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**UNITED STATES DISTRICT COURT**
**DISTRICT OF WYOMING**

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| STATE OF WYOMING, et al.,<br><br>Petitioners,<br><br>v.<br><br>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,<br><br>Respondents. | **UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION'S REPLY IN SUPPORT OF ITS MERITS BRIEF**<br><br>Case No. 2:15-cv-00043-SWS<br>(consolidated with 15-cv-00041-SWS)<br><br>Assigned: Judge Scott W. Skavdahl |

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## DISCUSSION OF LAW

### I. BLM LACKS RULEMAKING AUTHORITY ON TRIBAL LANDS.

In its opening brief, the Tribe discussed that, in addition to the arguments by other parties related to the BLM's lack of authority to adopt the Rule (with which the Tribe agrees), there are additional reasons why BLM lacks rulemaking authority regarding fracking on land which the United States owns in trust for the tribes/tribal members. The authority which Congress delegated to the BLM is defined by the FLPMA, and Congress expressly excluded tribal land from authority it delegated to BLM. 43 U.S.C. § 1702(e). In the IMLA and the IMDA, Congress granted some rule making and regulatory authority to the BIA, but not to BLM, related to tribal oil and gas development.

In its response, BLM acknowledges that the Tribe is correct regarding the FLPMA, IMLA, and IMDA, but it argues that under regulations adopted under the IMLA and IMDA, BIA has delegated to BLM carte blanche rulemaking authority over Indian lands, Resp. Br. at 6.

BLM starts from the proposition that the BIA has authority to regulate tribal minerals. Although the parties disagree about the scope of the BIA's authority, and that disagreement is discussed elsewhere in the Tribe's opening and reply briefs, the parties do agree that BIA has at least some authority in this regard under the IMLA and the IMDA. The Tribe made that point in its opening brief.

In support of its assertion that the BIA delegated to BLM carte blanche authority to impose any regulations it wants against tribes, BLM cites to three regulation under the

IMLA (25 C.F.R. §§ 211.4, 211.44, and 211.48)[1] and two regulations under the IMDA (25 C.F.R. §§ 225.4 and 225.32).[2] In each of those BIA regulations, the BIA incorporates some or all of the following BLM regulations: 43 C.F.R. parts 3160, 3180, 3260, 3280, 3480 and 3590.[3]

BLM then asserts that all it has to do to come within allegedly delegated rulemaking authority is to make sure that it codifies what it is doing to tribes under 43 C.F.R. Part 3160 (as it did here) or under 43 C.F.R. parts 3180, 3260, 3280 3480 or 3590. Resp. Br. at 6. BLM then asserts that because it has codified the challenged regulations under 43 C.F.R. Part 3160, the regulation are within its delegated rulemaking authority. Resp. Br. at 6. This is the disputed point discussed in this section of this brief.

There are four independent errors in BLM's argument, which will be analyzed in the next four subsections. In subsection A, the Tribe briefly notes its correct legal discussion in its opening brief that the FLPMA precludes BLM rulemaking regarding tribal lands, while subsections B, C, and D respond to BLM's claim that BIA has attempted to delegate rulemaking to BLM regarding tribal and individual trust lands

### A. THE FLPMA PROHIBITS BLM RULEMAKING REGARDING TRIBAL LAND.

As the Tribe discussed at length in Section I and IV of its opening brief, Congress defined the land subject to BLM's authority to exclude tribal lands. Tribal land is subject to BIA

[1] 25 C.F.R. §§211.4, 211.44 and 211.48 were adopted July 8, 1996. 61 FR 35653.
[2] 25 C.F.R. §§225.4 and 225.32 were adopted March 30, 1994. 59 FR 14971.
[3] At page 12-13 of its response, BLM asserts that if the Secretary cannot delegate BLM rulemaking authority over tribal land, 43 U.S.C. §1731(a) becomes "meaningless." The section plainly remains meaningful, but as expressly provided for in 1731 and as required by the core of separation of powers, any delegation to BLM must be consistent with the FLPMA and other federal laws.

jurisdiction, and while BIA is far from perfect, at least it has some understanding of its trust responsibilities to tribes. The Rule therefore must be permanently enjoined as it relates to tribal lands because it is outside BLM's rulemaking authority. BIA cannot delegate rulemaking to BLM where Congress has already spoken..

