far as that accounting is concerned and we think he [sic] should award attorney fees to all of the attorneys involved. It is my opinion that a very modest fee would be \$10,000 to each of these sets of lawyers and that is a very modest fee.

AA0905 at 7:17-19; AA0911 at 13:18-25. The district court, however, disagreed stating:

I think we should pursue the accounting matter of course. I think that is the most important part of the lawsuit, really. The legal points are settled now. Let's have an accounting of what the state's been doing with the Indians' money. That's the short question that we need to go into and let's pursue it.

AA0915.

Notwithstanding this clear direction from the Court, no further action was taken until December 1978, when counsel were served with an order to show cause why *Jim* should not be dismissed for failure to prosecute. AA0917; AA2847. No cause was shown and the case was dismissed with prejudice. AA0919. This ended the *Jim* litigation. See AA2848.



***Bigman v. UNDC***

The complaint in *Bigman v. UNDC*, Civil No. C-77-0031 (D. Utah), was filed on February 7, 1977, by two individually named plaintiffs, Seth Bigman and Martha Collins. AA1839. The *Bigman* complaint contained no allegations that a class action was appropriate and no request that a plaintiff class be certified. *See generally* AA1839-1850. In fact, counsel for the *Bigman* plaintiffs intentionally rejected the idea of pursuing a class action due to long-running tension between the original beneficiaries and the beneficiaries added by Congress in 1968. *See* AA1856-57 at Deposition of Herbert Yazzie<sup>8</sup>, 20:10-21:5; AA2848.

Although the *Bigman* complaint contained an accounting cause of action, AA1846, plaintiffs' counsel never intended to pursue an actual accounting of the Trust Fund, AA1936-37 at Deposition of Eric Swenson<sup>9</sup>, 160:4-10 and 161:6-18; AA1944 at 168:11-25. Instead, counsel intended to address discrete activities and practices of the Utah Navajo Development Council ("UNDC"), a private Utah corporation to which Utah delegated trust administration duties. AA1907-08 at

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<sup>8</sup> Herbert Yazzie was one of the plaintiffs' attorneys in the *Bigman* litigation. *See* AA1848.

<sup>9</sup> Eric P. Swenson was one of the original plaintiffs' attorneys in *Bigman*. *See* AA1848.

50:24-51:6; AA1910 at 68:9-13; AA1918 at 104:10-20; AA1911-1913 at 74:23-76:1.

Just seven months after the complaint in *Bigman* was filed, the case was settled. AA1982; AA2849. The plaintiffs agreed to abandon all but two claims, both unrelated to this litigation, in exchange for an investigation into certain discrete transactions of, and a management audit of UNDC. *See* AA1982-1988.

Because *Bigman* was not a class action, no notice of the proposed settlement or of the court's review and acceptance of the settlement was provided to non-party beneficiaries. AA2849. Nor did plaintiffs' counsel discuss the settlement with any nonparty beneficiaries or with Navajo chapter officials. AA1928 at 120:12-19. While the lawsuit may have been discussed at some chapter meetings, *see* Utah's Br. at 28-29, it was never discussed at other chapters that included beneficiaries of the Navajo Trust Fund, including the Dennehotso Chapter and Blue Mountain Dineh Group. AA1826-27 at 117:6-118-18.

The parties retained Dr. Roger Nelson to perform the investigation mandated by the settlement. AA2849. Plaintiffs' counsel prepared a list of discrete, questionable transactions for Dr. Nelson to investigate, AA1919 at 105:7-22; AA1992, but did not examine all UNDC records before compiling the list, *see* AA1924 at 114:1-8; AA1925 at 115:8-13; AA 1926 at 116:13-15, and omitted certain transactions that he knew were improper, AA 1920-21 at 106:25-107:8;

AA1997 (investigation to include just four transactions of a “multitude” of potentially fraudulent expenditures involving housing projects); AA1998 (noting that vehicle misuse is “so widespread as to make a complete investigation impractical”); AA2001 (abandoning claim based on need for court order). Most if not all of the specific transactions involved UNDC, and were not related to the State of Utah defendants. AA1898-1903.

The result of Mr. Nelson’s investigation was a detailed report, entitled: A Management and Investigatory Review of the Utah Navajo Development Council. *See* AA0118-0648. That report is referred to herein as the “Nelson Report.”

Section One of the Nelson Report investigated the management structure and operation of UNDC’s service divisions, and medical clinics, as well as the for-profit companies UNDC’s affiliate, Utah Navajo Industries, was created to own and run.<sup>10</sup> *See* AA0120-26. Section Two of the Report investigated 26 “suspect transactions.” AA0247. Section Three set forth Dr. Nelson’s recommendations for changes in how UNDC and UNI should operate. *See* AA0587.

While Sections One and Two of the Nelson Report uncovered numerous problems with UNDC and UNI, such as conflicts of interest and self dealing, *see*

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<sup>10</sup> Prior to FY 1978, UNDC operated these for-profit companies. Thereafter, UNI, a Utah corporation wholly owned by UNDC, was formed to run the companies. AA0591.

AA0589-0648, the Nelson Report was not a formal accounting like that sought here. It focused almost exclusively on the operations of UNDC and UNI. *Id.* More significantly, it simply was not an accounting in which a comprehensive review of all receipts and disbursements occurring within a specified time period are examined to ensure beneficiaries that their money is being administered per the terms of a specific trust instrument. Rather, it was a snap-shot survey exclusively focused on how best to restructure UNDC and UNI management and operations. *See id.* In addition, it did not investigate whether the Navajo Trust Fund was receiving all royalty income to which it was entitled. *See generally id.*; AA1941 at 165:19-22. In fact, *Bigman* counsel never discussed or considered the need to examine this issue. AA1941-42 at 165:14-166:21.

The Nelson Report was never provided to the *Bigman* plaintiffs, AA1915 at 81:1-13; AA1955 at 20:2-6; AA1812 at 70:13-24, and was never made widely available to any fund beneficiaries. AA1945-1946 at 169:23-170:12; AA2849.

After completion of the Nelson Report in 1977, the parties continued to litigate the remaining issues in *Bigman*. *See* AA0946-53. Those issues were finally resolved in 1978. *Id.* The court, however, retained continuing jurisdiction. AA0095. In 1984, it granted the parties' stipulated petition for a minor amendment of the 1977 settlement. AA0095-96; *see also* AA1190-1193. In 1989,

it entered an order approving a stipulated loan payback agreement. AA1296 (order); AA1974-77 (motion). By this time, Eric Swenson, the lead plaintiffs’ attorney in *Bigman*, had switched sides and was representing the defendant, UNDC. See AA1977. This was the end of the *Bigman* case. AA2851.

### **STANDARD OF REVIEW**

Utah asserts that the standard of review to be applied in this appeal is *de novo* because both “application of *res judicata*,” and propriety of summary judgment are legal issues. Utah’s Br. at 34-35.

The Beneficiaries agree with Utah that purely legal issues—*i.e.*, whether Utah bears the burden of proof on privity, and whether the District Court should have considered conduct of counsel in determining privity—should be reviewed *de novo*.

The Beneficiaries disagree, however, that this standard also applies to factual issues—*i.e.*, whether as a matter of virtual or adequate representation the Beneficiaries were in privity with plaintiffs in the three prior cases. *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1276 (10th Cir. 1989) (“The determination of identity between litigants for the purpose of establishing privity

is a factual question.”) (internal quotation marks omitted).<sup>11</sup> On the contrary, factual issues should be reversed only if “clearly erroneous.” *Id.*

The clearly erroneous “standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *Trentadue v. United States*, 397 F.3d 840, 859 (10th Cir. 2005). Instead, “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Id.*

## **ARGUMENT**

### **I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT UTAH BORE THE BURDEN OF ESTABLISHING THE PRIVACY ELEMENT OF ITS *RES JUDICATA* DEFENSE.**

Utah asserts that the District Court erred when it concluded that Utah bore the burden of establishing the privacy element of its *res judicata* defense.<sup>12</sup> Utah’s Br. at 39-43 (concerning *Sakezzie* and *Jim*); *id.* at 55-56 (concerning *Bigman*). In light of the policy of finality behind class actions and *res judicata*, Utah argues

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<sup>11</sup> That the District Court decided these issues in the context of summary judgment does not convert these factual issues into legal ones. *See id.* at 1274, 1276 (reviewing privacy as factual issue even though privacy determination was made in the context of motion to dismiss treated as summary judgment).

