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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her Official capacity as Secretary of the Interior: UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management, Respondents.	Case No. 2:15-cv-00043-SWS Judge Scott W. Skavdahl

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

MERITS BRIEF

CONTENTS

Cases

INTRODUCTION

This Court has already determined that the United States did not meet several of the threshold requirements for the final rule regarding fracking on federal and Indian lands, 80 Fed. Rg. 16, 128 (Mar. 26, 2015) (hereinafter the Rule or the Fracking Rule). There is nothing new in the interim which impacts this Court's correct analysis. The administrative record establishes that the United States did not comply with its duty to consult with the Ute Indian Tribe of the Uintah and Ouray Reservation (the Tribe or the Ute Tribe). That record has not changed. The law establishes that the Bureau of Land Management did not have the authority to issue the regulations. That law has not changed. This Court has already decided the issues presented under the exact facts and law of this case, and other co-petitioners are providing this Court with additional analysis of the legal and factual field plowed by this Court in its prior decision. The Tribe can merely tell this Court exactly what this Court has already discerned from its own review of the law and facts. This Court's prior order directs the result.

The only thing which has changed is that even after this Court preliminarily enjoined the Rule, even after the record showed the United States' wrongful failure to consult and its other violations of law related to the Ute Tribe, the United States and its co-respondents continue to offensively and paternalistically assert that they know what is best for the Ute Tribe and the Ute people.

The Tribe again reiterates that it is one thing for the United States to adopt the Fracking Rule for its own lands, where it has the powers of both a government and the land owner; but it is something far different to paternalistically impose that exact same Rule against tribal lands, where the United States does not have the beneficial ownership. It is also concerning to the Tribe that in this case the United States has been joined by interest groups who, with even less basis and therefore even more offensively, adopt a similarly paternalistic position toward the Tribe. While the Tribe can have reasoned discussions with others regarding what is best for the Tribe, its lands, and its people, in the end it is for the Tribe to then make the decision. It is not for outsiders or the United States to attempt to impose their will on a tribe which has been existing and living on these lands since before the United States was born.

DISCUSSION OF LAW

Under the APA this Court "hold unlawful and set aside agency action" determined to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (construing 5 U.S.C. § 706(2)(A)-(D) as providing "the generally applicable standards"). The court must set aside an agency action "unless

it is supported by substantial evidence in the administrative record." *Via Christi v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (quoting *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (internal quotation omitted)). *See also* 5 U.S.C. § 706(2)(E). In determining whether substantial evidence supports the agency's decision, "the court must also consider that evidence which fairly detracts from the [agency's] decision." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 854 (10th Cir. 2007).

Agency action must be "based on a consideration of the relevant factors." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). An agency must also "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). "The agency itself must supply the evidence of that reasoned decisionmaking in the statement of basis and purpose mandated by the APA [*i.e.*, the rule's preamble]." *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984).

The above is all familiar to this Court and thoroughly briefed by numerous parties. The only aspect which is not universal to review of agency action is that when considering the agency's action as it relates to tribes, an agency's trust responsibility to a tribe can enhance the standard of review for a substantive agency decision. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252

(D.D.C. 1972). An agency's obligations beyond what would be required under an administrative law analysis, and "[a]ctions that might well be considered within an agency's discretion because not 'arbitrary or capricious,' as stated in the APA, may nevertheless be held to violate the Secretary of the Interior's trust responsibility to tribes." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.05[3][c], at 430 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK]. The extent to which the trust doctrine sets limits on agency discretion is determined by "the extent to which the general law of trusts is applicable." *Id*. at 431.

Because BLM's final rule is both procedurally and substantive deficient, it must be permanently enjoined. This is more clearly required where the Agency is violating its trust responsibilities, abusing powers it is supposed to use solely for the benefit of tribes, and using those powers to harm the Ute Indian Tribe. While sadly history illustrates this is nothing new to the Tribe or tribes, it is nevertheless deeply disappointing, and wrong, and contrary to the government-to-government relationship that the United States violated when it sought to impose its rules not only to land that it owned in fee but also to land to which the Tribe holds beneficial ownership.

I. THE RULE IS CONTRARY TO THE FEDERAL TRUST OBLIGATION TO INDIAN TRIBES

Laws can provide the contours of an agency's trust responsibility. COHEN'S HANDBOOK at 430. For example, in *Pyramid Lake Paiute Tribe of Indians v. Morton*,

the Secretary of the Interior was obligated to ensure that Pyramid Lake had sufficient water to satisfy the purposes for which the Reservation was created. 354 F. Supp. 252, 254 (D.D.C. 1972). The Court explained that "[i]n order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake." *Id*. at 256. The Court further explained that the Secretary should be "judged by the most exacting fiduciary standards" because he had charged himself with the "moral obligations of the highest responsibility and trust." *Id*.

