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

OPENING 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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PRIOR OR RELATED APPEALS

There have been two prior related appeals:

(1) *Ute Distribution Corporation v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir. 1998)

(2) *Ute Distribution Corporation v. Norton*, 43 Fed. Appx. 272, 2002 WL 1722061 (10th Cir)

CORPORATE DISCLOSURE STATEMENT

Petitioner Ute Distribution Corporation is incorporated under the laws of the State of Utah. It has no parent corporation or subsidiaries, and does not hold stock in any other corporation.

JURISDICTIONAL STATEMENT

The Ute Distribution Corporation ("UDC") appeals the district court's decision affirming administrative action of the Secretary ("Secretary") of the Interior ("DOI"). Jurisdiction here and in district court is under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1331 based on the Ute Termination Act ("Partition Act") of August 27, 1954, ch. 1009, 68 Stat. 868, codified and amended at 25 U.S.C. §§ 677-677aa (Addendum, Ex. 1). Jurisdiction here is also under Fed.R.App.P. 4 & 15. Pursuant to Fed.R.App.P. 4, the UDC also appeals the district court's ruling of lack of jurisdiction over a 28 U.S.C. § 2201 declaratory judgment action.

On June 2, 2008, the district court affirmed the Secretary's Decision. Addendum, Ex. 2 (Mem. Decis.). On July 22, 2008, an "Amended Judgment" disposed of all claims. On July 30, 2008, the UDC filed a Notice of Appeal.

STATEMENT OF ISSUES

No. 1: Did the district court err in deciding the Secretary has authority today to adjudicate whether Tribal water rights were divided and distributed more than a

half-century ago? Did the district court accordingly err in finding it had no jurisdiction over a declaratory judgment?

No. 2: Beginning in 1960, respondent Ute Indian Tribe ("Tribe") began to assert claims to *Winters* reserved irrigation and Municipal and Industrial ("M&I") water rights based in part on the alleged practicable irrigability status of grazing lands ("Rangelands"). Did the Secretary and district court err in finding those *Winters* claims were "susceptible to equitable and practicable distribution" in 1956?

No. 2: Was it error for the Secretary and district court to interpret the Plan for Division § X(F), and the Plan for Distribution, as compelling the conclusion that *Winters* claims were divided and distributed to each mixed-blood appurtenant to Rangelands?

No. 3: Did the Secretary and district court err in their legal finding that *Winters* claims could be "partitioned in a reasonable manner based on division and distribution of the reservation's lands"?

No. 4: Did the Secretary and district court misinterpret/misapply case law on appurtenancy and allotted lands?

No. 5: Did the district court err by failing to apply standards for agency action review of *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560 (10th Cir. 1994)?

No. 6: Did the Secretary and district court err in failing to address conflict between their decisions and the holding in *Hackford v. First Security Bank,* 521 F. Supp. 541 (D. Utah 1981), *aff'd,* 1983 WL 21080 (10th Cir.)?

No. 7: Did the Secretary err in her legal determination the UDC is not entitled to reimbursement of funds pursuant to Central Utah Project Completion Act and Section 502 of Title V of Public Law 102-575?

STATEMENT OF CASE

I. NATURE OF CASE

The Partition Act requires "[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representative of the mixed blood group." 25 U.S.C. § 677i. This case involves unadjudicated/unliquidated claims to reserved water rights ("*Winters* claims") which were not identified, described, or quantified at the time of division/distribution. The 1956 Plan for Division (Addendum, Ex. 3 (AR 4957-72)) provided that 27.16186% of Tribal assets then susceptible to equitable and practicable distribution be divided to the mixed-blood group. Any Tribal asset that could not be "equitably and practicably distributed" to each mixed-blood was to remain in Secretarial trust for joint management by the Tribal Business

Committee ("TBC") and UDC, with UDC having 27.16186% beneficial ownership. Relying on the Plan for Division's language, the Secretary held the Tribe's *Winters* claims were divided and distributed to mixed-bloods appurtenant to land, including Rangelands. The district court affirmed, and also found the Secretary has indefinite authority under the Partition Act to resolve disputes by dividing assets, and also has indefinite authority to decide whether an asset actually was divided and distributed a half-century ago. Addendum, Ex. 2, p. 13. The district court also stated it would make the same ruling if deciding the issue independently. *Id.*

II. COURSE OF PROCEEDINGS

On April 24, 1995, the UDC filed a Complaint against the Secretary and Tribe seeking declaratory judgment regarding Tribal water rights. On March 5, 1997, the court remanded the issue to the Secretary for "final action and decision." AR 49-51. The Secretary issued a decision October 2, 1998 (Addendum, Ex. 4 (1998 Decision (AR 1349-70))), finding: (1) "tribal water rights of the Ute Indian Tribe were an asset susceptible to equitable and practicable distribution and that this asset was in fact divided and distributed" appurtenant to land (AR 1353), and (2) the UDC had no right to share in funds from Congress under Central Utah Project legislation related to the 1965 Deferral Agreement, which was compensation for the Tribe's deferring its assertion of *Winters* claims (AR 1369-

70). In deciding, the Secretary concluded the parties approved the Plan for Division and it provided *Winters* claims were appurtenant to even Rangelands.

After the 1998 Decision, the court ordered the Secretary to provide documents to the UDC since she had not done so, and to consider those on further review. AR 1577-78. On February 5, 2004,[1] the Secretary affirmed her 1998 Decision. Addendum, Ex. 5 (2004 Decision (AR 1311-26)).

The UDC filed an Amended Complaint, and the Tribe and Secretary jointly moved to dismiss. The court denied the Motion, finding it had no jurisdiction over a declaratory judgment, but had jurisdiction over appeal of agency action. Addendum, Ex. 2, p. 9 (citing April 19, 2006 Order).

FACT STATEMENT

In addition to the following general facts, the UDC submits for review its Statements of Facts to the Secretary and district court.[2]

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[1]The UDC submitted: (a) brief (AR 1586-1629); (b) "Explanation of Additional Documentation and Evidence" (AR 1632-36); (c) "Additional Documentation and Evidence" (AR 1638-1708); (d) "Alphabetical Index of Document References" (AR 1711); (e) binders containing copies of cited documents.

[2]These have citations to the Administrative Record ("AR"), and are located in Addendum at: (a) Ex. 6 (Statement of Facts in UDC's Initial Brief (AR 1588-99)); (b) Ex. 7 (Additional Statement of Facts on Remand ("Add'l Facts") (AR 1638-1708)); (c) Ex. 8 (Reply to Tribe's Response to UDC's Additional Documentation (AR 1933-71)).

I. BACKGROUND

1. This case involves unliquidated and unadjudicated claims to water rights which, under *Winters v. United States*, 207 U.S. 564 (1908), were reserved when the Reservation was set aside, but which had not been described or put to beneficial use in 1956 at the time of the Plan for Division, and never have been. The core issues are whether, in 1956 when the Plan for Division was approved, *Winters* claims met the requirements of the Partition Act § 677i that they be "susceptible to equitable and practicable distribution" to each mixed-blood, and whether the Secretary correctly concluded claims were actually divided between the two groups and distributed to each mixed-blood as appurtenant to the 27.16186% of Rangelands divided to mixed-bloods as a group.

II. UTE PARTITION ACT

2. In the 1950s, Congress decided to terminate supervision of Indian tribes. *United States v. Felter*, 546 F. Supp. 1002, 1004 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985).

3. In 1954, Congress enacted the Partition Act to terminate the Ute Indian Tribe ("Tribe"), with mixed-blood members terminated first, and full-bloods to be terminated within ten years. *First Security,* 521 F. Supp. at 543.

4. All 490 mixed-blood Tribal members were terminated (27.16186%). *Id.* Full-bloods were never terminated. *Id.*

5. Some Tribal assets were incapable of division, such as gas/oil, minerals, and "unadjudicated or unliquidated claims against the United States." *Hackford v. Babbitt*, 14 F.3d 1457, 1462 (10th Cir. 1994).

III. "DIVISION" AND "DISTRIBUTION" OF TRIBAL ASSETS

6. The Partition Act directed the parties to "commence a division" of Tribal assets "then susceptible to equitable and practicable distribution." 25 U.S.C. § 677i.

7. "Divide" meant to divide assets between the parties in proportion to numbers, *i.e.*, 27.16186% versus 72.83314%. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 135 & n.5 (1972).

8. "Distribute" meant to give each mixed-blood 1/490th share of the 27.16186% of an asset "divided" to the group. *Id.*

9. Assets that could not be "equitably and practicably distributed" to each individual mixed-blood remained in Secretarial trust for joint management by the TBC and "authorized representative of the mixed-blood group." *Id.* at 135. This included mixed-bloods' collective 27.16186% beneficial ownership in oil/gas. *Id.*

IV. PLAN FOR DIVISION

10. In late 1956, the TBC and Affiliated Ute Citizens ("AUC"), as mixed-bloods' representative, approved a Plan for Division. AR 127-44, 136. On

October 16, 1956, the Plan was approved by the Superintendent of the Uintah & Ouray Agency ("Reservation Superintendent"). AR 136.

11. The Plan for Division took effect once adopted by the TBC and AUC, and after Secretarial approval. AR 135.

12. Section X of the Plan for Division specifies generally how valuation of "land" will occur for division purposes. For example, "assignments" were lands "assigned" to Tribal members based on the Tribe's 1937 Constitution. These were beneficially owned by the Tribe with "assignees" having right of use for life. Addendum, Ex. 9 (1937 Const., pp. 6-8).

13. After 1934's Indian Reorganization Act, Indians could not obtain allotments, and thus could not obtain legal title to Tribal property unless they had a pre-1934 allotment. *County of Yakima v. Confederated Bands & Tribes of Yakima Indian Nation*, 502 U.S. 251, 255 (1992).