<sup>12</sup> While this argument appears as part of Utah’s issue II (concerning adequacy of representation in *Sakezzie* and *Jim*) and as part of Utah’s issue III (concerning adequacy of representation in *Bigman*) the Beneficiaries address it first.

that it is fair to impose the burden of *disproving* privity on a party attacking a final judgment rather than imposing a burden to prove privity on a party seeking to rely on that judgment. *See generally id.* This is a legal issue subject to *de novo* review. *See United States v. Smith*, 133 F.3d 737, 746 (10th Cir. 1997) (“The allocation of burden of proof is a legal issue subject to *de novo* review.”).

Utah’s burden-shifting argument fails for two reasons. First, the argument cannot be considered here because it was not adequately preserved below. Second, the Tenth Circuit has adopted the generally applicable rule that a defendant must prove each element of his *res judicata* defense, including privity. If, however, this Court decides that the Beneficiaries did have a burden to disprove privity, the proper remedy is remand because the District Court never considered whether the Beneficiaries met such a burden.

**A. Utah Cannot Raise Its Burden-Shifting Argument Because That Argument Was Not Adequately Preserved Below.**

It is well-settled that “a party may not try the case on one theory and appeal on another.” *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 723 (10th Cir. 1993). Accordingly, “absent extraordinary circumstances, [the Court] will not consider arguments raised for the first time on appeal.” *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002). This is because the review of issues not

raised below undermines “the need for finality in litigation” and requires this Court to “hold everything accomplished below for naught.” *Lyons*, 994 F.2d at 721 (internal quotation marks and citations omitted).

In this case, Utah did not raise its burden-shifting argument in the briefing and oral argument leading up to the interlocutory order on appeal here. *See* AA2152-2205; AA2727-2808. Although it raised a similar argument in 2002, *see* AA1471-72, the District Court rejected it, *id.* at 1693, and Utah neither sought to appeal that ruling nor requested reconsideration.

Until this appeal, Utah appeared to have conceded that it bore the burden on the privity issue. Indeed, in briefing leading to this appeal, when the Beneficiaries stated: “Utah bears the burden of proving that the parties and the non-party beneficiaries in the prior lawsuits were adequately represented,” AA1745, Utah replied simply that it had “met the standard to establish adequacy of representation,” *id.* at 2185, by submitting “evidence [that] established that the named plaintiffs and their counsel in the *Sakezzie*, *Jim*, and *Bigman* cases were adequate.” *Id.*

Because Utah abandoned its burden-shifting argument in the proceedings below, it should not be permitted to raise that argument here. This is especially true in this appeal, because this is a discretionary interlocutory appeal under 28



U.S.C. § 1292(b). An appeal under 28 U.S.C. § 1292(b) “is from the *certified order*, not from any other orders that may have been entered in the case.” *United States v. Stanley*, 483 U.S. 669, 677 (1987) (emphasis in original). On Section 1292(b) review, “[t]he court of appeals may not reach beyond the certified order to address other orders made in the case.” *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996); *see also Stanley*, 483 U.S. at 677 (“court of appeals will not consider matters that were ruled upon in other orders”) (internal quotation marks omitted).

Because Utah did not argue in the context of the order on appeal here that it was the Beneficiaries’ burden to prove inadequate representation, it should not be permitted to do so in this limited interlocutory appeal.

**B. The District Court Correctly Concluded that Utah Bears the Burden of Proof on the Privity Element of its *Res Judicata* Defense.**

Like other courts, this Circuit has expressly held that: “Res judicata is an affirmative defense on which the defendant has the burden to set forth facts sufficient to satisfy the elements.” *Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997); *see also e.g., Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1171 (D.C. Cir. 2003) (“[A] party invoking [*res judicata*] has the burden of establishing its elements.”); *General Electric Co. v. Deutz AG*, 270 F.3d

144, 158 (3rd Cir. 2001) (“The party seeking to take advantage of [*res judicata*] has the burden of establishing it.”); *Piper Aircraft Corp. v. Teledyne Indus. Inc.*, 244 F.3d 1289, 1296 (11th Cir. 2001) (“At all times the burden is on the party asserting *res judicata* . . . to show that the later-filed suit is barred.”).

One of the elements of a *res judicata* defense is that “the parties must be identical or in privity.” *Nwosun*, 124 F.3d at 1257. In this case, it is undisputed that the named parties in *Sakezzie*, *Jim*, and *Bigman* were not the same as the parties here. AA2853 n.8. Privity, therefore, is a necessary element of Utah’s *res judicata* defense. In this case, Utah has argued that privity is established because plaintiffs in the prior litigation either virtually or adequately represented the Beneficiaries’ interests.

Because privity is an element of Utah’s *res judicata* defense, and because Utah seeks to establish privity through virtual or adequate representation, the District Court correctly concluded Utah had the burden to establish that the Beneficiaries were virtually or adequately represented in prior litigation. *See, e.g., Pedrina v. Chun*, 97 F.3d 1296, 1301-02 (9th Cir. 1996) (“In order to show privity between a non-party and a party to former litigation, the party who asserts that the

matter is barred by [*res judicata*] must demonstrate that the nonparty's interests and rights were represented and protected in the prior action."').<sup>13</sup>

**C. Imposing a Burden to Disprove Privity on the Beneficiaries  
Would Be Contrary to Established Tenth Circuit Precedent.**

While Utah acknowledges that a defendant generally carries the burden of establishing each element of its *res judicata* defense, *see* Utah's Br. at 42, it argues that an exception to this rule should be recognized when a plaintiff asserts lack of privity due to inadequate representation, *see id.* Under such circumstances, Utah asserts, a plaintiff "should bear the burden to prove *inadequate* representation as an element of [his] claim[]." *Id.* at 42, 43 (citing *Gonzalez v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973), *Brown v. Ticor*, 982 F.2d 386, 390-91 (9th Cir. 1992), and *Yankton Sioux Tribe v. Gambler's Supply, Inc.*, 925 F.Supp. 658, 667 (D.S.D. 1996)).

Utah's argument must be rejected because it relies wholly on out-of-jurisdiction cases and directly contradicts established Tenth Circuit precedent.

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<sup>13</sup> Utah asserts that the district court's reliance on *Pedrina* is erroneous because that case was not a class action and privity through adequate representation was not at issue. *See* Utah's Br. at 43 n.8. First, the District Court did not rely on *Pedrina* in the order at issue here. *See* AA2837-61. It relied on *Pedrina* only in its 2002 decision which Utah chose not to challenge and which is not part of this interlocutory appeal. *See* AA1693. Second, the fact that *Pedrina* was not a class action and did not involve a privity challenge does not negate the validity of its statement of the generally applicable rule that a defendant must prove each element of his *res judicata* defense.

Indeed, this Court has expressly held that: “Res judicata is an affirmative defense on which *the defendant has the burden* to set forth facts sufficient to satisfy the elements.” *Nwosun*, 124 F.3d at 1257 (emphasis added).

**D. If This Court Determines that the Beneficiaries Had a Burden to Disprove Privity, It Should Remand For Further Determination By the District Court.**

Utah implies that if this Court concludes that the burden to disprove privity should have been placed on the Beneficiaries, Utah necessarily prevails because the District Court already concluded that the Beneficiaries “have not established that the representation in *Sakezzie*, *Jim*, and *Bigman* was inadequate.” Utah’s Br. at 55 n.11 (citing AA1694). This argument is without merit because the ‘conclusion’ that Utah refers to was made in the context of a different summary judgment motion. The District Court, therefore, never considered whether the evidence submitted in connection with this summary judgment motion established *inadequacy* of representation.

