APPEAL NO. 08-4147

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE DISTRIBUTION CORPORATION, a Utah corporation,

Plaintiff/Petitioner,

vs.

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

Defendant/Respondent,

UTE INDIAN TRIBE OF THE UINTAH AND OURAY AGENCY,

Intervener/Respondent,

RED ROCK CORPORATION, a Utah corporation,

Intervenor.

Appeal From the United States District Court for the District of Utah, on appeal from Administrative Decision of Secretary of the Interior

Dist. Court Case No. 2:95CV376B

Judge Dee V. Benson

Oral Argument Requested

REPLY BRIEF OF PETITIONER UTE DISTRIBUTION CORPORATION

MAX D. WHEELER (A3439)
SHAWN E. DRANEY (A4026)
CAMILLE N. JOHNSON (A5494)
JUDITH D. WOLFERTS (A7023)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Plaintiff/Petitioner
Ute Distribution Corporation

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ARGUMENT

I. THE SECRETARY'S NEW ARGUMENTS FAIL.

A. There Was No Cross-Appeal.

The Secretary's appellate brief argues the district court ("court") erred in finding 28 U.S.C. § 2401(a)'s limitations[1] does not bar this lawsuit, and erred in finding "continuing violation" doctrine applies. He also makes an argument not made below, *i.e.*, there is no cause of action on which to base declaratory judgment. These issues are moot because he failed to cross-appeal.

Appellees failing to cross-appeal "'may not attack a [judgment] with a view either to enlarging [their] own rights thereunder or of lessening the rights of [their] adversary.'" *Fischer-Ross v. Barnhart*, 431 F.3d 729, 733 n.2 (10th Cir. 2005) (citation omitted); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82 & 480 nn.2-3 (1999) (error in justifying failure to cross-appeal). This is not to penalize, but "to protect institutional interests in the orderly functioning of the

[1]Although the Secretary complains of no ruling on his § 2401(a) limitations argument until 2008, in 1996 he conceded the court's "on-going duty" holding could apply and requested remand to the agency. Dkt., 11a (refer. to Hrg. Trans. (12/17/96) in UDC Appx. Vol. 1; Dkt. 51, 10a (citing Sec. Rep. Supp. Mot. Dismiss (11/17/96)).

judicial system, by putting opposing parties on notice of the issues to be litigated and encouraging repose of those that are not." *Netzsosie*, 526 U.S. at 481-82.

In *Barnhart*, reviewing an ALJ's Social Security ruling, the district court rejected: (1) Commissioner's argument the ALJ erred in finding steps 1-2 supported disability, and (2) Claimant's argument the ALJ erred in finding steps 4-5 did not support disability. *Barnhart*, 431 F.3d at 731-32. However, Claimant successfully argued the ALJ erred by failing to make findings at step 3, so the district court remanded step 3 to the ALJ for further findings. *Id.* at 732-33. (The claim would be denied if step 3 favored Commissioner. *Id.*). Commissioner appealed to the Tenth Circuit the remand of step 3. *Id.* at 730. Claimant's appellate response challenged the court's steps 4-5 findings. This Circuit refused to consider Claimant's challenge to steps 4-5 because she failed to cross-appeal, noting her attempt to enlarge her own rights and lessen Commissioner's would render Commissioner's appeal "meaningless." *Id.* at 731 n.1.

This applies here. The Secretary seeks to enlarge his rights and lessen UDC's by raising unappealed issues. This should be rejected.

B. Section § 2401(a) Is Not Jurisdictional.

The Secretary cannot use § 2401(a) to avoid failure to cross-appeal. Section 2401(a) is not jurisdictional, and challenges based on its limitations period do not invoke subject matter jurisdiction. *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95-96 (1990) (equitable tolling applies to § 2401(a)); *Day v. McDonough,* 547 U.S. 198 (2006); *Barclay v. United States*, 351 F. Supp.2d 1169, 1175-76 (D. Kan. 2004) (§ 2401(a) limitations is 12(b)(6) affirmative defense), *aff'd* 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied* 549 U.S. 1209 (2007); *Lord v. Babbitt,* 943 F. Supp. 1203, 1208 (D. Alaska 1996) (rejecting government's argument § 2401(a) limitations is jurisdictional). *See also Biester v. Midwest Health Serv., Inc.*, 77 F.3d 1264, 1267 (10th Cir. 1996) (limitations not jurisdictional if can be equitably tolled).

C. Section 2401(a) Is No Bar.

UDC's request for review of agency action, review of the Secretary's Partition Act interpretation, and/or review of declaratory judgment were timely and the Secretary failed his burden to show any action is time-barred.[2] *Barclay,*

[2]*See* Pub. L. No. 108-108. 117 Stat. 1241 (2003) (limitations "shall not begin to run on any claim" involving trust fund loss/mismanagement until DOI provides accounting).

351 F. Supp.2d at 1175-76. In *Comanche Nation v. United States*, 393 F. Supp.2d 1196 (W.D. Okla. 2005), two possible § 2401(a) accrual times were identified with the "knew or should have known [] the more lenient standard for plaintiffs to meet." *Id.* at 1208. The Secretary proposes that standard.

1. No accrual before 1996.

District Judge Winder was informed by the Secretary in 1996 that he had never decided whether reserved water was appurtenant under the Partition Act and must make that decision:

> The position of the United States is . . . this issue has never before been presented to the United States in a way that the resources and expertise of the Secretary in particular in Indian matters and specifically within the administration of the [Partition Act] has been brought to bear. . . the Secretary has not made a final determination. . . . Water rights claims require findings that water rights exist. That requires a fairly intensive factual determination . . .. None of that has occurred.

