Case Nos. 18-4151; 18-4160

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee & Cross-Appellant,

v.

UINTAH VALLEY SHOSHONE TRIBE et al.,

Defendants/Appellants & Cross-Appellees.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Bruce S. Jenkins, Senior Judge

BRIEF FOR THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA, Plaintiff/Appellee & Cross-Appellant, vs. UINTAH VALLEY SHOSHONE TRIBE, et al., Defendants/Appellants & Cross-Appellees.	Nos. 18-4151; 18-4160 BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the Uintah Valley Shoshone Tribe, Dora Van, Ramona Harris, Leo LeBaron, and those in active concern with them (collectively "UVST") timely filed their appeal (i.e., 18-4151) of the district court's September 13, 2018 judgment correctly holding that the UVST has no authority to sell hunting and fishing permits on the Reservation. (J.A. at 1104).[1] The United States timely filed its cross-appeal (i.e.,

[1] The United States acknowledges 10th Cir. R. 28.1 and cites to the Joint Appendix as "J.A." followed by the Joint Appendix's page number.

18-4160) because the district court abused its discretion by not permanently enjoining the UVST's fraudulent hunting and fishing permit sales. (J.A. at 1135).

STATEMENT OF THE ISSUES

Issue No. 1: The Ute Tribe is the exclusive, legally-recognized tribal authority over the Uintah and Ouray Reservation. The UVST, which has no legal authority to govern the Reservation, sold its own hunting and fishing permits for use on thereon, among other places. Did the district court correctly determine that the UVST lacks authority to sell its own hunting and fishing permits?

Issue No. 2: Congress authorized courts to enjoin schemes that use interstate wire communications to obtain money through false representations. Although the UVST has no legal authority to sell its own hunting and fishing permits, the UVST does not dispute that it did so with the help of interstate wire communications. Did the district court abuse its discretion by refusing to enjoin UVST's scheme?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Statutory and Regulatory Background

By his October 3, 1861 Executive Order, President Abraham Lincoln authorized the creation of the Uintah Valley Reservation in the Uintah Basin. *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994). Twenty-one years later, President Chester A. Arthur authorized the creation of the Uncompahgre Reservation by his Executive Order of January 5, 1882. *Id*. at 1459. Subsequently,

the Uintah Valley and Uncompahgre reservations became the Uintah and Ouray Reservation ("the Reservation"). *Id*. Under the Indian Reorganization Act of 1934 ("the IRA"), 25 U.S.C. § § 461 to 479, the Uintah, White River, and Uncompahgre Bands of the Ute Tribe reorganized and formed the "Ute Tribe of the Uintah and Ouray Reservation of Utah." *Id*. at 1461. In June 1950, representatives of the three aforementioned bands signed five tribal resolutions, which completed the transition of the three "loosely-knit bands" into the "unified Ute Tribe." *Id.*

Under the IRA, the Ute Tribe established a Constitution, which extends the Ute Tribe's jurisdiction "to the territory within the original confines of the Reservation." *Id*. at 541 (quoting Article I of the Ute Tribe's Constitution). "The Constitution thus makes clear that the Bands ceased to exist separately outside the Ute Tribe [and] that jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe . . . ." *Id*.

In 1954, Congress exercised its plenary power over tribal affairs by enacting the Ute Partition and Termination Act ("UPTA"), [2] which established a procedure to: (1) terminate membership in the Ute Tribe of those deemed "Mixed Bloods," and (2) to divide tribal assets between the Full-Blood members of the Ute Tribe

[2] *Nation of Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary.").

and the "Mixed Bloods."[3] Pub. L. No. 83-671, § 1; 68 Stat. 868 (codified as amended at 25 U.S.C. § § 677 to 677a). Under the UPTA, after the divisible assets were allocated between the two groups, Congress required the Secretary of the Interior to issue a proclamation terminating the Mixed Bloods' status both as members of the Ute Tribe and as "Indians" under federal law. *Hackford*, 14 F.3d at 1462.

In 1956, the Secretary published final rolls that listed 490 Mixed-Bloods, *id.* at 1462, and, in 1961, the Secretary issued a proclamation, "which declared, '[a]ll statutes of the United States which affect Indians shall no longer be applicable [to the Mixed Bloods].'" *Id*. at 1463 (quoting *Termination of Federal Supervision Over the Affairs of the Individual Mixed-Blood Members*, 26 Fed. Reg. 8042 (Aug. 24, 1961)). Thereafter, the UPTA terminated the Mixed Bloods as members of the Ute Tribe and forbade them from ever being able to apply for recognition as a tribe. 25 C.F.R. § 83.11(g) (2015). The UVST has never applied for tribal recognition and, therefore, is not a federally-recognized tribe. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017).

[3] The United States recognizes that the term "Mixed Bloods" may be offensive in the modern vernacular. However, because UPTA uses this term, this brief does also to avoid confusion.

