IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:18-cv-546-CJN
UNITED STATES OF AMERICA, et al.	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT
ORAL ARGUMENT REQUESTED

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The Ute Indian Tribe respectfully moves for summary judgment vacating Defendants decisions refusing to recognize that the land owned by the United States on the Uncompahgre Reservation is owned in trust for the Tribe.

INTRODUCTION

This case is likely the last major case in the long and disgusting history of the United States attempting to wrongly take land from Indian tribes. And while so many of the prior chapters in this history have gone against tribes, this Court has the power and the duty to write this one small last chapter in favor of the Ute Indian Tribe. One could view the current case as one of the worst chapters in this history. An Indian Secretary of the Interior, a President who ran on a platform of restoring tribal homelands, but an Executive Branch that has pulled out all the stops, seeks to violate the well-established separation of powers between the executive and legislative branches in Indian affairs, all to attempt to rationalize their predecessors' rejected legal analysis. The result would be the theft of over 1,500,000 acres of the Uncompahgre Tribe's "permanent homeland."

Defendants' arguments are contrary to multiple acts of Congress. In criminal law, their attempt to assert fee ownership over the Ute Indian Tribe's land would be theft from an Indian Tribe. But the Department of Justice twists the law to say that Secretary Deb Haaland and Deputy Secretary Tommy Beaudreau have unreviewable "discretionary authority" to violate Acts of Congress and to take the Tribe's property.

The legal rule applicable to this matter is very simple, and was recently and emphatically re-affirmed by the United States Supreme Court: Once land is set aside for Indians, only Congress has the power to remove that land from federal trust ownership. The Executive Branch simply does not have that authority, and it does not matter whether or how many times the Executive Branch wrongfully claimed in the past that it had that power. Applying this rule, the United States

loses. The Uncompahgre Reservation was created. And there is ***NO*** act of Congress which thereafter removed the Uncompahgre Reservation from trust. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (1985) (*Ute III*).

The rule that Congress has the power to take land from tribes is itself highly controversial (or more accurately, wrong). The rule is contrary to the original intent of the United States Constitution and contrary to international laws. At one of the multiple peaks in anti-Indian racism, and when tribes were refusing to agree to any further takings of tribal land, the Supreme Court created the rule out of whole cloth. *Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)*. *Lone Wolf* is based upon the Supreme Court's view that because tribes and Indians are inferior to whites, Congress has "plenary authority" to do whatever Congress claims is best for tribes and Indians, including the power to attempt to force tribes to become yeomen farmers by taking their lands without tribal consent, "terminating" tribes. One of the sad ironies of *Lone Wolf* is that the decisions that Congress wanted to make for tribes, but that many tribes at the time were refusing to agree to, were, at least in hindsight,[1] horrifically bad decisions for tribes and Indians.

But under the United States Constitution and even under *Lone Wolf*, the power to take tribal lands is only granted to Congress—not to Secretary Haaland or anyone else in the Executive Branch.

> The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' *Dred Scott* decision. To the practical statesman, it appeared to say the Indian tribes had acquired no rights by treaty which the Congress was bound to respect.

[1] *See generally,* C. Joseph Genetin-Pilawa, *Crooked Paths to Allotment: The Fight over Federal Indian Policy after the Civil War* (2012) (discussion that many at the time believed hindsight was not even needed to realize that Congress's assimilation and allotment policies were harmful to tribes and were also wrong for legal and moral reasons).

Sioux Nation of Indians v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979), *aff'd,* 448 U.S. 371, (1980).

> *Lone Wolf* is among the worst decisions ever made by the Supreme Court and is arguably the most unjust decision of all time in the field of federal Indian law.

Joseph William Singer, Lone Wolf, or How to Take Property by Calling It A "Mere Change in the Form of Investment", 38 Tulsa L. Rev. 37, 37–38 (2002)

> The District Court should greatly expand *Lone Wolf*, to give the Department of the Interior the same power to take tribal land without recourse which *Lone Wolf* gave to Congress.

Deb Haaland, through her attorney (paraphrasing Defendant Response to Motion to Amend at 9-10). If, as it unfortunately appears, Secretary Haaland wants to take the Ute Indian Tribe's homeland, she should go to Congress.

I. STATEMENT OF FACTS

A. 1863 AND 1868 TREATIES AND 1874 ACT

The Uncompahgre Band of the Ute Indian Tribe entered into Treaties with the United States in 1863 and 1868. 13 Stat. 673 (October 7, 1863)("1863 Treaty); 15 Stat. 619 (March 2, 1868) ("1868 Treaty). In the Treaties, the Ute Indians and the United States agreed that the Uncompahgre and other bands of Ute Indians living in Colorado would give some of their land to the United States[2] in exchange for the United States' supposedly solemn reciprocal agreement that the land that the Tribe reserved (the "Reservation")[3] would be the Tribe's permanent homeland,

[2] The lands the Tribe reserved included lands for the Uncompahgre in Colorado. The lands that the Tribe relinquished included the lands that, in 1880/1882 became the replacement Uncompahgre Reservation.

