IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01303-MSK

SOUTHERN UTE INDIAN TRIBE,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
SALLY JEWELL, in her official capacity as Secretary of the Interior,
JANICE M. SCHNEIDER, in her official capacity as Assistant Secretary, Land and Minerals Management,
BUREAU OF LAND MANAGEMENT, and
NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management,

Defendants.

SOUTHERN UTE INDIAN TRIBE'S OPENING BRIEF

Plaintiff Southern Ute Indian Tribe ("Tribe") respectfully submits this opening brief in support of its first claim for relief challenging the Bureau of Land Management's ("BLM") final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," in relation to the Tribe's lands. 80 Fed. Reg. 16128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160) ("BLM Rule").

I. INTRODUCTION

In its first claim for relief, the Tribe requests a declaratory judgment that the BLM Rule impermissibly departs from existing law and, therefore, should be set aside and vacated under the Administrative Procedure Act ("APA") as to the Tribe's lands. 5 U.S.C. § 706(2)(A). At the "law

and motion" hearing of June 23, 2015, the Court found that the Tribe's first claim for relief raised "solely a legal issue with no facts in dispute," and the Court bifurcated the Tribe's first claim for relief from its remaining second claim for relief. Further, under Rule 65(a)(2), FED. R. CIV. P., the Court consolidated the Tribe's motion for preliminary injunction with adjudication of the Tribe's first claim for relief. Courtroom Minutes, at 2, June 23, 2015, ECF No. 15, 1:15-cv-01303-MSK.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under existing law (i.e., 25 C.F.R. § 211.29), Indian Reorganization Act tribes leasing oil and gas minerals under the Indian Mineral Leasing Act of 1938 (25 U.S.C. §§ 396a-396g) ("IMLA") have the unconditional power to supersede, through tribal legislative enactment, the Bureau of Indian Affairs' ("BIA's") 25 C.F.R. Part 211 regulations that implement the IMLA. In 25 C.F.R. § 211.4, those BIA regulations incorporate the BLM's 43 C.F.R. Part 3160 regulations, within which the BLM intends to include the BLM Rule. 80 Fed. Reg. at 16217-22. In contrast to the power of supersession recognized in 25 C.F.R. § 211.29, the BLM Rule conditions tribal variances on the appropriate BLM State Director's discretionary approval and "only if the BLM determines that the [tribe's] proposed alternative meets or exceeds the objectives of [the BLM Rule]." 80 Fed. Reg. at 16221. Accordingly, the first legal issue is whether the conditional tribal variance provisions of the BLM Rule conflict with the Tribe's 25 C.F.R. § 211.29 unconditional right to supersede the 25 C.F.R. Part 211 regulations.

2. The United States Department of the Interior's Departmental Manual directs that the exclusive means by which delegations within the Department may occur is via Departmental Manual releases. Under the Departmental Manual, the BLM's delegated authority does not

include authority for administering operations on Indian lands leased under the Indian Mineral Development Act of 1982 (25 U.S.C. §§ 2101-2108) ("IMDA"). Thus, the second legal issue is whether the BLM and its officials lack the delegated regulatory authority to apply the BLM Rule to the Tribe's lands subject to minerals agreements under the IMDA.

III. SUMMARY OF ARGUMENT

The BLM Rule unlawfully conflicts with existing law in two respects. First, the variance provision in the BLM Rule, which conditions the Tribe's ability to obtain a variance on the appropriate State BLM Director's discretionary determination that the Tribe's law meets or exceeds the BLM Rule's objectives, conflicts with the Tribe's unconditional power under 25 C.F.R. § 211.29 to supersede the BLM Rule. Second, under the United States Department of the Interior's Departmental Manual, BLM lacks the delegated authority to apply the BLM Rule to the Tribe's lands subject to minerals agreements under the IMDA. Because the BLM Rule's variance provision conflicts with the Tribe's power to supersede under 25 C.F.R. § 211.29 and because the BLM lacks delegated regulatory authority under the Departmental Manual to regulate IMDA lands, the BLM Rule, as promulgated, is "not in accordance with law." *See* 5 U.S.C. § 706(2)(A).