14. Under the Plan for Division § X(B), assignees could purchase their assignments for market value, with proceeds divided between the parties. AR 134 If the assignee did not purchase the assignment, it was sold to another mixed-blood, full-blood, or non-Indian. Other land was handled the same way. *Id.*

15. The Plan for Division directs that land division need not be based on market value, but if not, it must be divided on "equitable and relative values of the divided assets in direct relation to the established ratio." AR 133.

16. Section X(C) of the Plan for Division specifies how valuation of Rangelands must occur for division purposes. AR 134. Division was on "animal unit month" ("AUM"), *i.e.,* grazing capacity. The only water mentioned was stock water, not irrigation or M&I water:

> X(C): Range Lands: Considering improvements, ease of fencing, location to markets, relation of summer and winter range and water, range lands will be equitably divided using animal use units as the measure of value.

AR 134.

17. Section X(F) of the Plan for Division is a general provision on valuing lands with regard to water, *i.e.*, determining "fair value" so land can be "divided." It assumes that if specified water rights are not considered in determining lands' "fair value," they do not run with the land. "Fair value" is determined by considering water and water rights "pertinent" to the land or being used there at that time, as well as "potential water rights that may subsequently attach":

> X(F): Water Rights: All water and water rights pertinent to the lands involved or generally used in connection therewith whether represented by shares of stock in a corporation or otherwise and all potential water rights that may subsequently attach to the lands to be divided shall be considered in arriving at the fair value of the lands divided and shall be considered as running with the land.

AR 135.

18. Agreement alone was not enough; the Secretary had to convey the assets. Add'l Facts ¶ 20.

V. UTE DISTRIBUTION CORPORATION

19. The UDC was incorporated in 1958 to manage jointly with the TBC all Tribal assets that could not be equitably and practicably distributed. *Affiliated Ute Citizens,* 406 U.S. at 136. It was formed "for the distribution of assets to the individual members of the [mixed-blood] group." *Id.*

20. In January 1959, the AUC and Secretary approved the UDC Articles of Incorporation, and the AUC delegated authority to the UDC to handle all assets that could not be equitably and practicably distributed. *Id.* Each mixed-blood received 10 UDC shares to represent their beneficial interest in assets that could not be equitably and practicably distributed. *Id* at 136-37.

VI. VALUATION OF TRIBAL ASSETS

21. Experts were hired to assess Tribal farming lands, Tribal rangelands, and Tribal *Winters* rights/claims. Each was handled differently.

A. Tribal Farming Lands

22. At the time of termination, the irrigation source for all Tribal farming lands was water from the Uintah Irrigation Project ("Project").[3] *Hackford,* 14 F.3d at 1457. Project water is "managed by [DOI]." *Id.* at 1459. The water rights were

[3]Facts and citations to documents involving the Project are at Add'l Facts ¶¶ 98-101.

held in the United States' name, with assignees and allottees having right of use of a portion of water available under the Tribe's right. Under negotiated terms of the unratified 1980 and 1990 Compacts, the title status of all Tribal rights would remain. They would be held in the United States' name, with successors of allottees and those who purchased assignments having beneficial right of use of water. AR 2305, 2397.

23. Project work began in 1905 and was substantially completed by 1922, and its water served most Tribal allotments. *Hackford,* 14 F.3d at 1461 n.2. The United States filed lawsuits in 1923 to enjoin non-Indian irrigation companies from interfering with Indians' use of water from three rivers flowing through Project lands. *Id.* at 1461. The Tribe's water rights had originally been perfected pursuant to state application and certification process with a 1905 priority, but the 1923 lawsuits declared the Tribe's rights were *Winters* rights with an 1861 priority. At the time of partition, these rights unquestionably were more than "claims," and had become *Winters* "rights" through adjudication.

24. In *Hackford v. Babbitt*, the Secretary refused to acknowledge the Project was a Tribal asset. However, she stated that if it was, since the Partition Act "conferred a collective right" to jointly manage assets that could not be "equitably and practicably distributed," the UDC and Tribe would manage it. *Hackford*, 14 F.3d at 1465.

B. Mixed-Blood Rangelands

25. In 1905, the United States set aside Tribal Rangelands as a "non-irrigable grazing reserve," which was their status in 1955-1956. AR 3493-94.

26. On September 20, 1955, Bureau of Indian Affairs ("BIA") officials met with Tribal officials to discuss dividing Tribal Rangelands. Add'l Facts ¶¶ 8-9 (AR 2510-23). They decided to divide Rangelands based on carrying capacities set in 1948 and 1952. *Id.; First Security,* 521 F. Supp. at 544-45; AR 2512, 2530-31. The Tribal attorney stated there was "no intention of trying to divide intangible things but that surface rights, for instance, could be divided." AR 2511. This was incorporated into the Plan for Division as § X(C).

27. In 1956, BIA Range Conservationist Joe Wagner determined which Rangelands each group should receive. Add'l Facts ¶¶ 13-16 (AR 2525-48). Wagner used 1948/1952 carrying capacities, and the parties' respective 1954 usages of Rangelands, including summer/winter range. *Id.* ¶ 13 (AR 2530-31, 2534-42, 4674-88, 4692-4730).

28. The Wagner Report does not mention considering *Winters* claims to irrigation water when deciding division. *Id.* ¶ 15 (AR 2525-48).

29. On or about October 9, 1956, the Secretary approved the Plan for Division. Add'l Facts ¶ 17 (AR 4957-72)

C. "Rearranging" Project Water For Land Valuation

30. On June 3, 1957, the Tribe issued a Resolution stating division of Rangelands had been agreed on, but that more time was needed to divide Tribal farming lands because "division of this asset will be dependent upon the final termination [*sic*] of water rights apertaining to the lands to provide for equitable division by the two groups." AR 2561-62

31. In October 1957, the Reservation Superintendent told the BIA that an appraisal was needed before agricultural lands could be divided. AR 4182.

32. By December 23, 1957, the AUC and TBC had compiled a list of Tribal lands and the water rights they had determined would be "appurtenant" to each parcel. AR 4295-4346 ("1957 Tabulation").

33. The 1957 Tabulation shows "rearrangement" of Project water rights. AR 4295-4346. It shows some "assignments" and other lands would have Project water removed, and some would have Project water added. *Id.*

34. The 1957 Tabulation shows full-blood Maxie Chapoose would purchase his assignment, and Project water "pertaining" to 25 acres of that land was removed with land value reduced. AR 4304. Other land had water added, with value increased. *See, e.g.,* AR 4311, 4319.

35. The 1957 Tabulation shows no water associated with Rangelands. AR 4340-41.

D. BIA Appraisal of Mixed-Blood Rangelands

36. The BIA hired Charles Moore in 1958 to appraise Rangelands ("BIA Appraisal") divided in 1956 to the mixed-blood group. Add'l Facts ¶¶ 41-59 (AR 4436-4532, 4781-82).

37. The BIA Appraisal is dated September 1, 1958, with BIA approval September 20, 1958. AR 4748-49.

38. The BIA Appraisal states Rangelands have no potential crop land, and the highest and best use is grazing. AR 4454.

39. "Comparable" lands used to assess Rangelands' value are discussed in terms of AUM, and were non-Indian and other lands that did not have irrigation water rights and typically list "water" as "none." AR 4436, 4532, 4463-71.

40. The BIA Appraisal does not mention *Winters* irrigation claims and does not show Rangelands as irrigable. *Compare* AR 4457-61 *with* AR 4295-4346.

VII. RANGE CORPORATIONS

41. On October 15, 1958, the Rock Creek Cattle Company ("Cattle Company") and Antelope Sheep Range Company ("Sheep Company") ("Range Corporations") were incorporated as non-profit grazing corporations to take title to Rangelands divided to the mixed-blood group. Add'l Facts ¶¶ 60-77 (AR 3575-85, 4357-87). "Each mixed-blood then surrendered his undivided interest in the

range land" which was placed in the Range Corporations, and in return received one share of Cattle Company stock and one share of Sheep Company stock. *First Security*, 521 F. Supp. at 545.

42. Range Corporation shares represented the right to graze 2.5 cows for six months, and 5 sheep for six-months on both winter and summer range. *Id.*; AR 3577-78, 4360. First Security Bank was transfer agent for the shares. *First Security*, 541 F. Supp. at 545.

43. Between October 5, 1959, and September 15, 1960, the Sheep Company was issued patents for about 128,000 acres, and between October 5, 1959 and April 25, 1960, the Cattle Company was issued patents for about 44,000 acres. AR 2848-73, 3171-95. The patents make no mention of water rights. *Id.*

A. *First Security* Finds No "Intangible" *Winters* Water Rights/Claims Appurtenant to Rangelands.

44. In 1981, the Utah district court held a bench trial in *Hackford v. First Security*.[4] A major issue was whether "intangibles" such as *Winters* irrigation claims were appurtenant to Rangelands. *First Security*, 521 F. Supp. at 541, 557. The question was value of Rangelands shares sold by mixed-blood trustee First

[4]For facts and AR cites documents from *First Security, see* Add'l Facts, at n.4 and ¶¶ 41-57, 88-97, 138-67, 178-89. The Secretary and Tribe knew of the lawsuit because the Bank moved to file third-party complaints against them on grounds of fraud, breach of fiduciary duty, etc, based on the Secretary's valuation of shares and her making sure the Bank could only sell shares to the Tribe. *Id.* ¶ 179-89 (AR 4559-62, 4582-4648, 3587-96, 4389-4408).

Security Bank ("Bank"), and the Bank's position was the sales price was adequate because *Winters* irrigation claims were *not* appurtenant to Rangelands. *Id.* at 451-62; Add'l Facts ¶¶ 188-89 (AR 4389-96).

45. Moore was deposed in *First Security* and when asked "what water rights came with this property," answered that only incidental stock watering rights were included. AR 4792-93.

46. Jenkins, BIA Chief Appraiser working with Moore, was deposed in *First Security* and asked what water went with Rangelands, answered "[j]ust whatever stock water we knew about that went with, that was appraised with the land." AR 4752.