### B. BIA DID NOT DELEGATE RULEMAKING AUTHORITY TO BLM.

BLM asserts that the BIA regulations delegate BIA's future rulemaking authority to BLM. It is wrong. Instead the regulations are by the BIA, through which BIA was exercising its congressional delegated rulemaking authority related to tribes. In exercising its delegated authority, the BIA, at most, only adopted and incorporated BLM regulations. For example, in the two primary regulations cited by BLM, 25 C.F.R. §211.4 and 25 C.F.R. §225.4[4], BIA, exercising its rulemaking function, states that the cited regulations from Title 43 "apply to leases and permits approved under this part." BIA's regulations do not state BIA is delegating rulemaking authority, and in fact show that BIA is exercising rulemaking authority over the issues. While the Tribe's position is that BIA could not delegate rulemaking authority to BLM because Congress expressly excluded tribal lands from BLM's purview, the Court does not need to reach that more difficult issue because BIA did not delegate.

[4] In addition to the two regulations discussed in the body of this brief, the remaining three regulations are purported to show BIA adopting regulations regarding suspension of operations under specified conditions, 25 C.F.R. §211.44 (applying 43 C.F.R. § part 3160 subpart 3165), and requiring secretarial lease approval, 25 C.F.R. §§211.48, 225.32 (applying standards from other BIA and BLM regulations). None of these regulations purport to grant rulemaking authority or to adopt future amendments to any incorporated regulations.

### C. EXERCISING ITS RULEMAKING AUTHORITY, BIA ADOPTED THEN-EXISTING BLM REGULATIONS, NOT FUTURE BLM REGULATIONS

Second, and closely related to the first point, in exercising its rulemaking authority, BIA attempted to adopt and incorporate the BLM's regulations as they existed at the time that BIA made that decision to adopt and incorporate. It did not adopt and incorporate unknowable future BLM regulations.

#### i. IMLA

As it relates to the IMLA, the legal analysis of this issue is simple, because 25 C.F.R. §211.4 shows that BIA was adopting 43 C.F.R. Part 3160 as it existed on July 8, 1996, that it was not even attempting or purporting to incorporate future changes which BLM might make to regulations in Part 3160. We can determine this by contrasting the relevant BIA regulation under the IMLA (not incorporating future changes) with the relevant regulation under the IMDA (purporting to incorporate future changes).

Other than minor grammatical changes, BIA made only one change between 25 C.F.R. §225.4 (adopted in 1994) and 25 C.F.R. §211.4 (adopted in 1996). In both regulations, BIA incorporates BLM regulations contained in 43 C.F.R. Parts 3160, 3160, 3180, 3260, 3280, 3480, and 3590. BIA's incorporation under the IMDA states: "These regulations, as amended, apply to minerals agreements approved under this part." 25 C.F.R. §225.4 (emphasis added). But in its later regulations under the IMLA, BIA incorporated as follows: "These regulations, [sic][5] apply to leases and permits approved under this part." 25 C.F.R. §211.4.

[5] The stray comma is in the published regulation, and appears to have been accidentally left when

The Court must interpret BIA's decision to omit "as amended" in its later regulation as meaningful. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." *United States v. Menasche*, 348 U.S. 528 (1955).

A corollary of this rule is:

> When the legislature uses a term or phrase in one statute or provision but excludes it from another, courts do not imply an intent to include the missing term in that statute or provision where the term or phrase is excluded. Instead, omission of the same provision from a similar section is significant to show different legislative intent for the two sections.

2A *Sutherland Statutory Construction* §46:6 (7th ed.) (citing numerous cases).

Here the meaning of this sole substantive change is clear. The BIA was expressly not including future changes to the regulations that it was incorporating under the IMLA. As an analogous example, in 79 FR 70095-01, a federal agency noted that it was revising its regulations to "remove the date-specific IBR of section 52.21, replacing it with an IBR of 40 CFR 52.21 'as amended.' . . .[T]hese revisions incorporate the current Federal PSD requirements, and will automatically incorporate any future changes to the Federal regulations into the Maryland SIP." Conversely here, the deletion of "as amended" has the opposite intent and effect.

As the sole substantive difference between 25 C.F.R. §211.4 and 225.4 shows, BIA knows how to draft a regulation which attempts to incorporate future changes to the

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the phrase "as amended" was removed.

incorporated regulations. Under the IMLA it chose not to incorporate future changes. The amendments to the regulations at issue do not apply under the IMLA.

In the IMDA, the BIA expressly purported to incorporate future changes to the incorporated BLM regulations, while in the IMLA it was incorporating the regulations as they existed on the date of the regulation, without incorporating any unknown future changes that BLM might make nearly 20 years later. Therefore the IMLA does not incorporate the changes to 43 C.F.R. Part 3160.[6]

**ii. IMDA**

A more difficult, but probably purely theoretical legal question, is whether the BIA's attempt in its IMDA regulations to incorporate future BLM regulations is effective.