As to those tribal assets that were not divisible, Congress provided that they "'were to remain in government trust and be jointly managed by [the Ute] Tribal Business Committee and the Mixed Bloods' representative."' *Hackford*, 14 F.3d at 1462 (quoting *Ute Distrib. Corp. v. United States*, 938 F.2d 1157, 1159 (10th Cir. 1991)). Hunting and fishing rights are among those assets that were not divisible, *United States v. Felter*, 752 F.2d 1505, 1509 (10th Cir. 1985), and, therefore, were held in trust by the United States to be managed by the Ute Tribal Business Committee and the Mixed Bloods' representative. *United States v. Von Murdock*, 132 F.3d 534, 536 (10th Cir. 1997). The Ute Tribal Business Committee has enacted by-laws that govern hunting and fishing on the Uintah and Ouray Reservation ("the Reservation"). Ute Tribal Code § § 8-1-1 to 8-1-24. The Ute Tribal Code vests authority over hunting and fishing in the Ute Tribal Business Committee, which delegated supervision over those assets to the "Ute Indian Fish and Wildlife Department" and officers working within that Department. *Id*. § 8-1-14.

Although the Mixed Bloods listed on the Secretary of the Interior's rolls were terminated both as Indians with federal protection and as members of the Ute Tribe, they retained a personal right to hunt and fish on the Reservation. *Von Murdock*, 132 F.3d at 539-40 (stating that listed Mixed Bloods' hunting and fishing rights "are personal to the member"). These personal hunting and fishing

rights "cannot be conveyed to another through inheritance or in any other way." *Id.* at 540. Therefore, once a listed Mixed Blood member dies, so does his/her personal right to hunt and fish on the Reservation. *United States v. Felter*, 546 F.Supp. 1002, 1025 (D. Utah 1982) ("As each of the mixed-blood Utes passes away, his or her personal right [to hunt and fish] is extinguished . . . ."); *aff'd* 752 F.2d at 1509.

II. FACTUAL BACKGROUND

The UVST consists of Mixed Bloods and their progeny. (J.A. at 796, 756, 1092). Dora Van is the Chairwoman for the UVST. (J.A. at 697, 704-05, 748, 758). Ramona Harris is the Director for the UVST, and Leo LeBaron is the Director for Wildlife of the UVST's wildlife department. (J.A. at 697, 703, 747).

A. *The Scheme to Defraud*

In 2016 and 2017, the UVST, through Ms. Van and Ms. Harris, was selling permits to hunt deer and elk to its members for $25.00 and lifetime fishing permits for $5.00. (J.A. at 699 (Mr. Wilkerson stating that he purchased a deer and elk permit from UVST); 703 (Ms. Harris admitting to selling hunting permits out of UVST's offices); 715 (Mr. Brackenbury stating that he purchased an elk permit from UVST in 2017); 720 (copy of blank permit application showing deer and elk permit for $25.00); 786 (permits from UVST showing that permittees paid $25.00 for elk and deer permits)); 769-85 (showing that permittees who purchased a

hunting and a fishing permit paid $30.00). Ms. Harris stated that the UVST was issuing these permits "the same as they [Utes] do; we're using their Proclamation, we're using their rights that they have because that's . . . our rights are the same." (J.A. 705).

The UVST issued a big game proclamation to regulate hunting and fishing on the UVST's purported "Trust Lands" during 2016-2017 ("the Proclamation"). (J.A. 728-45). The UVST Proclamation defines "Trust Lands" as "lands within the original confines of the Reservation as set forth by Executive Orders of October 3, 1861, and January 5, 1882." (J.A. 731). Today, the "original confines of the Reservation" referenced in the Proclamation includes the Reservation, federal, state, and private land. (J.A. 788-89).

The UVST Proclamation allows both its members and non-members alike to hunt and fish on "trust lands of the Reservation" as long as they have a valid UVST hunting/fishing permit. (J.A. 733-34 (defining "Tribal member" and "Non-Member")).[4] UVST permittees confirmed that they were told by those selling UVST hunting permits that the permittees could hunt the lands referenced in its Proclamation. (J.A. at 699-700, 713).

[4] For purposes of summary judgment and this brief, the United States assumes as true that the UVST has only sold hunting and fishing permits to UVST members. (J.A. at 796).

UVST's hunting and fishing license applications state that the UVST is "a Federal Corporation d/b/a the 'Ute Indian Tribe' of the Uintah & Ouray Reservations, Utah." (J.A. at 720). The UVST's hunting permits state that the UVST is "a Federally Recognized Tribe of the Uintah & Ouray Reservations, Utah." (J.A. at 721-23). Consistent with the applications and permits themselves, Ms. Van and Ms. Harris told UVST member and hunting permittee Joseph Hackford at an August 2016 hunting meeting that the UVST was a "recognized" tribe under the law and that the UVST hunting permits were valid. (J.A. 712-13). In fact, the USVT has placed its own "No Trespassing" signs bearing the UVST name on Ute reservation lands. (J.A. at 746).

B. *The Use of Interstate Wire Communications*

Ms. Van and Ms. Harris use UVST's Yahoo! email account to communicate with UVST's Wildlife Director, Mr. LeBaron, about the UVST permittees who are authorized to hunt. (J.A. at 706, 712, 747). These communications must travel interstate because Yahoo! does not have email servers in the State of Utah. (J.A. at 718). Mr. LeBaron and other UVST game wardens help to make sure that UVST permittees can use their UVST hunting/fishing permits and, in some cases, assist the permittee with hunting the animal. (J.A. at 709, 713).