First, the “conclusion” that Utah refers to was made in the context of the District Court’s 2002 ruling, which expressly declined to rule for either party on the issue of privity. *See generally* AA1694. In 2005, after several years of additional discovery, the parties again sought decision on the privity issue. This time, the parties submitted more than 1,000 pages of argument and evidence. *See*

*generally* AA1697-2717. The resulting decision is the decision at issue in this interlocutory appeal. *See* AA2837-2861. The District Court’s 2002 conclusion, therefore, is irrelevant in this appeal.

Second, in the decision on appeal here, the District Court never addressed whether the Beneficiaries had or could establish absence of privity. Instead, it expressly ruled that Utah “ha[d] the burden to establish that privity, or adequacy of representation, existed in the [three prior] cases.” AA2852. Ultimately, the district court concluded that Utah had failed to meet this burden. *See generally* AA2853-60. It did not address whether the Beneficiaries could have established the non-existence of privity had it been their burden to do so. *See generally* AA2837-61.

Accordingly, if this Court decides that the burden to *disprove* privity rests on the Beneficiaries, this case should be remanded to allow the District Court to determine in the first instance whether the Beneficiaries can meet such a burden. *E.g., Warknik v. Booher*, 425 F.3d 842, 843 (10th Cir. 2005) (remanding to permit examination by district court in the first instance).

**II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE THEORY OF VIRTUAL REPRESENTATION DID NOT ESTABLISH PRIVACY BETWEEN THE BENEFICIARIES HERE AND THE PLAINTIFFS IN THREE PRIOR CASES.**

Utah argues that the District Court erred in failing to find privity, under the doctrine of virtual representation, between the Beneficiaries here and the plaintiffs in three prior cases—*Sakezzie*, *Jim*, and *Bigman*.<sup>14</sup> Utah’s Br. at 33-40. Although Utah argued below, as it does here, that the doctrine of virtual representation applied to each of the prior cases, *see* AA2197-98, the District Court addressed only whether that doctrine applied with regard to *Bigman*, AA2858-60. With regard to the class actions, *Sakezzie* and *Jim*, the District Court utilized a different analysis—that of “adequate” representation. *Id.* at 2853-58. As explained in more detail below, the District Court was not required to consider Utah’s virtual representation theory with regard to *Sakezzie* and *Jim* and correctly concluded that the virtual representation theory did not support a finding of privity in *Bigman*.

**A. The District Court Did Not Err in Failing to Apply the Virtual Representation Theory to *Sakezzie* and *Jim* Because That Theory Does Not Apply to Class Actions.**

The virtual representation theory does not apply to *Sakezzie* or *Jim* because unlike *Bigman*, *Sakezzie* and *Jim* were pursued as class actions. In a class action,

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<sup>14</sup> Although this argument is Utah’s first, the Beneficiaries address it second.

the named plaintiffs *actually* represent the absent class members. *See* Restatement (Second) of Judgments § 41(1)(e) (“A person . . . is represented by a party who is: The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.”). Because a named party “actually” represents the absent parties in a class action, there is no need to determine whether the named party is a “virtual” representative. The theory of virtual representation, therefore, does not apply to class actions. *See, e.g.*, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction and Related Matters § 4457 p. 514-15 (2d ed. 2002) (differentiating virtual representation theory from adequate representation rule applied in class actions); *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003) (“‘Virtual representation’ . . . would permit the outcome of one *non-class suit* to control another . . .”) (internal citation omitted; emphasis added).

The District Court correctly applied the theory of adequate representation, rather than virtual representation, in determining whether privity had been established with regard to *Sakezzie* and *Jim*. It is well established that in class actions, privity between named and absent class members is dependent not on whether the named plaintiff was a “virtual” representative, but whether the named

plaintiff in fact “adequately represented” the absent parties interests. *See* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction and Related Matters § 4457 p. 514 (2d ed. 2002) (referring to “generally recognized rule that preclusion reaches [unnamed] class members only if in fact there was adequate representation”); *Garcia v. Bd. of Educ.*, 573 F.2d 676, 679-80 (10th Cir. 1978) (recognizing rule). Accordingly, it was not error for the District Court to conduct the privity analysis for *Sakezzie* and *Jim* under the theory of adequate representation rather than under the theory of “virtual” representation.

**B. If This Court Decides that the Virtual Representation Theory Should Have Been Applied to *Sakezzie* and *Jim*, it Should Remand That Issue for Determination by the District Court in the First Instance.**

In the opinion on appeal here, the District Court did not apply the virtual representation theory to either *Sakezzie* or *Jim*. *See generally* AA2837-61. This was appropriate not only because *Sakezzie* and *Jim* were class actions, *see* Section II(A) herein, but also because the theory of virtual representation is not recognized in the Tenth Circuit and the requirements of that theory cannot be established here, *see* Section II(C) herein. If, however, this Court decides that the theory of virtual representation should have been applied to *Sakezzie* and *Jim*, it should remand to



allow the District Court to apply that theory in the first instance. *E.g., Warknik*, 425 F.3d at 843.

**C. The Theory of Virtual Representation Does Not Support a Finding of Privity Between the Beneficiaries Here and the Plaintiffs in *Bigman*.**

Utah argues that the District Court erred in failing to find privity under the theory of virtual representation between the Beneficiaries here and the plaintiffs in *Bigman*.<sup>15</sup> Utah's Br. at 34-40. Specifically, Utah argues that privity is established under this theory simply because the Beneficiaries' legal interests in the Navajo Trust Fund are identical to those of previous plaintiffs, *id.* at 36, and this case is "an action to vindicate a public right," *id.* at 37.

The District Court's decision on this issue is factual and should be reversed only if clearly erroneous. *See Lowell Staats*, 878 F.2d at 1276 (even in the context of summary judgment, privity is a factual determination that "should not be reversed unless . . . clearly erroneous"); *E.E.O.C. v. Pemco Aeroplex, Inc.*, 383

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<sup>15</sup> Utah presents its virtual representation argument with regard to all three of the prior cases. *See generally* Utah's Br. at 34-40. As explained in Section II(A) above, however, the District Court applied this theory only to *Bigman*. The Beneficiaries, therefore, address the merits of the virtual representation theory only with regard to *Bigman*.

F.3d 1280, 1287 (11th Cir. 2004) (“Whether a party is a virtual representative of another is a question of fact.”).

**1. Utah’s Virtual Representation Argument Should Be Rejected Because That Theory is Not Recognized in the Tenth Circuit.**

Utah has failed to cite any case in which the Tenth Circuit recognized the virtual-representation theory, *see* Utah’s *Br.* at 35-40, and the Beneficiaries have been unable to find one. It appears, therefore, that this theory is not recognized in the Tenth Circuit. On this basis alone, the Court may reject Utah’s virtual-representation argument.

**2. The District Did Not Clearly Err in Concluding That the Virtual Representation Theory Does Not Support a Finding of Privity Between the Plaintiffs in *Bigman* and the Beneficiaries Here.**

Utah argues that the District Court erred in failing to find privity under the theory of virtual representation because the Beneficiaries’ legal interests are identical to those of previous plaintiffs, Utah’s *Br.* at 36, and this case is “an action to vindicate a public right,” *id.* at 37. Utah’s argument should be rejected for three reasons. First, Utah’s own cases establish that additional factors must be considered in determining virtual representation and Utah has failed to make any showing with regard to such factors. Second, while the circuits have widely varying virtual representation analyses, they are unanimous that factors besides identity of interest and a public right must be considered and Utah has failed to

present evidence on such additional factors. Third, even assuming that identity of interests and a public right are all that is required, Utah's claim fails because the interests of the prior and current litigants are not the same and this case is not an action to vindicate a public right.