As BLM admits, Congress delegated both the general power related to Indian Affairs and the specific power for rulemaking under the IMLA and IMDA to the BIA. Resp. Br. at 6. Because it has the delegated duty and trust responsibility, BIA cannot simply say that whatever the BLM adopts at some future date is BIA's rule. BIA is not clairvoyant, and it therefore did not know, in 1994, that the BLM was going to attempt to regulate fracking in regulations in 2015, nor did it know the contents of those far-in-the-future regulations. Adopting BLM's future rules is an abdication, not an exercise of a BIA's delegated authority. *See, e.g.*, *Shankland v. Washington*, 6 Pet. 390, 395 (1831). *Compare United States v. Paul*, 6 Pet. 141 (1831) (incorporation of state statute could not

[6] Without citation to the record, BLM asserts that the Ute Tribe has entered into contracts under both the IMLA and the IMDA. Resp. Br. at 6. The Tribe searched for, but could not find any record support for that assertion. *But see* DOIAR0034495 at 74 (an attorney for the Tribe stated that the IMDA is not used because it is "unworkable."). The Tribe's current understanding is that nearly all activity is under the IMLA, but that the IMDA is used on rare occasions.

incorporate future changes) *with United States v. Sharpnack*, 355 U.S. 286 (1958) (holding that because Congress had demonstrated intent, through 123 years of periodically reincorporating current state law as federal law, the reincorporation could include future changes).

**D. PART 3160 DOES NOT APPLY TO TRUST LANDS.**

As applied to both the IMDA and IMLA, the allegedly incorporated regulations in 43 C.F.R. Part 3160 apply only to restricted Indian lands, not to tribal or individual trust lands. In its own brief, BLM asserts that the Rule applies to tribal trust land based upon the provision in 43 C.F.R. 3160.01(b) which states that 43 C.F.R. Part 3160 applies to federal regulation of oil and gas deposits from "restricted Indian Land leases."[7] BLM correctly identifies and quotes the applicable definition of restricted lands, which shows that tribal trust lands are not restricted Indian lands:

> Restricted land or land in restricted status means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

Resp. Br., at 13 n. 4 (quoting 25 C.F.R. §151.2(e), emphasis added by the Tribe).

[7] The limitation to "restricted Indian Lands" is in 43 C.F.R. § 3160.0-1, currently and was in that regulation existed in 1994, in 1996. The argument in this section is therefore independent from the argument in section I.B, *supra*.

That BIA definition of "restricted land" is in contrast to BIA's definition of trust lands: "Trust land or land in trust status means land the title to which is held in trust by the United States for an individual Indian or a tribe." 25 C.F.R. §151.2(d) (emphasis added).[8]

This distinction between trust land and restricted lands is well established and well-known to those dealing with Indian lands or mineral resources.

> Allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ("trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment).

Cohen's Handbook of Indian Law ¶16.03[1]—Individual Indian Property: Allotments: Terminology (2012 ed.) (hereinafter "Cohen's")

> "There is a distinction between a "trust patent" and a "restricted fee" patent. Indians holding lands under a trust patent are the beneficial or equitable owners of the lands. While the United States holds the legal title in trust for the Indian allottee. In the case of restricted fee patents both beneficial and legal title pass from the United States to the allottee, subject to restrictions on the power of the allottee to convey or otherwise encumber the land."

Title Examination of Indian Lands, 5C Rocky Mtn. Mineral Law Inst. Special Inst. 5 (1977). *See also* Robert T. Coulter, *Native Land Law* §4.3 (noting same distinction); Act of May 17, 1906, 34 Stat. 197 (repealed 1971) (providing for restricted fee patents to Alaskan Native Americans); 25 C.F.R. Part 151 (regulations for United States' acquisition of land in trust for tribes or tribal members); 25 C.F.R. Part 152 (defining procedures for issuance of a restricted fee patent and for removal of restrictions); Memorandum, Solicitor,

[8] The Tribe agrees with the United States that the relevant definition is contained in C.F.R. Title 25. The regulations now in 43 C.F.R. Part 3160 were originally codified in, and based upon the definitions in, 25 C.F.R. The recodification into Part 3160 was a non-substantive act. 48 FR 36582-02 (Aug. 12, 1983).