47. Moore's and Jenkins' testimony was used as evidence at the bench trial. AR 4810-88, at 4871; *First Security*, 521 F. Supp. at 558. The court held in the Bank's favor, finding no evidence Rangelands had appurtenant *Winters* irrigation rights claims so value was adequate. The court stated that if there had been appurtenant claims, mixed-bloods would have "a colorable claim" for the Bank's selling shares at an inadequate price (Secretary had set value). *First Security*, 521 F. Supp. at 558.

48. As additional support, *First Security* stated "intangible" water claims "were arguably unsusceptible to practicable distribution," and Range Corporations' articles of incorporation "make no reference to the intangible rights

and thus do not empower the corporation to develop them for the benefit of the shareholders." *Id.* at 557-58.

B. Certification of Range Corporations' Value

49. Raymond Carufel was BIA realty officer for the Uintah & Ouray Agency, and Otto Weaver was a BIA land operations officer. Add'l Facts ¶¶ 62-66 (AR 3605, 3613, 2597-980).

50. In 1958 when the Range Corporations were incorporated, Carufel and Weaver certified the value of their lands. AR 3585, 4375-76. That value was the same as in the BIA Appraisal. *Compare* AR 3585, 4375-76 (certifications) *with* AR 4437 (BIA Appraisal).

51. On September 29, 1959, Carufel sent a Memorandum to the Reservation Superintendent regarding "AUC Land Transactions." AR 2663. It lists lands "Incorporated in Antelope Sheep Company" and shows "0" attached "water right." *Id.*

VIII. *WINTERS* CLAIMS BASED ON 1960 DECKER REPORT.

52. At the time of the 1956 Plan for Division, no effort had been made to quantify or identify the Tribe's *Winters* irrigation claims beyond those adjudicated in 1923. No one knew exactly which Tribal lands could be used as the basis for claiming irrigation water, no one knew how much water might be claimed for said lands, and no one knew the total amount of water to which the Tribe might be

entitled. For that to be determined, there would need to be a compact or state court general adjudication. *See* 43 U.S.C. § 666.

53. In 1958, E.L. Decker was hired "to investigate and make reports to the Tribe looking toward full protection to Tribe and Affiliated Ute water rights." AR 2724-25.

54. Decker stated he was to do this by determining for the first time which lands on "the Reservation" were practicably irrigable. AR 2741-42.

55. "Tribal rights to water are quantified based on the purposes of the reservations, but the use to which the water can be put is not necessarily determined by those purposes. Except for water reserved for instream flow to protect and maintain fisheries, most courts have held the tribes may use their water for any lawful purpose." F. Cohen, *Handbook of Federal Indian Law,* p. 1188, § 19.03[6] (2005 ed.).

56. When Decker was hired, the AUC had not delegated to the UDC authority over undistributed assets. *Affiliated Ute Citizens*, 406 U.S. at 136.

A. Decker Report

57. Decker issued his report on December 12, 1960, after patents for Rangelands were issued and after the BIA Appraisal. AR 2162. His Report used the "practicably irrigable acreage" ("PIA") standard to quantify the amount of reserved water claims which the Tribe might assert. *See id.*

58. The Decker Report theorized for the first time that some Rangelands, and some former Tribal lands then in private ownership, were PIA. AR 2134, 2140-43.

59. On April 25, 1962, at Decker's invitation, UDC Board Members attended a conference involving the Central Utah Project ("CUP"). AR 2753-54.

60. On August 27, 1962, the Tribe sent a letter to the UDC asking that it pay its "proportionate share of Mr. E.L. Decker's expenses for working on Indian Water Rights." AR 2668-72.

61. Range Corporations were incorporated in 1958 with the last fee patent issued in 1960, but there is no evidence the Tribe asked them to pay Decker's expenses.

62. On April 25, 1962, BIA officials and the Reservation Superintendent met with the UDC Board to assure there were funds for Decker to continue his work. AR 2753-54.

63. Their articles of incorporation say nothing about, and do not give Range Corporations authority to handle or develop irrigation water rights. Add'l Facts ¶¶ 60, 63 (AR 3575-85, 4357-87).

B. Decker's "Groups"

64. The Decker Report described *Winters* irrigation claims as falling into seven Groups. AR 2162-2301, at 2165-68.

65. Groups 1 and 2 were lands irrigated under the Project as confirmed by the 1923 adjudications. *Id.* Group 3 consisted of additional PIA lands that could be irrigated under the Project. *Id.*

66. Group 4 lands were theorized as PIA based on proposed "privately constructed ditch systems." *Id.*

67. Group 5 was 29,118 acres theorized as PIA when the ultimate phase of the CUP was completed, including construction of the proposed Flaming Gorge Aqueduct, a 200-mile-long tunnel from Flaming Gorge Reservoir. *Id.*

68. Group 6 & 7 lands consisted in part of the "Ute Extension," which the parties had determined was so remote it could not even be divided by AUM, as well as lands theorized as becoming PIA based on proposed private ditch systems. AR 2165-66.

C. Evolution of Decker Group Claims; Other Claims to Reserved Water.

69. The UDC submitted to the Secretary maps by PSOMAS Corporation, of Groups 3, 4, and 5 lands identified by Decker in 1960, showing how the *Winters* claims changed and evolved from Decker's 1960 Report, to the 1980 Compact, to the 1990 Compact. AR 2140-43 (PSOMAS Certification); AR 2134-37 (PSOMAS maps); AR 2303-09 ("1980 Compact"); AR 2406-13 ("1990 Compact").

70. The 1980 and 1990 Compacts contain water claims compiled by the Tribe for each of Decker's Groups. AR 2309-82 (1980 Tabulation); AR 2414-68 (1990 Tabulation). Neither Compact has been ratified.

71. The PSOMAS Certification explains how its tabulations were compiled (AR 2140-43), and states the maps "graphically depict how [Groups 3, 4, and 5 lands] correlate[] with lands conveyed to the Antelope-Sheep Range Company and the Rock Creek Cattle Company." AR 2140.

1. Group 3

72. Decker's Group 3 theorizes irrigability of 1,115.32 acres. AR 2226. The PSOMAS Certification shows these lands were divided 0% to mixed-bloods and 17.95% to the Tribe. AR 2143. The remaining 82.05% could not have been divided because they were privately-owned. *Id.*

73. In the 1980 Compact, Group 3 acreage was reduced by: (a) lands being dropped from tabulation, (b) dropping reference to certification of rights, (c) then trimming all acreage 7% to account for use for highways, corrals, etc., which required no irrigation water. AR 2306. The PSOMAS Certification shows the result was the 1980 and 1990 Compacts recognize 1,037 acres in Group 3. AR 2319, 2358-59; AR 2414.

2. Group 4

74. The Decker Report theorizes irrigability of 1,480 acres of Group 4 lands. AR 2166. About 62.77% of the designation was lands divided to mixed-bloods as Rangelands, with 13.11% of Group 4 divided to the Tribe as its grazing lands. AR 2143. About 24.12% of the lands were privately-owned. AR 2140-43.

3. Group 5

75. The Decker Report theorizes irrigability in Group 5 of 29,118 acres, including a large area called Towanta Flats, which lands would only become irrigable upon construction of the proposed Flaming Gorge Aqueduct as part of the final phase of the CUP. AR 2166, 2169. About 6.7% of Decker's Group 5 lands had by 1960 been sold to individual mixed bloods, or divided as Rangelands to mixed-bloods. AR 2142. 89.5% were given to the Tribe in the grazing lands division, and about 3.8% were privately-owned in 1956. *Id.*

76. By 1980, it was clear the Flaming Gorge Aqueduct would not be constructed. The 1980 Compact replaces 19,809 acres of land in Decker's 1960 Group 5 designation (Towanta Flats) with lands in Leland Bench. AR 2367-68.

77. The Group 5 theory changed again in the 1990 Compact, which states: "[t]he source of supply for the Group 5 lands has been transferred to the Green River, within the exterior reservation boundaries, and the Tribe waives all

claims to develop the Group 5 lands in place as set forth in the Decker Report." AR 2411.

4. Groups 6, 7

78. As Groups 6 and 7, the Decker Report theorizes lands in the "Ute Extension" as PIA. AR 2168. The Ute Extension was Tribal grazing lands so remote they would be difficult to divide even by AUM. AR 2907. The Plan for Division valued them at $1 per acre, with the Tribe retaining them and paying mixed-bloods 27.12186% of that. *Id.*

5. M&I Claim Not Included in Decker Report

79. The 1980 and 1990 Compacts recognize a water claim to 10,000 acre feet reserved for "municipal, industrial and related purposes from the Green River" ("M&I" water). AR 2304–05, 2318, 2413. This claim is not described in Decker's Report, and is not based on irrigability or any other use of any particular land. *See id.*

SUMMARY OF ARGUMENT

The Secretary's Decision should be set aside for failing to properly assess legal and other issues, failing to comply with *Olenhouse* standards, and misinterpreting/misapplying case law. The district court's decision fails for the same reasons, including virtually ignored *Olenhouse* on review.

First, the district court erred in finding it had no jurisdiction over a declaratory judgment action, and in finding that under the Partition Act, the Secretary has sole authority to decide this issue.

Second, the Secretary errs in legal assessment of the Plan for Division and interpretation of "susceptible of equitable and practicable distribution." She fails to show how, except through the UDC, an irrigation claim not known when non-irrigable Rangelands were divided nevertheless could have been distributed so each mixed-blood had 1/490th share.

Third, the Secretary fails to show how a "claim" to irrigation water rights could be appurtenant to non-irrigated Rangelands so as to be divided and distributed equitably when economic and statistical data was not available to determine what land was and was not PIA, and when PSOMAS maps illustrate the *Winters* irrigation claims were not fixed and have evolved over time, including disappearing or being shifted in association with the irrigation of distant parcels and based on claimed irrigability of lands that did not belong to the Tribe in 1960.