IV. STANDARD OF REVIEW

The APA sets out the standards of judicial review of agency action. Under the APA, the reviewing court decides "all relevant questions of law, interpret[ing] constitutional and statutory provisions, and determin[ing] the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The reviewing court must hold unlawful and set aside agency actions, findings, and conclusions if they are "not in accordance with law." 5 U.S.C. § 706(2)(A). Generally, if

agency regulations conflict with clear statutory limitations, no deference is owed to the agency's regulation. *United Keetoowah Band of Cherokee Indians v. United State Dep't of Housing and Urban Development*, 567 F.3d 1235, 1245 (10th Cir. 2009). If a statute is silent or ambiguous, a reviewing Court must "ask 'whether the agency's answer is based on a permissible construction of the statute.'" *Id.* at 1240 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (2004)). Where two agencies have conflicting regulations, however, *Chevron* deference is not appropriate, and any deference afforded to challenged agency regulations will turn on a number of factors, including the relative historic role and expertise of the agency with respect to the matter in conflict. *See, e.g., ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) (determining that the Department of the Army rather than the Department of the Interior had exclusive authority to contract for withdrawals of water from flood control reservoir).

In this case, no deference is owed to BLM's newly adopted regulatory restrictions on the power of Indian Reorganization Act tribes to supersede the BLM Rule incorporated by reference in the BIA's regulations, particularly since the scope of such tribal power is a matter about which the BLM has no recognized expertise. The BIA, rather than the BLM, is the agency whose interpretations of the scope of tribal powers of supersession under 25 C.F.R. § 211.29 should be afforded deference. *Cf. Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152 (1991) (where two administrative actors within the same agency have conflicting interpretations of the same agency regulation, the interpretation of the actor empowered to promulgate rather than adjudicate the regulation was entitled to judicial deference). The Court, therefore, should decide the Tribe's first claim for relief de novo, without affording any deference to the BLM Rule and deferring instead to the BIA's longstanding interpretations of the

Indian Reorganization Act of 1934 and the IMLA embodied in 25 C.F.R. § 211.29.

Affording deference to the BIA's interpretation of tribal supersession powers also comports with canons of construction that favor tribal sovereignty in reviewing ambiguous statutes and regulations affecting tribes. *See, e.g., Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'"); *see also, Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283-84 (10th Cir. 2010) (noting that "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization," and discussing Tenth Circuit cases regarding applicability of federal laws of general applicability to Indian tribes).

V. ARGUMENT

A. The tribal variance provision in the BLM Rule conflicts with and unlawfully conditions the Tribe's power as an Indian Reorganization Act Tribe under 25 C.F.R. § 211.29 to supersede the regulations in 25 C.F.R. Part 211 including the BLM regulations incorporated therein by reference.

1. Under 25 CFR 211.29, the Tribe has the unconditional power to supersede the Part 211 regulations including the BLM regulations incorporated therein by reference, and most particularly the BLM Rule.

The implementing regulations for the IMLA, one of two Indian tribal mineral leasing statutes cited by the Defendants as authority for promulgation and application of the BLM Rule to Indian tribal lands, provide that any regulation in 25 C.F.R. Part 211 may be superseded by a tribal constitution or charter issued under the Indian Reorganization Act of 1934 (25 U.S.C. §§

476, 477) or by any tribal law authorized by a tribal constitution or charter. 25 C.F.R. § 211.29. In other words, tribes organized under the Indian Reorganization Act are empowered by 25 C.F.R. § 211.29 (and have been empowered since shortly after enactment of the IMLA (3 Fed. Reg. 1429 (June 17, 1938)) to supersede the regulations of the Secretary of the Interior governing lease operations. 25 C.F.R. § 211.29 provides:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461–479) . . . or by ordinance, resolution, or other action authorized under such constitution, bylaw or charter; Provided, that such tribal law may not supersede the requirements of Federal statutes applicable to Indian mineral leases. The regulations in this part, in so far as they are not so superseded, shall apply to leases and permits made by organized tribes if the validity of the lease or permit depends upon the approval of the Secretary of the Interior.