- a. Utah's own cases establish that factors other than identity of interests and public right are to be considered and Utah has failed to make any showing with regard to such factors.**

Utah relies exclusively on *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996) and *Los Angeles Unified School District v. N.A.A.C.P.*, 714 F.2d 935 (9th Cir. 1983) to support its virtual representation argument.

These cases, however, recognize that more than simply identity of interest and a public right must be considered. Indeed, in *Tyus*, the Eighth Circuit expressly stated that while identity of interests and presence of a public issue were important, it would also consider “a close relationship between the prior and present parties[,] participation in the prior litigation[,] apparent acquiescence[,] whether the present party deliberately maneuvered to avoid the effects of the first action[,]” and “adequacy of representation.” 93 F.3d at 455. And in *Los Angeles Unified School District*, the Ninth Circuit considered whether the absent party was

“well represented.” 714 F.2d 935, 943 (9th Cir. 1983).<sup>16</sup> Since its decision in *Los Angeles Unified School District*, the Ninth Circuit has added additional considerations, including close relationship, substantial participation, and tactical maneuvering. *See Kourtis v. Cameron*, 419 F.3d 989, 996 (9th Cir. 2005).

Utah has failed to make the requisite showing under either *Tyus* or *Los Angeles School District*. Utah has not even alleged that it produced evidence establishing a close relationship between the Beneficiaries and the *Bigman* plaintiffs, that the Beneficiaries substantially participated in *Bigman*, or that the Beneficiaries tactically maneuvered to avoid the effects of the *Bigman* judgment. *See generally*, Utah’s Br. at 35-40, 55-59.<sup>17</sup>

Perhaps the most significant factor that Utah has failed to establish is adequacy of representation. *E.g.*, 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure Jurisdiction and Related Matters* § 4457 p. 530 (2d ed. 2002) (“if a judgment can bind members of a certified class

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<sup>16</sup> The Beneficiaries note that this opinion was withdrawn and superceded by an *en banc* decision reaching the same result. *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 750 F.2d 731, 736, 741 (9th Cir. 1985) (*en banc*). As explained more fully herein, however, the withdrawn opinion does not support Utah’s position here.

<sup>17</sup> For these same reasons, Utah has failed to establish that the plaintiffs in either *Sakezzie* or *Jim* virtually represented the Beneficiaries here.

only if class interests were adequately represented, a judgment resulting from a less protective procedure can rise no higher”).

In the Tenth Circuit, “adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were *vigorously pursued and protected* in the class action by qualified counsel.”

*Garcia*, 573 F.2d at 680 (emphasis added). The Beneficiaries’ interest here—an interest in securing a full accounting by the State of Utah of the Navajo Trust Fund—was not vigorously pursued and protected in *Bigman*. Indeed, although the *Bigman* complaint contained an accounting cause of action, AA1846, plaintiffs’ counsel never intended to pursue an actual accounting of the Trust Fund, AA1936-37 at Deposition of Eric Swenson, 160:4-10 and 161:6-18; AA1944 at 168:11-25. Instead, counsel intended to address discrete activities and practices of the Utah Navajo Development Council (“UNDC”), a private Utah corporation to which Utah delegated trust administration duties. AA1907-08 at 50:24-51:6; AA1910 at 68:9-13; AA 1918 at 104:10-20; AA1911-1913 at 74:23-76:1. Such claims are not “a public right” based on a constitutional function of the executive branch of government.

Just seven months after the complaint in *Bigman* was filed, the case was settled. AA1982; AA2849. The plaintiffs agreed to abandon all but two claims,

both unrelated to this litigation, in exchange for an investigation into certain discrete transactions of, and a management audit of UNDC. *See* AA1982-1988.

The parties retained Dr. Roger Nelson, PhD. to perform the investigation mandated by the settlement. AA2849. The result of Dr. Nelson's investigation was a detailed report, entitled: A Management and Investigatory Review of the Utah Navajo Development Council. *See* AA0118-0648. That report is referred to herein as the "Nelson Report."

While the Nelson Report uncovered numerous problems with UNDC and UNI, such as conflicts of interest and self dealing, *see* AA0589-0648, it was not a formal accounting like that sought here. *See id.*; Statement of Facts, *supra*. It focused almost exclusively on the operations of UNDC and UNI. *Id.* More significantly, it simply was not an accounting in which a comprehensive review of all receipts and disbursements occurring within a specified time period are examined to ensure beneficiaries that their money is being administered per the terms of a specific trust instrument. *See id.*

Under these circumstances, it cannot be said that the interest of the Beneficiaries here—securing a full fiduciary accounting of the Navajo Trust Fund—were vigorously pursued and protected in the *Bigman* litigation.<sup>18</sup>

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<sup>18</sup> Nor were the Beneficiaries adequately represented in the *Sakezzie* and *Jim* (continued...)

Accordingly, even under *Tyus* and *Los Angeles Unified School District*, Utah has failed to establish virtual representation of the Beneficiaries' interests in the *Bigman* case.<sup>19</sup>

- b. Circuits are unanimous that more than identity of interest and public right must be considered in the virtual representation analysis and Utah has failed to establish any of those factors.**

Virtual representation is a flexible theory that does not lend itself to a consistent elemental test. *See, e.g., Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 761 (1st Cir. 1994) (“virtual representation is best understood as an equitable theory rather than as a crisp rule with sharp corners and clear factual predicates”); *Tice v. Am. Airlines*, 162 F.3d 966, 970 (7th Cir. 1998) (“the doctrine of virtual representation is amorphous”); *Tyus*, 93 F.3d at 455 (“there is no clear test for determining the applicability of the [virtual representation] doctrine.”); *Kourtis*, 419 F.3d at 996 (“The case law applying the virtual representation doctrine has been appropriately characterized as ‘episodic’ and lacking any ‘clear pattern,’ and it is therefore difficult to distill a generally applicable framework from the relevant precedent”); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,

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<sup>18</sup>(...continued)  
litigation. *See* Sections IV(B) and IV(C) herein.

<sup>19</sup> This same reasoning defeats Utah’s argument that the Beneficiaries were adequately represented in *Sakezzie* and *Jim*.

Federal Practice & Procedure Jurisdiction and Related Matters § 4457 p. 513 (2d ed. 2002) (describing virtual representation cases as establishing “no clear pattern”).

While the theory of virtual representation is vastly different in each circuit, the circuits agree on one thing—more must be considered than simply an identity of interests and a public right. *E.g.*, *Gonzalez*, 27 F.3d at 761-763 (considering notice, consent to be bound, express or implied legal relationship, familial relationship, tactical maneuvering, and adequacy of representation); *Doctor’s Associates, Inc. v. Reinert & Duree*, 191 F.3d 297, 304-05 (2nd Cir. 1999) (considering special relationship, control of litigation, notice, sufficiency of representation, understanding to be bound, intent to bind others, and court action to protect absent parties); *Moldovan v. Great Atlantic & Pacific Tea Co., Inc.*, 790 F.2d 894, 899 (3rd Cir. 1986) (examining whether previous litigants had fiduciary duty or obligation to protect interests of subsequent litigants); *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005) (examining whether first litigant was accountable to subsequent litigants and whether representation of non-party litigants was at least tacitly approved by the court); *United States v. Texas*, 158 F.3d 299, 306 n.6 (5th Cir. 1998) (requiring an express or implied legal relationship); *Becherer v. Merrill Lynch*, 193 F.3d 415,



424 (6th Cir. 1999) (*en banc*) (requiring express or implied legal relationship in which parties to first suit are accountable to subsequent parties); *E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287 (11th Cir. 2004) (considering adequacy of representation, participation in earlier litigation, consent to be bound, tactical maneuvering, and relationships between previous and current parties); *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) (virtual representation may be established when there is “an express or implied legal relationship that makes a party to the prior action accountable to a non-party”); *W. Coal Traffic League v. Interstate Commerce Comm’n*, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (considering prior participation and adequacy of representation).<sup>20</sup>

Utah has failed to allege or establish the additional factors deemed relevant by these other circuits.<sup>21</sup> Specifically, Utah fails to point to any evidence of an express or implied legal relationship between the *Bigman* plaintiffs and the

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<sup>20</sup> The Seventh Circuit has expressly rejected the virtual representation theory, *see In re Bridgestone/Firestone*, 333 F.3d at 769 (noting rejection of theory), and the Tenth Circuit has yet to address it, *see* Section II(C) herein.