Fourth, the Secretary fails to explain how Rangelands could have been divided equitably based on *Winters* claims when PSOMAS maps show inequitable division when those claims are considered.

Fifth, the Secretary errs in applying Plan for Division § X(F) to Rangelands, including that the 1957 Tabulation she uses to prove unadjudicated *Winters* irrigation claims were appurtenant, proves they were not.

Sixth, the Secretary fails to meet *Olenhouse* standards, including failing to rely on "substantial evidence," providing implausible explanations, ignoring evidence, and violating due process.

Seventh, the Secretary errs in legal interpretations of the Plan for Distribution, and misapplies allotment case law.

Eighth, the Secretary fails to explain how as trustee of Range Corporation shares she could find *Winters* irrigation claims appurtenant to non-irrigated Rangelands, when *Hackford v. First Security* held they were not.

Ninth, the Secretary's Decision that the UDC is not entitled to restitution of its portion of Title V funds is based on her perception that Congress intended to choose sides. Plain language of the Joint Senate and House Report shows precisely the contrary.

ARGUMENT

I. STANDARD OF REVIEW

Review of the Secretary's Decision is *de novo.* This Court is not bound by the district court's factual findings or legal conclusions. *Olenhouse,* 42 F. 3d at 1577 n.27. "Informal agency action must be set aside if it fails to meet statutory,

procedural, or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 1574 (citation omitted). Under *Olenhouse,*

> the essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion. Legal principles applicable in the first two determinations are straightforward. . . . Determination of whether the agency complied with prescribed procedures requires a plenary review of the record and consideration of applicable law.

Id. at 1574 (citations omitted).

The reviewing court must "engage in a 'substantial inquiry,'" and the agency's action must be given a "thorough, probing, in-depth review. " *Id.* '"[T]he reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions.'" *Id.* at 1573 n.23 (citing 5 U.S.C. § 706(2)(E)). If due process and sufficiency are raised, the reviewing court "must review the agency's decisionmaking process and conduct a plenary review of the facts underlying the challenged action." *Id.* at 1565. Where the agency's process is not conducted in a "manner most likely to obtain the necessary facts," there is a due process violation and the result is a decision "both arbitrary and capricious." *Id.* at 1583. Agency action is set aside if its process violates "basic concepts of fair play." *Id.*

In considering "arbitrary and capricious" the court must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decisions made." *Id.* at 1574. Thus,

> [i]n reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. Agency action will be set aside "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Id. (citations omitted). "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 50 (1983). "The agency must make plain its course of inquiry, its analysis and its reasoning. After-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with these principles." *American Petroleum Inst. v. EPA*, 540 F.2d 1023, 1029 (10th Cir. 1980).

The arbitrary and capricious standard requires that informal agency action be supported by facts contained in the record, and action will be set aside as arbitrary if it is "unsupported by 'substantial evidence.'" *Olenhouse*, 42 F.3d at 1575. A court may "'strike down as arbitrary agency action devoid of needed factual support.'" *Id.* (citation omitted). "'Substantial evidence' is more than a mere scintilla; it must be such relevant evidence as a reasonable mind might accept

as adequate to support a conclusion. Evidence is not substantial if it is overwhelmed by other evidence." *Id.* at 1581 (citations omitted). Further:

> "the substantial evidence test to impose affirmative duties on a district court: the court must consider conflicts in the record and 'define, specifically, which facts it deems supportive of the agency's decision if that is the court's resolution of the matter. This requires a plenary review of the record as it existed before the agency.'"

Id. (citations omitted). The court must conduct the record review and identify for itself facts supporting the agency's action, which requires factual findings. *See id.* at 1580-81. "Isolated bits of evidence, taken out of context and overwhelmed by other evidence, will not support an affirmance of agency action. By relying on such 'evidence,'" a court commits reversible error. *Id.* at 1578.

II. THE DISTRICT COURT HAD JURISDICTION OVER A DECLARATORY JUDGMENT.

Stating the Secretary has sole authority under the Partition Act to decide whether the *Winters* claims are subject to joint management, the district court found it has no jurisdiction over a 28 U.S.C. § 2201 declaratory judgment to declare the UDC's and Tribe's rights under the Partition Act. This Court should find this is incorrect. There is nothing in the Partition Act to give the Secretary authority after final termination: (1) to declare whether an asset is susceptible to equitable and practicable distribution; (2) to decide whether an asset actually was divided/distributed in 1956; (3) to actually divide an asset. *See* 25 U.S.C. ¶¶ 677,

et seq. This Court should find the district court had jurisdiction to decide this issue and could have independently done so.

III. *WINTERS* IRRIGATION CLAIMS WERE NOT "SUSCEPTIBLE TO EQUITABLE AND PRACTICABLE DISTRIBUTION," AND THERE WAS NO DISTRIBUTION.

The Secretary's Decision is based on her finding that *Winters* irrigation and M&I claims were appurtenant to non-irrigated Rangelands, and were divided and distributed with those Rangelands. To be valid, her conclusion requires a: (1) legal decision that *Winters* claims were "susceptible to equitable and practicable distribution" so each mixed-blood could proportionately use and benefit from such claims, just as the mixed-bloods obtained a right to use and benefit from the Rangelands for grazing, and (2) factual determination that those claims were equitably divided as appurtenant to Rangelands, and then were equitably distributed to each separate mixed-blood. Her assessments fail.

A. *Winters* Irrigation Claims Were Not "Susceptible to Equitable and Practicable Distribution."

The Partition Act prohibited division or distribution of Tribal assets unknown in scope. Other than land irrigated under the Project as described in the 1923 decrees, the Tribe's irrigation claims under *Winters* were of unknown scope in 1956 when Rangelands were divided, and could not have been included in their value so as to assure the two groups received appropriate ratios.

The Partition Act mandates that only assets that can be identified and quantified are capable of division and then distribution with each mixed-blood receiving a proportionate share. "Distribution" of assets of unknown quantity and location, such as oil/gas, was not only impossible except through the UDC, it was prohibited:

> All unadjudicated or unliquidated claims against the United States, all gas, oil, mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be jointly managed by the Tribal Business Committee and the authorized representative of the mixed-blood group, subject to such supervision by the Secretary as is required by law . . ..

25 U.S.C. § 677i. For example, land was not "divided and distributed" under the Partition Act except by selling it and dividing monetary proceeds, with mixed-bloods' 27.16186% then "distributed" by paying each mixed-blood 1/490th of 27.16186%. Everyone who obtained land under the Partition Act paid for it. The Partition Act states "any contract made in violation of this section shall be null and void." 25 U.S.C. § 677i.

The Secretary erred in her legal conclusion that *Winters* claims were "susceptible of equitable and practicable distribution" in 1956. Those claims could not have satisfied statutory requirements for division/distribution in 1956 unless *Winters* claims were *not* part of valuation of Rangelands because: (1) the standard for quantifying Indian reserved water rights was uncertain in 1956 and to a great extent remains so; (2) "quantification," *i.e.*, legal determination of nature

and extent of the right, can only be done through general adjudication or compact; and (3) economic and statistical data to determine the nature and extent of any right was unavailable in 1956.

1. Indian Water Rights Law Was Not Certain When Rangelands Were Divided And Remains Uncertain.

Winters claims here do not satisfy the Partition Act's division/distribution requirements because law on how to determine reserved rights was uncertain in 1956 when Rangelands were divided.

In *Winters*, the Court held that the reservation of land for a particular purpose impliedly reserves sufficient water to make reservation lands "valuable or adequate" for the reservation's purposes. *Winters v. United States*, 207 U.S. 564, 576 (1908). After *Winters*, Indian reserved water rights/claims became the enigma of western water law. They existed, but had no stated quantity, no stated point of diversion, no stated use, and no stated place of use. Most important, they had no risk of forfeiture for non-use, and very early priority dates. *Winters* thus cast a cloud of uncertainty over the western system of adjudication of water rights on the basis of prior appropriation. "The federal reserved right is not like any other water right in the West. It is not on record, not fixed in size, not dependent on beneficial use." Trelease, *Federal Reserved Water Rights Since PLRRC*, 54 Denver L.J. 473, 474 (1977). This uncertainty meant that such things as planning water projects was "impaired because neither present nor future water projects can rest securely

upon supply estimates," and there was no "clear quantification standard." *Indian Reserved Water Rights: The Winters of Our Discontent*, 1979 Yale L.J. 1689, 1692.

It was not until 1963 in *Arizona v. California*, 373 U.S. 546 (1963), that the Supreme Court addressed the standard for scope and extent of reserved water rights for irrigation. Cohen, p. 1984, § 19.03[5][a].[5] *Arizona*'s issue was determining the amount of water "reserved" for irrigation by tribes living along the Colorado River. Restrictive standards were proposed by non-Indians, *i.e.*, "reasonably foreseeable needs" and "equitable apportionment," but the Court selected the most expansive standard proposed. It found tribes were entitled to enough water to irrigate all "practicably irrigable" acreage on the reservation ("PIA standard"). Cohen, p. 1185-86, §§ 19.03[5][a]&[b] ("Court created [PIA] standard as 'only feasible and fair way' to measure agricultural water rights").

"The future of the PIA standard is in some doubt." Cohen, p. 1186, § 19.03[5][b]. States criticize PIA as giving tribes a windfall, but tribes with few irrigable acres contend if they had adequate water they could develop other

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[5]Boomgaarden, *Quantification of Federal Reserved Indian Rights—"Practicably Irrigable Acreage" Under Fire: The Search for a Better Standard*, 1990 Land & Water L.Rev. 417, 421 (Court took 50 years post-*Winters* to discuss issue again); M. Franks, *The Uses of the Practicably Irrigable Standard in the Quantification of Reserved Water Rights*, 31 Nat. Resources J. 549, 552 (1991) (Court provided no guidance on quantification for irrigation before 1963's *Arizona v. California*).

resources which they *do* have to provide an economic base. *Id.* Another question unresolved for Indian Reservations is whether water rights were reserved for all purposes of the Reservation, or just primary purposes of the Reservation. Cohen, p. 1180, § 19.03[4].