[3] The term "reservation" stems from this history, common to most of the tribes that were able to stay on parts of the land for which they held "aboriginal title." Such tribes ceded some lands, and the land that was not ceded was their Reservation. Under federal Indian law, "Reservation" has a broader meaning now.

and that the United States would keep non-Indians out of the Reservation. Article 1 of the 1868 Treaty reaffirmed all provisions of the 1863 Treaty which were not inconsistent with the 1868 Treaty.

In Article 2 of the 1868 Treaty, the United States agreed that the Tribe would have the "absolute and undisputed use and occupation" of the Reservation created by the Treaty, that the United States would not enter the lands except as authorized by the Treaty, that the United States would not authorize others to enter the lands, and that the United States had the non-discretionary duty to preserve the Tribe's right to peaceful enjoyment of the lands.

In the 1868 Treaty, the United States further agreed that it would comply with all federal law applicable to the Reservation lands, and that it would not take the lands from the Tribe.

These treaty rights were subsequently transferred to the replacement Reservation created by the 1880 Act and the 1882 Presidential Proclamation executing the Congressional directive to create the replacement Reservation. *E.g., Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017).

The United States almost immediately broke that Treaty, and the non-Indian trespassers discovered valuable gold and silver deposits on the Reservation. Only five years after the 1868 Treaty, the United States came back to the Tribe, to cajole the Tribe to give up the lands containing the most valuable of those gold and silver deposits. The result was the Brunot Treaty of 1873.[4] 18 Stat. 36, I Kapp. 151.

[4] The United States formally stopped entering into treaties with tribes in 1871. Prior to that, treaties were between the Tribe and the United States, with approval by the Senate. After that, treaties or agreements also required approval by the House of Representatives. In 1903, the Supreme Court decided that the United States Congress had virtually unfettered authority to violate treaties with tribes.

B. 1880 ACT

Seven years after that, the United States came back to the Tribe, and forced the Tribe to enter into a new "Agreement," in which the Uncompahgre Band was required to give up 3.7 million more acres of lands in exchange for yet another promise that the United States would establish and protect a smaller Reservation in Colorado if practicable, or a Reservation in Utah. Congress memorialized the terms of that treaty into the Act of June 15, 1880, 21 Stat. 199 ("1880 Act").

Because of the critical importance of these provisions, we quote the pertinent sections of the 1880 Act verbatim:

* * * * * *

The * * * chiefs and headmen of the confederated bands of Utes * * * agree and promise to use their best endeavors with their people to procure their consent *to cede to the United States all the territory of the present Ute Reservation in Colorado, except* as hereinafter provided for their settlement.

The Southern Utes agree to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado: and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other un-occupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

* * * * * *

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the Government of the United States *cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty* * * *.

* * * * * *

Second. That so soon as the consent of the several tribes of the Ute Nation shall have been obtained to the provisions of this agreement, the President of the United States shall cause to be distributed among them in cash the sum of sixty thousand dollars of annuities * * *, and so much more as Congress may appropriate for that purpose; and that *a commission shall be sent to superintend the removal and settlement of the Utes*, and to see that they are well provided with agricultural and pastoral lands sufficient for their future support, and upon such settlement being duly effected, that they are furnished with [other necessities], and that the money to be appropriated by Congress for that purpose shall be apportioned among the different bands of Utes in the following manner: One-third to those who settle on the La Plata River and vicinity [the Southern Utes]; *one-half to those settling on Grand River and vicinity* [*Uncompahgre Utes*], and one-sixth to those settling on the Uintah Reservation [the White River Utes].

Third. That in consideration of the cession of territory to be made by the said confederated bands of the Ute Nation, the United States, in addition to the annuities and sums for provisions and clothing stipulated and [otherwise provided by law or treaty], agrees to set apart and hold, as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed per capita to them annually forever.

Fourth. That as soon as the President of the United States may deem it necessary or expedient, the agencies for the *Uncompahgres* and Southern Utes be removed to and established at suitable points, to be hereafter selected, *upon the lands to be set apart,* and to aid in the support of the said Utes until such time as they shall be able to support themselves, and that in the mean time the United States Government will establish and maintain schools in the settlements of the Utes, and make all necessary provision for the education of their children.

Fifth. [Prior treaties are reaffirmed.]

* * * * * *

Sec. 2. [Five Commissioners were authorized to present the agreement to the Utes for their ratification, and upon ratification to assess improvements and take a *census* of the Southern Utes, Uncompahgre Utes, and White River Utes]. * * * [A]nd they [commissioners] shall also select lands and allot them in severalty to said Indians, as herein provided, and superintend the removal, location, and settlement of the Indians thereon, and do and perform such other services as the Secretary of the Interior may consider necessary for them to do in the execution of the provisions of this act.