Ms. Harris and other UVST members also use Facebook to communicate about the UVST hunting program. (J.A. at 759-67). At least 24 subscribers to and

recipients of UVST's Facebook posts live outside the State of Utah. (J.A. at 715). Ms. Harris advertised on Facebook in 2016 that hunting and fishing permits would be available through the UVST, and that "NO we will not be harassed by the Northern Ute fish and game as to hunting, fishing, gathering, or anything else on our TREATY lands next year." (J.A. at 763) (words in all capital letters in original). Ms. Harris also used Facebook to solicit donations to help pay the attorney fees of UVST members who were criminally cited for hunting on Ute tribal trust land with a UVST hunting permit. (J.A. at 764).

Ms. Van was also aware that four UVST members had been cited for hunting on the Reservation using UVST permits. (J.A. at 706). Individuals who purchased UVST's hunting permits made Ms. Harris and Ms. Van aware that wildlife authorities from both the Ute Tribe and State of Utah were questioning the legitimacy of the UVST hunting permits and threatening prosecution. (J.A. at 749). Further, Ms. Van, Ms. Harris, and Mr. LeBaron were aware that Ute Tribe officers cited the UVST's "wildlife officers" for impersonating law enforcement and for trespass. (J.A. at 713). In October 2016, a Special Agent for the United States Fish and Wildlife Service also informed both Ms. Van and Ms. Harris that the hunting permits they issued for the UVST were not valid. (J.A. at 710-11). Nevertheless, in 2017, UVST continued selling hunting and fishing permits. (J.A. at 712, 714-15).

C. *The United States' Suit Against the UVST*

Given the fact that armed UVST hunters were having law enforcement interactions with armed Ute Tribe game wardens who believed they had a right to be on the Reservation and impacting trust resources, the United States filed a complaint and moved for a temporary restraining order against the UVST under 18 U.S.C. § 1345, which allows the United States to seek a civil injunction against wire fraud.[5] (J.A. at 7, 17). As to the merits of its claim, the United States argued that the UVST had used a scheme to obtain money by falsely representing to its members that it had authority to sell them hunting and fishing permits for use on the UVST's purported "Trust Lands" listed in its Proclamation. (J.A. at 44-47). The United States further argued that the UVST had used interstate wire communications to advertise and to perpetuate its scheme. (J.A. at 47-48).

At the hearing on the United States' motion for a temporary restraining order, the UVST agreed not to sell any hunting or fishing permits until it was able to retain counsel to argue on its behalf. (J.A. at 537). After the UVST obtained counsel, the parties agreed to file cross-motions for summary judgment pending

[5] In addition to being able to enjoin wire fraud, the United States holds in trust the fish and wildlife resources on the Ute Tribe's land. *Hackford*, 14 F.3d at 1462. Consequently, the United States may protect the rights of the Ute Tribe. *Cramer v. United States*, 261 U.S. 219, 229 (1923) (holding that the United States could "accord protection" to the property rights that the United States holds in trust for a tribe).

the resolution of which, the UVST would not issue any hunting or fishing permits. (J.A. at 624).

The United States' Motion for Summary Judgment argued that the district court should permanently enjoin the UVST from issuing its own hunting and fishing permits for use on the UVST's purported "Trust Lands" because the UVST had committed wire fraud by using interstate wire communications to perpetuate the scheme of selling hunting and fishing permits that the UVST had no legal authority to sell. (J.A. at 680-86). The United States also argued that it and the Ute Tribe would suffer irreparable harm if an injunction was not ordered and that both the balance of the harm and the public interest favored an injunction. (J.A. at 686-89).

The UVST's cross-motion for summary judgment argued that members of the UVST retained pre-UPTA hunting and fishing rights that allowed the UVST to issue its own hunting and fishing permits on the lands covered by the treaties. (J.A. at 796-99). Additionally, the UVST filed an opposition memorandum to the United States' Motion for Summary Judgment wherein the only fact it disputed was whether Ms. Van had informed hunters that they could hunt on United States Forest Service Land (J.A. at 810)[6] and argued only that the United States had not

[6] For purposes of this brief, the United States does not dispute that Ms. Van did not advise UVST hunters that they could access United States Forest Service land.

prevailed on the merits of its wire fraud claim because the UVST had a right to sell its own hunting and fishing permits on the Reservation. (J.A. at 810-12). The UVST provided no argument whatsoever regarding whether: (1) it used interstate wire communications to perpetuate its scheme, (2) the United States had suffered irreparable harm; (3) the balance of the harms favored an injunction; or (4) the public interest favored permanent injunctive relief. (J.A. at 808-12).

D. *The District Court's Memorandum Decision and Order*

After oral argument (J.A. 1014-65) and supplemental briefing (J.A. 823-29), the district court issued its Memorandum Decision and Order ("Decision"). (J.A. 1067-78). The Decision recognized that after Congress enacted the UPTA, the Mixed Bloods' interest in hunting and fishing rights, among other non-divisible assets, was "held in trust by the United States and exclusively managed by the Ute Tribal Business Committee and the Mixed Bloods' representative." (J.A. at 1075). The district court recognized that the UVST consisted of Mixed Bloods and their progeny. (J.A. at 1068, 1075). Therefore, the only governance over hunting and fishing rights that the UVST could maintain was through the Mixed Bloods' lone representative working with the Ute Tribal Business Committee, which is the exclusive tribal authority on hunting and fishing rights on the Reservation. (J.A. at 1075-76). Consequently, the district court held that the UVST has "no power to issue permits to hunt and fish on trust or other Tribal lands. None." (J.A. at 1077).