The Rangelands were divided in 1956, and at that time there was no law on method for quantification. The law as to quantification of Indian water rights continues to have considerable uncertainty. This means any water "claims" could not have been divided equitably as appurtenant to particular parcels.

2. *Winters* Water Is Quantified Only by General Adjudication or Agreement.

Even if there had been a definitive standard in 1963, there had been no "quantification" of the Tribe's *Winters* claims, so it was impossible to divide and then distribute equitably so that each mixed-blood could benefit from 1/490th of the mixed-bloods' share. "Quantification" sets the amount of water available to the Tribe as its "right." There are two ways to quantify a claim: (1) general judicial adjudication, or (2) compact among the United States, Tribe, and State. *See* McGovern, *Settlement or Adjudication: Resolving Indian Reserved Water Rights*, 36 Ariz. L.Rev. 195, 196-97, 214-20 (1994). Before quantification, an unadjudicated water right is only an untested and uncertain *claim* for water. *Id.* at 197. This means proof must be supplied that the claim is consistent with proferred use of the land and purposes of the reservation. Regarding Decker's PIA claims,

the question is whether the land on which claims were based actually *was* practicably irrigable. For M&I water, it would be whether the claimed amount was consistent with purposes of the reservation.

Although Decker theorized potential claims for *irrigation* in his 1960 Report, his Report did not establish their validity. That was impossible without adjudication or compact. In fact, the Tribe's "claims" have changed substantially since 1960, whereas if there had been adjudication, the amount of those claims would have been unchangeable. What Decker did was to inventory lands and give his judgment about their greatest potential for eventual adjudication or negotiation confirming they were in fact practicably irrigable.

The *Winters* claims at issue here were, and remain, unquantified and uncertain. They were incapable of equitable "distribution" to each separate mixed-blood except through the UDC and its trustee relationship with the Secretary. Without quantification, they were like the "unadjudicated and unliquidated claims against the United States." Had some unadjudicated and unliquidated claims gone to the full-bloods, and others to the mixed-bloods, some claims would have borne fruit, and others would not, leaving the parties with an inequitable distribution. Equity demanded that all such claims be held for the benefit of both groups, with proceeds distributed from the whole lot as received. This is exactly like oil/gas, *i.e.*, had mineral rights been distributed as appurtenant

to Rangelands without knowledge about which lands were rich in minerals and which were poor (something still not well-understood today) the division of minerals would not have been equitable, but rather, would have been random and illegal under the Partition Act.

3. Economic/Scientific Data Was Unavailable in 1956

Winters claims could not have been divided and distributed in 1956 because the nature and extent of an Indian reserved water right requires economic and scientific study and data concerning viability and economic feasibility of water use, as well as the economic viability of building facilities to deliver the water, all of which was unavailable in 1956. *See* Boomgaarden, p. 29; *In Re: General Adjudication of All Rights to Use Water in the Big Horn River Sys*, 753 P.2d 76, 102-05 (Wyo. 1988), *aff'd sub nom. Wyoming v. United States*, 109 S. Ct. 2994 (1994). Until a final adjudication determining which parcels are in fact PIA, or until a final ratified compact, the claims at issue here–like all unadjudicated *Winters* claims of the Tribe–are subject to change.

As of April 11, 1956, the CUP had been authorized as a participating project of the Colorado River Storage Projects Act, 43 U.S.C. § 620. In 1956, when division of Rangelands was agreed on, the work needed to identify which tracts of land had appropriate soil types, topography and climate for irrigation, had not begun, and funds had not been appropriated for the CUP so investigative work on

that had not begun. *See* Bureau of Reclamation, Department of Interior, *Central Utah Project Bonneville Unit Final Environmental Impact Statement* (Aug. 2, 1973), p. 19. To attempt in 1956 to associate a particular tract with a given amount of water that *might* be available from the CUP in particular would have been sheer speculation, and the Secretary has not referenced a single document or statement to show quantification was even attempted in 1956. Under the mandate of § 677i, that asset remained in trust.

B. Adopting the Secretary's Decision Means Division Was Inequitable.

As discussed above in Part III(A), the Tribe's *Winters* claims were not legally capable of "equitable and practicable distribution" in 1956. Indeed, facts surrounding the claims and their treatment at partition and afterwards, show they could not have been, and were not, divided and distributed appurtenant to Rangelands.

If the *Winters* rights claims were sufficiently definite to have been capable of equitable division and then distribution in 1956, and if they had been actually appurtenant to Rangelands, one would expect them to be substantially the same today. However, they are different, and the UDC submitted evidence to the Secretary showing that if division of Rangelands was based on Decker's proposed PIA, the division was inequitable. Facts ¶¶ 69-79.

1. M&I Claim

The Tribe's unadjudicated claim to 10,000 acre feet of water for M&I use clearly was not divided and distributed. AR 2413 (1990 Compact's M&I description). Although it is *Winters*-based since it refers to the date of the Reservation, it is not based on irrigation and does not purport to be related to particular lands. *See id.* No law or logic could support this claim as being appurtenant to specific lands, let alone divided with them. There is no evidence it was considered, described or valued at the time of division, and no evidence it was ever divided--which it should have been for the Secretary's Decision to be valid.

2. Group 3 Lands

Assuming the Secretary's Decision is correct that all *Winters* claims were divided, the Group 3 *Winters* claim was not divided equitably in 1956. The 1960 Decker Report describes a claim with 1,115.32 PIA and as:

> Lands that are or can be served from the Duchesne River through the facilities of the Uintah Indian Irrigation Project, a water right for which is claimed under the "Winter's Doctrine." These lands have been placed in two classes: (1) lands certified for the State of Utah for which a supplemental right to the area is claimed consisting of 450.32 acres, and (2) lands not having a State certificate but have been designated as irrigable. A water rights for this land is claimed under the "Winter's Doctrine" and included in the Uintah Irrigation Project by Secretarial designation, consisting of 665.00 acres.

AR 2165. The PSOMAS Certification shows that lands divided in 1956 and which were theorized as Group 3 in 1960, were divided 0% to mixed-bloods via

the Range Corporations, and 17.95% to the Tribe via grazing lands it retained. AR 2143. The remaining 82.05% of these lands were privately-owned in 1956 and not divided. *Id.* The 1980 Compact reduced total acreage of Group 3 lands, recognizing only 1,037 acres. AR 2319, 2358-59; Facts ¶¶ 69-79. The 1990 Compact also recognizes 1,037 acres within Group 3. AR 2414.

3. Group 4 Lands

Again assuming the Secretary's Decision is correct, the Group 4 claim was not divided equitably in 1956. The Decker Report describes this PIA claims as:

> Lands which have been found to be productive and economically feasible to irrigate from privately constructed ditch systems diverting from the Duchesne River or its tributaries above the Pahcease Canal, now in operation or to be constructed, a water right for which is claimed under the "Winter's Doctrine," consisting of 1,480 acres.

AR 2166. Approximately 62.77% of lands included in Group 4 in 1960 had been divided to mixed-bloods in 1956 and went into the Range Corporations, while only 13.11% of grazing lands divided to the Tribe in 1956 were Group 4 in 1960. AR 2140-43. About 24.12% of Group 4 lands were privately-owned in 1956 and not divided. This does not show equity; it shows that division between the parties in 1960 of lands later comprising Group 4 could not have been anything except chance. AR 2140-43.

4. Group 5 Lands

The proportional amount of Group 5 lands shown in Rangelands divided between the parties in 1956 also shows *Winters* claims could not have been appurtenant if division was proportionate. The 1960 Decker Report theorizes Group 5 lands as 29,118 acres which would become irrigable upon construction of Flaming Gorge Aqueduct in the last phase of the CUP.

> Lands which have been found to be productive and economically feasible to irrigate and are proposed to be included in the ultimate phase of the Central Utah Project . . . .

AR 2166, 2169. Of that 29,118 acres, about 6.7% had been divided in 1956 to individual mixed-bloods and mixed-bloods as a group as Rangelands. AR 2142. About 3.8% were privately-owned in 1956, and the remaining 89.2% were divided to the Tribe as grazing lands. *Id.* Since the possibility of constructing the Flaming Gorge Aqueduct was speculative (Facts ¶¶ 75-76), this allegedly "equitable" division by the Secretary's standard, gave the Tribe a disproportionate percentage of lands that likely never would be irrigable.

Furthermore, Group 5 has changed so substantially over time that the Secretary's appurtenancy theory is implausible. When it became clear by 1980 that Flaming Gorge Aqueduct was unlikely to be built, the Group 5 claim shifted, and the 1980 Compact proposed that 19,809 of Group 5 acres be replaced with land in Leland Bench that was not even part of partition. AR 2367-68. Then in

the 1990 Compact, the water source for Group 5 PIA was transferred to the Green River, and the Tribe waived all claims to develop land designated Group 5 by Decker. AR 2411. Consequently, the Secretary's appurtenancy theory fails because it requires that *Winters* claims be fixed, defined, and certain to succeed.

5. Groups 6-7 Lands

Evidence as to Decker's Groups 6 and 7 lands shows the Secretary's appurtenancy theory is legally impossible. The 1960 Decker Report describes Groups 6-7 as lands in the "Ute Extension" and theorizes those as PIA. AR 2168. However, the Ute Extension is so remote it was thought the lands would be difficult to divide even by AUM, so the Plan for Division valued them at $1/acre with the full-bloods retaining them and paying mixed-bloods 27.12186%. AR 2907. Clearly, no *Winters* rights, or "potential rights" were involved in that 1956 valuation. The Group 6-7 claims also changed in the 1980 and 1990 Compacts, rather than being the fixed and certain claims the Secretary's appurtenancy theory assumes and requires.