Department of the Interior, to Secretary of the Interior, M-37023, "Applicability of 25 U.S.C. §2719 to Restricted Fee Lands," (Jan. 18, 2009) (concluding that a statute that used the term "trust lands" unambiguously excluded restricted land).[9]

Restricted fees arise "by the operation of certain treaties, some tribe-specific statutes, and, more generally, the Trade and Intercourse Act." Solicitor's Memorandum M-37023. Much of that land is in the eastern part of the United States, where white contact preceded the federal trust ownership of reservations and therefore the restriction arises by operation of the Trade and Intercourse Act, *id.*, or in Oklahoma or Alaska, *Native Land Law* §4.3. Land on the Ute Reservation was allotted, and there is no tribe-specific statute which created restricted fee patents on behalf of the Ute Tribe or its members. *See generally Ute Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997). There is no record evidence that there are any restricted lands on the Ute Reservation.

At most, BIA delegated authority to BLM only related to restricted land. Its argument here that it can now impose its regulation to tribal or individual trust lands is simply wrong. It has not been delegated that authority.

## II. BLM FAILED TO APPLY THE LEGALLY MANDATED FACTORS WHEN DETERMINING WHETHER TO APPLY THE RULE TO TRIBAL LANDS.

In its opening brief, the Tribe provided a detailed discussion of the enormously different standard that is to guide the United States when it is regulating its own land

[9] For the present matter, we are not dealing with a "*Chevron* deference" issue, and instead dealing with interpretation of the existing regulation. But as the Solicitor concluded, even where Chevron deference would apply, the agency could not through regulation expand the statutory restriction to trust lands to include restricted lands.

compared to when it attempting to regulate tribal lands. Confirming is lack of respect for tribes, the BLM simply but inexplicably denies that the standards are different. Resp. Br §V.C.

It constructs its argument upon a string of independent errors. First it attempts to frame the issue as whether or not Congress has "mandated that the Department apply different standards for regulating hydraulic fracturing on federal and Indian lands." While not the point BLM was attempting to make, technically BLM is correct, but for one of the reasons that the rule should be permanently enjoined--Congress has not so mandated because, as this Court has already determined, Congress has not even authorized BLM to adopt the Rule for any lands, whether tribal or non-tribal. And then additionally, BLM's framing of the issue is merely another attempt by BLM to evade a primary issue raised by the Tribe. As the Tribe discussed at length in its opening brief, Congress has mandated that the United States must apply a very different set of factors to determine whether/how it should regulate tribal land, compared to the set of factors which guide federal regulations of the United States own lands.

As the Tribe discussed, and as BLM does not dispute, BLM simply did not conduct the required separate analysis of its rules based upon the factors that are to guide the rulemaker's decision related to Indian lands. Instead BLM's position during the rulemaking process was that there is no difference between the factors applicable to federal lands from the factors applicable to tribal lands and therefore its one-size-fits-all rule is not only permissible but is required. It had adopted that position before it had engaged in any consultation with tribes, *e.g.*, DOIAR008889 (Letter from BLM to Wilson R. Benally,

President, Navajo Nation, Burnham Chapter (Dec. 9. 2011)) (In what appears to be the only letter of record to a tribal leader preceding the January 2012 consultation,[10] BLM states, "Any future rule on hydraulic fracturing will apply to both Federal and Trust lands."),(emphasis added), and BLM maintained the same throughout rulemaking, *e.g.*, 80 Fed. Reg. 16,128. Its attorneys are therefore in the unenviable position of being stuck with that losing argument in their response brief.

Because the record clearly shows that BLM did not consider the factors that are required by law as related to tribal lands, BLM asserts, in effect "So what? There is nothing the Tribe or the Court can do about it, because there is no remedy for the United States violating its trust relationship with tribes." The Tribe's discussion in its opening brief already shows that BLM is wrong, but the Tribe will briefly show the sophistry which leads the United States to an argument which denies the very foundational principle of federal Indian law.

In its response, BLM asserts that this Court should apply the legal analysis used to determine if the United States has waived sovereign immunity to a claim for money damages to the current APA suit (where there is undisputedly a waiver of federal sovereign immunity). Section 5.05 of Cohen's has a good general discussion of the distinction between these two types of cases and the legal rules applicable to them, that is titled

[10] BLM claims that it invited "nearly 180 tribal leaders" for consultation which was to take place in January 2012. Resp. Br. at 31. In searching the administrative record, the Tribe was not able to locate any mailing list, or other original source document supporting that assertion. The only document it found was this single letter to a president of one of approximately 100 Navajo chapters, in which BLM invited that chapter officer to attend one of the January 2012 consultations.