However, the district court refused to grant the United States' request for a permanent injunction of the UVST's permit sales based on wire fraud. The district court observed that "[b]ased on the agreed factual stipulations it is difficult for the Court to find . . . a scheme to obtain money by false representations and promises through the sale of permits." (J.A. at 1077). The district court reasoned that

> the question presented to the Court by the United States is more in the nature of a declaration as to the absence of sovereign power in Defendants to issue hunting and fishing permits. Thus, it appears to the Court the United States as trustee is entitled to a ruling so declaring, but denied relief by way of injunction because of the absence of evidence dealing with a criminal statute.

(J.A. at 1077). Therefore, the district court denied the United States' request for a permanent injunction because the UVST was precluded from issuing hunting and fishing permits "not because they have concocted a scheme to defraud purchasers of such permits, but because they simply lack the power to issue such permits." (J.A. at 1077). The parties timely appealed. (J.A. at 1080, 1111).

SUMMARY OF THE ARGUMENT

I. The district court correctly determined that the UVST has no right to issue its own hunting and fishing permits for use on its purported "Trust Lands" because the Ute Tribe, not the UVST, is the exclusive, legally-recognized tribal authority over the Reservation. Under the authority of the IRA, the Ute Tribe was formed to become the exclusive tribal authority over the lands and resources within

the Reservation. Further, under the UPTA, Congress terminated the Mixed Bloods's status both as "Indians" under Federal supervision and as members of the Ute Tribe. UVST consists of Mixed Bloods and their progeny. Therefore, because only the Ute Tribe may govern the Reservation and the Mixed Bloods are no longer members of the Ute Tribe, the district court correctly found that Congress left no room for the UVST to set up a rival government to the Ute Tribe to independently manage hunting and fishing rights on the Reservation.

Moreover, to the extent that the UVST argues that it received authority to govern the hunting and fishing resources from the purported pre-UPTA rights of its members, the UVST is mistaken. This Court has long held that the hunting and fishing rights of the Mixed Bloods were limited to those 490 names on the list that the Secretary of the Interior published as UPTA required. This Court has also held that the hunting and fishing rights of those on the Secretary's list were not alienable, transferable, or inheritable and, therefore, when the listed person died, so did his/her hunting and fishing rights. Accordingly, those UVST members whose names are not on the Secretary's UPTA list have inherited no ancestral hunting and fishing rights because those rights died with their ancestors. Similarly, those UVST members whose names are on the Secretary's list of 490 Mixed Bloods cannot transfer their rights to the UVST but may only exercise their personal right to hunt and fish in accordance with the management determined by the Ute Tribal

Business Committee and the Mixed-Blood representative. Thus, the district court correctly determined that the UVST lacks authority to issue its own hunting and fishing permits for use on its purported Trust Lands.

II. Because the UVST lacks any authority to issue its own hunting and fishing permits for use within its purported Trust Lands, the district court abused its discretion by not enjoining the UVST and those in active concert with it for using interstate wire communications to promote the sale of these fictitious permits. To obtain a permanent injunction, the United States must: (1) succeed on the merits of its wire fraud claim; (2) establish irreparable harm; (3) show that the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest. The district court abused its discretion by finding that the United States failed to succeed on the merits of its claim because the United States clearly demonstrated that the UVST had engaged in a scheme to sell fictitious hunting and fishing permits in which interstate wire communications were used. The United States also established elements (2), (3), and (4) for permanent injunctive relief before the district court.

Although the district court addressed only the first element for injunctive relief, this Court should grant the United States' motion for permanent injunction especially where, as here, the UVST did not contest any of the United States'

arguments pertaining to elements (2), (3), or (4) below. Indeed, remanding elements (2)-(4) to the district court to pass upon in the first instance is unjust because it will give the UVST a second bite at an apple of which it refused to partake the first time it was presented. Therefore, this Court should reverse the district court's refusal to permanently enjoin the UVST's scheme to defraud and order it to permanently enjoin the UVST from issuing hunting and fishing permits on its purported Trust Lands.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE UVST LACKED AUTHORITY TO SELL HUNTING AND FISHING PERMITS FOR USE ON ITS PURPORTED TRUST LANDS.

A. *Standard of Review*

This Court reviews grants of summary judgment de novo *Water Pik, Inc. v. Med–Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013).

B. *The UVST Has No Right To Sell Permits.*

The district court correctly determined that the UVST has no authority to sell its own hunting and fishing permits on its purported Trust Lands because the Ute Tribe is the exclusive tribal authority over the Reservation, which precludes the UVST from establishing a rival government. Under the IRA, the Uintah, White River, and Uncompahgre Bands of the Ute Tribe reorganized to form the "Ute Tribe of the Uintah and Ouray Reservation of Utah". *Hackford*, 14 F.3d at

1461. For purposes of governance, the three aforementioned bands ceded their authority to the unified Ute Tribe, which became the exclusive tribal authority over the Reservation. *Id.*

The fact that the Ute Tribe is the exclusive tribal authority over the Reservation is important here because in 1954, Congress enacted the UPTA, which established a procedure to terminate the Mixed Bloods from their membership in the Ute Tribe. Pub. L. No. 83-671, § 1; 68 Stat. 868. Under the UPTA, the Secretary of the Interior was required to publish rolls of names of "Full-Blood" members of the Ute Tribe and those who were or wanted to be treated as "Mixed Bloods." *Von Murdock*, 132 F.3d at 535-36. When the Secretary of the Interior published the final rolls, Congress declared that '"the [Ute] tribe shall . . . consist exclusively of Full-Blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this subchapter."' *Id*. at 536 (quoting 25 U.S.C. § 677g (emphasis added)). Thus, the UPTA terminated the listed Mixed Bloods' status both as "Indians" under Federal supervision and as members of the Ute Tribe. 25 C.F.R. § 83.11(g) (2015).