C. The Theory that Claims to Reserved Water Were "Subject to Equitable and Practicable Distribution" Cannot Stand.

The Secretary's Decision fails unless it is supported by "substantial evidence." *Olenhouse*, 42 F.3d at 1575. "Substantial evidence" means more than a "mere scintilla" of evidence, and also means the decision must be based on an explanation that does not run counter to the evidence or be "so implausible that it

could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 1574. "Evidence is not substantial if it is overwhelmed by other evidence." *Id.* at 1581.

The Secretary's Decision is overwhelmed by other evidence and implausible. If valid, the Secretary's appurtenancy theory must guarantee equitable division, which requires certainty, which means legally enforceable rights. However, her theory is contradicted by PSOMAS evidence of a Group 5 PIA claim that now is based on the practicable irrigability of Leland Bench, but which in 1960 was based on different and distant Rangelands which required construction of a 200-mile-tunnel through mountains to become PIA, and which in 1956 did not have even that speculative tunnel on which to rely. Facts ¶¶ 75-76. It also was impossible in 1956 for mixed-bloods to have legally enforced or benefitted from any alleged water rights.

The water rights claims in Groups 3, 4, and 5 also show implausibility of the Secretary's appurtenancy theory. Although those claims are now claimed by the Tribe, some lands were privately-owned at partition. Facts ¶¶ 72, 74, 75. The Partition Act provides for division of "assets of the tribe" (25 U.S.C. § 677i), and defines "asset" as "property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States" (25 U.S.C. § 677a(f)). That

Winters claims were "distributed" with Rangelands is incompatible with the fact that many lands on which Decker based his "tribal claims" were not Tribal "assets" in 1960. Another item unexplained by the Secretary in her conclusion that *Winters* claims were appurtenant to and divided with Rangelands, is the claim to M&I water. This claim materialized in 1980, associated with no lands at all. Facts ¶ 78. By asserting this claim, the Tribe implicitly asserts it existed at the time of partition. However, there is no mention of M&I in the Plan for Division, and the Secretary does not even attempt to reconcile its existence with her appurtenancy theory, much less identify which "divided" lands this claim was allegedly appurtenant to.

Finally, if the Secretary's legal conclusion above cannot stand, then her factual determination that *Winters* claims in question were actually distributed as appurtenant to the grazing lands is implausible and erroneous. Under *Olenhouse*, the Secretary's Decision (and district court's) must demonstrate she "examined the relevant data and articulated a rational connection between the facts found and the decisions made." *Olenhouse*, 42 F.3d at 1574. This implies a duty to examine critically the relevant facts, such as PSOMAS Certification and Decker Report, and articulate a basis upon which those facts can be reconciled with the Secretary's decision. However, the Secretary and district court failed to account for the random and disproportionate division resulting from her hypothesis, and

also failed to account for claims not tied to divisible lands. This inability and failure renders the Secretary's Decision irrational, arbitrary and capricious, and violates § 677i, which prohibits the very result she imposes.

IV. THE SECRETARY MISINTERPRETED THE PLAN FOR DIVISION.

The Secretary points to § X(F) of the Plan for Division and takes a position that amounts to simply stating: "the parties planned it, and it must be so." Section X(F) states:

> Water Rights. All water and water rights pertinent to the lands involved or generally used in connection therewith whether represented by shares of stock in a corporation or otherwise and all potential water rights that may subsequently attach to the lands to be divided shall be considered in arriving at the fair value of the lands divided and shall be considered as running with the land.

AR 4965. From this, the Secretary assumes that unadjudicated and unliquidated *Winters* claims were not only considered in valuing Rangelands, but that they were actually divided and distributed as "potential water rights." Her analysis involves several legal errors.

First, the Secretary errs in relying on a December 23, 1957 land tabulation ("1957 Tabulation") to prove the parties simply stipulated that *Winters* claims were appurtenant. *See* AR 1355 (referencing 48-page tabulation and contending Court of Claims Case[6] shows parties had "stipulated" "future" water rights were

[6]The "Court of Claims Case" referenced herein is *Affiliated Ute Citizens v. United States*, 566 F.2d 1191 (Table), 1977 WL 25897 (Ct. Cl. 1977), *cert. denied*, 436 U.S. 903 (1978). *See* AR 276-83 (Case Complaint).

"pertinent"). She omits that the 48-page 1957 Tabulation (AR 4295-4346) actually shows the finalized amount of "potential" *Project* water to be included as "pertinent" under § X(F).

The October 1956 Plan for Division's "valuation of lands" provision (§ X(F)) (AR 4296) required that "potential water rights" be used in valuing lands *before* division could occur. Facts ¶ 17. On December 23, 1957, the AUC and TBC sent the Reservation Superintendent the 1957 Tabulation showing water "rights" they now had determined would be appurtenant to each parcel, and which would be used to value the lands as required by § X(F). AR 4295-4346. It shows the parties had "rearranged" water rights, and that all such "rights" were to Project water. *See id.* Some land had appurtenant Project water removed, whereas other lands had Project water added. *Id.*; *see also* Facts ¶ 34 (Chapoose's assignment devalued (AR 4304)).

Thus, the Secretary equates the 1957 Tabulation with *Winters* claims and her appurtenancy theory when she calls it the "actual division of assets" under the Plan for Division (AR 1355), and states that it confirms the AUC "understood" it was "distributing the tribal water rights asset" and that division of "water rights covered in Section X" occurred (AR 1358). However, what the 1957 Tabulation actually confirms is that it was Project water that was referenced in § X(F), and that it was necessary to include in the Plan for Division a "valuation" provision for

"potential water rights" since the parties knew Project water had not yet been rearranged but would be. Indeed, valuation of some lands changed from October 1956 to December 1957 based on "potential [Project] water rights." AR 4295-4346.

Second, the Secretary construes § X(F) by reference to extrinsic evidence, *i.e.*, the 1957 Tabulation, which means she must have assumed "potential water rights" was ambiguous. Her legal construction fails.

"The underlying purpose in construing or interpreting contractual provisions is to determine the intentions of the parties." *Peterson v. Coco-Cola, USA*, 2002 UT 42, ¶ 9, 48 P.3d 941. "The court may consider extrinsic evidence of the parties' intentions where the contractual provision is ambiguous." *Id.* "'A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of " uncertain meanings of terms, missing terms, or other facial deficiencies."'" *Id.* (citations omitted).

The term "potential water rights" is not ambiguous, since a "claim" is not a "right," and in fact is just a "hope" until quantified by general adjudication or compact. It is impossible to value land so that it can be equitably divided if part of the "valuation" is purely speculative. Thus, "potential water rights" must have been ones already quantified, which could only mean Project water, and the 1957 Tabulation shows it *was* Project water that was added.

The term also is not ambiguous because another key provision of the Plan for Division, § X(C), refers to how Rangelands must be valued. Under § X(C), that "valuation" by AUM includes only stock water. For the Secretary to ignore § X(C) in favor of § X(F) as to Rangelands is legally improper, since "it is well established under the generally applicable rules governing contract provisions that specific provisions . . . take precedence over more general provisions . . .." *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 480 (10th Cir. 1996) (citing *Corbin on Contracts*); *Wood v. Utah Farm Bureau Ins. Co.*, 2001 UT App 35, ¶ 7, 19 P.3d 392.

Furthermore, even if there was ambiguity, the 1957 Tabulation proves the parties' intention. It shows the parties intended in § X(F) to assure that: (1) rearrangement of already-adjudicated Project "water rights" had time to take place; (2) the "potential" Project water added or deleted would then be used to value land; and (3) the Plan for Division approved this rearrangement.

In sum, the "Stipulation" relied on by the Secretary to prove *Winters'* claims were appurtenant actually proves the parties' intention was: (1) the only "water rights" covered in Section X(F) were already-adjudicated Project water rights, and (2) the "potential water rights that may subsequently attach to the lands to be divided" referenced in § X(F) were identified and finalized in the 1957 Tabulation.

V. THE SECRETARY FAILED TO MEET *OLENHOUSE* STANDARDS.

The Secretary's Decision and district court's affirmance should be set aside based on *Olenhouse*. The district court failed to consider *Olenhouse* standards in any significant way, and the Secretary did likewise, including failing to: (1) make plain her course of inquiry, analysis and reasoning; (2) examine/consider all relevant data and facts; (3) make needed findings of fact; (4) articulate a rational connection between facts found and decision made; (5) support the decision with "substantial evidence"; (6) consider all important aspects of the issue. Moreover, the Decision: (1) is arbitrarily drawn from facts actually considered; (2) is not supported by the facts in the record; and (3) gives an explanation for decision which runs counter to and ignores evidence, including the government's evidence and past history involving this issue.

A. Conflicts with Other Government Positions

Under the Secretary's theory, all land sold or divided under the Partition Act, including land sold to non-Indians, came with actual ownership (not just use) of both adjudicated and unadjudicated *Winters* rights/claims as appurtenant. This is inconsistent with government positions in other contexts:

1. On July 6, 1960, the government Realty Division prepared a Journal Voucher transferring funds out of trust for the Tribe to purchase "tribal grazing

and restoring ceded lands acquired in division of assets," *i.e.*, Rangeland Corporations shares. AR 2644. The Voucher states "no water rights." *Id.*

2. As shown in agency correspondence, as late as 1963, DOI/BIA had no position on and were unsure as to whether even quantified and adjudicated Project rights were "owned" as "pertinent" under the Partition Act. Addendum, Ex. 10 (Ex. A to UDC's Reply to Tribe) (letter from BIA to Regional Solicitor (Jan. 16, 1963) (requesting decision on whether Project water is property of Indian landowner/allottee so "divergent opinions of various agency and area officials may be reconciled")).[7]

3. In the Court of Claims Case, the government's summary judgment stated conveyances to non-Indians in connection with the Partition Act did not carry reserved water claims because "there is no requirement that the United States deliver water reserved for the reservation to non-Indians who have acquired former Indian lands." Add'l Facts ¶ 120(f), (h) (AR 2953 n.1; AR 3114).