"Enforcement of Federal Indian Trust Against the Executive. Subsection 1 is "Jurisdiction, Sovereign Immunity, and the Substantive Right to Relief." Subsection 5.05[1][a] is applicable here: "Claims for Specific Relief." "Three essential predicates must be met in order to seek specific relief against the federal government for breach of trust: subject matter jurisdiction; a statutory consent to suit, and the existence of a claim upon which relief can be granted." *Id.* *Cohen's* then notes that many of these claims for specific relief for breach of trust are brought under the APA, which provides the first two predicates if the tribe can state a claim. In such suits "courts frequently have turned to the common law of trust to determine the nature and extent of duties owed to tribes and to apply the appropriate remedies." *Id.* (citing numerous cases). As the Tribe discussed in its opening brief, and as BLM does not dispute, BLM loses under that applicable law.

To attempt to escape, BLM misdirects this Court to the very different, much more complex, and higher standard discussed in *Cohen's* subsection 5.05[1][b], titled "Claims for Money Damages." Every case BLM cites is one brought by a tribe in the Federal Court of Claims under the "Indian Tucker Act." It is in those suits for money damages, and only in those suits, and solely because the suit must fit within the Indian Tucker Act's limited waiver of sovereign immunity, that a tribe is required to show breach of a statutorily defined trust duty. In fact, the Indian Tucker Act cases that BLM cites clearly draw the distinction between claims for specific relief (controlled by the standard discussed above, which the Tribe easily meets) and the more limited set of matters where there is a federal waiver of sovereign immunity for money damages. *E.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011); *United States v. Navajo Nation*, 556 U.S. 287 (2009);

*Mitchell v. United States* (*Mitchell II*), 463 U.S. 206 (1983). The Tribe need not meet that more complex and difficult standard applicable a suit for money damages.[11] This Court has jurisdiction under the APA, and the United States has waived sovereign immunity under the APA.

Based upon its reliance upon the wrong line of cases, the United States asserts that "neither the government's 'control' over Indian assets nor common-law trust principles matter." Resp. Br at 19. This is an astounding assertion, contrary to the very foundations of federal Indian law in the "Marshall Trilogy", *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823). That BLM asserts that the United States' trust responsibilities do not "matter" illustrates, more clearly than any words the Tribe itself could write, why the BLM failed to apply the factors guiding federal rulemaking related to tribal mineral lands.

Here, because it fails to grasp this fundamental starting point, BLM simply did not make the required differentiation and did not make the required separate analysis of whether the regulations which it claims meet the factors applicable to federal lands would meet the factors applicable to tribal lands. Because it did not conduct that required and very different analysis for tribal lands, its regulations would be invalid even if we were to assume, contrary to law, that BLM did have authority to regulate tribal lands. *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983).

[11] As the Tribe has already discussed at length, under case law in the Tenth Circuit exactly on point, the Tribe does meet the even higher standard.

## III. THE DEPARTMENT DID NOT COMPLY WITH ITS LEGAL DUTY TO CONSULT WITH TRIBES.

### A. THE DEPARTMENT'S TRIBAL CONSULTATION POLICY IS LEGALLY ENFORCEABLE AGAINST THE BLM IN THIS CASE.

In its opening brief, the Tribe began its legal discussion of the BLM's duty to consult with tribes by citing and discussing the relevant sections of the IMDA and the ITESDA[12], both of which expressly direct the Secretary to consult with tribes before issuing, revising, or amending rules and regulations that will impact tribal mineral interests. Tr. Br. at 25 (citing 25 U.S.C. §§2107, 3501n). The Tribe then cited executive orders and department policies which flesh out the statutorily mandated requirement to consult. *Id.* at 26. The Tribe then showed that the United States did not comply with its statutory duty to consult.

As it does in its breach of trust argument, BLM's primary response is to assert that it has no legally enforceable duty to tribes. To construct that incorrect argument, BLM completely omits any mention of, let alone discussion of, the United States' statutory obligations to engage in consultation with tribes prior to amending or revising its oil and gas regulations affecting tribal minerals. Instead BLM only presents a straw man argument that the Department's consultation policy and Executive Order 13175 would not independently create a legally enforceable duty to consult. Resp. Br at 28.

For the undisputed reasons discussed by the Tribe, BLM is required to comply with its statutory duty to meaningfully consult with tribes.

[12] "In carrying out this title and the amendments made by this title, the Secretary [of Energy] and the Secretary of the Interior shall, as appropriate and to the maximum extent practicable, involve and consult with Indian tribes." Pub. L. 109-58, title V, § 504, Aug. 8, 2005, 119 Stat. 778.