The Supreme Court relied upon this regulatory acknowledgment of tribal primacy as specific authority supporting tribal imposition of a severance tax covering leases issued under the IMLA. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 140, 150 n.15 (1982). The regulation carries out the proviso in Section 2 of the IMLA (25 U.S.C. § 369b), under which Congress reserved to Indian Reorganization Act tribes full authority to legislate on mineral development matters that are within their constitutional authority. *Merrion*, 455 U.S. at 150. Congress explicitly provided that the leasing procedures of the IMLA would "in no manner restrict the right of tribes organized and incorporated under Sections 16 or 17 of the [Indian Reorganization Act] (48 Stat. 984) [25 U.S.C. §§ 476, 477] to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution or charter adopted by any Indian tribe pursuant to the [Indian Reorganization Act]." 25 U.S.C. § 396b.

The power of Indian Reorganization Act tribes to supersede IMLA regulations includes the power to supersede BLM's 43 C.F.R. Part 3160 regulations, which apply to IMLA lands via BIA's incorporation of the BLM regulations in the IMLA regulations. Indeed, the 43 C.F.R. Part 3160 regulations are made applicable by the BIA to IMLA lands only through incorporation under BIA's IMLA regulations, and the BLM intends to include the BLM Rule within 43 C.F.R. Part 3160. Specifically, 25 C.F.R. § 211.4, provides:

> The functions of the Bureau of Land Management are found in 43 CFR part 3160—Onshore Oil and Gas Operations, 43 CFR part 3180—Onshore Oil and Gas Unit Agreements: Unproven Area, 43 CFR part 3260—Geothermal Resources Operations, 43 CFR part 3280—Geothermal Resources Unit Agreements: Unproven Areas, 43 CFR part 3480—Coal Exploration and Mining Operations, and 43 CFR part 3590—Solid Minerals (other than coal) Exploration and Mining Operations; and currently include, but are not limited to, resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification. These regulations, apply to leases and permits approved under this part.

Another BIA IMLA regulation that incorporates portions of the BLM's 43 C.F.R. Part 3160 regulations is 25 C.F.R. § 211.48, requiring Secretarial approval in accordance with 43 C.F.R. Part 3160 before operations are started on IMLA leased premises. Arguably, BIA has also incorporated portions of BLM's 43 C.F.R. Part 3160 regulations through 25 C.F.R. § 211.49, subjecting IMLA leases to "such restrictions as to time or times for well operations and production from any leased premises as the Secretary judges may be necessary or proper for the protection of the natural resources of the lease land and in the interest of the lessor." Regardless of the specific incorporating provision of 25 C.F.R. Part 211, however, the BLM Rule amends and revises the 43 C.F.R. Part 3160 regulations, which are made applicable by the BIA to IMLA

lands through incorporation under BIA's IMLA regulations.

In its comments on BLM's proposed hydraulic fracturing rule, the Tribe reminded the BLM that the Tribe's powers as an Indian Reorganization Act tribe included the power to supersede BLM regulations incorporated by reference in the regulations governing the leasing of tribal lands under the IMLA. Aff. Robert Zahradnik ¶ 13, June 22, 2015, ECF No. 6-2, 1:15-cv-01303-MSK. The BLM, however, while noting that the issue of supersession had been raised in tribal comments, refused to recognize the right of Indian tribes to opt out of the BLM's rule, stating:

> [25 C.F.R. § 211.29] includes a proviso that tribal law may not supersede the requirements of Federal statutes applicable to Indian mineral leases, and that the regulations in that part [25 C.F.R. Part 211] apply to tribal leases and permits that require the Secretary's approval.