* * * * * *

Sec. 3. *That the Secretary of the Interior be * * * authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided.* And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement * * * and whenever the report and proceedings of said commissioners * * * are approved by the President * * *, he shall cause patents to issue to each and every allottee for

the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, *and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands*, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, *That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law*; *but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at*[*$1.25*] *per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided in this act: * * *.*

(Emphasis supplied throughout, except usual statutory italics.)

As a part of the forced 1880 Agreement and Act of June 15, 1880, the Uncompahgre Band "agreed" to remove to and settle upon a new Uncompahgre Reservation at the confluence of the Grand River (renamed as the Colorado River circa 1921) and Gunnison River in Colorado, if there was sufficient agricultural land in that area. If sufficient land could not be located in Colorado, the United States would create the new Uncompahgre Reservation on agricultural lands in the territory of Utah.

In the 1880 Act, Congress repeatedly stated that the Executive Branch was required to "set apart" the new Reservation. It directed that "the government of the United States cause the lands so *set apart* to be divided among the said Indians in severality." 21 Stat. 200-201. It stated that the agencies for the Uncompahgre and Southern Utes were "to be removed to and established at suitable points, to be hereafter selected, *upon the lands to be set apart.*" *Id*. at 201 (emphasis added).

The 1880 Act plainly provided that lands not allotted would be opened for disposal "at the same price and on the same terms as other lands of like character." 1880 Act, ch. 223, § 3, 21 Stat. 199, 203 (June 15, 1880). That Act further provided that the remaining proceeds from the land sales "shall be deposited in the Treasury as now provided by law for the benefit of the said Indians." *Id*. at 204 (emphasis added).

The land was set apart, and allotment was attempted multiple times, and no act of Congress later ended the set apart.

As discussed in more detail in the discussion of law below, the debates leading to the Act of June 15, 1880 demonstrate that Congress understood: 1) because of the Tribe's treaty rights, Congress could not or would not take any of the Tribe's Treaty lands unless 75% of the Tribe agreed to it; and 2) Congress was directing the Executive Branch to remove the Uncompahgre Band from its existing treaty Reservation and was directing the Executive Branch to create the new Reservation for the Uncompahgre Band. SO418006.

Consistent with the overarching theme of federal Indian policy at that time, Congress expected that *eventually* Congress would also get the Tribe to agree to give up most of the land on the new Uncompahgre Reservation. *Cohen's Handbook of Federal Indian Law, Section* 1.04. ("The theme of Indian Policy" beginning in 1871 and "for the remainder of the nineteen and first quarter of the twentieth century was "civilization and assimilation."). *See also* House Cong. Rec. Dec 18, 1879 at p. 179.

Many in Congress believed that "manifest destiny" would ultimately result in the end of tribes and end of tribal communal ownership of lands. SO518006 (asserting that regardless of the 1863/68 Treaty provisions "this government, in my judgment, has no power to arrest the progress

of that great tide," of non-Indians who were flooding into Ute treaty lands in Colorado in violation of the 1863/1868 Treaties). But, that belief regarding the future is legally immaterial. If Congress' expectation for the future were material, no reservations would exist because history is clear that beginning at some point in the 1800s and continuing through about 1928 and then again between about 1943-1961, Congress thought it would ultimately terminate all tribes and eliminate federal trust ownership of land for tribes or individual Indians. Cohens Handbook of Federal Indian Law Sections 1.04-1.06. As discussed below, Courts have consistently and repeatedly rejected the argument that Congress' expectations regarding the future are sufficient.

C. 1882 PROCLAMATION AND ATTEMPTS AT ALLOTMENT

The Executive Branch, placating Colorado politicians and citizens, but in violation of the Act of Congress, falsely claimed that suitable land could not be located in Colorado.[5] The Executive Branch created the congressionally mandated replacement Reservation in what the United States then believed to be some of the least valuable land anywhere in the United States—rocky high-plains desert lands--the present-day Uncompahgre Reservation. *Report of Utah Expedition*, printed in Deseret News, Sept. 25, 1961, *quoted in* Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004) (non-Indians reported that the area was "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians and to hold the world together.") *See generally*, Peter Decker, "*The Utes Must Go!": American Expansion and the Removal of a People*, Ch. 6 (2004). Professor Decker took the first part of the

[5] Grand Junction, Colorado, the largest city on the west side of Colorado, now sits at the mouth of the Gunnison, and there is fertile irrigated agricultural lands in that area. The Uncompahgre Reservation in Utah is literally uninhabited to this day: the only statistical population area in the Uncompahgre dropped from 1 person in the United States census to 0 in the most recent census.

book title from the rallying cry of Colorado politicians, newspapers, and the white population in general, where "go" meant "go from Colorado." Professor Decker discusses that Coloradans successfully used the Meeker Incident in 1879 to accomplish their long-standing goal to force most of the bands of Utes out of Colorado.