Hrg. Trans., pp. 6-8 (12/17/96) (ref. in UDC Appx. Vol. 1 at Dkt., 11a).

The Secretary then referenced *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994), which discussed Tribal *Winters* water rights which had been defined by adjudication in 1923 and used in the Uintah Irrigation Project ("Project"), stating: (1) there had "never been an issue presented as to other rights which are non-pertinent"; (2) "issues beyond pertinent rights . . . involve the interpretation of

what was distributed at that point and what was left over"; (3) "to determine water rights that are in addition, that is non-distributed water rights . . . it would be beyond the plan for division." Hrg. Trans., pp. 10-11 (12/17/96); *Hackford,* 14 F.3d at 1461 (citing 1923 cases); Add'l Doc. & Evid.[3] ¶¶ 100-01. The Secretary's 1996 admission he had no position means no claims could be time-barred. *Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995).

2. No event marked accrual.

There is no merit to the Secretary's argument the following events put UDC on "notice" of a "claim." Indeed, this presupposes water rights claims *were* distributed, and discussing accrual in that context is misleading.

(1) The 1960 Decker Report (AR 693-891) did not mark accrual. Decker and/or DOI: (a) included UDC in Decker's work and met with UDC to assure payment for his work (AR 2753-54; Add'l Doc. & Evid. ¶ 109); and (b) invited UDC to a CUPCA conference (AR 2753-54; Add'l Doc. & Evid. ¶ 108). The Tribe also asked UDC to pay its share of Decker's expenses. AR 2668-72; Add'l Doc. & Evid. ¶ 110. These show the Secretary and Tribe recognized UDC jointly-managed *Winters* claims.

[3]Located at Ex. 7 in Addendum, UDC's Init. App. Brf.

(2) The 1965 Deferral Agreement did not mark accrual, and shows the opposite since it is based on Decker's Report (AR 3479; Add'l Doc. & Evid. ¶ 113). If non-adjudicated *Winters* claims were appurtenant, numerous others including Range Corporations (AR 2684-85, 4950; Add'l Doc. & Evid. ¶¶ 123, 175) "owned" those "claims" and should have signed, deferring their rights. AR 121-23; AR 4952-53, 4951; Add'l Doc. & Evid. ¶¶ 176-77 (Range Corporations not dissolved until January 29, 1969). Since *Winters* claims remain in Secretarial trust, the government could sign for UDC.

(3) *Affiliated Ute Citizens v. United States*, No. 159-69 (Ct. Claims) did not mark accrual, and actually put the Secretary/Tribe on notice *Winters* claims were not appurtenant. The government there alleged Rangelands "presumably" received reserved water claims (AR 2953-54; Add'l Doc. & Evid. § 129f), but admitted Rangelands' value represented all land and water claims (AR 3014; Add'l Doc. & Evid. ¶ 129g). Rangelands' value undisputedly included only stock water, as sworn to by Rangelands' appraisers Moore (hired by DOI) and Jenkins (Phoenix BIA chief appraiser) in *Hackford v. First Security Bank*, 521 F. Supp. 541 (D. Utah 1981), *aff'd* 1983 WL 20180 (10th Cir. 1983). AR 4792-93, 4752; Add'l Doc. & Evid.

¶¶ 55, 56, 189. BIA's chief appraiser confirmed Rangelands' value with only stock water (AR 4453-4532, at 4453), and the Secretary verified that value in Range Corporation documents (AR 3585, 4375-76; Add'l Doc. & Evid. ¶¶ 60-65).

(4) The 1977 Court of Claims decision did not mark accrual. That decision held water was divided as either appurtenant *or* to the UDC for joint management. Since right-to-use of already-adjudicated *Winters* water in the Project was "appurtenant" to lands sold under the Partition Act, the court surely was acknowledging other, unadjudicated, *Winters* claims could be an undistributed asset. This comports with *First Security,* where this was resolved by finding Range Corporation shares sold by the Bank as trustee for mixed-blood minors/incompetent persons were *not* sold for an inadequate price because there was no evidence *Winters* claims were appurtenant to Rangelands. *First Security*, 521 F. Supp. at 557-58.

5. The 1980 Compact did not mark accrual. Neither the Tribe or federal government ever ratified it. Further, as discussed below in Part II.G. (discussing Hackford), in the unratified 1990 Compact the government holds *all* water as trustee. Similarly, in the 1980 Compact, the government holds all *Winters* claims in trust, including already-adjudicated *Winters* water used in the Project. AR 894-

5. That the government would hold all *Winters* claims in trust is consistent with its trust duties to the UDC for undistributed assets. Indeed, in *Hackford* this Circuit found the Project itself is held in trust by the government, but if it had not been it would be jointly managed by the UDC/Tribe. *Hackford*, 14 F.3d at 1466.

D. "Ongoing Duty" Doctrine Applies.

There is no merit to the Secretary's argument the "continuing wrong" doctrine would not apply to § 2401(a)'s limitations.

First, requesting remand, the Secretary agreed if *Winters* claims were subject to joint management, an "ongoing duty to ensure that UDC was properly included at all times in the joint management of" could apply to his § 2401(a) argument: "the United States recognizes that the Court's rationale would apply to the [government's] Motion to Dismiss on limitations grounds . . .." Dkt. 44 (refer. Sec. Reply. Supp. Mot. Dismiss, pp. 8-9 (10/8/96)), in UDC Appx. Vol. I, p. 9a. He admitted suit was proper any time that duty was breached. *Id.*

Second, trustees have ongoing duty regarding asset management. *Harley v. Minn. Mining & Mfg. Co.*, 42 F. Supp.2d 898 (D. Minn. 1999). The Secretary thus has an ongoing duty regarding undistributed assets. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 139 (1972).