An agency's discretion in enacting regulations affecting a tribe can be limited by the contours of the trust. *See Cobell v. Norton*, 240 F.3d 1081, 1104 (D.D.C. 2001); *Pyramid Lake Paiute Tribe*, 354 F. Supp. 252. "In the absence of specific statutory duties, federal agencies discharge their trust responsibility if they comply with the statutes and general regulations." COHEN'S HANDBOOK, 431. However, where specific statutes impose a trust responsibility, federal administrative power is limited and the discretion of the agency is narrowed. *Id*.

A. INDIAN LEASING MUST BE BEST INTEREST OF TRIBE.

The federal government holds Indian lands in trust for Indian tribes, not the general public. This established rule required the Secretary to conduct a vastly different analysis to determine whether to adopt any rule or what rule to adopt for

tribal lands as compared to public lands. The Secretary did not even attempt to comply with her obligation as relates to tribal lands.

The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a *et seq.* ("IMLA") and the more recent Indian Mineral Development Act of 1982, Pub. L. 97-382, 25 U.S.C. § 2101 ("IMDA") provide the contours of the Secretary's trust obligation. "Acting in the capacity as a trustee, the Secretary … must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues." *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) (emphasis added).

The Secretary cannot even claim in good faith that the fracking rules attempt to maximize the Ute Tribe's leas values. Instead, as the Secretary has acknowledged in her response to the Tribe's prior motion for preliminary injunctive relief, the Secretary is sacrificing lease values for other interests. Even if she could make that tradeoff for federally owned lands, she is simply not permitted to do it for tribally owned lands. Instead it is the Tribe who can, and who does, make those decisions for its own lands.

For many rural tribes, including the Ute Tribe, energy production governed by the IMLA and IMDA is the primary source of funding for tribal governmental

services.[1] Oil and gas development, spurred by advances in horizontal drilling technology and hydraulic fracturing, has propelled tribal economies where few other economic opportunities exist.[2] Since 2010, Indian tribes have seen royalty disbursements generated from energy development grow from $407 million to 860 million dollars in 2013.[3]

There is significant energy development on the Uintah and Ouray Reservation, which includes parts of Uintah County and Duchesne County. According to Utah's Division of Oil, Gas and Mining, oil production in Duchesne County increased from 10,916,561 barrels in 2010 to 19,478,038 in 2014.[4] Similar growth is present in Uintah County, where production more than doubled from 6,609,784 barrels in 2010 to 13,451,451 in 2014.[5] The same growth is present in natural gas development as production increased in Duchesne County from 35,831,642 mcf/year in 2010 to 53,050,603 mcf/year in 2014.[6] Natural gas production in Uintah County dramatically increased from 28,352,074 mcf/year in 2010 to 310,000,853 mcf/year in 2014.[7]

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[1] AR0074320 *passim.*
[2] *Id.* at 1–4; ARO26333, 337.
[3] AR0100522 p. 32.
[4] State of Utah – Oil and Gas Program – Oil Production by County, *available at* http://www.oilgas.ogm.utah.gov/Statistics/PROD_Oil_county.cfm.
[5] *Id.*
[6] *Id.*
[7] *Id.*

With respect to actions taken pursuant to the IMLA and IMDA, the Secretary must look out for the best interest of tribes and tribal members—regardless of the interests of the American general public. This is a very different standard from federal public lands that are held in trust for the American public. The Federal Land Policy and Management Act of 1976, Public Law No. 94-579, 43 U.S.C. § 1701 *et seq.* ("FLPMA") requires the Secretary to restrict or prevent unnecessary and undue degradation to tribal trust resources.

The Secretary is only supposed to take action under the IMLA and the IMDA when such action would be in the Indian mineral owner's "best interest." *Woods Petroleum Corp. v. Dep't of the Interior*, 47 F. 3d 1032 (10th Cir. 1995). The Court is required to enforce this "best interest" requirement.

> In evaluating the Secretary's actions [regarding federal regulation of oil and gas on Indian lands], we must keep in mind that the Secretary and his delegates act as the Indians' fiduciary and thus must represent the Indians' best interests. *Cheyenne-Arapaho*, 966 F.2d at 588-89; *Cotton Petroleum*, 870 F.2d at 1524; *Kenai*, 671 F.2d at 386. The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners.