<sup>21</sup> Because the Beneficiaries have already addressed Utah’s failure to allege or establish factors relevant to the virtual representation analysis in the Eighth and Ninth Circuits, the Beneficiaries do not readdress those factors in this paragraph. In this paragraph, the Beneficiaries address only whether Utah has alleged or established additional factors not considered in the Eighth and Ninth Circuits but deemed relevant in other circuits.

Beneficiaries, court efforts to protect the Beneficiaries' interests, or court recognition that the *Bigman* plaintiffs were proceeding on behalf of persons besides themselves. *See* Utah's Br. at 35-40, 55-59. Nor does it point to any evidence that the Beneficiaries controlled the *Bigman* litigation or understood that they would be bound thereby. *See id.* While Utah does assert that the Beneficiaries received notice of the litigation, Utah's Br. at 39 n.5, 56-57, it does not argue that this notice conveyed the substance of the claims involved, indicated that the Beneficiaries had a right to appear, or notified the Beneficiaries that they would be bound by any judgment rendered in the case. *Cf.* Fed. R. Civ. P. 23(c)(2)(B) (outlining requirements for formal notice in 23(b)(3) class actions).

Because Utah's own cases, and cases from all other circuits require consideration of more than simply identity of interest and a public right to justify virtual representation, and because Utah has failed to present evidence or argument concerning any factor other than identity and a public right, the District Court did not clearly err in deciding that Utah failed to support its virtual representation theory here.<sup>22</sup>

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<sup>22</sup> Because Utah's claim fails under any construction of the virtual-representation theory, it is unnecessary to decide whether that theory should be adopted here. If the Court does adopt the theory, however, it should be careful to adopt a version that is not overly broad. *See, e.g., Gonzalez*, 27 F.3d at 760 (discussing need to narrowly construe doctrine); *Martin*, 407 F.3d at 651 (same); (continued...)

- c. **Even under its own virtual representation theory, Utah’s claim fails because the Beneficiaries’ interests are not the same as the interests of the *Bigman* plaintiffs and this is not an action to vindicate public rights.**

Even if this Court were to adopt Utah’s virtual-representation theory—that virtual representation requires only identity of interests and a public right—Utah’s claims would still fail because neither of these factors can be established here.

First, as explained in more detail in Section IV(A) herein, the Beneficiaries have a different interest in this litigation than the *Bigman* plaintiffs had in the *Bigman* litigation. *See* Section IV(A) herein (relying on *Hansberry v. Lee*, 311 U.S. 32 (1940)).

Second, this case does not concern a public right.<sup>23</sup> For purposes of virtual representation, a “public right” is a right “shared in common with the public.” *See Tyus*, 93 F.3d at 457 (defining “private” right as right not shared with the public). In another context, the Supreme Court has defined a public right as a right that “arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or

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<sup>22</sup>(...continued)  
*Tice*, 162 F.3d at 973 (same).

<sup>23</sup> Nor did the prior case, *Bigman*, concern such a public right. In fact, the relief awarded in that case was against two private corporations, UNDC and UNI, not against the state of Utah. *See* Statement of Facts, *supra*.

legislative departments.” *Granfinanciera v. Nordberg*, 492 U.S. 33, 51 n.8 (1989) (internal quotation marks omitted).

Here, the Beneficiaries’ interest in the Navajo Trust Fund is a private right, not a public one. The Beneficiaries’ right is not shared with the public as a whole. Instead, it is shared only with Navajos in San Juan County Utah, not with Utahns as a whole, nor with Indians as a group, nor with the Navajo Nation, or members of the Navajo Nation generally. *See* 47 Stat. 1418 (1933), *as amended by* Pub. L. No. 90-306, 82 Stat. 121 (1968) (defining beneficiary class); *see also Pelt v. Utah*, 104 F.3d 1534, 1545 (10th Cir. 1996) (concluding that Navajo Nation has no interest in Navajo Trust Fund). In addition, the Beneficiaries’ right does not arise as a result of Utah’s performance of its constitutional, executive, or legislative functions. Instead, it arises as a result of federal legislation imposing a private trusteeship between the State of Utah and the Beneficiaries. 47 Stat. 1418 (1933), *as amended by* Pub. L. No. 90-306, 82 Stat. 121 (1968) (establishing relationship); *Pelt*, 104 F.3d at 1544 (concluding that Act established fiduciary relationship between the State of Utah and the Beneficiaries).

Contrary to Utah’s assertion, *see* Utah’s Br. at 36-38, the Supreme Court’s conclusion that interests in the Navajo Trust Fund are not property interests within the meaning of the Fifth Amendment is of no import. The fact that an interest is

not protected by the Fifth Amendment does not convert a suit regarding that interest into an action to vindicate a public right. For instance, a person may not have a Fifth Amendment property interest in continued employment, but that does not mean that a lawsuit regarding his employment necessarily implicates “public rights.” On the contrary, the public as a whole is generally disinterested in such a suit whether or not a Fifth Amendment right is at issue.

**III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ADEQUACY OF REPRESENTATION IS IN PART DEPENDENT ON WHETHER CLASS COUNSEL IN FACT VIGOROUSLY PURSUED AND PROTECTED THE ABSENT PARTIES’ INTERESTS.**

Utah argues that the District Court erred in considering the performance of class counsel in determining whether the Beneficiaries were adequately represented in *Sakezzie* and *Jim* because the only consideration relevant to that inquiry is whether the plaintiffs in the prior and current actions share the same interests. Utah’s Br. at 44-51.<sup>24</sup> This is a legal question that is reviewed *de novo*.

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<sup>24</sup> In its brief, Utah presents this argument under two separate headings: II(B)—“Adequate representation is determined by examining the identity of interests between class representatives and absent class members”; and II(C)—“The district court erroneously conducted a qualitative evaluation of class counsel’s performance in *Sakezzie* and *Jim*.” The Beneficiaries interpret this as one argument—*i.e.*, the district court erred in considering actual performance of counsel because the only relevant consideration is identity of interests between prior and current plaintiffs. In this Answer Brief, therefore, the Beneficiaries address Utah’s arguments II(B) and II(C) as one.

*See, e.g., S. Colo. MRI, LTD v. Med-Alliance, Inc.*, 166 F.3d 1094, 1100 (10th Cir. 1999) (questions of law are reviewed *de novo*).

Utah's argument should be rejected because the Tenth Circuit has expressly held that adequacy is dependent on whether the absent party's interests were *in fact* vigorously pursued and protected. For purposes of this inquiry, class counsel's performance is inseparable from that of the named plaintiffs. Thus, it is entirely appropriate to examine class counsel's performance in determining whether absent parties' interests were adequately represented in previous class-action litigation.

**A. The District Court Correctly Concluded That Adequacy of Representation Requires Consideration of the Actual Conduct of the Litigation.**

While Utah recognizes this Court's holding that adequate representation is dependent on whether the interests of the absent parties "were vigorously pursued and protected," *Garcia v. Bd. of Ed.*, 573 F.2d 676, 680 (10th Cir. 1978), it asserts that actual conduct of the litigation is unimportant because "[v]igorous pursuit and protection" is determined by identity of interests between the previous and current plaintiffs. Utah's Br. at 44.

First, Utah appears to be confusing the adequacy inquiry upon initial class certification with the adequacy inquiry following final judgment.

Utah is correct that at the outset of a class action, a court must necessarily concentrate on the identity of interests between named and absent class members in determining whether the named plaintiffs will “adequately represent” the absent parties’ interests. *See, e.g., Gonzalez v. Cassidy*, 474 F.2d 67, 73 (5th Cir. 1973) (referred to herein as “*Cassidy*”).