Third, the Secretary's statement that "it has long been plainly apparent that all tribal water rights were divided and distributed" assumes the conclusion he urges and UDC disputes, and contradicts his 1996 admission.

Finally, the Secretary's cited case, *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 1006), supports UDC by describing "continuing violation doctrine" to allow suit where violation continues to the present.

E. The Secretary Is Not Immune From Declaratory Judgment.

In alleging declaratory judgment cannot be brought by UDC, the Secretary changes his position below and concedes this Circuit's law is "APA's immunity waiver is not limited to suits challenging final agency action," which includes declaratory judgment.[4] Sec. App. Brf., p. 38 (citing *Simmit v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005)). He now makes an argument not made below, that declaratory judgment/review of the Secretary's Partition Act interpretation is barred because "UDC does not seek review of any action that the Secretary allegedly took or failed to take" and "instead seeks a declaration" rights/claims were not divided and remain in Secretarial trust under Tribal/UDC

[4]A sovereign immunity argument also fails because 5 U.S.C.§ 702(A) waives immunity for all lawsuits not seeking "damages."

joint management. Sec. App. Brf., p. 38. He argues there is no APA waiver for declaratory action because there is "no cause of action on which to base it." This is incorrect.[5]

The UDC pleaded causes of action on which to base declaratory judgment, including property interest/due process derelictions, Partition Act interpretation, request for accounting, breach of Secretary's Partition Act trust/fiduciary duties,[6] and final agency action itself. These include:

(1) final agency action and due process violations (Dkt. 177 (Sec. Amd. Compl., ¶¶ 109-120, 140));

(2) review of final agency action or alternatively, declaratory judgment "to declare the parties' rights, interests and obligations under the [Partition Act]." *Id.*, ¶ 1.

(3) "[in]terest in Tribal waters and *Winters* Doctrine rights/claims are a property interest held by [] UDC pursuant to [] dictates of Congress as reflected in the Partition Act" (*id.*, ¶ 98);

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[5]The Secretary's cited cases are inapplicable, *e.g.*, there was not even a *potential* property interest in *Hansen v. Wyatt*, 552 F.3d 1148 (10th Cir. 2008).

[6]*United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), holds that when statutes create a trust relationship between government and tribe, the government assumes an actionable duty regarding assets. This applies to the government and UDC.

(4) Secretary failed to provide UDC its portion of Section 502 of Title V of Pub. L. 102-575 (1992) settlement funds held in trust (*id.* ¶¶ 99-100);

(5) request for accounting of Title V trust funds (*id.*, ¶¶ 155-164);

(6) "[p]ursuant to the Partition Act, the [Secretary] owes [] Plaintiff clear, ministerial, non-discretionary duties imposed by Congress and statute, regulations promulgated by the [Secretary], trust, and the existence of [] fiduciary relationship (*id.,* ¶¶ 140-41); and

(7) Secretary failed to recognize UDC's rights/interests in water rights/claims (*id.*, ¶¶ 146-47).

Likewise, there is no merit to the contention the Partition Act does not "create" a cause of action because it allows the Secretary to "'proceed in any manner deemed by him to be in the best interests' of the mixed-blood and full-blood groups on any other matters on which agreement is not reached." Sec. App. Brf., p. 40. This argument that *any* decision concerning division of *any* asset at anytime is "committed to agency discretion by law," is incorrect. The Partition Act specifies Secretarial decision "would give rise to no cause of action against the United States" *only* if he made division decisions within a *specified* time and

division *only* involved Tribal assets "*then* susceptible to equitable and practicable distribution." *See* 25 U.S.C. § 677i.

Moreover, Congress stated any decision/agreement by the Secretary or mixed bloods/full bloods ("groups") to "divide" undistributable assets, is void. This is discussed in detail in Part II(C), *infra.*

Thus, the Secretary's Decision fails *Olenhouse* because it concludes the groups agreed in the Plan for Division to divide assets not "susceptible to equitable and practicable distribution." *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). If the Secretary believes the "groups agreed to" divide what could not be equitably and practicably *distributed* to each separate mixed-blood, his approving the Plan for Division violated the law.

II. *OLENHOUSE* REQUIRES REVERSAL OF THE SECRETARY'S DECISION.

A. "Chevron Deference" Is Unwarranted.

The Secretary's Decision is not entitled to deference under *ChevronU.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). *Chevron* deference is afforded only to agency construction of ambiguous statutory language (*id.* at 842-43), and no one contends the Partition Act is ambiguous. *Chevron* is also limited to "when it appears [] Congress delegated authority to the agency

generally to make rules carrying the force of law, and [] the agency interpretation claiming deference was promulgated in [] exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001). This requires formal rulemaking, and informal statutory interpretations are "'not entitled to [*Chevron*] deference.'" *McGraw v. Barnhart*, 450 F.3d 493, 500 (10th Cir. 2006) (citation omitted). The Secretary engaged in no formal rulemaking or regulation. The Tribe's quotation from *Mead* also is unavailing because the full quotation contemplates "notice and comment" leading to a regulation or rule (*Mead*, 533 U.S. at 230), which has not occurred.