Id. at 1038. *See also* 25 U.S.C. §§ 2102, 2103

The Secretary defined its statutory "best interest" mandate in the regulations implementing the IMLA and the IMDA. Specifically, the regulations read:

> *In the best interest of the Indian mineral owner* refers to the standards to be applied by the Secretary in considering whether to take administrative action affecting interests of an Indian mineral owner. In considering whether it is "in the best interest of the Indian mineral

> owner" to take a certain action . . . the Secretary shall consider any relevant factor, including, but not limited to: economic considerations . . . probable financial effects on the Indian mineral owner . . . marketability of mineral products; and potential environmental, social, and cultural effects.

25 C.F.R. §§ 211.3, 225.3 (emphasis in original); *see also* 25 C.F.R. § 225.22(c)(1); 61 Fed. Reg. 35634, 35640 (July 8, 1996) (comments 17 and 18, and BIA responses to the same); 25 U.S.C. § 2103(b).

Although the Secretary acknowledges that the Fracking Rule is not the only possible way to carry out the federal trust responsibilities, she claims that one rule which covers both Indian lands and public lands is more economic than creating a parallel set of regulations and regulatory personnel in the BIA. *Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,185 (March 26, 2015). While that might be easier for the Secretary, it is grossly inconsistent with the different policies and laws applicable to the two types of land. The Secretary, statement confirms her serious misunderstanding of the relevant factor analysis. Administrative economies of scale should not trump tribal concerns—especially when the Tribe can regulate itself.

B. FIDUCIARY RESPONSIBILITY

It has alarmed the Tribe to see the inadequate and uncertain plan which the United States had in place for attempting to implement the Fracking Rule on Indian lands. Certainly, the Secretary should be able to point to something other than it

being easier to administer a single rule to justify the significant curtailment of tribal revenues which the United States seeks to impose upon tribes. If operators spurn tribal development opportunities, of course the environment will not be harmed, because there will be virtually no human activity on the remote tribal lands at issue. But this is directly contrary to the Tribe's wishes and to the Secretary's duty to the Tribe. Additionally, the Tribe is more than capable of developing its own regulations that protect the environment while also support continued existence of a healthy tribal government. After all, development is necessary to supply tribal governments with the resources to perform fundamental governmental functions.

When taking action concerning tribal trust mineral leases, the Secretary's broad discretion is severally limited by the "fiduciary responsibilities vested in the United States as trustee of Indian lands." *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 589 (10th Cir. 1992). Furthermore, the Secretary:

> Must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to *maximize* lease revenues.

Id. (citing *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) (emphasis supplied)). Consequently, the Secretary violates her duty by taking action that otherwise avoidably decreases the opportunities for tribes.

The Secretary has not provided a scintilla of evidence that this Rule is in the best interest of the Tribe. Nowhere has the Secretary identified a single documented

instance of groundwater contamination on the Reservation that resulted from hydraulic fracturing.[8] Therefore, it will not remedy groundwater contamination or environmental disasters on the Reservation.[9] Simply, as applied to the Tribe's lands, there is no record of a problem which needs fixing, and therefore no basis for the harmful rule that the Secretary paternalistically seeks to impose upon the Tribe. Instead, the Secretary has merely given hypothetical scenarios (generally inapplicable to the land formations on the Ute Reservation) that this rule will then, and only hypothetically, prevent or mitigate.[10]

Here is a very real scenario: this rule will hinder energy development on the Reservation.[11] It will limit job opportunities and push operators off the

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[8] DOIA0034423, 34461-2 (The Tribe notes that there has been fracking on Ute Reservation since 1934 without problems, and the BLM acknowledges "You are right in your area."); Administrative Record, passim (The Tribe reviewed the administrative record and could not locate any reference to any such contamination.) The record contains substantial documentation that there has not been such contamination. *E.g*. DOIAR0034423 (); DOIAR0027636; DOIAR0056627.

[9] *Id.*

[10] DOIA0026855-56 (in response to the BLM's request for input from its own Vernal Field Office Senior Petroleum Engineer, that engineer, Robin Hansen, emphatically concluded that based upon his considerable experience in the industry and in the Vernal office, "at least for our field office" the rule would have a "**major impact** upon the oil and gas operators" in the area, and "the **cost** of these new regulations as they stand will be high" but without providing any additional protection to usable water zones.) (emphasis in original). *See also* DOIAR0074845 (noting that 60% of economy in the counties in which the Tribe is located comes from oil and gas production.

[11] *E.g.*, DOIA0056286, 56291 (discussing surveys of producers which shows that the inordinate delays in permitting do cause substantial shifts of production away from Indian lands) (DOIAR0104453 (discussing in detail why the rule will lead to "production away from states with large allocations of BLM land" *Id.* at 104456), DOIAR0074845 (Letter from Cody Stewart, Energy Advisor to Utah Governor to Tommy Beaudreau, Acting Asst. Sec'y Land and Minerals Mgmt, U.S. Dept. of Int. (Aug 23, 2013) (discussing issue in context of Vernal Utah office). See also, e.g., D01AR0057627; DOIAR0051035; DOIPS000181; DOIPS000197; DOIPS0000216; DOPIS0000245 DOIPS0000631; DOIPS0008723 DOIPS0010700 (examples of industry discussions that the rule will impact their decisions).