Although the Mixed Bloods were terminated as members of the governing Ute Tribe, Congress recognized that terminated Mixed Bloods still retained an interest in non-divisible assets held jointly with the Ute Tribe. Specifically,

Congress recognized that these non-divisible assets, including hunting and fishing,[7] '"were to remain in government trust and be jointly managed by [the Ute] Tribal Business Committee and the Mixed Bloods' representative."' *Hackford*, 14 F.3d at 1462 (quoting *Ute Distrib. Corp. v. United States*, 938 F.2d 1157, 1159 (10th Cir. 1991)). Additionally, the 490 Mixed Bloods listed on the Secretary of the Interior's UPTA rolls were recognized to have a strictly personal—not tribal—hunting and fishing right upon the Reservation that was "neither alienable, assignable, transferable nor descendible." *Von Murdock*, 132 F.3d at 538 (citations and quotations omitted).

This legal reality for the Mixed Bloods is devastating to the UVST's argument because the UVST concedes that it consists of Mixed Bloods and their progeny. (J.A. at 796, 756, 1092). Given that Congress: (1) gave exclusive tribal governance over the Reservation to the Ute Tribe; (2) terminated the Mixed Bloods as "Indians" and as members of the Ute Tribe; (3) limited the Mixed Bloods to one representative to work with the Ute Tribe in governing non-divisible trust assets such as hunting and fishing; and (4) restricted hunting and fishing rights only to those 490 Mixed Bloods whose names appear on the Secretary's UPTA rolls without any option to transfer those rights, Congress left no room for terminated Mixed Bloods and their progeny (including the UVST) to establish a rival,

[7] *United States v. Felter*, 752 F.2d 1505, 1509 (10th Cir. 1985).

independent hunting and fishing regime on the Reservation. Accordingly, the district court correctly held that the UVST has no authority to issue its own hunting and fishing permits for use on its "Trust Lands."[8]

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT PERMANENTLY ENJOINING THE UVST'S FRAUDULENT SALE OF HUNTING AND FISHING PERMITS FOR USE ON THE RESERVATION.

A. *Standard of Review*

This Court reviews "the district court's grant or denial of a permanent injunction for abuse of discretion, reviewing underlying questions of law de novo." *Crandall v. City and Cty. of Denver, Colo.*, 549 F.3d 1231, 1236 (10th Cir. 2010). "Under the abuse of discretion standard, the decision of a trial court will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004). Where, as here, the parties do not dispute the facts in the record, the elements for a permanent injunction were presented to the

[8] In support of its argument, the UVST cites *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968), for the proposition that the UVST's hunting and fishing rights survived UPTA. (Aplt. Br. at 14-15) However, this Court previously rejected this line of argument pertaining to the Mixed Bloods and the UPTA by finding that any hunting and fishing right that survived the UPTA was a non-transferable personal right of Mixed Bloods listed on the Secretary of the Interior's final rolls; it does not create tribal rights. *Von Murdock*, 132 F.3d at 538.

district court below, and the UVST failed to argue against nearly all the elements for a permanent injunction, this Court may depart from the general rule that requires a district court to first rule on the issues before reviewing them. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (stating factors an appellate court may use to determine whether to decide a matter not passed upon below).

B. *The UVST Should be Enjoined from Issuing Fraudulent Hunting and Fishing Permits.*

The district court made a clear error of judgment by not permanently enjoining the UVST from engaging in wire fraud. Congress enacted 18 U.S.C. § 1345(a) to empower the United States to seek civil injunctive relief where the United States is able to establish that a person is violating or about to violate the wire fraud statute (i.e., 18 U.S.C. § 1343). To obtain a permanent injunction, the United States must prove: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (quotations and citations omitted). As shown in order below, the United States established each element by a preponderance of the evidence before the district court, and the UVST provided absolutely no argument to the contrary as to elements (2), (3), and (4). Therefore, the district court abused its discretion by failing to issue a permanent injunction.

1. The United States Succeeded on the Merits of its Wire Fraud Claim.

The district court made a clear error of judgment by finding that the United States had not proven its Section 1343 wire-fraud claim against the UVST. To establish wire fraud, the United States must show: "(1) a scheme or artifice to defraud or obtain money by false pretenses, representations, or promises; and (2) use of interstate wire communications to facilitate that scheme." *United States v. Cochran*, 109 F.3d 660, 664 (10th Cir. 1997). The district court found that the United States failed to establish that the UVST had engaged in a scheme to defraud. (J.A. at 1077). However, as shown in order below, the United States clearly proved—based on the uncontested evidence in the record—that: (a) the UVST engaged in a scheme to defraud, which (b) it furthered through interstate wire communications.

a. The United States proved that the UVST engaged in a scheme to obtain money by false representations in violation of Section 1343.