But once the case proceeds to final judgment and is asserted as part of a *res judicata* defense, the adequacy inquiry changes focus. At that point, the question is not whether the interests are aligned such that the named parties had an incentive to vigorously pursue the absent parties’ interests, but whether the absent parties’ interests were *in fact* vigorously pursued and protected. *E.g., id.* at 73 (examining “conduct of entire suit”);<sup>25</sup> *Garcia*, 573 F.2d at 680 (examining whether interests “were vigorously pursued and protected”); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (“members of a class not present as parties to the litigation may be bound by the judgment where they are *in fact* adequately

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<sup>25</sup> Utah asserts that the *Cassidy* opinion turned not on whether the absent parties’ interests were *in fact* vigorously pursued and protected, but whether a conflict developed between the named and absent parties’ interests. This is incorrect. Utah’s Br. at 51 n.9. The Court found lack of adequate representation because the named plaintiff failed to appeal, not because his interests differed from those of the absent parties. *See Cassidy*, 474 F.2d at 76. That *Cassidy* may have been distinguished in a subsequent case, which has since been overruled, involving different facts than those at issue here or in the *Cassidy* case, *see* Utah’s Br. at 51 n.9, does not affect this conclusion.

represented by parties who are present.”) (emphasis added); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure Jurisdiction and Related Matters § 4455 at 448 (2d ed. 2002) (in the context of preclusion, even if there is no divergence of interests, the representatives must provide representation that is in fact adequate).

The adequacy inquiry following final judgment “necessarily requires a hindsight approach to the issue of adequate representation, and in no way reflects on the [district] court’s conclusion [at the outset] that the [class representative] would adequately represent the class.” *Cassidy*, 474 F.2d at 73 n.11.

Accordingly, in this case, it was appropriate for the District Court to consider the actual conduct of the *Sakezzie* and *Jim* litigation in determining whether the Beneficiaries were adequately represented in those cases.

Second, neither of Utah’s cases establish that in the Tenth Circuit, identity of interests is the sole criterion for establishing adequate representation following final judgment.

While *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 106-07 (2nd Cir. 2005) appears to support Utah’s argument, it cannot help Utah here because it is directly contrary to this Court’s decision in *Garcia*. In *Wal-Mart Stores*, the Second Circuit states: “Adequate representation of a particular claim is



established mainly by showing an alignment of interests between class members, not by proving vigorous pursuit of that claim.” 396 F.3d at 106-07. In direct contrast, this Court’s decision in *Garcia* states: “adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were *vigorously pursued and protected* in the class action by qualified counsel.” 573 F.2d at 680.

The Fifth Circuit’s decision in *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979) is little help. That case simply notes that identity of interests “should be considered” in the adequacy analysis. *Fowler*, 608 F.2d at 1058. It does not reach the question whether actual conduct of the litigation may also be considered, apparently because the plaintiff did not challenge the judgment on that ground. *Id.* at 1058-59.

**B. The District Court Correctly Concluded that Counsel’s Performance Could Be Considered In Determining Whether the Beneficiaries’ Interests Were Vigorously Pursued and Protected.**

Utah appears to argue that the manner in which the class attorney litigated a case cannot be considered in determining whether, in that case, the interests of absent class members were vigorously pursued and protected. *See generally* Utah’s Br. at 44-51.

The only persons who have the ability to vigorously pursue and protect interests are the named plaintiffs and the attorney representing the class. As Utah itself recognized in its briefing below, “for purposes of determining adequate representation[,], the performance of the class lawyer is inseparable from that of the class representative.” AA2187 (citing *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002)). In *Culver*, the Seventh Circuit explained: “Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is [*sic*] sheer sophistry.” 277 F.3d at 913 (internal quotation marks omitted; alteration in original); *accord Garcia*, 573 F.2d at 680 (“adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were vigorously pursued and protected in the class action *by qualified counsel*.”).

Accordingly, it was not error for the District Court to rely on the conduct of class counsel in determining whether the Beneficiaries were adequately represented in *Sakezzie* and *Jim*.

Utah erroneously relies on *Los Angeles Unified School District v. NAACP*, 714 F.2d 935, 941 (9th Cir. 1983), for the proposition that counsel’s performance need not be considered because all that matters is that the claim was actually

litigated. Utah’s Br. at 45. What Utah fails to appreciate is that the Ninth Circuit’s statement on this point has nothing to do with the adequacy inquiry. It is stated in the context of another element of *res judicata*—whether the previous and subsequent cases involve the same cause of action. *Los Angeles School District*, 714 F.2d at 940-42. That element is not at issue here. *See* AA2840.

Utah next relies on *Nwosun*, 124 F.3d at 1258 for the proposition that one should not second-guess the manner in which a claim was litigated because this would amount to “speculative gymnastics.” Like *Los Angeles School District*, *Nwosun* did not address the adequacy element of *res judicata*. Instead, it addressed a separate element—whether the subsequent claim could have been brought in the prior proceeding. *Nwosun*, 124 F.3d at 1258. In *Nwosun*, the Court refused to engage in “speculation” concerning what the first court would have done had certain claims been brought, not as to whether counsel’s trial tactics were appropriate. *Id.*

Contrary to Utah’s assertions, the District Court here was not “second-guessing” class counsel’s litigation strategy or tactics in *Sakezzie* or *Jim*. Instead, it was simply recognizing counsel’s blatant lack of vigor which ultimately resulted in the dismissal of both cases for failure to prosecute. No second-guessing or

speculative gymnastics are required to conclude that such conduct simply does not amount to adequate representation.

**C. Utah May Not Rely on the District Court’s Consideration of the Conduct of Class Counsel to Obtain Reversal Here Because Utah Invited the Court to Consider Such Conduct.**

In this appeal, Utah argues that “the district court erroneously conducted a qualitative evaluation of class counsel’s performance in *Sakezzie* and *Jim*, ” Utah’s Br. at 49, that “[a] court should not focus on whether decisions made by class counsel in the prior litigation were, in the court’s view, appropriate to a full and adequate resolution of a claim,” Utah’s Br. at 45, and “when evaluating a claim of inadequate representation, it is not appropriate for a court to determine whether it agrees with the litigation decision of the class representatives or their counsel,” Utah’s Br. at 47.

Under the invited error doctrine, Utah may not succeed on this argument. “The invited error doctrine . . . prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error.” *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1229 (10th Cir. 2003) (internal quotation marks omitted).

In briefing before the District Court, Utah argued that: the “adequacy of representation” standard “looks at the role of named plaintiffs *and the role of the*

*counsel.*” AA2186; and that “although the named plaintiffs have a responsibility to the absent beneficiaries, for purposes of determining adequate representation the performance of the class lawyer is inseparable from that of the class representative.” AA2187. Indeed, three subsections of Utah’s summary judgment brief—Adequacy of counsel, Qualifications of prior counsel, and Performance of counsel—were dedicated to discussions regarding previous counsel. AA2188-89. While Utah did state that “incentive to litigate,” and “alignment of interests,” was important, it dedicated significant attention to the actual performance of each attorney in each of the prior cases. AA2189-92.

Because Utah argued below that prior counsel’s performance was relevant to the adequacy determination, under the doctrine of invited error, Utah should not be permitted to argue on appeal that consideration of such performance was error.

#### **IV. THE DISTRICT COURT DID NOT CLEARLY ERR IN DETERMINING THAT PLAINTIFFS IN *SAKEZZIE* AND *JIM* FAILED TO ADEQUATELY REPRESENT THE BENEFICIARIES’ INTERESTS.**

Utah next argues that the District Court erred in concluding that the Beneficiaries’ interests were not adequately represented in *Sakezzie* or *Jim*. Utah’s Br. at 47-48. This is a factual determination which is reviewed for clear error. *Lowell*, 878 F.2d at 1276 (even in the context of summary judgment, privity is a factual determination that will be reversed only if clearly erroneous).