Reservation.[12] In fact, in its response to the Tribe's prior motion for injunctive relief, BLM cavalierly stated that the likely economic impact on Indian lands will "only" be about $10,000,000 per year, and that the "highest total costs are associated with operations in, inter alia," the Ute Tribe's Reservation. Dkt. 102 at 13. Perhaps $10,000,000 per year is not a big deal to the United States. It is to tribes. It is to the Ute Tribe. Oil companies are not going to absorb these increased costs,[13]and because the Tribe competes with lessors who will not be subject to the Fracking Rule, standard economic rules lead to the conclusion that the increased regulatory costs will fall to the mineral rights owners—here the Ute Tribe. Somehow, the Secretary in a throwback to the failed federal policy of paternalism, has decided she knows what is best for the Tribe, whether they like it or not, and is forcing the Tribe into a position where it must fight to prevent federal regulations that will sabotage the economic engine of the Tribe's government and people and the rest of the Uintah Basin. [14]

Instead of ignoring tribal requests, the Secretary should have spent the last four years working with tribes so that they can develop their own hydraulic fracturing regulations. The Tribe is willing and capable to regulate activities on tribal lands to address the issues on the Tribe's homeland in Utah. It is willing to

[12] *See* n. 11.
[13] *See* n.11supra.
[14] AR0075154, p.1–2; AR0057633.

listen to scientists and other experts and analyze the issues. But it is not willing to then let others make the decision. Here, the United States and its codefendants are not attempting to use reason (and the record in this matter shows why—because reason and science are not on their side), and are instead seeking to force their position on the Tribe. Instead of the United States deciding what is best for the Tribe, the current federal policy is for the Tribe to decide what is best for itself. The United States can be a beneficial partner in that endeavor, providing expertise and suggestions, but here it cannot merely impose this harm upon the Tribe by fiat. The Tribe is very cognizant of the protection of its land and water while also preserving the livelihoods of those that live and work on their homeland. Both can happen, but not under the Fracking Rule.

II. THE SECRETARY DID COMPLY WITH HER OBLIGATION TO CONSIDER SOCIO-ECONOMIC IMPACTS ON TRIBES.

The Secretary did not adequately consider the devastating economic impact that the Rule will have on Indian lands. For energy-producing tribes such as the Ute Indian Tribe, the Rule will eliminate revenue sources for the tribal government, harm tribal businesses, and decrease opportunities and services for tribal members. Equally concerning, the Secretary did not properly consider how the Rule would affect the decision of operators to develop Indian minerals.

The Secretary's economic impact analysis did not appropriately consider how the Rule would deter operators from developing tribal minerals.[15] The Rule will lengthen delays, adding more costs to producing tribal minerals.[16] Should the Rule be implemented in its current form, operators and investors will avoid tribal and allotted lands and will instead invest their capital in state and fee minerals, many of which are immediately adjacent to Indian lands and tribal communities. Such action denies Indian communities a valuable source of revenue that is critical to Tribal governments and the very economic life of their members.

It seems that the Secretary overlooked these impacts because Indian minerals are only a small percentage of total federal minerals. The Ute Indian Tribe leases out less than 400,000 mineral acres. The United States owns approximately 700

[15] *See* n. 11. The Administrative Record does not contain any substantive response to the consistent industry statements and supporting surveys cited in n. 11. Admin Record, *passim*.

[16] DOIAR0074845 (Letter from Cody Stewart, Energy Advisor to Utah Governor to Tommy Beaudreau, Acting Asst. Sec'y Land and Minerals Mgmt, U.S. Dept. of Int. (Aug 23, 2013) (noting that "as of May 2013, the Vernal Field office had 30 vacancies and 1,350 backlogged Application to Drill Permits", and computing that even under the BLM's dubious statistics, the Vernal office would need to add 3 full time equlivalent employees, and discussing examples of the difficulty the Vernal office has in attracting qualified engineers and geologists) (emphasis added) DOIAR0049741 (email from Steven Wells, BLM Division Chief, Fluid Minerals, noting that in the BLM's Vernal office "they just can't fill key vacancies") (Mr. Wells' position is not identified in the cited email, but is identified in numerous other emails and documents, e.g., DOIARO102772). See also 34461 (BLM acknowledges to the Ute Tribe that "everybody knows that we have personnel shortages" and BLM states they are "hoping" that they will get more resources to remedy shortages). A senior petroleum engineer at the Vernal Field Office sent a comment on the proposed rule that was requested by the BLM Lead Petroleum Engineer in the Washington D.C. Office of the BLM stating: "In theory the new information required from the operators with this proposed rule is more detailed than that which is required under our current regulations and it will add much girth to our official paper files, but it will also add up to 230 work weeks (4.4 years) to our current annual work load in the Vernal Field Office . . . ." AR0026855.

million mineral acres. Therefore, when BLM considered the balance between alleged environmental protections and energy development—and whether the Rule will adversely impact jobs, revenue, and effective government—it found the impacts to be nominal. This may be true for federal public lands, but it is certainly not true for Indian lands, and in particular it is not true for the Ute Tribe's lands.