B. Due Process Violation.

The Secretary's and Tribe's apparent indignation that UDC requested documents in government possession and then submitted them for Secretarial review, supports the due process violation alleged by UDC. The Secretary admits giving UDC no documents prior to issuance of the first decision (AR 23), so the court ordered him to provide UDC all relevant documents. The Secretary gave UDC access only to federal archives/repositories, and stated documents *might* be located there but others may have been destroyed by fire. Sec. Amd. Compl., ¶¶ 111-118. UDC had no access to Justice Department documents, documents possessed by DOI's/BIA's local or other offices or employees, or post-Partition

Act communications between Tribe and DOI/BIA regarding water issues. *Id.*, ¶¶ 113, 116, 118. Some archive/repository documents led UDC to other sites where relevant documents were found which were not in the archives/repositories. *Id.*, ¶ 115. Moreover, in 1998, DOI employees were in Utah removing documents from Agency files and DOI e-mailed them warning not to treat UDC's requests under FOIA lest rights/remedies arise, and instructing some documents be withheld, particularly ones concerning mixed-blood minors. AR 2720-22; Add'l Doc. & Evid. ¶¶ 195-196. The "minors" likely were those in *First Security* since the youngest mixed-blood was 44 in 1998. Then, when UDC submitted documents on remand, the Secretary refused to consider many, contending they were available before 1998 in "public sources," and contended other documents were "missing" but failed to request replacements from UDC despite taking two years (AR 1311-1312) to issue a decision. In court, the Secretary then filed joint briefs with the Tribe against UDC. *See* n.19, *infra*. These and other things prompted UDC to plead a due process violation. Sec. Amd. Compl. ¶¶125-39, at ¶ 135.

C. The Secretary Cannot Allow Violation of the Partition Act.

There is no merit to appellees' contention the Secretary's and court's reasoning on the Partition Act proves *Winters* claims were divided appurtenant to

land.[7] UDC's disagreement that the cited "water" sections (X(C) and X(F)) in the Plan for Division prove this, is discussed in UDC's Initial Memorandum, pp. 17-20, and *infra* at Part II.E.

The Secretary's/court's analysis of the Plan for Division also is incorrect. The Partition Act gave the Secretary authority only to divide "assets of the tribe that are *then* susceptible to equitable and practicable *distribution,*" (25 U.S.C. § 677i (emphasis added)), and he could do so *only* if the "groups" had not decided on a division "within a period of twelve months from the date of such commencement . . ." (*id.*). The Secretary never divided anything in the specified time or any other time.[8]

Most important, Congress prohibited division of assets that could not be "equitably and practicably distributed," even if that was by contract, *e.g.*, Plan for

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[7]The Tribe contends Congress intended the groups to divide every asset *except* "unadjudicated and unliquidated claims against the United States" and "all gas, oil, and mineral assets of every kind." Tribe's App. Brf., p. 9. However, the Supreme Court recognized there could be other undistributable assets. *Affilliated Ute Citizens,* 406 U.S. at 135 (naming "unadjudicated or unliquidated claims against the United States, gas, oil, and mineral rights, and other tribal assets not susceptible of equitable and practicable distribution").

[8]The district court, and Secretary in briefing, referenced 25 U.S.C. § 677aa to support the Secretary dividing even undistributable assets. Order, p. 13. However, § 677aa only allows him to resolve disputes between the groups about assets *already* found undivided/undistributable. 25 C.F.R. part 217.

Division. *Ute Indian Tribe v. Probst*, 428 F.2d 491 (10th Cir. 1970), recognized this, finding § 677i's language that "[a]ny contract made in violation of this section shall be null and void" "applied to undivided interests." *Id.,* at 496. Thus, the Secretary's assumption the groups could do whatever they wanted with assets is incorrect, since he assumes they agreed to divide *Winters* claims despite their being undistributable.

Compounding this error is the Secretary's (and court's) reliance on a December 23, 1957 land tabulation ("1957 Tabulation")[9] as proof the groups simply agreed *Winters* claims were appurtenant. AR 1355 (referencing 48-page tabulation and contending it shows groups stipulated future water rights were appurtenant). The Secretary misunderstood that document. He apparently believed it showed "appurtenant" *Winters* claims, but it actually shows the finalized amount of already-adjudicated *Winters* "potential" Project water included as "pertinent" under § X(F) of the Plan for Division. *See* AR 4295-4346. Project water can be moved around from parcel to parcel since it is "owned" by the Project under government trusteeship. Since § X(F) stated "any potential water rights"

[9]The UDC's "1957 Tabulation" (AR 4295-4346) is the same as the Secretary's "47- page summary" (AR 362-409) and court's "Summary of Division of Assets" (Order, p. 11 n.4). The difference is AR 4295-4346 includes the document's first six pages.

were to be included in the valuation of lands for sale, the groups had to move around/rearrange these Project "potential water rights" before they could value the land. They completed this in 1957, and sent the Tabulation to the Agency Superintendent, showing Project water "rights" they *now* had determined would be appurtenant to each parcel. AR 4295-4346. Those Project rights of use reflected were only to already-adjudicated Project (*Winters)* water, and the Tabulation had nothing to do with *Winters* claims at issue here (allegedly "appurtenant" to Rangelands) and never mentions them. *See* UDC's Init. Brf., pp. 17-19. In the Tabulation, grazing (range) lands always show "0" water going with lands, which is consistent with Rangelands' valuation as only including stock water.

Accordingly, any reliance on the Plan for Division and 1957 Tabulation to ground a decision is arbitrary, capricious, contrary to law,[10] and reversible error.

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[10]Pointing to comments about timber, the Tribe contends Congress allowed the groups to decide that assets other than those named in the Partition Act (*e.g.*, oil/gas) were nevertheless "not susceptible to equitable and practicable distribution." The Tribe then concludes that because there are no comments this was done to water, water was *not* undistributable. This ignores that although the Partition Act does not prohibit the groups from agreeing to place a "divisible" asset in the "not distributable" category, the opposite is prohibited, *i.e.*, placing a "not distributable" asset such as *Winters* claims in the "divisible" category. 25 U.S.C. § 677i.