BLM's straw-man argument has a second fault which this Court should note. BLM argues that it demonstrated that it "did not intend to announce substantive rules enforceable by third parties in federal courts" because it "did not publish the draft policy in the federal register." Resp. Br. at 29. As noted above, BLM does not need to "announce" that it has a substantive duty, because Congress has already made that announcement. But even putting that aside, the BLM's argument is wrong on the facts, and application of its argument to the facts leads to a conclusion exactly the opposite of that put forward by BLM. The Department's draft Policy on Consultation with Indian Tribes was published in the Federal Register. 76 Fed. Reg. 28446 (May 17, 2011). Using the United States' own logic, the fact that the Department did publish the draft policy in the Federal Register, "show[s] that the Department did [] intend to announce substantive rules enforceable by third parties in federal court." Resp. Br. at 29. Taken together, the explicit language of the statutes and the Department's regulations and policies establish that consultation is required and legally enforceable in this case.

The BLM's statutory obligation to engage in government-to-government consultation prior to beginning the rulemaking process begins with the IMDA. The BLM relies on the IMDA for its authority to regulate oil and gas on Indian lands. *See* Resp. Br. at 5. The explicit language of the IMDA requires the Secretary to "consult with national and regional Indian organizations and tribes with expertise in mineral development both in the initial formulation of rules and regulations and any future revision or amendment of such rules and regulation**s**." 25 U.S.C. §2107 (emphasis added). In fact, in the comment and response section of the Final Rule, the Secretary actually referenced the BLM's

"statutory responsibilities" to engage in tribal consultation on the proposed rule. 80 Fed. Reg. at 16184.

The Department has established policies and procedures to implement Congress's mandate for government-to-government consultation that its Bureaus and Offices are required to follow.[13] According to the Department's policy, consultation includes the duty to engage tribes in consultation to discuss tribal implications of a proposed action "as early as possible." Department of the Interior Policy on Consultation with Indian Tribes at §VII, E, 1. As shown in the Administrative Record, the BLM failed to satisfy the Department's minimum requirements for consultation, resulting in a Final Rule that will substantially harm tribal interests if implemented.

"Agency action taken without statutory authorization, or which frustrates the congressional policy which underlies a statute, is invalid." *Yankton Sioux Tribe v. Kempthrone*, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) (quoting *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 715 (8th Cir. 1979). In determining the validity of a policy in the Indian Affairs Manual, the Supreme Court held that agency rules and policies, whether considered substantive or interpretive, must remain consistent with the governing legislation and employ procedures that conform to the law. *Morton v. Ruiz*, 415 U.S. 199, 232, 237 (1974) ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose."). The *Morton* Court further explained that the BIA's failure to make any real attempt to comply with its own policies not only violates

[13] The DOI's consultation policies and procedures are discussed in detail in the Tribe's Opening Brief at 21-26.

those general principles which govern administrative decision making, but also violates "'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id*. at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

In another case concerning the adequacy of an agency's consultation where the agency contended that the consultation policies and guidelines do not have the force of law, the court held that "[t]he BIA is not to be permitted to disavow its own policies and directives." *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 400 (D.S.D. 1995). The court further stated that by failing to consult with the tribe prior to acting, "[t]he BIA ignored its own rules and representations and violated its obligations of trust and fiduciary obligations." *Id*.

**B. BLM DID NOT COMPLY WITH ITS LEGAL DUTY TO CONSULT.**

As the Tribe has discussed in its opening brief, BLM did not comply with its legal duty to consult. In its response brief, BLM merely rehashes the same discussion of the meager steps which it took after it had already decided that it was going to adopt a single Rule applicable to federal and tribal lands. Because there is very little new here, the Tribe will only respond to a few points, and otherwise relies upon the thorough and correct analysis in its opening brief.

BLM cites to numerous secondary records as claimed evidence of its consultation. The reason it cites to secondary sources appears to be that there is no primary source evidence of the alleged consultation. For example, it cites to DOIAR0052181 as showing that it engaged in additional consultation with tribes. That document is actually an internal

BLM email to BLM officers in California asking the local offices to contact tribes for consultation. The document does not show such consultations, nor could the Tribe locate any documents showing whether/what steps BLM staff in California took to carry out the request. Similarly, BLM cites DOIAR0023603 as proof that "significant time was allotted to consult and discuss tribal concerns." That was also an email discussion proposed future steps, not events or results. *See also* n. 10, *supra*.