In *Nance v. Environmental Protection Agency*, the Crow Tribe challenged the EPA's approval of the Northern Cheyenne Tribe's redesignation of air quality on its reservation from Class II to the Class I standard. 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981). The Crow Tribe argued that the more stringent Class I standards would interfere with mineral development on the Crow Reservation, which is situated adjacent to and west of the Northern Cheyenne's reservation. *Id.* Examining whether EPA in substance fulfilled its trust obligations, the court found,

> The primary concern of the Crow from the beginning of the redesignation procedure was clearly the potential impact of such a redesignation on their ability to mine coal. It is in this respect that they now claim that the EPA failed to exercise its trust responsibilities. However, in specifically finding that the redesignation would not, under the law as it stood at that time, have any effect on strip mining, the EPA adequately addressed the Crow's interest in this regard. That the assumption may have turned out as a result of subsequent events to have been wrong does not affect the answer to the question of whether the fiduciary responsibilities were fulfilled in the first place.

Id. at 711. Thus, the court concluded that EPA had fulfilled its fiduciary responsibility to the Crow tribe because it specifically analyzed the issue. *Id*. at 711-12.

Here, the Secretary has not specifically analyzed socio-economic impacts of the Rule on the lands of energy-producing tribes.[17] Instead of focusing on the purported environmental protections for all federal lands, the Secretary should have studied how this rule will place tribes such as the Ute Indian Tribe at a competitive disadvantage.[18]

A. FEDERAL CONTROL LIMITS OPPORTUNITIES FOR TRIBES

As described below, the federal staff regulations and lack of staffing to carry out those regulatory duties related to tribal oil and gas development already create a large incentive for producers to avoid trial land and to factor in the federal delays into their pricing. As applied to the Ute Reservation, the Fracking Rule will significantly add to already overburdened and understaffed federal regulator

[17] The Administrative Record does not evidence the socio-economic analysis repeatedly requested by energy producing tribes. The Administrative Record reveals that the impact of the Rule on reservations was a concern to Indian tribes. AR0068595, p. 25–27. In a 2014 prepared response to Mandan, Hidatsa, and Arikara Nation Chairman Tex Hall's concern about a lack of an analysis on the impact of the Rule to tribal economies, the BLM stated, "We are working on a path forward that best integrates the interests of the tribes, supports economic development on the reservations, reduces unnecessary duplication, and still allows the Department to fulfill its broad fiduciary trust responsibility to provide for economic opportunities and protect natural resources." AR0076866, p. 4. The closest the BLM comes to providing a socio-economic analysis can be found in documents such as: AR0080140, p. 87; AR010067, p. 61–63; AR0080933, p. 1–6; AR0057633, p. 22.

[18] AR0100522.

officers,[19] and the Secretary failed to adequately consider this additional harm to the Tribe.[20] Federal agencies control nearly every aspect of Indian energy development, raising the costs to develop tribal minerals significantly, due to the overwhelming amount of federal oversight. Specifically, the BLM must review and approve an operator's application for permit to drill ("APD") before Indian oil and gas minerals can be developed.

Delays in this review process increase costs for operators. At the Vernal Field Office, which services the Tribe, delays far outpace those field offices serving federal public lands. This office has a well-documented backlog of pending permits.[21] In 2012, the Tribe informed the BLM that it took approximately 480 days for the Vernal Field Office to process an APD.[22] Those numbers have not improved much. This is because the office has nearly forty job openings and lacks sufficient engineers, geologists, and other technical professionals.[23] In contrast, in Utah operators can receive an APD to develop state minerals in approximately three months.[24]

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[19] *See* n. 10-15, supra.
[20] *See* n. 10-15, supra.
[21] AR00784845, p. 5.
[22] DOIAR0056286, 289-90 (noting that the Vernal Office requires 480 days to process an APD on tribal land, but in contrast processes applications for APDs for federal lands in a relatively lighting speed of only 288 days.
[23] *See* n. 10-15, supra.
[24] DOIAR0056286, 289-90.