D. The Plan for Distribution Confirms UDC's Position.

Pointing to the Plan for Distribution as allowing "organization of water companies," the Secretary contends this shows mixed-bloods "understood" division of assets included "distribution" of water rights. Sec. App. Brf., p. 47. To the contrary, the Secretary admits such companies were ever formed, which confirms that no water was distributed. Moreover, Moore's Appraisal included only stock water, and all comparables were to non-Indian lands. AR 219-315.

E. The Secretary's Plan for Division Conclusions Are Unreasonable, Irrational, and Unsupported

In contending the Secretary did not misinterpret the Plan for Division, appellees[11] contend § X(F), which states how lands is valued, takes precedence over § X(C), the specific Rangelands provision. This ignores that § X(F) directs that *if* there is potential water, the land *must* be valued with that taken in account, and that government employees Moore (hired by DOI), Jenkins (DOI appraiser), Mathis (BIA Chief Appraiser), Carufel (BIA realty officer), and Weaver (BIA land operations officer) certified the Rangelands' value as including only stock water.

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[11]"The agency must make plain its course of inquiry, its analysis and its reasoning. After-the-fact rationalization in briefs or argument will not cure noncompliance by the agency with those principles." *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1029 (10th Cir. 1980).

Add'l Doc. & Evid. ¶¶ 44-59, 62, 65-66. Since appellees contend *Winters* claims were appurtenant to the Rangelands but the appraised value shows they could not have been, those claims must have gone to the UDC as an undistributed asset.[12] Accordingly, the Secretary's conclusions are unreasonable, irrational and unsupported.

F. Case Law Does Not Support The Secretary.

There is no precedent for handling *Winters* claims/rights because the Ute Tribe are the only Indians ever impacted by partial termination. Appellees searched elsewhere for precedent, and came up with Indian "allotment" case law. These cases do not assist.

The property interests to which appellees contend *Winters* claims attach are not allotments. Allotments are individual parcels of tribal land (agricultural or grazing) "allotted" to, and eventually conveyed to, individual Indians. Cohen's Handbook of Federal Indian Law § 16.03[1] (2005); General Allotment Act of 1887, Ch. 119, 24 Stat. 388. The allotment policy is discredited and was repudiated by statute in 1934.[13] 25 U.S.C. §§ 461-65.

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[12]The Secretary agrees "irrigation of the range lands [was] speculative." Sec. App. Brf., p. 53.

[13]Ute Tribal members had "assignments" (Ute Tribe Corp. Charter ¶ 7 (6/18/1934)), and under the Partition Act could purchase those assignments but the

Allottees did not pay for land and could sell it after receiving a fee patent, which raised the question of whether tribal water ran with allotted land. In *United States v. Powers,* 305 U.S. 527 (1939), the Court held that an agricultural allotment includes a right to *use* a portion of the tribe's reserved water sufficient to support agriculture. Other courts agree that patenting an allotment does not sever reserved rights from tribal ownership; rather the allottee acquires only a right of use. Cohen, § 19.03[8][a]. Building on *Powers*, the Ninth Circuit held in 1981 that use of water was appurtenant to the land, but that subsequent non-Indian transferees could lose the right by non-use. *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 51 (9th Cir.), *cert. denied,* 454 U.S. 1092 (1981). Today, such rights are known as *Walton* rights and are understood as rights of use only, not ownership interests in tribal reserved water rights. Cohen, § 19.03[8][b].

All of appellees' cited cases arise in the context of allotments, and thus do not support that there is a body of case law that supports reserved water rights *ownership* as appurtenant to lands under the Partition Act, a unique statute with specific intent. This raises the Tribe's contention *Winters* claims "cannot be lost or forfeited," since the Secretary's reasoning does result in loss/forfeiture.

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purchase excluded undistributable assets, including oil/gas. By contrast, Ute tribal members/mixed-bloods owning pre-1934 allotments own underlying oil/gas.

The Secretary presumes it was not just right of use of *Winters* claims that attached to Partition Act lands sold/divided, but actual ownership, which begs the question of what happens with the reversionary interest since the Tribe would have given reserved water "ownership" and not just "use." The Secretary's position inevitably results in reversion to the state if Partition Act landowners either cease using or never timely use *Winters* claims water. This means others can appropriate water without having to compete with the Tribe's priority date as of Reservation establishment. Thus, since Range Corporations were non-Indian, any alleged Rangelands-appurtenant *Winters* claims are available for appropriation[14] without hindrance from Tribal priority.

This result of appurtenance was warned about in the Court of Claims case by William Veeder,[15] DOI Assistant Commissioner of Economic Development. AR 5114-17; Add'l Facts & Evid. ¶¶ 193-94. Veeder warned about "damage to the Indians by attempting to generalize respecting the principles of the *Powers*

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[14]Water was never used or timely put to use after Range Corporations were incorporated in 1958 (AR 3575-85, 4357-87) (incorporation documents)) and fee patents issued from 1959 to 1960 (Add'l Doc. & Evid. ¶¶ 68-70).

[15]The Tribe's brief addresses Veeder at p. 31, n.6, in contending the Secretary cited instances of alleged "misrepresentation" by UDC. However, the Secretary did not mention Veeder and never contacted UDC to request *alleged* missing documents.

case," and cautioned against theories of appurtenancy of *Winters* claims because this could "spell disaster for Indian reservations." AR 5116.

G. Post-Division Activities.

The Tribe points to mixed-bloods' alleged concerns they "might have to adjudicate their own water rights." The Secretary did not rely on this new argument and it is irrelevant to reviewing his Decision. Regardless, as a trust asset, in *Winters* adjudications the Secretary would represent both the Tribe and UDC. There also is no merit to the Tribe's reliance on the following alleged "post-division" activities as support for the Secretary's Decision.