In the Tenth Circuit, “adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were *vigorously pursued and protected* in the class action by qualified counsel.” *Garcia*, 573 F.2d at 680 (emphasis added). In both *Sakezzie* and *Jim*, the plaintiffs had different interests than the Beneficiaries here, failed to secure accountings, and obtained no monetary relief. After significant periods of inaction, both *Sakezzie* and *Jim* were dismissed for failure to prosecute. Under such circumstances, the District Court did not clearly err in concluding that the plaintiffs in both *Sakezzie* and *Jim* failed to vigorously pursue and protect the Beneficiaries’ interests.

**A. Contrary to Utah’s Assertions, the Beneficiaries Here Have Interests Different from Those of the Plaintiffs in Previous Cases.**

Throughout its brief, Utah argues that because the Beneficiaries here and the prior plaintiffs enjoyed the same legal interests in the Navajo Trust Fund, the prior plaintiffs necessarily served as adequate representatives for the Beneficiaries. *E.g.*, Utah’s Br. at 37, 39. While Utah is correct that each of the Navajo Trust Fund’s beneficiaries enjoys the same legal “interest” in the Trust Fund, this does not mean that all Trust Fund beneficiaries have the same “interest” in Trust Fund litigation. The parties’ litigation interests, not their legal interests, are what is relevant for purposes of *res judicata*.

In *Hansberry v. Lee*, 311 U.S. 32 (1940), the Supreme Court made clear that for purposes of *res judicata*, the relevant inquiry is not whether the parties' *legal* interests are the same, but whether their interests in the *litigation* are the same. *Hansberry* involved a collateral attack on a prior class action to enforce racially restrictive covenants on use of real property. *Id.* at 37-38. The plaintiffs in the first suit sought to enforce the restrictive covenant. *Id.* at 39. The subsequent litigants challenged the covenant on the ground that it was invalid. *Id.* at 38. Although the original and subsequent litigants enjoyed the same *legal* interest—a racially restrictive covenant—the Court found their interests in the *litigation* to be different. Specifically, the Court noted that the first group of litigants sought to enforce the covenant and the second sought to avoid it. *Id.* at 44. Accordingly, the Court found, the original litigants could not have adequately represented the interests of the subsequent litigants. *Id.* at 45-46. The subsequent litigants, therefore, were not bound by the judgment in the first action. *Id.* at 44-46.

Here, while the Beneficiaries and the prior plaintiffs have the same *legal* interest in the Navajo Trust Fund, they have different *litigation* interests. The Beneficiaries are interested in securing: (1) a full and accurate accounting of decades of income and disbursements from the Navajo Trust Fund; and (2) reimbursement to the Navajo Trust Fund for undocumented or improper

disbursements and income that should have been but was not received. *See generally* AA1298-1323. This claim has an estimated value of approximately \$150,000,000. Exhibit A at 11. The plaintiffs in each of the previous cases neither expressed an interest in nor vigorously pursued such a claim.

Indeed, the plaintiffs in *Sakezzie* were interested only in prospective relief. Exhibit B at 12-13. They expressly disclaimed any interest in past transactions, *see id.*, did not seek verification of income received by the Navajo Trust Fund, and did not seek monetary compensation for disbursements improperly made and income not received, *see generally* AA0733-35; Statement of Facts (“SOF”), *supra*. The *Sakezzie* plaintiffs abandoned their limited accounting claim after having received only summary reports in response to interrogatories. *See generally* AA2096-2100 (first answer to interrogatories); AA0107-17 (second answer to interrogatories); AA2068 (dismissal for failure to prosecute); SOF, *supra*.

Like the plaintiffs in *Sakezzie*, the plaintiffs in *Jim* were not interested in obtaining a complete accounting and reimbursement to the Navajo Trust Fund. Instead, they were interested in testing the constitutionality of the 1968 amendment to the 1933 Act. *See* AA2844-45; SOF, *supra*. When that issue was resolved, the plaintiffs allowed their accounting claim to be dismissed, AA0919,



after receiving only a limited selection of financial documents and meeting minutes, *see generally* AA0829-46; AA0851-891; SOF, *supra*.

Finally, the plaintiffs in *Bigman* were not interested in a full accounting. Instead, they were interested in the actions of UNDC. AA1936-37; AA1944; AA1907-08; AA1910; AA1918; AA1911-13; SOF, *supra*. The relief that the *Bigman* plaintiffs sought and obtained was a management audit of several discrete transactions of UNDC. AA1982-88; AA1919; AA1992; SOF, *supra*.

Accordingly, under *Hansberry*, the Beneficiaries’ “interests” are different from those of prior plaintiffs for *res judicata* purposes.

**B. The District Court Did Not Clearly Err in Determining That the *Sakezzie* Plaintiffs Failed to Adequately Represent the Beneficiaries’ Interests.**

Utah argues that the Beneficiaries’ interests were adequately represented in *Sakezzie* because “the class representative successfully prosecuted their claim for an accounting,” Utah’s Br. at 47, and although the case was dismissed for failure to prosecute, “both the plaintiffs’ representative and their attorney remained engaged in a continuing effort to protect the beneficiaries.” Utah’s Br. at 48.

In the Tenth Circuit, “adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were

*vigorously pursued and protected* in the class action by qualified counsel.”

*Garcia*, 573 F.2d at 680 (emphasis added).

Contrary to Utah’s assertions, the facts demonstrate that the *Sakezzie* plaintiffs neither obtained a full accounting nor vigorously pursued and protected the Beneficiaries’ interests. Instead, they allowed the suit to be dismissed for failure to prosecute after having received only fifteen pages of limited financial information in two sets of answers to interrogatories.

After the initial *Sakezzie* petition was filed, Utah provided answers to interrogatories containing what Utah characterizes as “accounting information.” Utah’s Br. at 14. This “accounting information,” however was summary in nature, totaled only five pages, contained no information regarding income to the fund or verification thereof, and included no backup documentation such as receipts or vouchers. *See* AA2096-2100. When the district court concluded that these answers to interrogatories and an opportunity to inspect Utah’s records<sup>26</sup> mooted any accounting claim, AA0761-62, the plaintiffs neither objected, AA2842, nor appealed, AA0780.

Thereafter, the *Sakezzie* plaintiffs filed a second petition seeking, among other things, monthly accounting reports for the Navajo Trust Fund. AA0764-70.

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<sup>26</sup> *See also* Utah’s Br. at 14 (alleging support for ruling in opportunity to inspect records).

While this petition was pending, Utah again filed answers to interrogatories containing what it calls “accounting information.” *See* AA0107-17. These answers, however, were summary in nature, totaled only ten pages, and contained no verification of income or supporting documentation such as receipts or vouchers. *See id.* Ultimately, the second petition resulted in an order requiring Utah to make monthly reports. AA0789.

When Utah again failed to comply with its reporting obligations, plaintiffs filed a third petition. AA2062-66. The record reveals no further activity for more than a year, AA2844, when the district court ordered plaintiffs to show cause why the petition should not be dismissed, AA2068. Plaintiffs’ counsel did not attend the show cause hearing and the petition was dismissed for failure to prosecute. *Id.* Counsel’s motion to reinstate the petition was denied but the court “granted leave to the plaintiffs to file an amended petition.” AA1580. Plaintiff’s counsel failed to do so. AA2844. This ended the *Sakezzie* litigation. *Id.*

Utah implies that the decision not to refile an amended petition in *Sakezzie* was a reasonable tactical decision because the attorney was waiting to gather more information to support the suit. Utah’s Br. at 18, 48-49. The letter relied on to support this proposition, however, was written July 31, 1968, more than three years after the third petition was dismissed. *See* AA2224. Moreover, that letter

was written in response to one written by the Honorable Willis W. Ritter, United States District Judge, on July 8, 1968, to the same non-beneficiary, in which Judge Ritter suggests that the beneficiaries might fire the attorney who represented them in *Sakezzie*, and declares that “it is most urgent that your new attorney get on the job and vigorously proceed to take care of this problem. Any delay is likely to be detrimental to the interests of [the trust beneficiaries].” AA2271.