On January 5, 1882, pursuant to the 1880 Act, and as recommended by the Commissioner of Indian Affairs, President Chester Arthur signed an Executive Order that "*set apart as a reservation for the Uncompahgre Utes*" approximately 1,900,000 acres in northeastern Utah. Exec. Order of Jan. 5, 1882, I Kapp. 901.

In 1887 Congress granted the Utah Midland Railway a right-of-way to enter the Uncompahgre Reservation. Notably, Congress directed the Secretary of the Interior to fix the amount of compensation due the Tribe for the use of the Uncompahgre lands. 24 Stat. 548 (Mar. 4, 1887).[6]

Only a few years after creating the Uncompahgre Reservation the United States found that one part of the neighboring Uintah Valley Reservation contained a valuable hard mineral—gilsonite. *See* H.Rep.No.791, 50th Cong., 1st Sess. (1888); S.Rep.No.1198, 50th Cong., 1st Sess. (1888) LD 17; 19 Cong. Rec. 1927-1929, 3776, 3821 (1888). Congress took the gilsonite lands. Act of May 24, 1888.

Gilsonite was also found on the Uncompahgre Reservation, and bills were introduced to remove that land from the Uncompahgre Reservation. Almost immediately, Congress sought to

[6] In Memorandum 37051, the Department of the Interior illogically attempts to dismiss the significance Congress' requiring compensation by immaterially discussing that the railway was not completed and that the Department of the Interior lacks records which determine whether or not compensation was paid. As discussed in the body of this brief, the central issue is the 1880 Act, as it would have been understood by the Ute Indian Tribe in 1880.

excise a 12-mile strip of gilsonite lands from the Uncompahgre Reservation. S. 1762, 51st Cong., 1st Sess., reprinted in S.Ex.Doc.No.157, 51st Cong., 1st Sess. (1890). On June 17, 1890, the bill was vetoed by President Harrison, who found it to be detrimental from a policy standpoint. Veto Message of the President, June 17, 1890, LD 20. Three months later, S. 4242 was introduced "to change the boundaries of the Uncompahgre Reservation," *see* H.Rep.No.3305, 51st Cong., 2d Sess., LD 22 (1890), but it died at the end of the session. A similar bill, S. 574, was favorably reported by the Committee on Indian Affairs in February of 1892, see S.Rep.No.240, 52d Cong., 1st Sess. (1892), as was H.R. 69, another bill to "change the boundaries of the Uncompahgre Reservation." *See* H.Rep.No.1076, 52d Cong., 1st Sess. (1892). Neither of the bills passed.

During that time period, there were multiple statements from the Executive Branch which showed that the Tribe held compensable title. For example, the Commissioner of Indian Affairs found that, under the Indian Leasing Act of 1891, ch. 383, 26 Stat. 794, I Kapp. 56, 57, the Uncompahgre Band held compensable title to their lands, and could lease their lands for mining purposes. *Ute Indian Tribe v. Utah* ("*Ute I*"), 521 F. Supp., 1072, 1101 (D. Utah 1981) (citing Letter from Comm'r of Indian Affairs to Sec'y of the Interior of Dec. 30, 1892). Given that Congress and the Executive Branch both repeatedly stated that the Tribe had compensable title and that the Tribe could lease or otherwise collect for use of the Uncompahgre lands, the Tribe also reasonably understood that they had these rights. *Ute III* at _____.

Similarly, Commissioner of Indian Affairs Morgan

> understood that the Uncompahgres "owned", or held compensable title to, their lands, at least for the purposes of the Indian Leasing Act, Act of Feb. 28, 1891, ch. 383, 26 Stat. 794, I Kapp. 56, 57 (2d ed. 1904), LD 23, and could lease their lands for mining purposes, though mining operations might be undesirable for other reasons. Letter from Comm. of Ind. Aff. to Secretary of the Interior of Dec. 30, 1892, JX 36. Congress had already provided for compensating the Uintahs and the

> Uncompahgres for lands granted as a right-of-way to the Utah Midland Railway Co. Act of Mar. 3, 1887, ch. 368, 24 Stat. 548, I Kapp. 255-256 (2d ed. 1904), LD 14.

Ute I at _____.

Congress attempted to have the Uncompahgre Reservation allotted under the Act of August 14, 1894, ch. 290, 28 Stat. 286, 337-338 ("1894 Act") (thereby acknowledging that the land was not then part of the public domain). The 1894 Act provided that, following approval of allotments by the Secretary, the remaining lands would have been opened for entry. Act of August 15, 1894, ch. 290, §21, 28 Stat. 337.

The Executive Branch appointed a three-person commission to attempt to carry out allotment under the 1894 Act. Letter from Assistant Attorney General to Sec'y of the Interior (Aug. 5, 1897). The condition precedent to opening the lands for entry never occurred, because the Ute Indians refused to approve or accept allotments. *Id.* The Commission was disbanded before any lands were allotted or any proclamation was issued. *Id*. *See also Ute I*, 521 F. Supp. 1072, 1103 (D. Utah 1981) (summarizing relevant history).