Tribes compete with nearby state and private lands for development opportunities. Instead of eliminating unnecessary bureaucratic red tape or bolstering tribal regulatory authority or providing other methods of eliminating the federal delays which harm the Tribe's economy and government, the Fracking Rule compounded problems of a sluggish, costly, and excessively burdensome regulatory review process that exists for oil and gas development on Indian lands.

B. THE RULE WILL PUSH OPERATORS AWAY FROM DEVELOPING TRIBAL MINERALS

Compliance with federal and tribal mineral regulations is costly because it involves at least four federal agencies and the tribe's energy and minerals department. Operators are increasingly cautious about developing tribal minerals due to the overwhelming amount of federal oversight, which saddles otherwise appealing development opportunities with additional costs and bureaucratic delays. Nor has the Secretary explained how the Vernal Field Office can effectively process the increased workload that will result from the Fracking Rule.[25] BLM rejected commenters' concerns that BLM lacks the staffing, budget, or expertise to administrate the Rule, *see* 80 Fed. Reg. 16,177, but it has not articulated any plan for how the agency intends to meet the additional administrative responsibilities at

[25] Admin. Record, *passim. E.g.*, 34461 (BLM acknowledges to the Ute Tribe that "everybody knows that we have personnel shortages" and BLM states they are "hoping" that they will get more resources to remedy shortages).

the Vernal Field Office.[26] Should the Rule be implemented in its current form, operators and investors will avoid tribal and allotted lands and will instead invest their capital in state and fee minerals, many of which are immediately adjacent to Indian lands and tribal communities.

Had the Secretary performed the requisite economic analysis, she would have understood the cause and effect of the Tribe's recent success. Moreover, she would have understood just how this rule would roll back hard-fought advancements that improved the lives of tribal members. The Secretary should know better than to take action that denies Indian communities a valuable source of revenue that is critical to Tribal governments and the very economic life of their members.

Unlike the federal government, the Tribe does not have a plethora of resources to pull from when one income stream dries up. There is not an abundance of good-paying jobs on the Reservation outside of the energy industry. The Tribe knows oil and gas development and knows it well. For decades, the Tribe has relied upon oil and gas development to fill the ever-increasing shortfalls in federal funding. The Rule unseats the economic driver on the Reservation that has been the tool for tribal members to pull themselves out of poverty.

[26] *See* n. 26, *supra*.

III. LACK OF GOVERNMENT-TO-GOVERNMENT CONSULTATION

The BLM had a mandatory duty to consult with the Tribe on a government-to-government basis. The IMDA mandates consultation with tribes both for initial formulation of rules and for any future revisions or amendments of such rules or regulations. 25 U.S.C. § 2107. *See also* 25 U.S.C. § 3501n (under the Energy Policy Act of 2005, "the Secretary of the Interior *shall* . . . involve and consult with tribes"). The Executive Order and the Department's own manual, discussed below, provide additional details regarding the manner of consultation.

The BLM did not consult with the Tribe on the required government-to-government basis in accordance with federal law and policy.[27] Instead, BLM met with the Tribe only after it had paternalistically dictated that the Tribe needed additional hydraulic fracturing regulations. Had the BLM consulted from the beginning, it would understand that the Tribe has the authority, will, and capacity to regulate its own lands. Indian tribes should have the opportunity to opt-out of the rule and apply their own regulations uniquely tailored to each tribe's concerns. This would promote tribal self-determination and tribal sovereignty.

[27] Admin. Record, *passim*. (For example, to attempt to satisfy the requirement that they engage in meaningful consultation with tribes, the agency includes numerous assertions that one or more unnamed federal agents met individually with tribes at some unspecified time and location, BUT the record does not contain any basis for concluding that the contents of the supposed meetings were made available to those making decisions on the fracking rule. The requirement is not merely that some federal employee meets with the Tribe, it is that the agency meaningfully consults with tribes and considers their input, and the record plainly does not permit a conclusion that such consultations occurred).

Numerous legal authorities specify procedures as to how federal Departments, agencies, and bureaus are to carry out consultation and the government to government relationship with tribes. See White House Indian Affairs Executive Working Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols, and Guidance at 1-4 (2009), available at http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version_6-09.pdf. In the recent past, Presidents Obama, Bush and Clinton have all made clear that executive branch agencies have an obligation to tribes to both respect their sovereignty and to engage in government to government consultations as to all actions affecting tribal lands, tribal resources and tribal economics. Further, the Executive Orders require agencies to consult with tribal governments early in the development of any regulation or action impacting tribes prior to issuing the regulation. These Executive Orders serve as evidence that meaningful consultation is an integral component of any agency action that may impact tribal interests.