We are not interested in plans. We are, strictly, not even interested in whether there was adequate "consultation." We are interested in whether the administrative record shows adequate consultation, because this Court must base its decision on that record. The record does not show adequate consultation. This is illustrated by the United States response at page 30 footnote 18 to the Tribe's discussion at page 21 footnote 27 of its opening brief. In its brief, the Tribe noted that BLM alleges various meetings with tribes for which the record does not show who, when or where the supposed consultations occurred, and more important for which there is no record of the contents of the alleged consultation. BLM seeks to turn that into yet another straw man, incorrectly asserting that the Tribe was arguing that the only meetings that count as consultation are those between a tribe and the decision-maker. The Tribe made no such argument. Instead the Tribe's legal assertion is one with which BLM actually agrees—that a meeting does not count as consultation if, as is generally the case in this matter, there is no record basis to show that the content of the meeting was "transmitted . . . to staff in DC." Resp. Br. at 30 n. 18. BLM does not dispute that the record does not show such transmittal. Under BLM's own argument in its footnote 18, meetings for which the contents are not documented do not count as "consultation."

In fact the lack of record evidence is consistent with the disrespectful attitude that BLM has displayed toward tribes throughout this matter. It was not actually intersected in what tribes or tribal leaders thought, in how its rule would impact tribes, in what was in tribes' best interests. In BLM's mind, there was no need to bother recording what tribal leaders said to the unnamed BLM employees tasked with "consulting" with tribes, because tribal input was not respected, was not going to be considered, and therefore did not need to reach decision-makers who had, after all, already reached their key decisions long before they tasked subordinates with the charade of consulting. At most it was merely paying lip service to treating tribes with respect.

Finally, BLM asserts that their consulting was not a paternalistic charade because they made two changes to their regulations "based upon" their consultation. For one of the two, a tribal chairman was discussing his tribe's position that it should be permitted to opt out of some of the regulations. BLM disagreed, but during the discussion, BLM noticed that one subsection might be clearer if it was broken into two subsections. DOIA0050425-548. The other change is the only one that was suggested by a tribal officer. The tribal officer suggested that BLM correct an obvious oversight by adding the word "tribal" to a provision which required operators to certify that they had complied with some "applicable federal, state, or local laws." DOIAR0010192.

BLM added one word to this very complex set of regulations based upon a suggestion by a tribal officers. While it claims this shows "robust" consultation with tribes, the record supports the Tribe's discussion that it shows exactly the opposite.

Both Congress and the Executive Branch have articulated a longstanding policy that requires meaningful consultation to occur between the federal government and tribes prior to a federal action that may implicate tribal interests. The BLM woefully failed to consult with tribes in a timely and meaningful manner in the promulgation of this Rule. As such, the BLM violated Departmental policies, federal law, and its trust and fiduciary obligations. It would be a grave injustice to allow the BLM to ignore its trust responsibilities by hiding behind a claim for agency deference.

## IV. BLM DID NOT CONDUCT THE REQUIRED SOCIO-ECONOMICS ANALYSIS BECAUSE ASSUMING WITHOUT ANALYSIS THAT THERE WILL NOT BE IMPACT IS INSUFFICIENT.

Where one is considering regulations which may impact Indian tribes, the agency is required to analyze the regulation's potential socio-economic affect upon tribes. Tr. Br. §II. As with all other unique requirements related to tribes BLM did not comply with that requirement related to tribes. In its response brief, BLM continues to indicate that it does not understand that it even had that obligation. Instead it claims that it conducted the required analysis because "the Rule's minimal cost,[14] as compared to the cost of drilling a well for hydraulic fracturing, showed that the Rule would not impact operators' investment decisions, including whether to drill on Indian lands." Resp. Br. at 24. However, by only comparing the amount of increased costs associated with the Rule to the total costs of drilling a well, the BLM failed to perform any actual analysis of whether or how the increased costs will affect the decision of operators or how it will impact tribes. BLM simply assumes, without the legally required analysis, that the costs will not affect decisions to develop and that therefore tribes will not be impacted.

[14] As other parties have discussed, the United States estimates of the costs of the new regulation are implausibly low. The Tribe agrees with those arguments, but its argument in this section is independent from that issue.

There are multiple reasons why this is insufficient. First, BLM is merely assuming the very issue it was required to analyze: even if its estimate of the amount of the increased costs are accurate, what impact would the regulation have on tribes? Although producers repeatedly stated that the regulations would impact their decisions on when and where they would drill, BLM dismissed all of those statements without even gathering any data on factors that would influence producers' decisions. It did not gather information on profit margins, on whether there would be a difference in such margins if the producers did move down the road to a location not subject to the Rule, or other alternatives that producers might have. People will pick a gas station because its price is $.02 cheaper per gallon. Would a producer not pick a location which was $11,719 cheaper (or more)? DOIA0080223. Here, we don't know, because BLM merely assumed, without analysis, that the producer would pick the more expensive location because it was only 1% or so more expensive.