As pressure to open the Uncompahgre Reservation to non-Indian usage continued, Congress passed another allotment act, the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 ("1897 Act"). In contrast to the 1894 Act, the 1897 Act provided a deadline, April 1, 1898, upon which the Reservation would be "open for location and entry under all the land laws of the United States." Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

In 1897, Congress passed a law which permitted the United States to sell land to non-Indians, but which did not alter tribal ownership until the land was sold. As the Tenth Circuit decided in Ute III, that type of statute, which does not restore the lands and which does not require

payment of a sum certain for restoration of the lands to the public domain does not extinguish the Tribe's trust ownership rights in the land, and therefore does not alter the reservation boundaries. For lands that the United States lawfully disposed of under that Act, the Tribe loses its trust ownership rights, but the land remains reservation. For the land that was not disposed of under that Act, the United States continues to own the land in trust. It is those lands, still owned in trust based upon the Acts of Congress, which are at issue in this case.

The Uncompahgre Commission failed to make any allotment by the April 1, 1898 deadline. Western Union Telegram from Agent H.P. Myton, Uncompahgre Allotment Commissioner, to Commissioner of Indian Affairs (March 27, 1898); Report of the Comm'r of Indian Affairs at 42 (1898), *reprinted in* H.R. Doc. No. 5 (1899).

Despite the language of the 1880, 1894, and 1897 Acts, the United States did not pay the Uncompahgre Band or the Ute Tribe for the unallotted surplus lands of the Uncompahgre Reservation that were disposed of after 1897 and did not deposit proceeds from the land into an account for the Tribe. In the appealed administrative decision, the Executive Branch ignores the clear statutory requirement of the 1880 Act that proceeds from the sale of Uncompahgre lands, after any offsets, had to be held in trust for the Uncompahgre Band, and ignores that the 1894 and 1897 Acts did not change tribal ownership rights for lands that the United States still possesses. But contrary to those laws, the Executive Branch turns around and asserts that the lands cannot be restored to the Tribe cause the Tribe did not have a right to proceeds from sale. The Tribe had the right to proceeds, and had and continues to have ownership rights to the lands. The lands therefore not only can be restored, they must be because they are properly held in trust under the Acts of Congress.

Attempting to twist that law and the Tenth Circuit decisions on their head, the Department of Interior, through Memorandum 37051 (M-37051) by Danial Jorjani to the Secretary of the Interior and others (February 21, 2018), opines that because the United States did not restore the lands to the public domain for payment of a sum certain, the Tribe had no rights to the land. Consistent with federal law governing diminishment and disestablishment in the relevant time period, the Tenth Circuit correctly reached the exact opposite conclusion.

Later, the United States found out that the Uncompahgre Reservation contained substantial amounts of another valuable mineral--oil. By that point in history, Congress did not have the audacity to take more of the Tribe's permanent homeland.

But Defendants United States, Department of Interior and Secretary of the Interior Haaland, and Assistant Secretary Beaudreu—today—have no such qualms. In violation of acts of Congress which created the Uncompahgre Reservation and the acts of Congress and Supreme Court decisions which prevent the Executive Branch from taking tribal lands without Congressional authorization, Defendants Haaland, Beaudreu, and the Department of the Interior claim are literally supporting the federal Executive Branch's theft of land from the Ute Indian Tribe. They should be deeply ashamed, both for the past wrongful federal actions and moreso for their own non-sense attempts to rationalize the prior wrongful executive branch actions.

DISCUSSION OF LAW

This court has the power to set aside an agency decision which is:

A) arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law

B) Contrary to Constitutional right, power, privilege, or immunity;

C) In excess of statutory jurisdiction, authority, or limitation, or short of statutory right

5 U.S.C. § 706.

The Department of the Interior's refusal to restore lands to tribal trust ownership based upon Memorandum 37051 is all of those things. It must be set aside. And, because the applicable Act of Congress requires the United States to hold land on the Uncompahgre Reservation in trust for the Ute Indian Tribe, this Court must issue an order directly the Defendants to comply with that Act of Congress.

I. THE COURT IS REQUIRED TO INTERPRET TREATIES AS THE MEMBERS OF THE TRIBE WOULD HAVE UNDERSTOOD THEM.

To interpret a tribal treaty, the Court would first have to know how the member of the Tribe understood the tribal treaty language. The Supreme Court has made clear that Indian treaties are unique, governed by different canons of construction than those that apply to statutes and to other treaties. *E.g., County of Oneida v. Oneida Indian Nation*, 470 U.S.226, 247 (1985). Owing to the special relationship between the United States and Indian tribes, Indian treaties must be interpreted liberally in favor of Indians. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Any ambiguities in the language of an Indian treaty must be resolved in favor of the Indians. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196-203; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-577 (1908).

Further, Courts must endeavor "to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs Band of Chippewa Indians,* 526 U.S. at 196; *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970).