The Department of the Interior's Departmental Manual includes detailed policies, responsibilities, and procedures for operating on a government to government basis with tribes. Office of American Indian Trust, Departmental Responsibilities for Indian Trust Resources, 512 DM § 2 (Dec. 1, 1995). The Departmental Manual states, "[i]n the event an evaluation reveals any impacts on

Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s)…" *Id.* at § 4(B). The Manual specifically requires each Bureau and Office in the Department to have an "open and candid" consultation with tribal governments prior to any decision so that the "bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes." *Id.* The "shall consult" language pervasive throughout this section reflects that Interior intended this document to be binding authority. 011 DM § 1.2(B) (2001); *Hymas v. United States*, 117 Fed. Cl. 466, 502 (2014) (holding that the Fish and Wildlife Service's failure to comply with the Departmental Manual was arbitrary and capricious).

Proper tribal consultation is an expression of the unique legal relationship between Indian tribes and the federal government, the federal trust responsibility, and the right of self-government for tribes. It is based upon the exact opposite of the outdated philosophy upon which the United States operated here. It is in fact both telling and concerning that the United States still continues to attempt to justify its paternalism in this case, instead of conceding that vis a vis tribes, it was simply wrong, and that it must start over.

Consultation must begin early in the rulemaking process so that tribes can be involved in designing effective rules from the outset. Tribal consultation also helps the federal government ensure that future federal action is achievable,

comprehensive, long-lasting, and reflective of tribal input. For Indian tribes, proper tribal consultation is not a trivial issue.

BLM's attempt to meet with tribes was woefully inadequate and fell considerably short of the requirements of Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments and the Department of the Interior's Policy on Consultation with Indian Tribes and Secretarial Order No. 3317. On November 5, 2009, President Barack Obama issued a Presidential Memorandum directing each Federal agency to submit a detailed plan of action describing how the agency will implement the policies and directives of Executive Order No. 13175. On December 2, 2011, the Department announced that its new Tribal Consultation Policy would provide, "a strong, meaningful role for tribal governments at all stages of federal decision-making on Indian policy." Press Release, Department of the Interior, "Secretary Salazar Kicks Off White House Tribal Nations Conference at Department of the Interior" (Dec. 2, 2011).

The Interior's Tribal Consultation Policy states that that "[e]ach Bureau or Office will consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications." Department of the Interior Policy on Consultation with Indian Tribes at § VII, E, 1. This tribal "[c]onsultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making [and, that] … [c]onsultation is built upon government-to-

government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." Department of the Interior Policy on Consultation with Indian Tribes at § II.

In direct violation of these policies, BLM spent more than a year developing the proposed rule before initiating consultation with Indian tribes. The revised proposed rule describes meetings and forums in 2010 and 2011 where BLM was first considering and leading discussions regarding hydraulic fracturing. During this time, Interior's Tribal Consultation Policy requires that BLM separately engage Indian tribes in consultation to discuss tribal implications of the proposed action. However, BLM did not begin holding regional tribal consultations until January 2012. [28] By this time, BLM had already decided that it would claim this rule was in the best interest of tribes and was merely informing tribes of its pending action.

Rather than forcing tribes to "consult" through Federal Register notices and comments, BLM was to have approached individual energy-producing tribes prior to the development of the rule on a government-to-government basis to determine whether, how, and by which entity hydraulic fracturing should be regulated on Indian lands.

There are only a handful of tribes across the country with a substantial interest in the revised proposed rule. For this reason, it is startling that BLM did not make

[28] DOIAR00960, 10290, 10872, 24889 (transcripts of regional meetings)

the effort to consult with these tribes on a meaningful basis. A handful of meetings held in 2013 and 2014[29] do not suffice. As a result, legitimate tribal concerns were either lost in a cacophony of other comments or invited only after much of the BLM's Rule was nearly in final form. Such considerations would have occurred had the Secretary *meaningfully consulted* with Indian tribes throughout the rulemaking process. And the Secretary would have meaningfully have consulted if she were not erroneously convinced that she knew what was best for tribes and therefore did not need to bother to talk to tribes about what they viewed as best for tribes and tribal people.

BLM never attempted to discuss the appropriate balance for well stimulation activities on Indian lands. Instead the Rule imposes a "protection" on us. This kind of paternalism is not the proper or modern role of the federal trustee. Nor does it comply the consultation requirements set forth in Executive Order No. 13175 or Secretarial Order No. 3317.