First, reliance on the post-division Decker Report, Deferral Agreement, and *Affiliated Ute Citizens v. United States*, No. 159-69 (Ct. Claims), fail for the same reasons stated in Part II.C.2., *supra.* Further, the Tribe's reliance on governmental assertions in the Court of Claims ignores the government also asserted there:

(1) Conveyances to non-Indians under the Partition Act do not carry reserved water claims because "there is no requirement [the government] deliver water reserved for the reservation to non-Indians who have acquired former Indian lands" (citing *Skeem v. United States*, 273 Fed. 93 (9th Cir. 1921) & *United States v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928)). AR 2953 n.1.

(2) "[D]efendant does not contend conveyance to non-Indians in connection with the [Partition Act] carried *Winters* reserved water rights" because 'courts have distinguished between conveyances of

allotments to members of a tribe and non-Indians.'" AR3114; Add'l Facts & Evid. ¶ 131.

(3) "The general rule is that when land is transferred out of Indian ownership, no water rights are conveyed unless an intent to do so is demonstrable." AR 3114-15 (citing Wiel, Water Rights in the Western States, Vol. 1, p. 240 n.3 (3d ed. 1911)).

These statements conflict with the Secretary's *Powers*' reliance and his position that fee patents to Rangelands and land sold to non-Indians were the same so *Winters* claims were appurtenant to both.

Second, the Tribe's reliance on proposed 1980 and 1990 Ute Water Compacts as showing "UDC was absent from the process" is another "after-the-fact generalization" not mentioned in the Secretary's Decision(s). The Secretary's only reference to Compacts states the "others" in the 1980 Compact are "allottees and successors to allottees who have water rights appurtenant to allotments of former allotments." AR 41. This only underscores his failure to comprehend the difference between pre-1934 "allotments" and lands sold/divided under the Partition Act.

Third, the Tribe's discussion of PSOMAS maps' alleged deficiencies is improper because the Secretary failed to examine those maps. AR 1325. *Olenhouse* required the Secretary to demonstrate he "examined the relevant data and articulated a rational connection between the facts found and the decisions

made." *Olenhouse*, 42 F.3d at 1574. The Secretary did neither regarding the maps. At most, he accepted the Tribe's viewpoint. AR 1325. If he doubted the maps' accuracy he could have examined underlying source information from deeds, Decker Report, and Compacts. He did not, and refused to examine the maps, only stating the Tribe's "objections" called "into question" the maps' accuracy. *Id.* He then refused to consider them on remand because he concluded UDC could have provided them before the 1998 Decision. *See id.* His refusal makes his decision arbitrary, capricious, a violation of due process, and also ignores the maps are just a compilation and illustration of important source information, always before him and part of the Administrative Record.

Furthermore, there is no merit to the Tribe's contention of "flaw" in the PSOMAS maps because they deal with 172,000 acres of mixed-blood Rangelands, and not the 230,666 acres the Tribe cites. Tribe's App. Brf., pp. 35-36. Governmental briefing in the Court of Claims case identified 172,000 acres: it stated fee patents for "some 128,000 acres" of Rangelands were given the Sheep Corporation and for "some 44,000 acres" were given the Cattle Corporation. AR 2848-2873, at 2871; Add'l Doc. & Evid. ¶ 69. This comports with acreage in incorporation documents and the Secretary's Facts here. Sec. App. Brf., p. 14;

Cattle Corp. (AR 3541, Add'l Doc. & Evid. ¶¶ 60-62); Sheep Corp. (AR 4357-87; Add'l Doc. & Evid. ¶¶ 63-66).

The additional acreage cited by the Tribe is significant, however, because the Secretary contends those acres were "distributed to individual mixed bloods or sold." Sec. App. Brf.. p. 14. Calvin Hackford is one mixed-blood who purchased Partition Act range (grazing) land. The Tribe's briefing here and below compared language in the Rangelands' fee patents to Hackford's grazing land fee patent, and stated Hackford's land "includ[ed] all of the water assets." Tribe's App. Brf, p. 15. If the Secretary's Decision and Tribe are correct, Hackford, whose grazing land was Group 5 and who still owns it, would be proportionate "owner" of Group 5 water claims and the government's trust relationship would not apply to his reserved water claims. However, the 1980 and 1990 Compacts provide all Group water rights are held by the government as trustee (AR 973; AR 892-970, at 892-897; AR 973-1045, at 973-980), and that the Tribe waives the right to use water in place on Hackford's land (AR 1027). Thus, not only was Hackford not a party to the 1990 Compact, but the Tribe and government assumed the position that they, not Hackford, owned "his" water. They could not own Hackford's water if, as they contend, *Winters* claims were appurtenant. Their positions cannot be

reconciled with fee patents, historical record, Partition Act, present status of water claims, or their actions.

H. There is No Justification For the Secretary's Failure to Address *Hackford v. First Security Bank*.

Discussing UDC's reliance on *Hackford v. First Security*, the Tribe again injects after-the-fact rationalization to explain what the Secretary did not explain or address. The Secretary's first opinion dismissed *First Security* by stating: (1) comments therein about intangible rights "appear to be" dicta; (2) the government/ Tribe were not parties; (3) *First Security*'s statements about intangible rights were "inconsistent with the language of the UPA and its implementing documents." AR 27 n.6. His second opinion stated only the government was not a party. AR 1325 n.10. However, collateral estoppel can bar a non-party trustee. AR 1586-1629, at 1621-1629 (UDC Init. Remand Brf. to Sec. (11/29/01) (trustor Secretary in privity with trustee Bank (*Fouke v. Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952)). The Secretary also failed to address: (1) why six DOI/BIA employees (Jenkins, Mathis, Carufel, Weaver, Harris, Moore) certified Rangelands' value as including only stock water (not *Winters* claims); (2) his duty as trustor to minors (Add'l Doc. & Evid. ¶¶ 88-97) and that DOI set the price for minors' Range Corporations shares based on Moore's Appraisal (*id.* ¶ 157). Failure to explain this and other *First*

Security evidence submitted by UDC renders his Decision arbitrary and capricious.