The UVST engaged in a scheme to obtain money by false representations. "[A] scheme to defraud by false representations may be accomplished by patently false statements or statements made with a reckless indifference as to their truth or falsity, and deceitful concealment of material facts may constitute actual fraud." *Cochran*, 109 F.3d at 665. "[E]ven though a defendant may firmly believe in his

plan, his belief will not justify baseless or reckless representations." *Id*. (citations and quotations omitted, alteration in original).

The UVST engaged in a fraudulent scheme because it and its leaders knew that their permits were invalid and, therefore, resorted to false representations to make the sales. As shown above, the Ute Tribe has long been recognized as the exclusive tribal authority that governs hunting and fishing rights on the Reservation, in conjunction with the Mixed Bloods' lone representative. Consequently, UVST's claims to an ancestral right to govern hunting and fishing rights on its purported trust lands is "untenable." *See, e.g.*, *Von Murdock*, 132 F.3d at 540. This Court decided *Von Murdock* in 1997, which was nearly 20 years before the UVST began selling its fictitious hunting and fishing permits here. The UVST was clearly on notice that it could not sell hunting and fishing permits on its purported Trust Lands.

Besides ignoring well-established law, the UVST had direct notice that its permits were invalid. For example, before the district court, the UVST did not dispute that in 2016: (1) four members of the UVST were criminally cited for hunting on the Reservation with a UVST hunting permit; (2) the UVST members who had purchased hunting permits were reporting to UVST leadership that law enforcement questioned the permit holders as to the permits' validity; (3) the UVST's wildlife officers were cited by the Ute Tribe for impersonating an officer;

and (4) that a Special Agent for the United States Fish and Wildlife Service informed UVST leadership that the UVST permits were invalid. (J.A. at 679, 706, 710-11, 713, 749). Nevertheless, during the 2017 hunting season, the UVST continued to sell its fraudulent hunting and fishing permits. (J.A. at 679, 809).

Despite being clearly aware that the UVST hunting and fishing permits were invalid, the UVST's leadership made misrepresentations to its members to give them false comfort that the permits they were buying were actually valid. By illustration, the UVST hunting and fishing license applications falsely represented to applicants that the UVST is "a Federal Corporation d/b/a the 'Ute Indian Tribe' of the Uintah & Ouray Reservations, Utah." (J.A. at 720-23). The UVST is not a "Federal Corporation" given that no act of Congress created it. *Kenai Oil & Gas, Inc. v. Dep't of the Interior*, 522 F.Supp. 521, 523 (D. Utah 1981) (showing that the Ute Indian Tribe is a "federal corporation" because Congress chartered it in 1938). Moreover, the UVST is not doing business as the "Ute Indian Tribe of the Uintah and Ouray Reservations, Utah" because that is the official name of the Ute Tribe. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015). Indeed, co-opting the name of the Ute Tribe to sell UVST's permits is the epitome of misleading.

Additionally, the UVST's hunting permit itself contains the misrepresentation that the UVST is "a Federally Recognized Tribe of the Uintah &

Ouray Reservations, Utah." (J.A. at 720-23). This claim is patently false because the UVST is not a federally-recognized tribe at all much less the federally-recognized tribe with authority over the Reservation. *See, e.g.*, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017). Worse yet, UVST's Chairperson (i.e., Ms. Van) and Director (i.e., Ms. Harris) doubled down on this assertion of tribal recognition by telling UVST member and hunting permittee Joseph Hackford at an August 2016 hunting meeting that the UVST was a "recognized" tribe under the law and that the UVST-issued hunting permits were valid. (J.A. at 712-13). Additionally, the USVT has taken its misrepresentations even further by placing UVST "No Trespassing" signs on the Reservation. (Appx. 53). Furthermore, Ms. Harris advertised in 2016 that hunting and fishing permits would be available through the UVST, and that "NO we will not be harassed by the Northern Ute fish and game as to hunting, fishing, gathering, or anything else on our TREATY lands next year." (J.A. at 763) (words in all capital letters in original). Therefore, the UVST knows that it has no authority to sell hunting and fishing permits for use on its purported Trust Lands and has engaged in substantial misrepresentations in order to make these sales.

Despite all of this record evidence, the district court denied the United States' request for injunctive relief for want of a scheme to defraud "because of the

absence of evidence dealing with a criminal statute." (J.A. at 1077). Although the statute allowing the United States to seek civil injunctions against wire fraud is found in the federal criminal code, the burden of proof to obtain civil relief is still a preponderance of the evidence. *Citizens Concerned for Separation of Church and State v. City and Cty. of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980) ("Thus, the party seeking the injunction must prove his own case and adduce the requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which he bases the right to and necessity for injunctive relief."). And, as shown above, the United States clearly established that the UVST knew it lacked authority to sell hunting and fishing permits but did so anyway using objectively false representations. Indeed, neither before the district court nor in its opening brief has the UVST attempted to defend its claim on its permit applications and permits that it is either a "federal corporation" or a federally-recognized tribe. Instead, the UVST contends that it has hunting and fishing rights <u>despite</u> not being a federally-recognized tribe. (Aplt. Br. at 13, 15) This evidence establishes a scheme by a preponderance of the evidence. Accordingly, the district court made a clear error of judgment by holding that the undisputed facts in the record failed to establish that the UVST engaged in a scheme to sell fictitious hunting and fishing permits through false representations.

b. The United States established that the UVST used interstate wire communications to perpetuate its scheme.