80 Fed. Reg. at 16185 (emphasis added).

The BLM's justification for refusing to recognize Indian Reorganization Act tribes' supersedure power contains two fatal flaws. First, the BLM Rule is not itself a federal statutory requirement immune from tribal supersession; it is rather a 43 C.F.R. Part 3160 operational regulation incorporated by reference into the BIA's IMLA regulations at 25 C.F.R. § 211.4. As such, the BLM Rule, like the other 25 C.F.R. Part 211 regulations, is expressly subject to Indian Reorganization Act tribes' supersedure power. Second, by omitting key regulatory language, the BLM's justification distorts the import of 25 C.F.R. § 211.29. Specifically, in describing the permissible scope of BIA's and BLM's regulations, 25 C.F.R. § 211.29 actually states, "The regulations in this part, in so far as they are not so superseded, shall apply to leases and permits

made by organized tribes if the validity of the lease or permit depends upon the approval of the Secretary of the Interior." (emphasis added)

BLM has also tried to justify its refusal to recognize Indian Reorganization Act tribes' power to supersede by stating:

> The commenters have not explained why, among all the other requirements of 43 CFR part 3160, an opt-out should be provided for this rule. . . . The Indian mineral leasing statutes previously cited do not authorize tribes to opt-out of the Secretary's regulations, and, unlike some environmental statutes, do not authorize tribal "primacy."

80 Fed. Reg. at 16185. The reason an opt-out should have been provided in the BLM Rule is self-evident – without acknowledging Indian Reorganization Act tribes' power to opt-out, the BLM Rule directly conflicts with such a tribe's express power to supersede. Additionally, BLM's uninformed interpretation of the IMLA ignores 25 U.S.C. § 396b, which recognizes the right of Indian Reorganization Act tribes to "to lease [their] lands for mining purposes . . . in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the [Indian Reorganization Act of 1934]." This proviso is the statutory basis for 25 C.F.R. § 211.29,[1] and, therefore, BLM's views not only conflict with 25 C.F.R. § 211.29, but also contradict BIA's interpretation of the IMLA and the Indian Reorganization Act. *See also Merrion*, 455 U.S. at 150.

2. ***Department proposals to condition or eliminate tribal supersedure power under 25 C.F.R. § 211.29 have not been adopted, and the Department has confirmed that the intent of 25 C.F.R. §211.29 is supersession and self-determination.***

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[1] The implementing regulations for the Indian Mineral Development Act ("IMDA") include a similar yet ambiguous provision. 25 C.F.R. § 225.1(d) ("Nothing in these regulations is intended to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, or minerals operations within their territorial jurisdiction.").

Within three weeks following passage of the IMLA, the Assistant Secretary of the Interior approved regulations recommended by the Acting Commissioner of Indian Affairs that included express recognition of the power of Indian Reorganization Act tribes to supersede the IMLA regulations. 3 Fed. Reg. 1429, 1433 (June 17, 1938) (§ 29). On a number of occasions since then, the BIA has considered but rejected proposals to dilute or eliminate regulatory recognition of the power of Indian Reorganization Act tribes to supersede the 25 C.F.R. Part 211 regulations.

In 1977, the BIA proposed conditioning the tribal supersession power upon tribal law providing "protection at least as stringent as is provided by these regulations." 42 Fed. Reg. 18083, 18093 (April 5, 1977) (proposed 25 C.F.R. § 182.1(d)). However, BIA declined to adopt any of the 1977 proposed regulations, and, instead issued a new set of proposed IMLA regulations in 1980. 45 Fed. Reg. 53164-53180 (Aug. 11, 1980). The 1980 set of proposed regulations made no reference to the power of Indian Reorganization Act tribes to supersede the Department's IMLA regulations. *Id.* at 53173-80 (proposed 25 C.F.R. Part 182). Again, the BIA declined to adopt its proffered 1980 set of regulations, and, in 1983, the BIA began an eleven-year process to adopt regulations supplementing the newly enacted IMDA, while simultaneously attempting to upgrade the IMLA regulations. 61 Fed. Reg. at 35635. The 1983 version of proposed IMLA regulations also did not include any provision acknowledging the authority of Indian Reorganization Act tribes to supersede the BIA's regulations. 48 Fed. Reg. at 31987-94. But, as with the 1977 and 1980 precursor proposals, the BIA withdrew the 1983 proposed IMLA regulations before they could become effective. 52 Fed. Reg. 39332 (Oct. 21, 1987).