I. Municipal and Industrial Water Rights.

No one disputes 10,000 acre feet of municipal and irrigation ("M&I") water materialized for the Tribe in 1980, associated with no lands at all. For the first time, the Tribe proposes a rationale for this, *i.e.*, M&I water resulted from "negotiation" between the 1980 Compact "parties" (not mixed-bloods or UDC), and this is "a right to water that the [mixed-bloods] and [full-bloods] provided for and divided in the Plan for Division" as a "potential water right" under § X(F). Tribe App. Brf., pp. 38-39.

The Secretary's Decision never gave this "explanation." Moreover, there is no evidence M&I water was ever included in any valuation of land as required by § X(F), nor did mixed-bloods receive offsetting funds to account for M&I water. The Tribe's rationale also undermines its contention *all Winters* claims were susceptible to equitable and practicable distribution in 1958 and were so distributed. By referencing the Plan for Division, the Tribe also admits M&I is *Winters*-based. If the Tribe could negotiate M&I water in 1980, it must have existed at partition, but the Secretary did not attempt to reconcile it with his appurtenancy theory let alone identify to which Rangelands it was appurtenant.

The Tribe's contention M&I was not *Winters*-based, while relying for its existence on the Plan for Division, underscores that *Winters claims* were impossible to equitably and practicably distribute because it was impossible to know with certainty the amount of water, uses of water, source of water, lands to which it might attach, or anything else that might result from negotiations or adjudications. As the M&I shows, without the certainly of negotiation or adjudication, it was a wild guess to "decide" how *Winters* claims would turn out.

III. THE COURT FAILED TO CONDUCT PROPER REVIEW.

Based on the discussion in Part II above and UDC's Initial Brief, the court failed to conduct a proper *Olenhouse* review. Under *Olenhouse*, the court was bound to "engage in a 'substantial inquiry'" and give the Secretary's Decision a "thorough, probing, in-depth review." *Olenhouse,* 42 F.3d at 1574 (citation omitted). The Tribe and Secretary failed to show the court did this, including that the court's Order failed by: (1) not reviewing the "agency's decision-making process," (2) not conducting an independent review of law/facts/evidence; (3) making significant errors regarding the Partition Act, Plan for Division, and 1957 Tabulation; (4) not reviewing the Secretary's decisionmaking process and conducting plenary review of facts; (5) not determining the Secretary failed to

"consider an important aspect of the problem" *e.g.*, PSOMAS maps, *First Security* evidence; (6) failing to consider conflicts in the record or make factual findings.

IV. THE SECRETARY MISCONSTRUES THIS APPEAL.

The Secretary misconstrues UDC's position on declaratory judgment.[16] As UDC's briefing reflects, this primarily is an appeal of the Secretary's final agency action, and only alternatively of the court's apparent declaratory judgment ruling. The court had stayed all UDC's claims pending review of the Secretary's Decision. UDC noted this in its brief when the court ordered supplemental briefing on statutes of limitation. Dkt. 273 in UDC's Appx. Vol. I at 27a (referencing UDC Supp. Brf. Juris. Issue, pp. 5-6). The court then unexpectedly decided at least two alternative matters: (1) review of final agency action using APA standards; (2) *de novo* review of Secretary's decision interpreting Partition Act and/or ruling on declaratory judgment. *See* Order, Ex. 2 in Addendum to UDC's Init. Brf. Since the court then dismissed the Complaint including stayed

[16]Declaratory judgments have no limitations period (Am.Jur.2d 677 *Declaratory Judgments* § 1984), and there is no federal limitations period governing common-law actions to enforce Indian property rights (*Oneida County v. Oneida Indians*, 470 U.S. 226, 240 (1985)). UDC is "Indian" regarding Partition Act undistributed assets.

claims, the UDC would have waived (2) if it had not included those in its appeal. *See* Ord. Correct. Judg., UDC Appx. Vol. I at 31a-33a.

V. ANY DECLARATORY JUDGMENT OR INITIAL DECISION BY THE COURT SHOULD BE REVERSED.

To the extent the court may have ruled on declaratory judgment or ruled *de novo* on the Secretary's interpretation of the Partition Act and *Winters* issues, it should be reversed based on UDC's argument in its briefs.

The court's initial decision errs for the same reasons the Secretary's Decision errs. In addition, if the court intended to decide issues *de novo*, it failed to provide due process by giving UDC an opportunity to conduct discovery. The Secretary clearly did not give UDC access to all documents, and the Tribe provided nothing. The UDC would have requested other documents involving DOI/BIA/Tribe, and conducted depositions. The court also would have dealt directly with evidence like the Journal Voucher referenced in UDC's Facts to the court, instead of ignoring them. *See* UDC App. Brf. to Dist. Ct., p. 4 (incorporating into Facts all Facts submitted to Sec.), Dkt. 229, 23a); Ex. B, p. 53 ¶ 144, in UDC Indx. to Dist. Ct., Dkt. 253, 25a (citing AR 2644 (journal voucher)). *See also* Add'l Doc. & Evid. ¶ 144. The Secretary arbitrarily and capriciously disregarded his own Voucher which stated "no water right" when

transferring trust funds to the Tribe to purchase Range Corporation shares, as "inconsistent" with the Decker Report and Wagner Report. AR 1324.