IV. APPLICATION OF THE RULE TO INDIAN LANDS EXCEEDS THE BLM'S AUTHORITY

The Secretary has promulgated the Fracking Rule, in part, to fulfill her duties under FLPMA. Congress enacted FLPMA in 1976 to guide federal agencies in the management of federal public lands. 43 U.S.C. §§ 1701-84. FLPMA establishes

[29] DOIA0053662; 50425.

the standards for the BLM's obligations to protect public lands and to minimize adverse environmental impacts to the lands and resources held in trust for the public. Unlike the statutes governing Indian lands, FLPMA requires BLM to manage public lands for multiple use and sustained yield and to balance competing resource interests, including in part, historical, ecological, environmental, and archaeological values. *Id*. § 1701(a)(8). Because federal lands are held in trust for the general public, BLM must balance preservation with development.

FLPMA's land management standards differ from and are not compatible with the standards required of the federal government for the management of Indian trust lands. This is why Congress specifically excluded Indian lands from the application of FLPMA. In promulgating this Rule, the Secretary attempts to satisfy her obligations to public lands and to Indians lands with a single rule. However, by applying the FLPMA standard to Indians lands, the Secretary exceeded her delegated authority.

BLM has not yet addressed Congress' specific exclusion of Indian lands from BLM's authority in FLPMA. Although BLM was originally created in 1946 through the reorganization of two offices within Interior, FLPMA is the organic act for the modern day BLM. Enacted in 1976, FLPMA was intended to recognize and promote the values of the Nation's public lands. BLM's lack of authority over Indian lands is plainly set forth in FLPMA. In defining the "public lands" that BLM

would manage under FLPMA, Congress specifically excluded Indian lands. Congress provided:

> The term 'public lands' means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except– . . . lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702 (e) and (e)(2) (emphasis added). Thus, when BLM exercises authority over public lands, that authority does not extend to Indian lands. Like every other federal agency, the Department of the Interior and BLM cannot supersede or ignore the specific direction of Congress.

BLM asserts the Secretary's general authority to oversee leases on Indian lands through the IMLA and the IMDA. The Secretary cites to 25 U.S.C. § 396d as providing BLM with the authority to apply the Rule to Indian lands, as the rule impacts oil and gas operations on Indian lands. Section 396d grants authority to the Secretary to promulgate regulations relating to any act affecting restricted Indian land:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of Section 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

25 U.S.C. § 396d.

The Secretary's authority to manage tribal mineral agreements under IMLA and the IMDA does not supersede Congress' explicit limitation of the authority delegated to the Secretary and to the BLM under FLPMA. Through FLPMA, Congress charged BLM with regulating oil and gas and other activities on public lands, specifically for multiple use and sustained yield of natural resources in accordance with the land use plans developed by the agency. Congress excluded Indian lands under its definition of public lands in FLPMA.

The limitation of BLM's authority on Indian lands is logical. Public lands and Indian lands are to be managed according to very different standards. Managing Indian lands according to public interest standards—even under the guise of proper statutory authority—violates the standards established for the management of Indian lands. The national standards set out in FLPMA Section 102 have no place in the management of Indian lands and resources.

Unlike federal public lands, Indian lands are held for the exclusive use and benefit of Indian tribes and managed according to specific treaties and the federal trust responsibility to Indian tribes. Indian lands are to be used for the best interest of the tribe, not to be preserved or protected for general public recreation, occupancy or use.

Congress has established entirely separate standards for the management of Indian lands. The Supreme Court has described the standard found in laws dealing with the management of Indian lands as trust or fiduciary standards. For example, in a case concerning the management of timber and forest resources by Interior, the Supreme Court stated:

> All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."
>
> Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.
>
> . . . .
>
> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

United States v. Mitchell, 463 U.S. 206, 225-26 (1983) (citations and footnotes omitted). As discussed above, the Tenth Circuit cases applying the general rule to this specific context hold that the United States does have enforceable trust responsibilities. *E.g.*, *Wood Petroleum. Corp.*, 47 F. 3d 1032. Importantly, Indian tribes, not the public, are the beneficiaries of these laws and standards.

If any federal agency should regulate tribal lands, it should be the U.S. Bureau of Indian Affairs ("BIA"). Over the past several decades, the Secretary has developed an entirely separate set of rules and regulations that BIA administers for Indian lands. The Secretary acknowledges that the Rule is not the only possible way to carry out the federal trust responsibilities. Nevertheless, she justifies the Rule by finding it is more economical than having the United States comply with its trust responsibilities by creating a parallel set of regulations and regulatory personnel in the BIA. This statement reveals the Secretary's misunderstanding of her fiduciary obligations to tribes.

CONCLUSION

For all of the reasons stated above, the Court permanently enjoin the fracking rule within the Ute Tribe's lands.

Respectfully submitted this 4th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, I filed a true and correct copy of the Ute Tribe of the Uintah and Ouray Reservation's Merits Brief via the court's ECF system, with notification to those who have receive notice in this matter via that system

/s/ Jeffrey S. Rasmussen

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