The Supreme Court has made clear that while a court should look to the parties' choice of words, it should also consider the "larger context that frames the Treaty," including its "history, purpose and negotiations." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196-203.

In the present case, Defendants will apparently claim that when the United States promised to create a permanent homeland for the Uncompahgre Ute Indians in the 1868 Treaty, and then later agreed to create the replacement Reservation, the Uncompahgre Ute Indians would have understood that the United States was not taking on a mandatory duty to maintain the Reservation. Mr. Jorjani's opinion does not cite anything which would support that conclusion, and the Tribe does not expect that the United States' summary judgment brief will either. Instead, Defendants appear to rely primarily on documents from decades later, which show a range of interpretation by Executive Branch officers.

The Tribe's view is that its bluntly obvious that the tribal members understood that the United States' 1868 promise to create a permanent Reservation for the Uncompahgre Band meant exactly what it said—that the United States took on the mandatory duty to create that permanent Reservation for the Uncompahgre. The federal courts have already analyzed that record and have concluded that the Tribe did not understand that the 1880 Act was meant to take the Uncompahgre's more fertile and larger homeland in Colorado in exchange for a few barren allotments in Utah. *Ute III* at 1092. Instead, the Tribe understood that, as expressly stated in the 1880 Act, the United States was expelling the Tribe from its home in Colorado, but was setting aside a new replacement Reservation in either Colorado or Utah.

II. INTERPRETATION OF TREATIES AND LAWS IN FAVOR OF INDIAN TRIBES.

The congressional intent must be clear, to overcome "the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of

the nation, dependent upon its protection and good faith.'" *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174, (1973) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); Bryan v. Itasca County, 426 U.S. 373, 392 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *The Kansas Indians*, 72 U.S. (5 Wall) 737, 760 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

III. UNDER THE ACTS OF CONGRESS, THE TRIBE IS THE LAWFUL TRUST BENEFICIARY OWNER OF ALL THE LANDS STILL OWNED BY THE UNITED STATES ON THE UNCOMPAHGRE RESERVATION.

Although the history in this case is complex, the dispositive issues presented in this case are surprisingly easy: 1) Is there an *Act of Congress* which took the replacement Reservation from the Tribe. 2) even if there were, are the lands still owned by the United States on that Reservation undisposed of opened lands?

If this Court were writing on a blank slate, the Court would have to conduct a detailed review of the separation of powers between the Executive and legislative branches over Indian lands, and the Court would then have to conduct a complex analysis applying the Supreme Court cases on disestablishment and diminishment of Reservations to the historical record.

We are not writing on a blank slate. First, and simplest, The U.S. Supreme Court has already, and repeatedly and recently, analyzed the dividing line between the legislative and executive branches when it comes to federal attempts to take land from an Indian Tribe. The settled legal rule is easily stated: once land is set apart for a tribe, only Congress, not the executive branch, can deprive the tribe of any rights in the land. As the Supreme Court recently held: "Because of the Nonintercourse Act, '[O]nly Congress can divest a reservation of its land and

diminish its boundaries.'" *McGirt v. Oklahoma*, 207 L. Ed. 2d 985, 140 S. Ct. 2452, 2462 (2020) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). *See also Nebraska v. Parker*, 136 U.S. 1072 (2016); *Idaho v. United States*, 533 U.S. 262 (2001); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985); *United States v. California,* 332 U.S. 19,40 (1947); *Royal Indem. Co. v. United States,* 313 U.S. 289,294 (1941); *United States v. Celestine,* 215 U.S. 278 (1909); *Warren v. United States* 234 F.3d 1331, 1338 (D.C. Cir. 2000). Based upon the rules of construction discussed above, any such act of Congress must be clear and unambiguous.

Second, the courts have already applied this law to the Uncompahgre Reservation, and concluded that there is no such Act of Congress. If this Court were required to start over from scratch, reasonable legal minds might differ. In fact, the judges who have reviewed this matter over the last fifty years have reached different results. The Tribe expects that ultimately the Court would come to the same conclusion that the Tenth Circuit, in a decision the United States now accepts, came to in 1983.

Based upon that historical record, both sides to this case could cite statements by tribal officers, federal legislators and various executive branch officers which offer some support for their positions. Certainly the bulk of that record supports the Tribe, but the Tribe expects that the Executive Branch's motion for summary judgment will cherry pick some of the statements that they believe support their effort to take the Ute Tribes' Reservation.

Fortunately for this Court and yet more fortunately for the Ute Indian Tribe, the Court is not writing on a blank slate. The hard work has already been completed in *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (D. Utah 1981)(*Ute I*); *Ute Indian Tribe v. State of Utah*, 716 F.2d 1298 (10th Cir. 1986) (*Ute II*); *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.

1986) (*Ute III*); *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*); *Ute Indian Tribe v. State of Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*); and *Ute Indian Tribe v. State of Utah*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*) (collectively referred to herein as the "*Ute Indian Tribe* Decisions").