The court also ignored the letter to Colin Murdock from BIA's Office of Trust Responsibility which states the "Tribal water right" was not divided. Add'l Doc. & Evid. ¶ 190 (AR2690-91). The Secretary's Decision contends the BIA was only "parroting back" Murdock's comments, which illogical in light of the government's anger at the employee writing the letter.

VI. 1992 SETTLEMENT FUNDS ARE AT ISSUE.

The Tribe contends Title V settlement funds (AR 835) are not at issue because they were not before the Secretary or court. They were before the Secretary and he found UDC was not entitled to a share of those funds "based upon the findings and determinations in the 1998 and 2004 decisions" (AR 42, 1325) and that Congress "clearly sought to benefit the Tribe, not others, through the settlement provisions of Title V" (AR 1325). This last statement is refuted by the Congressional Report accompanying Title V legislation (*see* UDC's Init. Brf., p. 35). They were before the court as a claim in the UDC's Second Amended Complaint, seeking reimbursement of its 27.16186% of Title V settlement funds placed in Secretarial trust. The court dismissed that claim and it is properly here on appeal. Moreover, the Secretary admits the "claim is dependent on a finding []

the tribal water rights were not divided." Sec. App. Brf., p. 61. Accordingly, if there is a reversal here, reimbursement to UDC of Title V funds is warranted.

VII. THE TRIBE WAIVED SOVERIGN IMMUNITY FOR ALL ISSUES.

The Tribe intervened and waived sovereign immunity[17] for all purposes/claims, and not just review of the Secretary's Decision. Moving for intervention, the Tribe asserted it was bound by any determination here and that tribes are never denied intervention when their water rights/interests are litigated. *See* Tribe's Mem. Supp. Motion Intervene (10/30/98), Dkt. 86, 12a. Consistent with this, the Tribe's briefs below, usually filed jointly with the Secretary, addressed every issue, *i.e.*, governmental sovereign immunity, declaratory judgment, governmental statute of limitations, intervention, other claims in the Complaint, Title V funds.[18] The Tribe's arguments were not limited to review of the Secretary's Decision, and it clearly intervened for all purposes.

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[17]The Tribe's corporate disclosure statement is incomplete; it is a Tribe *and* a corporation. Ute Indian Tribe Corp. Charter (6/28/1934).

[18]*See* Dkt. Nos. 111-112 (intervene); 120 (intervene); 122-123 (Jt. Mot. Dismiss Amd. Compl. (govt. sov'gn immun., juris.)); 152 (Mot. Stay Time Ans. Clm. in Intervention); 171 (Jt. Mot. Opp. UDC's Req. Ct. Proceed with Rev. Agency Action & Opp. Order Re Title V Funds); 184-85 (Jt. Mot. Dismiss Sec. Amd. Compl. (*i.e.*, decl. judgmt, equit. apportionm't, accting, breach trust & fiduc. duty, Title V funds)); 272,276 (Jt. Supp. Brf. & Resp. on Decl. Judgmt., limitations (APA, govt. sov'gn immun.)).

CONCLUSION

The Secretary's Decision as well as the district court's independent decision and its decision on review upholding the Secretary's Decision should be reversed, and this Court should hold *Winters* reserved water claims were not appurtenant, and that UDC is entitled to 27.16186% of total Title V funds placed in Secretarial trust.

Dated this 13th day of April, 2009.

SNOW, CHRISTENSEN & MARTINEAU

By /s/ Judith D. Wolferts
Max D. Wheeler
Shawn E. Draney
Camille N. Johnson
Judith D. Wolferts
Attorneys for Plaintiff/Petitioner/Appellant Ute Distribution Corporation

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) for a reply brief because it contains 6,986 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

DATED this 13th day of April, 2009.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Judith D. Wolferts
Judith D. Wolferts
Attorneys for Plaintiff/Petitioner/Appellant Ute Distribution Corporation

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of Snow, Christensen & Martineau and that I caused to be served an **REPLY BRIEF OF PETITIONER UTE DISTRIBUTION CORPORATION;** (U.S. Court of Appeals for Tenth Circuit, Appeal No. 08-4147) (U.S. Dist. Court Case No. 2:95CV376B), by e-mail and U.S. Mail, postage prepaid, upon the following on this 13th day of April, 2009.

John K. Mangum
Assistant United States Attorney
185 South State Street, Suite 476
Salt Lake City, Utah 84111
john.mangum@usdoj.gov

Paul H. Ashton
Ashtree Legal Services
1237 East Lorraine Dr.
Salt Lake City, Utah 84106
phashton@xmission.com

Kimberly D. Washburn
405 East 12450 South, Suite A
P.O. Box 1432
Draper, Utah 84020
kdwashburn_esq@msn.com

Katherine J. Barton
U.S. Department of Justice
Environment and Natural Resource Div.
P.O. Box 23795 (L'Enfant Plaza)
Washington, D.C. 20026-3795
katherine.barton@usdoj.gov

Tod J. Smith
Jeanne S. Whiteing
Whiteing & Smith
1136 Pearl Street, Suite 203
Boulder, CO 80302
tod@whiteingsmith.com
jwhiteing@whiteingsmith.com

Wallace T. Boyack
2290 East 4500 South, Suite 130
Salt Lake City, Utah 84117
wboyack@hotmail.com

Dated this 13th day of April, 2009.

/s/ Judith D. Wolferts