The rulemaking process that led to the current version of 25 C.F.R. Part 211 began on

November 21, 1991 (56 Fed. Reg. 58734) and concluded on July 8, 1996 (61 Fed. Reg. 35634). During its 1996 adoption of revisions to the IMLA regulations, the BIA considered narrowing or even deleting the authority of Indian Reorganization Act tribes to supersede the IMLA regulations. BIA's 1991 proposed revision would have replaced section 211.29 with an acknowledgment that the IMLA regulations were not intended "to prevent Indian tribes from exercising their lawful governmental authority to regulate the conduct of persons, businesses, operations or mining within their territorial jurisdiction." 56 Fed. Reg. 58734, 58737 (November 21, 1991) (quoting from proposed § 211.1(c)). After considering tribal comments, however, the BIA maintained the supersession language that had been in place since 1938, with only minor clarification. 61 Fed. Reg. 35634, 35652 (July 8, 1996).

The discussion in the preamble to the current version of BIA's IMLA regulations demonstrates the serious considerations of law and policy underlying BIA's decision to retain section 211.29. First, the preamble notes that a goal in adopting the regulations was "removing unnecessary regulatory barriers and complications that could make [tribal] minerals less attractive to industry and thus frustrate development." 61 Fed. Reg. at 35635; *see also* 59 Fed. Reg. 14960, 14960 (Mar. 30, 1994) (preamble to adoption of IMDA regulations stating same goals); 56 Fed. Reg. at 58734-35 (preamble to 1991 proposed IMDA and IMLA regulations stating same goals). Second, the preamble to BIA's 1996 IMLA regulations notes an additional goal of attempting "to provide the tribes as much freedom as possible to make their own determination on issues affecting the development of their minerals," consistent with the

Department's policy on self-determination. 61 Fed. Reg. at 35635.[2]

Third, the BIA acknowledged that "in a number of important respects mineral leasing and development on Indian lands differ from such activities on Federal lands," that "in such instances different treatment is required," and that the IMLA regulations "so provide." 61 Fed. Reg. at 35638-39. That recognition was rooted in a directive by the Secretary of the Interior in 1976 where the Secretary concluded that "the considerations governing the administration of Indian-owned resources are different from those involved in administering the public estate, and that certain provisions contained in the new regulations could not be married to the Department's legal relationship with Indian tribes." 42 Fed. Reg. at 18083. In this light, section 211.29 is an essential means expressly provided by the BIA by which an Indian Reorganization Act tribe may avoid regulation of its mineral resources better suited to the public estate.

Finally, in a "conclusion" section, the preamble stated:

[2] On June 16, 2015, in exercise of self-determination, and pursuant to its inherent powers and its powers under the Tribe's Secretarially approved Constitution as an Indian Reorganization Act tribe, the Tribe's governing body, the Southern Ute Indian Tribal Council, adopted Resolution No. 2015-98, which approved Southern Ute Indian Tribe – Hydraulic Fracturing and Chemical Disclosure Regulations. Aff. Sunshine Whyte, Attach. 1, June 22, 2015, ECF No. 6-3, 1:15-cv-01303-MSK. As allowed under 25 CFR § 211.29, in adopting Resolution No. 2015-98, the Tribal Council expressly confirmed that the Southern Ute Indian Tribe – Hydraulic Fracturing and Chemical Disclosure Regulations are intended to supersede the BLM Rule on tribal lands subject to the jurisdiction of the Southern Ute Indian Tribe, if and when the BLM Rule becomes effective. *Id.* The Tribe's hydraulic fracturing regulations regulate all aspects of hydraulic fracturing and are more restrictive than the BLM Rule's cementing requirements and provide more complete safeguards to water quality. Aff. Robert Zahradnik ¶ 14, June 22, 2015, ECF No. 6-2, 1:15-cv-01303-MSK. Significantly, the Tribe's regulations provide more certainty to operators by requiring prior notice of hydraulic fracturing operations but not pre-approval with no decision timetable, as under the BLM Rule. *Id.* Like the BLM Rule, however, the Tribe's regulations require storage of wastewater in tanks and public disclosure of the chemical composition hydraulic fracturing fluids. Aff. Sunshine Whyte, Attach. 1, June 22, 2015, ECF No. 6-3, 1:15-cv-01303-MSK.