BLM's economic analysis is based upon the assumption that that its rule will not alter even one decision to drill, but it has no analysis to support that assumption. A decision to forego even one well would have a major, and unanalyzed impact. DOIA0042097 (notes indicating that a decision to forego one well would cost the Tribe $5,000,000 over a five year period).

BLM's assumption that the rule will not have economic impact is based upon BLM's assumption that producers will make their investment decisions based upon BLM's DC office's estimate of compliance costs, instead of the much higher estimates of compliance costs by the industry and states or the much higher estimate of BLM's own

Senior Petroleum Engineer in its Vernal office, who wrote that as it relates to land under the Vernal office the regulation would have a "major impact" and that "the cost of these new regulations as they stand will be high." DOIA0074845. BLM's assumption that others will make decisions based upon BLM central office's dubious analysis is unreasonable, and is contrary to the record. As the Tribe noted in its opening brief, the record shows that the industry will be making its decisions based upon its own estimates, not BLM's estimates. Opening Br. at 12-14.

But more simply, BLM was required to do economic analysis, not to merely assume. *Id.* at 14-15. BLM needed to analyze what producers would do, not what it claims they should do if they were to assume BLM's cost estimates and delay estimates were correct, because it is what the producers would do which would then cause the economic impact that BLM was required to quantify and analyze.

The second deficiency is that BLM was required to analyze the impact on the tribes, and it did not conduct any such analysis. All it did was to quantify what it claimed would be the amount of money tribes would have to pay to comply with the regulations: approximately $10,000,000 per year. Even if we accept that low-ball estimate, that is only the first step. The requirement is to estimate the impact: how will diverting $10,000,000 per year to increased compliance costs impact tribes? How will the estimated $2,000,000 of increased costs to the Tribe impact the Tribe? What government services will it have to

cut, and how will that ripple through the Tribe's economy? Again, we do not know, because BLM did not do any economic analysis.[15]

This Court has "the duty and the ability to ensure that an agency has at least understood the relevant factors to be considered and has provided an adequate explanation of its reasoning process." *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983). The record in this matter affirmatively shows that the agency did not understand the relevant factors, that it did not conduct the required economic analysis, and that the minimal discussion of economic consequences that it has provided is based upon assumptions unsupported by the record or contrary to the record

Here, the Secretary is required to not only take only such actions that would be in the Indian mineral owner's best interest, but she also "must manage Indian lands so as to make them profitable for the Indians." 25 U.S.C. §2101 (emphasis added). Thus, BLM should have actually analyzed how the Rule would impact Indian mineral development rather than stopping at an unsupported conclusion that lacks any adequate explanation or evidence of a reasoned analysis. Simply concluding that the Rule will not impact the industry's decision to drill on Indian lands because the added cost of the Rule is only a

[15] In its opening brief, the Tribe discussed that some of the economic impact derives from chronic understaffing and backlog in BLM's Vernal office. In response, and contrary to the record, BLM asserts this is a funding issue, which it claims cannot be considered. First, the record shows it is not a funding issue: the positions at issue are open but chronically unfilled. DOIAR0074845 DOIAR0049741. Second, combining the backlog and the structure of the phase-in for the rule, new drilling on the Ute Reservation would be shut down completely for a year or more, and BLM's low-ball estimate of costs does not even consider that shut-down. The backlog for ADP approval is 16 months. DOIAR0056286, 289-90. Under the Rule, ADP applications in the pipeline will need to be resubmitted unless drilling starts within the phase in period. The phase in period is no longer than six months.

smaller fraction of the costs of drilling does not constitute an adequate reasoning process. Without the benefit of an accurate and complete regulatory impact analysis, the BLM's uninformed decision to implement the Rule on Indian lands was arbitrary and capricious.

## CONCLUSION

For all of the reasons stated in the Ute Tribe's Merit's Brief and Reply Brief the permanent injunction should be granted.

Respectfully submitted this 18th day of April, 2016.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is double-spaced and utilizes a proportionally spaced 13-point Times New Roman typeface. The total word count of the brief, excluding table of content, table of authorities, and certificates of counsel, is 6,934 words.

Dated this 18th day of April, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 18, 2016, I filed a true and correct copy of **UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION'S REPLY IN SUPPORT OF ITS MERITS BRIEF** via the court's ECF system, which will serve all parties of record.

*/s/ Ashley Klinglesmith*
Legal Secretary/Paralegal