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[7] *See also* AR 1979-81, at 1979 (memorandum from Reservation Superintendent to Decker (Feb. 18, 1959) (cannot complete report until they "know the legal status as to the ownership of the water rights that have been certificated by the state and/or decreed by the Federal Court")); AR 1982-84, at 1983 (letter from BIA area director to Reservation Superintendent (stating belief Secretary can transfer "Indian's" Project water without payment because Secretary is trustee over water)); AR 1985-86, at 1985 (Oct. 9, 1962) (recommending BIA Area Director initiate action with DOI and Solicitor to determine whether rights to Project water are individual property rights)).

4. In the Court of Claims Case, the government argued on summary judgment that it may be possible for *Winters* rights to be an asset "not susceptible to equitable and practicable distribution" or an "unliquidated and unadjudicated claim against the United States" and if so, the UDC would jointly manage that water. Add'l Facts ¶ 130 (AR 3115-17, 3124 n.3).

5. The government's position in the Court of Claims Case was that *Winters* reserved water claims did not run with lands conveyed to non-Indians. The Secretary's position here is *Winters* reserved water claims did run with land transferred to state law chartered range companies that were never members of the Tribe and were never "Indians." Fees patent issued to non-Indians and Range Corporations under the Partition Act have the same language. Add'l Facts ¶¶ 81-82 (AR 3200-13 (non-Indian); AR 3188 (Sheep Company)).

6. The Secretary here and government in the Court of Claims Case contend the value placed on Rangelands included "the water rights related to it." AR 3014. Sworn statements of BIA employees who appraised the Rangelands show the value did not include *Winters* irrigation claims. AR 4792-93 (Moore Depo.); AR 4752 (Jenkins Depo.); AR 3585, 4375-76 (Carufel/Weaver valuation of lands).

7. In *First Security,* the court found *Winters* rights claims were not appurtenant to the Rangelands, which was defendant Bank's position. *First*

Security, 521 F. Supp. at 557-58. The Secretary, trustee over mixed-blood shares at issue in *First Security* and who appointed the Bank as trustor over those shares, now contends *Winters* rights/claims *were* appurtenant to Rangelands.

8. Sometime after 1971, Decker prepared a memorandum referencing new *Winters* claims the Tribe would make for M&I use. Add'l Facts ¶ 131 (AR 2490-99). That claim is not appurtenant to land and is not for irrigation. *Id.*

9. The government argued in the Court of Claims Case that *Winters* claims ran with lands divided to mixed-bloods, but declared those claims can be appurtenant only to "reservation" lands so that after August 1961,[8] mixed-bloods had "no interest in the reserved water rights held in trust by the United States for the Ute Tribe." Add'l Facts ¶ 132 (AR 3123-24). Since alleged *Winters* claims were held by non-Indian Range Corporations and have never been adjudicated, if the government's position is accepted, the Range Corporations lost all claim to reserved water when rights were not adjudicated by August 1961. This means that when the Tribe acquired the majority of Range Corporation shares and dissolved the Corporations in 1969, any potential *Winters* claims had already been lost and could never again be "appurtenant."

10. In the Court of Claims Case, William Veeder, DOI Assistant Commissioner of Economic Development, when advising the government how to

[8]The Proclamation terminating federal trust relationship with mixed-bloods was published August 28, 1961. 26 Fed.Reg. 8042.

respond to an Interrogatory, stated there is "no 'doctrine of appurtenance to the land' so far as is known respecting Winters Doctrine rights to use of water.'" Add'l Facts ¶ 193 (AR 5114-117). He warned: "[i]n a water-short area the conclusion expressed [*i.e.,* there is "appurtenancy"] could destroy the presently existing Uintah-Ouray Reservation if a substantial proportion of the Indians rights to use of water was in fact transferred when the Reservation lands were disposed of." *Id.* The government answered the Interrogatory by stating it called for "a legal conclusion." *Id.* (AR 2785-2846, at 2805).

11. In 1977, the acting director of BIA Office of Trust Responsibilities stated in a letter to Colin Murdock, UDC Board Member: "[a]s stated in your letter the tribal water rights was not divided as it was determined that no workable division and distribution of this Tribal asset could be made." Add'l Facts ¶ 190 (AR 2690-91).

12. Lands offered for sale to mixed-bloods and non-Indians under the Partition Act were identified in published "Invitations to Bid" which listed lands offered, separated lands into agricultural and grazing, and stated the water included in the sale. Add'l Facts ¶¶ 72-87 (AR 3553-59, 3770-77, 3786-87, 3831-60, 3866-79, 3889-3905, 3912-13, 3916-26, 4031-34, 2602-03, 2618-19, 2624-42). All Invitations to Bid stated that any water rights were to Project water. *See id.* ¶ 74 (*e.g.,* AR 3561-63). Agricultural land listed acreage amount of Project

water. *Id.* ¶¶ 75-76 (*e.g.*, AR 3927-31). Grazing land showed no water. *Id.* ¶ 75 (*e.g.,* 4044-48).

B. Failure Under Other *Olenhouse* Standards

The Secretary's other *Olenhouse* failures include:

1. Even when the Secretary addressed a document, her reasoning was implausible. She acknowledged the Voucher which states "no water right" (AR 2644), but disregarded it as not "substantive" and being "inconsistent" with "other" documents she believes support her Decision, including the Plan for Division and Wagner Report (AR 1324). However, she does not identify these other "substantive"documents, and fails to explain why the Wagner Report is inconsistent. Further, as discussed above in Part IV, the parties' intent was that only adjudicated Project water went with lands under the Partition Act.

2. The Secretary's Decision is arbitrarily drawn from facts she actually considered. She explains the UDC's paying its portion of Decker's expenses (Facts ¶ 60 (AR 2668-72) by opining it did this because UDC Board members were "all Mixed-Blood members who, of course, continued to have an interest in protecting the water rights asset divided and distributed to them under the UPA." AR 1321. This argument is so speculative as to be arbitrary and capricious. Further, if the Secretary's appurtenancy theory is correct, the Range Corporations should have paid part of Decker's fee, and there is no evidence of that. She also

fails to acknowledge that Decker and BIA officials met with the UDC Board to assure Decker had funds to continue his work. Facts ¶ 62 (AR 2753-54). She also failed to acknowledge the UDC Board was invited to attend a meeting regarding the CUP (Facts ¶ 59 (AR 2753-54)), which would not have happened unless the UDC jointly managed reserved water claims/rights.

3. The Secretary attempted to explain away the 1977 letter to Murdock where the BIA admits water was not divided/distributed. Add'l Facts, ¶ 190 (citing AR 2690-91). She justifies her disregard by stating: (1) the BIA official "appears to be restating Mr. Murdock's statement"; (2) it is inconsistent with her 1998 Decision; and (3) Murdock was referred to BIA's Phoenix Area Office for a response. AR 1324. By ignoring the letter as inconsistent with her 1998 decision, the Secretary violated due process. Her other reasons were unexplained and thus arbitrary and capricious.

4. In discussing the letter to Murdock, the Secretary fails to mention: (a) the BIA memorandum showing "0" water rights in the Sheep Company; (b) Moore's and Jenkins' *First Security* testimony; (c) valuation of the range lands by BIA officials Carufel/Weaver. Facts ¶¶ 45, 46, 50, 51; AR 1324.

5. The Secretary ignores that if her appurtenancy theory is correct and *Winters* claims were "appurtenant" to Rangelands, the Range Corporations would

have had to sign the September 20, 1965 Deferral Agreement, but they did not.[9] Add'l Facts at ¶ 111-23, at ¶ 122 (AR 3094). Her explanation that the Tribe could sign for the Rangeland Corporations because it held a majority of shares, is implausible, since Range Corporations are not listed on the Deferral Agreement's signature page. AR 3094.

6. The Secretary failed to consider important aspects of the reserved water rights/claims issue, including: (a) benefits of uncertain reserved water rights claims could only be equitably distributed to individual mixed-bloods through the UDC; (b) the 1957 Tabulation finalizes the Plan for Division by rearranging adjudicated Project water to allow valuation of agricultural lands; (c) *Winters* claims are not considered in the Wagner Report; (d) division of Tribal grazing lands occurred before any appraisal was begun; (e) division of Tribal grazing lands was based on AUM; (f) *Winters* claims are uncertain, including in quantity, until determined by general adjudication or compact; (g) *Winters* irrigation claims can be identified by other than PIA; (h) the 1965 Deferral Agreement recognizes reserved water rights claims are not restricted to PIA (Add'l Facts ¶ 117 (AR 3092)); (i) the law and scope of *Winters* rights was unclear and unsettled at the time of the Partition Act, and even now. This makes her decision arbitrary and capricious.

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[9]For facts on the Deferral Agreement and related AR cites, *see* Add'l Facts ¶¶ 111-124.

7. The Secretary's explanation for her decision runs counter to, and ignores evidence such as: (a) specific lands to which the Tribe has attached *Winters* claims have changed over time as reflected in the 1980 and 1990 Compacts, and the water claims ascribed in 1960 to the Rangelands now are based upon alleged irrigability of lands the Tribe did not own at termination; (b) "Invitations to Bid" for lands sold under the Partition Act reflect that farming lands had only Project water (Add' Facts ¶ 73); (c) *First Security* found no reserved irrigation water attached to Rangelands (Facts ¶¶ 47, 48; *First Security,* 521 F. Supp. at 558).

8. The Secretary ignores that if *Hackford v. First Security* was wrongly decided, as her Decision assumes, the Bank would have sued the Secretary for fraud because the Secretary undervalued the shares. *See supra*, fn.4.

9. The Secretary ignores that the Court of Claims Case did not decide the water issue but did state that water claims could have gone to the UDC. Add'l Facts ¶ 137.