The *Ute Indian Tribe* Decisions stem from a suit that the Tribe filed in the United States District Court for the District of Utah in 1975. In *Ute I*, federal district court judge Jenkins issued a decision which runs for over 80 pages in the federal supplement reporter, with over 200 footnotes. Judge Jenkins provided a very thorough discussion of the voluminous historical record, but his legal analysis was less robust. He concluded that the Uncompahgre Reservation in Utah had been disestablished by the Act of June 7, 1897. A divided panel on the Tenth Circuit issued an opinion, *Ute II*, subsequently vacated, which would have affirmed that the Uncompahgre Reservation had been disestablished.

In *Ute III*, the Tenth Circuit, sitting en banc, rejected the District Court and the prior panel decision regarding the Uncompahgre Reservation. It concluded that the Tribe did not understand that any of the acts of Congress resulted in the Tribe losing the new Uncompahgre Reservation. *Id.* at 1092. It held that the lands on the Uncompahgre Reservation had been removed from the public domain and that Congress never restored those lands to the public domain. Instead, the subsequent Acts of Congress only allowed the United States to sell some of those lands as the Tribe's land broker. In *Ute V*, the Tenth Circuit held that its mandate in *Ute III*, as it relates to the Uncompahgre Reservation, remains the binding mandate.[7]

7 In *Ute V*, the Court modified its mandate in part for lands on the Uintah Valley Reservation. That modification is of no import to the current case regarding the Uncompahgre Reservation.

In *Ute I, Ute II, and Ute III*, the United State came in as amicus *against the Tribe.* Its arguments at the time, were based upon a 1938 solicitor opinion which Mr. Jorjani virtually copied into Memorandum 37051. The Tenth Circuit rejected the United States arguments—it rejected the arguments that form the basis for the 1938 opinion and for Mr. Jorjani's Memorandum. It is therefore inexplicable that in the decision currently before this Court, Mr. Jorjani dismisses the *Ute Indian Tribe* decisions with a disingenuous conclusory assertion that *Ute Indian Tribe* decisions are not on point. They are directly on point, and they establish that Congress never returned the lands to the public domain.

For example, in his opinion, Mr. Jorjani discusses that in 1934, the Tribe asked whether some lands in the Uncompahgre Reservation could be restored under Section 3 of the IRA, and that the Executive branch responded that the 1897 Act had disestablished the Uncompahgre Reservation. That is, appealed decision based upon Memorandum 37051 is based upon and dependent upon the historically incorrect argument that Utah and the United States put forward in *Ute III and that the Tenth Circuit directly and explicitly rejected*. *Ute III.*

Like his predecessor, Mr. Jorjani seeks to rely upon various statements by Executive Branch officers. As noted above, the Executive Branch statements span the gamut, and Mr. Jorjani cherry picks the ones that support the decision that he wants to issue. But more important than the range of opinions by Executive Branch officers, those statements do not change the meaning of an Act of Congress that was adopted decades earlier. Many of those statements, including statements that Mr. Jorjani relies (such as his discussion of events in 1934, discussed in the preceding paragraph) upon illustrate the wrong by the Executive Branch that is at issue in this case—their attempt to escape the requirement of the 1880 Act.

In *Ute VI* and *Ute VII*, then Judge Gorsuch writing for the Court, reiterated that for the Uncompahgre Reservation, the nearly 30 year-old mandate from *Ute III* remains binding. Although in *Ute I, II ,and III*, the United States had come in against the Tribe, in *Ute VII*, the United States supported the finality of *Ute III* and *Ute V*. United States' Brief as Amicus Curiae in Support of Plaintiff-Appellant and in Support of Reversal at 12 n.8, *Ute Indian Tribe v. Myton*, No. 15-4080 (10th Cir. Oct. 22, 2015), Dkt. 10313147. The record in the *Ute Indian Tribe* decisions also showed that the United States had prosecuted federal criminal cases, including at least one murder case, and that the United States had taken other actions based upon its acceptance of the decision in *Ute III*, that all land on the Uncompahgre Reservation is Indian Country.

Ute Indian Tribe v. Utah case is currently in mediation before the Court of Appeals for the Tenth Circuit, where it has been stayed for several years while the parties seek to resolve comparatively small issues.

The Courts in prior cases have also already determined that the Tribe's treaty rights in from the 1863 and 1868 treaties transferred to the new Uncompahgre Reservation. *E.g., Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017) (The United States agreement to pay for on-Reservation damage caused by "bad men among the whites" in the 1868 Treaty transferred to the Reservation created under the 1880 statute and remains enforceable in federal court suits against the United States).

In M-37051, Mr. Jorjani admits that the 1880 Agreement provides for the creation of a new Reservation for the Uncompahgre band and that "In accord with this Agreement an executive order withheld from sale 1.9 million acres of public domain land in Utah Territory, *setting them aside as a reservation for the Uncompahgre Utes*." *Id.* at 2.