The undisputed facts in the record and the UVST's failure to provide any argument to the contrary show that the district court should have found that the UVST used interstate wire communications to perpetuate its scheme. To meet this element of wire fraud, the United States does not have to show that the use of wire communications was an essential element of the fraudulent scheme. *United States v. Zander*, 794 F.3d 1220, 1226 (10th Cir. 2015) (interpreting mail fraud and wire fraud statutes and noting that because they are '"virtually identical,' so interpretations of one statute 'are authoritative interpreting parallel language' in the other"). Instead, "[i]t is sufficient for the [wire communication] to be incident to an essential part of the scheme or a step in the plot." *Id*. (citations and quotations omitted). Using wire communications to advertise the fraudulent scheme is incident to an essential part of the fraud. *See, e.g., United States v. Lawrence*, 449 F. App'x 713, 716 (10th Cir. Nov. 29, 2011) (unpublished) (affirming wire fraud conviction for advertising fraudulent scheme on Craig's list). Likewise, both the Supreme Court and this Court have held that a defendant's use of the mail to perpetuate the long-term success of his scheme is an "essential part" of that scheme. *Zander*, 794 F.3d at 1230 (relying on *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989) (holding that scheme required long-term relations with victims

and use of the mail furthered essential part of scheme by perpetuating good relationships with fraud victims)).

The UVST's uncontested use of interstate wire communications included both advertising and ensuring the long-term success of their scheme. First, in October 2016, Ms. Harris used Facebook to advertise that the UVST would be issuing hunting and fishing permits the following year. (J.A. at 763). The UVST also used its Facebook page to advertise the success that its permittees had in hunting animals on the Reservation on which they had no right to hunt. (J.A. at 765). The UVST Facebook posts were available to its 24 Facebook-page members who lived outside of Utah. (J.A. at 715).

Second, UVST's Chairperson, Ms. Van used Yahoo! email to communicate with UVST's wildlife director, Mr. LeBaron, who was the UVST's director of the fish and wildlife department. (J.A. at 747). In September 2016, Ms. Van emailed Mr. LeBaron the names and permit numbers of the game wardens who would be helping to ensure that holders of the UVST hunting permits would be able to hunt on the Reservation. Ensuring that holders of the UVST's fictitious permits were able to use them on the Reservation was essential to the long-term success of UVST's scheme because if permit holders were precluded from hunting, then permits would be harder to sell. Yahoo! does not have any of its servers in Utah, which means that communications sent using that network must cross state lines.

(J.A. at 717-18). The UVST did not dispute any of these facts before the district court and, therefore, cannot do so now. *Wilburn v. Mid–South Health Dev., Inc.*, 343 F.3d 1274, 1280–81 (10th Cir. 2003) (plaintiff waived argument that contract was void by failing to raise it before district court). Accordingly, the uncontested record evidence and the absence of any legal argument to the contrary before the district court shows that the UVST used interstate wire communications to perpetuate a scheme to defraud. Therefore, this Court should find that the United States has succeeded on the merits of its Section 1343 wire fraud claim.

2. The UVST's wire fraud scheme is causing irreparable harm.

Although courts presume irreparable harm once wire fraud is established,[9] the United States proved irreparable harm before the district court by a preponderance of the evidence without such a presumption. To establish irreparable harm, the United States must show that "a significant risk of harm" exists that cannot be remedied through monetary damages. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). Courts have found irreparable harm where a defendant's actions prevent a property owner from being able to "participate in the everyday operations" of his/her own property. *RoDa*

[9] *See, e.g., United States v. Quadro Corp.*, 916 F.Supp. 613, 617 (E.D. Tex. 1996) (stating that "[t]he government is not required to prove irreparable harm under [18 U.S.C.] § 1345" and citing cases so holding).

Drilling Co. v. Siegal, 552 F.3d 1203, 120-11 (10th Cir. 2009) (finding irreparable harm where plaintiff deprived of use of real property). Indeed, "[m]onetary relief fails to provide adequate compensation for an interest in real property, which by its very nature is considered unique." *O'Hagan v. United States*, 86 F.3d 776, 783 (8th Cir. 1996). Because of the unique nature of property, "[t]he deprivation of an interest in real property constitutes irreparable harm." *Opulent Life Church v. City of Holy Springs, Miss.*, 697 F.3d 279, 297 (5th Cir. 2012); *see also Bennett v. Dunn*, 504 F. Supp. 981, 986 (D. Nev. 1980) ("Property is always unique under general principles of the law of equity and its possible loss or destruction usually constitutes irreparable harm."). Also, this Court "has 'repeatedly stated that . . . an invasion of tribal sovereignty can constitute irreparable injury.'" *Ute Indian Tribe of the Uintah & Ouray Reservation*, 790 F.3d at 1005. As shown below, the UVST's fraudulent scheme will cause the UVST and the United States to suffer irreparable harm because: (1) it interferes with the Reservation and federal land, and (2) intrudes upon the Ute Tribe's sovereignty.