> The Department understands the concerns and importance to tribes of the recognition of tribal authority and responsibility in matters of the management generally of their own mineral resources. This authority and responsibility are recognized at §§ 211.1 and 211.29 in final rules. Section 211.29 specifically permits the supersedence of Federal regulations by the provisions of ordinance, resolution, or other action authorized under any properly issued tribal constitution, bylaw, or charter.

61 Fed. Reg. at 35652. Accordingly, the Tribe's action in superseding the BLM's hydraulic fracturing rule by adopting its own regulation is consistent with the BIA's section 211.29 goal of providing for tribal authority and responsibility in managing its mineral resources and is consistent with the BIA's longstanding interpretation of the scope of the authority reserved to tribes under the Indian Reorganization Act and the IMLA. By contrast, the BLM Rule's variance provision unlawfully conditions the Tribe's supersedure right under 25 U.S.C. § 211.29.

B. The BLM lacks delegated authority under the Departmental Manual to apply the BLM Rule to the Tribe's lands subject to minerals agreements under the Indian Mineral Development Act.

As part of its first claim for relief, the Tribe also asserts that the BLM and its officials lack the delegated regulatory authority to apply the BLM Rule to the Tribe's lands subject to minerals agreements under the IMDA. First Amended Complaint for Review of Final Agency Action and for Declaratory and Injunctive Relief, ¶ 33, June 25, 2015, ECF No. 17, 1:15-cv-01303-MSK. The Tribe does not question the general proposition that the Defendant Secretary of the Interior has broad power to delegate her authority. 5 U.S.C. § 302; Reorganization Plan No. 3 of 1950, 64 Stat. 1262. However, the mechanism chosen by the Secretary and the Defendant United States Department of the Interior to document such delegations is the Departmental

Manual.[3] 011 Departmental Manual (DM) 1.2. Under the Departmental Manual, the exclusive means by which delegations may occur is pursuant to Departmental Manual releases, except for emergencies when the Secretary may issue a "temporary delegation of authority" that must be promptly supplemented with a formal Departmental Manual release. *See* 200 DM 1.3 and 012 DM 1.1. Specifically, the Departmental Manual provides:

> The appropriate medium for issuing [Secretarial] delegations is in the Delegation Series of the Departmental Manual, as described below. For this reason, delegations of authority by the Secretary will not be prepared for other parts of this manual, or as memoranda, or included in regulations. Any statement regarding delegation of authority that is contained in any directive or regulatory material must be cross-referenced to, or have as its basis, a delegation published in Parts 200-299 of the Departmental Manual. A temporary delegation, however, may be issued as a Secretary's Order (012 DM 1).

200 DM 1.3. Actions taken by Departmental officials without, or outside of, delegated authority are void. *See, e.g.*, *United States v. Spain*, 825 F.2d 1426, 1429 (10th Cir. 1987) (holding that Drug Enforcement Agency's placement of a new drug on Schedule 1, and thereby criminalizing its distribution, was invalid because the DEA lacked delegated authority to act).