Under these facts, the District Court did not clearly err in concluding that the *Sakezzie* plaintiffs failed to vigorously pursue and protect the Beneficiaries’ interests in obtaining a full accounting of the Navajo Trust Fund.

**C. The District Court Did Not Clearly Err in Determining That the *Jim* Plaintiffs Failed to Adequately Represent the Beneficiaries’ Interests.**

Utah argues that the Beneficiaries were adequately represented in *Jim* because the plaintiffs “achieved the objectives of the litigation,” and “received an accounting from the State that they had represented to the court was acceptable.” Utah’s Br. at 48. Utah asserts: “Far from demonstrating inadequate representation, [the *Jim* plaintiffs’ and counsel’s] decision not to pursue litigation any longer was likely sound.” *Id.* at 47-48.

In the Tenth Circuit, “adequate representation can best be resolved by determining whether the interests of those who would attack the judgment were

*vigorously pursued and protected* in the class action by qualified counsel.”

*Garcia*, 573 F.2d at 680 (emphasis added).

Contrary to Utah’s assertions, the facts demonstrate that the *Jim* plaintiffs never secured a full accounting, that the “acceptable” accounting was simply an interim measure, and that the decision not to pursue further litigation was unreasonable.

In the course of the *Jim* litigation, Utah produced what it calls an “accounting and abstract.” *See* Utah’s Br. at 21-24. This “accounting and abstract” consisted of minutes from the Utah Board of Indian Affairs, copies of certain financial and audit statements, and an abstract. AA2012-13 (filing “accounting”) & AA0850-91 (recognizing receipt of “accounting” and attaching same); AA0829-0846 (abstract). It was not a complete fiduciary accounting, however, because it included no backup or supporting documentation such as vouchers, receipts, cancelled checks, or production records from the oil and gas wells themselves. *See generally* AA0829-46; AA0851-891; AA1883 at 25:1-13; AA0657-64.

While Utah is correct that at one point plaintiffs’ attorneys stated that this so-called “accounting” was acceptable, *see* Utah’s Br. at 48, Utah fails to note that at that time, the parties had stipulated that this summary information could be filed

*in lieu* of a formal accounting but that this would not affect the court's right to order a full accounting in the future. AA0829; AA2847.

Thereafter, in the context of a hearing on plaintiffs' counsel's motion for an award of attorney fees, plaintiffs' counsel indicted that a full accounting had yet to be performed. He suggested, however, that the court might still grant the fee motion and dismiss *Jim* without prejudice. AA0905 at 7:17-19; AA0911 at 13:18-25. The district court disagreed:

I think we should pursue the accounting matter of course. I think that is the most important part of the lawsuit, really. The legal points are settled now. Let's have an accounting of what the state's been doing with the Indians' money. That's the short question that we need to go into and let's pursue it.

AA0915.

Notwithstanding this clear direction from the Court, no further action was taken until December 1978, when counsel were served with an order to show cause why *Jim* should not be dismissed for failure to prosecute. AA0917; AA2847. No cause was shown and the case was dismissed with prejudice. AA0919. This ended the *Jim* litigation. See AA2848.

Under these facts, the District Court did not clearly err in concluding that the *Jim* plaintiffs failed to vigorously pursue and protect the Beneficiaries' interests in obtaining a full accounting of the Navajo Trust Fund.

**D. The District Court Appropriately Considered the Lack of Formal Notice to Unnamed Class Members in Determining that the Beneficiaries Were Not Adequately Represented in *Jim*.**

Utah argues that the District Court's reliance on the lack of formal notice in *Jim* was unwarranted because formal notice was not required and many beneficiaries were informally notified. Utah's Br. at 52-54. The Beneficiaries recognize that the District Court had discretion under the Rules of Civil Procedure to dictate the manner in which notice would be given. Nevertheless, the Beneficiaries maintain that in this case, that discretion was abused.

Here, the trial court judge decided not only that formal notice would not be required, but that no notice whatsoever need be given. AA0811-12. The judge based this conclusion on alleged "notoriety" of the case. *Id.* The attorney for the *Jim* plaintiffs recalls no evidence, written or oral, presented to establish notoriety of the *Jim* litigation. AA1874 at 16:3-21. Nor do the court records establish the alleged notoriety. *See* AA2857. In addition, there is no evidence that any notice unnamed class members may or may not have received was sufficient to fully inform them of the nature of the claims or to convey the potentially binding nature of the *Jim* litigation on the absent parties' rights.

Under these circumstances, it was appropriate for the District Court to consider the lack of formal notice to absent class members in determining whether absent class members were adequately represented in *Jim*.

**E. The District Court Did Not Err in Considering Abandonment of Claims in Determining Whether Representation in *Sakezzie* and *Jim* Was Adequate.**

Utah appears to argue that abandonment of accounting claims in *Sakezzie* and *Jim* does not render prior representation inadequate because in those cases, the plaintiffs first received an “accounting” and as a result, abandoning the claims was reasonable. Utah’s Br. at 44-49 (relying on *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2nd Cir. 2005)).

Utah correctly notes that in the context of settlement, abandonment of claims can be a reasonable litigation tactic that does not necessarily support a finding of inadequate representation. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 109-113. In *Sakezzie* and *Jim*, however, the accounting claims were not abandoned in the context of settlement. Instead, they were simply dismissed for failure to prosecute. As a result, the plaintiffs in *Sakezzie* and *Jim* received nothing in exchange for those claims.

While this may have been a reasonable litigation decision had the plaintiffs already received adequate fiduciary accountings, in *Sakezzie* and *Jim*, they had



not. As explained in detail in Sections IV(B) and IV(C) herein, the minimal financial documents produced in *Sakezzie* and *Jim* did not even remotely resemble the type of trustee accounting sought here. Accordingly, it was not reasonable for the *Sakezzie* and *Jim* plaintiffs to allow their accounting claims to be dismissed or to accept the dismissal of such claims without objection or appeal.

**V. THE BENEFICIARIES WERE NOT IN PRIVACY WITH THE PLAINTIFFS IN *BIGMAN*.**

Utah's last argument is that even though *Bigman* was not a class action, it should nevertheless have preclusive effect here because the Beneficiaries' interests were adequately represented in that case and the Beneficiaries received informal notice of the *Bigman* litigation. Utah's Br. at 55-59. This is simply a reassertion of Utah's "virtual representation" argument. *See id.* The Beneficiaries, therefore, have addressed arguments made in this section in the context of their response to Utah's first virtual-representation argument. *See* Section II(C) herein.

**STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is requested in this appeal. Due to the complexity of the underlying facts, the procedural history, and the legal issues, counsel believes that the decisional process would be significantly aided by oral argument.

## CONCLUSION

For the foregoing reasons, the Beneficiaries respectfully request that the decision of the District Court denying Utah's *res judicata* defense be affirmed.

DATED this 26<sup>th</sup> day of SEPTEMBER 2006.

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## **CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains thirteen thousand seven hundred sixty-eight (13,768) words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 10 in 14 point font Times New Roman type style.

## CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Plaintiffs/Appellees' Answer Brief, in both paper and digital form, were served on the following via first class mail and e-mail on this 26<sup>th</sup> day of September, 2006:

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I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Court and that the digital submissions have been scanned for viruses with the most recent version of the commercial virus scanning program Symantec AntiVirus - Corporate Version 10.0.0.359 Virus Definition, most recently updated on September 26, 2006, rev. 17, and, according to that program, the submissions are free of viruses.

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## **EXHIBITS**

EXHIBIT “A”: Pelt: Portion of Plaintiff’s Exceptions to Defendant’s Initial, Revised and Supplemental Accountings, Dk. #724.

EXHIBIT “B”: Sakezzie: Plaintiff’s Memorandum, dated June 9, 1961.