10. The Secretary disregards Veeder's position that "there is no 'doctrine of appurtenance to the land' so far as is known respecting *Winters* Doctrine rights to the use of water," with the result that her Decision means Project water is now "owned" by Tribal members and non-Indians, which is contrary to *Hackford v. Babbitt.*

11. The Secretary failed to address or explain in any substantive way the information contained in the historic documents which is graphically illustrated by the PSOMAS maps. AR 1611-615, 1921-22. At most, she simply accepted the Tribe's viewpoint without articulating an opinion or examining the maps. AR 1325. More importantly, if she had doubts about the accuracy of the maps, she could have gone to the underlying source information from the deeds, Decker Report, and Compacts. This is arbitrary and capricious. Alternatively, she excuses her failure to examine PSOMAS maps by stating the UDC could have provided them prior to the 1998 Decision, and she will not consider them on remand. *See id.* This ignores the fact that the maps are but a compilation and illustration of important source information, always before the Secretary and a part of the Administrative Record. In fact, if *Winters* claims were appurtenant to Rangelands as the Secretary contends, an examination of the underlying data, if not the maps, shows the division was wildly out of proportion and not remotely equitable or consistent with statutory authority.

VI. THE SECRETARY ERRED IN INTERPRETING "DISTRIBUTION."

The Secretary's Decision should be set aside because it errs in interpreting the Plan for Distribution. This is a question of law. The Secretary's Decision ignores that even though assets may have been "divided," if they could not be "equitably distributed" to each individual mixed-blood, they went to the UDC.

The Plan for Distribution of assets to each individual mixed-blood contains no provision for distribution of unadjudicated irrigation water rights. AR 4975-93. What it provides is that if property divided to the mixed-bloods requires organization of irrigation companies in order to provide for "equitable or advantageous distribution of water," those companies were to be organized "prior to the transfer of the water rights and the land to be irrigated." AR 4989. No irrigation companies were organized for the mixed-bloods, because in 1956 the grazing lands were not considered irrigable. As *First Security* stated, the Range Corporations' articles of incorporation "make no reference to the intangible rights and thus do not empower the corporation to develop them for the benefit of the shareholders." *First Security*, 521 F. Supp. at 557-58.

VII. THE SECRETARY MISINTERPRETS/MISAPPLIES CASE LAW.

The Secretary's Decision and district court's affirmance should be set aside because they misinterpret/misapply case law.

First, this case is different from *United States v. Powers*, 305 U.S. 527 (1939), and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). There, when title to allotted farm lands passed from Indian to non-Indian, the right to the *use* of an equitable portion of the reserved irrigation water rights also passed. In *Walton*, the appurtenant water had previously been put to use and quantified. *Walton,* 647 F.2d at 510-11; *see also*

United States v. Anderson, 736 F.2d 1358, 1362 (9th Cir. 1984) (non-Indian successor to Indian land acquires right to amount of water being used at time of conveyance, plus amount non-Indian puts to beneficial use following transfer of title). In this case the claimed *Winters* water still has never been used more than a half-century later.

Second, the point of these allotment cases is that the farm allotments in question there were intended to make individual Indian lands fit for agriculture, which lands would eventually be patented and might be sold. This could not be accomplished without irrigation water. Here, the Rangelands were conveyed with the intent they be used by full-bloods and mixed-bloods for grazing, not irrigation. They were valued only on the basis of use for grazing. If the allotment cases are applied by analogy, the Rangelands would have carried a right to use an equitable portion of the Tribal stock watering rights, not irrigation rights.

Lastly, "[m]ost of the [allotment water] cases presume that the allottee acquires a right of use only, so that allotment does not sever water rights from tribal ownership." Cohen, p. 1194-95, § 19.03[8][a]; *Hackford*, 14 F.3d at 1469. For example, in the text of the 1980 and 1990 Compacts the underlying water rights for the Project, and all other tribal rights, are held in the name of the United States and others. This shows the intent of the United States and Tribe, who negotiated the compacts with the State, that legal title to the water rights for the

Project were never transferred as an appurtenance to even assignments and allotments under the Project. All that was transferred was right of use. This has an important consequence. If such *Walton* rights of use are not being used on the allotted lands, the opportunity to use this water reverts to the Tribe. The Secretary does not explain how this reversionary interest was divided and distributed equitably.

VIII. UNDER *FIRST SECURITY, WINTERS* CLAIMS WERE NOT ATTACHED TO RANGELANDS.

In *Hackford v. First Security*, the court held there was no water in Rangeland shares or Range Corporation lands. *First Security*, 521 F. Supp. at 558. When the UDC pointed to this and argued the Secretary is collaterally estopped and cannot contend "unadjudicated water rights claims were appurtenant to the Rangelands divided to the mixed-bloods" (AR 2044-51), the Secretary justified her opposite conclusion by stating *First Security*'s finding is inconsistent with the Plan for Division,[10] and DOI was not a party (AR 1355 n.6; AR 1325 n.10). Her explanation fails all legal standards.

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of that fact or issue

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[10]The Secretary does not contend she could not be subject to *res judicata.* This is proper under *Nevada v. United States*, 463 U.S. 110 (1983), where the Court found the United States could be collaterally estopped even without full mutuality of parties when litigation is unique. The Partition Act is unique.

in a second suit involving the same party or their privy." *Lowell Staats Mining Co. v. Philadelphia Mining Co.*, 878 F.2d 1271 (10th Cir. 1989). Collateral estoppel applies when:

> (1) the issue previously decided is identical to the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Frandson v. Westinghouse Corp., 46 F.3d 975, 978 (10th Cir. 1995). It can also apply to a non-party in privity with a party. *Marine Midland Bank v. Slyman*, 995 F.2d 362, 365 (2d Cir. 1993); *Nevada,* 463 U.S. 110 at 144 n.16 (res judicata applied against tribe where government adjudicated tribe's water rights).

Since the Bank was trustee of the Trust set up by the trustor Secretary to protect Rangeland shares of mixed-blood minors and *non compos mentis,* the Secretary and Bank are in privity. Add'l Facts ¶¶ 88-97 (discussing trust agreement between Secretary and Bank, with AR cites); *id.* ¶¶ 138-89 (*First Security* facts, with AR cites). Further, if *First Security* was decided incorrectly, as the Secretary proposes, she breached her duty or committed fraud in undervaluing Rangelands and then virtually compelling the Bank to sell the shares to the Tribe. *See supra*, fn.4 (discussing third-party complaints against Secretary and Tribe). In light of the Secretary's legal error interpreting the Plan for Division (*supra*, Part IV), that position also fails.

Even if the Secretary was not collaterally estopped, her failure to explain why her conclusion is directly contrary to *First Security* renders it arbitrary and capricious under any *Olenhouse* standard.

IX. THE UDC IS ENTITLED TO RESTITUTION OF TITLE V MONIES.

The UDC asserted it is entitled to be reimbursed its appropriate percentage of monies obtained by the Tribe under Section 502 of Title V of Public Law 102-575. The Secretary's position is "Congress clearly sought to benefit the Tribe, not others, through the settlement provisions of Title V." AR 1325-26. However, this position conflicts with the Congressional Report accompanying Title V legislation:

> The Committee is aware of certain disputes and controversies that exist regarding the rights and privileges of "Full Blood" and "Mixed Blood" groups belonging to or associated with the Ute Indian Tribe of the Uintah and Ouray Reservation. It is the intent of the Committee that this legislation should be interpreted as being neutral with respect to any such disputes and controversies and in no way should be interpreted to affect, modify, affirm, or deny any underlying rights or privileges of any one group with regard to another.

Reclamation Projects Authorization and Adjustment Act of 1992, Report of Committee on Energy & Natural Resources U.S. Senate, p. 103 (part C), Relevant portion in Addendum, Ex. 11. In fact, these funds were intended to compensate for deferral of Tribal water rights, but Congress refused to take a position as to who exactly should be compensated for such deferral.

CONCLUSION

For the reasons set forth above and in its briefing to the Secretary and district court, this Court should find the district court had jurisdiction to declare the UDC's rights on this issue in a declaratory judgment action. This Court should also find the district court's review deficient under *Olenhouse,* as well as based on legal and other standards, and that the Secretary's Decision should be set aside. Further, the Court should find all *Winters* claims were divided/distributed by going to the UDC, to be managed jointly with the Tribal Business Committee, and that reimbursement to the UDC of Title V funds is proper.

REQUEST FOR ORAL ARGUMENT

The Ute Distribution Corporation requests oral argument on grounds that the explanations and questioning of counsel will enable the Court to more fully comprehend the complex nature of the issues involved, including the impact on Indian reserved water rights.

Dated this 10th day of November, 2008.

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 an opening brief because it contains 13,913 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

DATED this 10th day of November, 2008.

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 the **OPENING BRIEF OF PETITIONER UTE DISTRIBUTION CORPORATION** on each separately represented party (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 10th day of November, 2008.

SECRETARY OF THE INTERIOR

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

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

UTE TRIBE

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

UTE TRIBE (cont'd)

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

RED ROCK CORPORATION

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

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

Dated this 10th day of November, 2008.

_____

ADDENDUM

EXHIBITS:

1. Ute Termination Act, 25 U.S.C. §§ 677-677aa

2. District Court Memorandum Decision & Order (June 3, 2008)

3. Plan for Division

4. Secretary of Interior's 1998 Decision

5. Secretary of Interior's 2004 Decision

6. Statement of Facts in UDC's Initial Brief to Secretary

7. UDC's Additional Statement of Facts to Secretary on Remand

8. UDC's Reply to UDC's Additional Documentation on Remand

9. Constitution of Ute Indian Tribe of Uintah & Ouray Reservation (1937)

10. January 16, 1963 Letter from BIA to Regional Solicitor (Exhibit A to UDC's Reply to Tribe)

11. Reclamation Projects Authorization and Adjustment Act of 1992, Report of Committee on Energy & Natural Resources U.S. Senate, p. 103