Relevant to this claim, the Departmental Manual provides that:

> The Director, Bureau of Land Management, may exercise the authority of the Assistant Secretary - Land and Minerals Management for administering operations on oil and gas, geothermal, and other mineral leases on Federal and Indian lands under the Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.); Section 402, Reorganization Plan No. 3 of 1946 (60 Stat. 1099); the Mineral Leasing Act for Acquired Lands, as amended (30 U.S.C. 351-359); the Geothermal Steam Act of 1970 (30 U.S.C. 1001-1025); the Indian Allotted Lands Leasing Act (25 U.S.C. 396)***; the Tribal Lands Leasing Act (25 U.S.C. 396a)***; Right of Way Leasing Act of 1930 (30

[3] The Department of the Interior's Departmental Manual can be found in the Electronic Library of Interior Policies at http://elips.doi.gov/elips/.

> U.S.C. 301-306); NPR-A leasing authority in the Appropriations Act of 1981 (94 Stat. 2964); Federal Oil and Gas Royalty Management Act of 1982 (96 Stat. 2447); ***and other authorities under which the Bureau of Land Management issues mineral leases***.

235 DM 1.1.K (emphasis added). Notably absent from BLM's delegated authority is the authority for administering operations on Indian lands leased under the IMDA, under which the BIA—rather than the BLM—approves minerals agreements. 25 C.F.R. § 225.1 (stating that the implementing regulations for the IMDA are to be administered by the BIA); 25 C.F.R. § 225.4 (specifying that the BLM's regulations apply to minerals agreements approved under 25 C.F.R. Part 225). In sum, there is no valid delegation of authority to the BLM for implementation of the BLM Rule with respect to Indian tribal lands subject to the IMDA. Importantly, most of the Tribe's mineral lands leased since enactment of the IMDA have been leased under that Act. Aff. Robert Zahradnik ¶ 4, June 22, 2015, ECF No. 6-2, 1:15-cv-01303-MSK. Because the BLM lacks the delegated authority to implement the BLM Rule on tribal lands subject to the IMDA, the BLM Rule is not in accordance with law and must be set aside.

V. CONCLUSION

For the reasons discussed above, the Tribe respectfully requests, first, that the Court enter a declaratory judgment, under the APA, that the tribal variance provision of the BLM Rule, conditioning the Tribe's ability to obtain a variance on the appropriate State BLM Director's approval and on the Tribe's law meeting or exceeding the BLM Rule's objectives, is not in accordance with the Tribe's unconditional power under existing law, specifically 25 C.F.R. § 211.29, to supersede the BLM Rule. On that basis, the Tribe further requests the Court set aside and vacate the BLM Rule as to the Tribe's lands.

Second, the Tribe requests that the Court enter a declaratory judgment under the APA that BLM and its officials lack delegated authority under the Departmental Manual to implement the BLM Rule on the Tribe's lands subject to minerals agreements under the IMDA. On that basis, the Tribe requests the Court set aside and vacate the BLM Rule, under the APA, as to such tribal lands.

Dated: July 23, 2015.

Respectfully submitted,

/s/ *Thomas H. Shipps*
Thomas H. Shipps
Sam W. Maynes
Jeffrey M. Kane
Maynes, Bradford, Shipps & Sheftel, LLP
835 E. Second Ave., Suite 123
Durango, CO 81301
(970) 247-1755 // Facsimile (970) 247-8827
E-mail: tshipps@mbssllp.com
smaynes@mbssllp.com
jkane@mbssllp.com

/s/ *Lorelyn Hall*
Lorelyn Hall
Legal Department Director
Southern Ute Indian Tribe
P.O. Box 737
Ignacio, Colorado 81137
(970) 563-4803
E-mail: lhall@southernute-nsn.gov

ATTORNEYS FOR THE SOUTHERN UTE INDIAN TRIBE

CERTIFICATE OF SERVICE

I certify that on the 23rd day of July, 2015, a copy of the foregoing **SOUTHERN UTE INDIAN TRIBE'S OPENING BRIEF** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Suzanne Singley
Suzanne Singley