First, the UVST's scheme interferes with the Ute Tribe's ability to govern its tribal trust lands. As part of its fraudulent scheme, the UVST has published in its hunting Proclamation that UVST permittees have the right to hunt on UVST trust lands, which purportedly include "lands within the original confines of the Reservation as set forth by Executive Orders of October 3, 1861, and January 5,

1882." (J.A. at 731). This large swath of land includes the Reservation and private, state, and federal land. (J.A. at 788-89). To further its erroneous point, the UVST has placed its own "No Trespassing" signs on the Reservation. (J.A. at 746). Impinging upon the Ute Tribe's—and potentially the United States' Forest Service's—rights to determine who can enter tribal or Forest Service lands and remove wildlife thereon is irreparable.

Second, the UVST's fraudulent scheme directly interferes with the Ute Tribe's ability to govern itself by setting up a rival wildlife management system that Congress specifically precluded under the UPTA by terminating Mixed Bloods as members of the Ute Tribe. The Ute Tribe governs the taking of fish and wildlife on its trust lands through the Ute Tribal Business Committee, the lone Mixed-Blood representative, and the Ute Indian Fish and Wildlife Department. Ute Tribal Code § § 8-1-1 to 8-1-24. By authorizing hunting on its purported "Trust Lands," the UVST has established a rival wildlife management system that directly conflicts with the rights of the Ute Tribe. Setting up a rival government to the Ute Tribe creates irreparable harm, which the UVST did not dispute below. Consequently, because the UVST did not dispute the United States' argument showing irreparable harm before the district court, this Court should find that irreparable harm will occur if a permanent injunction is not issued.

3. The balance of the harms favors the United States.

The district court should have found that the UVST will suffer far less harm if a permanent injunction is issued than the United States, as trustee, and the Ute Tribe will suffer if the UVST's activities are not permanently enjoined. If an injunction is not issued, the Ute Tribe will continue to suffer from having an unauthorized entity determine who may enter upon its tribal trust lands and take wildlife resources, which is a clear violation of the Ute Tribe's constitution and the UPTA. Given that the UVST's purported Trust Lands include federal property, the United States, itself, suffers harm. However, if the UVST is enjoined, it will only be deprived of issuing fictitious hunting and fishing permits. Once again, the UVST never disputed this issue before the district court. Therefore, this Court should determine that the balance of harm favors the United States even though the district court did not.

4. The public interest favors a permanent injunction.

The district court should have determined that enjoining the UVST is in the public interest. Permittees holding these fictitious UVST hunting and fishing permits enter the Reservation and, occasionally, interact with Ute tribal law enforcement officers. Both the hunters and the law enforcement officers are armed. Where, as here, many hunters with UVST hunting permits have been told that they have a right to hunt—and where the UVST clearly feels animosity toward

the Ute Tribe[10]—there is a risk of armed conflict between hunters and law enforcement when law enforcement officers tell hunters that the UVST permits are invalid, cite them, or command the hunters to leave the Reservation. In addition to avoiding armed conflict, the public interest is furthered by protecting Ute tribal and federal sovereignty. Indeed, allowing the UVST—which consists of terminated Ute Tribe members and their progeny—to compete with the congressionally-recognized Ute Tribe in governing its tribal trust lands is contrary to public interest. As with other elements to obtain injunctive relief, the UVST did not dispute this argument before the district court. Consequently, the district court should have determined that the public interest favors enjoining UVST's sale and issuance of fake hunting and fishing permits.

Given that the United States clearly carried its burden to permanently enjoin the UVST's fraudulent activity this Court should exercise its discretion and reverse the district court's denial of a permanent injunction and permanently enjoin the UVST from issuing hunting and fishing permits within its purported Trust Lands. To remand these issues back to the district court to decide in the first instance will give the UVST a second-bite at the apple of which they were uninterested in

[10] *See*, *e.g.*, J.A. at (Appx. 70) (UVST Facebook post stating that "NO we will not be harassed by the Northern Ute fish and game as to hunting, fishing, gathering, or anything else on our TREATY lands next year." (words in all capital letters in original; underline added)).

partaking the first time these issues were clearly and carefully raised. Therefore, this Court should reverse the district court and order it to permanently enjoin the UVST from issuing hunting and fishing permits on its purported Trust Lands.

CONCLUSION

For the reasons stated above, this Court should: (1) AFFIRM the district court's determination that the UVST lacks authority to sell hunting and fishing permits; (2) REVERSE the district court's denial of the United States' request to permanently enjoin the UVST from issuing these unlawful permits; and (3) ORDER the district court to issue the requested permanent injunction.

ORAL ARGUMENT STATEMENT

Oral argument is requested in order to fully advise this Court on the historical, procedural, and legal questions pertaining to resolution of this action.

RESPECTFULLY SUBMITTED this 7th day of March 2019.

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CERTIFICATE OF COMPLIANCE

My brief was prepared in a proportionally spaced typeface and contains 8,986 words. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and an electronic copy via the ECF system of the foregoing BRIEF FOR THE UNITED STATES were served to all parties named below, this 7th day of March, 2019.

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CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that

(1) All required privacy redactions have been made and, with the exception of any redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the clerk; and

(2) The ECF submission has been scanned for viruses with the most recent version of "McAfee Endpoint Security," version number 10.5.3.3178, last updated March 7, 2019 and according to the program, are free of viruses.

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