Mr. Jorjani also acknowledges that the United States "supported the finality of" the holdings [*in Ute III and Ute V*] on the Reservation's boundary and "Indian country" status for jurisdictional purposes." *Id.* at 1.

But in the next sentence after he makes that dispositive acknowledgement, he makes his key error. Contrary to the very same decisions that the United States supports, Mr. Jorjani makes the wholly conclusory statement that "I conclude that those decisions do not address, much less resolve, the separate inquiry of whether the Tribe has any ownership interest in these lands or whether Section 3 of the IRA is an appropriate source of authority for the 'restoration they [sic: referencing the Ute Indian Tribe, so should be in the singular] request." *Id.* at 1-2. *See also id.* at 7 (replicating the same incorrect conclusory assertion, again without any analysis of the pivotal Tenth Circuit decisions.)

Notably Mr. Jorjani does not provide any analysis of the Tenth Circuit's decisions that the United States accepts. Nor could he have, because it is painfully obvious from the *Ute Indian Tribe* decisions that his conclusory assertion is wrong. **The reason all of the land on the Uncompahgre Reservation is Indian Country (as the United States agrees and accepts) is because the Tribe still has trust ownership rights in that land.!** ***Ute III*** **at ____**

> Our conclusion is that the phrase "restore to the public domain" is not the same as a congressional state of mind to disestablish. In other words, it doesn't disturb the ownership of the land by the tribal group. There are several competing meanings that could be implied from the phrase "restore to the public domain." But the most important one is that it permits the invasion of an area and purchase of land and general utilization. It is said that it is equally plausible that the phrase means that Indian lands would be available for settlement, but that the boundaries remain unchanged.

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That is, quite simply, the end of the inquiry. Congress never took the Tribe's ownership rights in the land. The lands therefore 1) are, under law, properly held in trust for the Tribe, and 2) this Court can and must direct the Executive Branch to comply with the Act of Congress.

The Executive Order was not issued in accord with the 1880 Agreement. It was issued in execution of the 1880 Act of Congress.

From this, and based upon the legal rule that only Congress can take tribal lands, it follows, that the lands remain trust lands. The lands had been removed from the public domain and set aside for the Uncompahgre Band, and were never restored to the public domain by Congress!!

But in M-37051, Mr. Jorjani ties himself into knots attempting to deny the obvious legal result. He contrasts the 1894 Act with the 1897 Act. He notes that that the 1894 Act would have restored the lands to the public domain if the Tribal members had approved—demonstrating that Congress understood that the lands were not in the public domain and would only be restored if Congress restored the lands to the public domain. He also cites a letter which is likely wrong but ultimately for current purposes immaterial, in which the Secretary of the Interior incorrectly opined that Congress could have taken the lands without compensation to the Tribe. He notes in the 1897 Act, Congress did not restore the lands to the public domain

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV § 3, cl. 2. The Supreme Court has consistently interpreted this provision in the broadest possible terms, and has repeatedly held that because the Constitution expressly conferred the federal power regarding property to Congress, neither the courts nor the executive branch can proceed contrary

to an act of Congress in this area. *E.g., Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941). Here, through an 1868 Treaty approved by Congress, the Uncompahgre Band ceded vast areas of land to the United States in exchange for the United States, through Congress, recognizing a Reservation for the Band in Colorado. The 1868 Treaty states that the lands reserved by the federal government for the Ute homeland are "hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named." 1868 Treaty, Art. 2, p. 3.

Notably, and as has been unfortunately typical in its relationship with the Tribe and other tribes, the United States asserts that the Tribe must abide by the treaty provisions and congressional takings of tribal land which are favorable to the United States, while the United States is free to violate its reciprocal obligations. The United States holds the Tribe to the Tribe's cessation of lands in 1868, which was in exchange for, *inter alia*, the Colorado reservation. And the United States has no qualms with Congress deciding to take the Tribe's Reservation in Colorado. But the United States does not want to be held to the *quid pro quo* that Congress placed into the very same statute taking the Tribe's Colorado Reservation. The United States asserts this Court cannot make the Executive Branch comply with that part of Congress' actions. The Executive Branch's position is morally abhorrent, and fortunately it is also legally incorrect.

CONCLUSION AND REQUESTED REMEDIES

M-37051makes the erroneous legal decision that the Secretary cannot restore the lands to tribal trust ownership. That legal assertion is wrong for three separate reasons.

First, as discussed above, the lands that the United States still owns on the Uncompahgre Reservation are, and since 1882 have been, in tribal trust ownership based upon the 1880 Act which directed the executive brand to set those lands apart for the Uncompahgre Band.

Second, even if one assumed, contrary to all of the law discussed above, that the Secretary is not required to hold the lands in trust, the lands still owned by the United States—i.e. the lands at issue in this case—would at least be undisposed of open lands on the Uncompahgre Reservation. Even if they were taken out of tribal trust ownership (contrary to the Act of Congress) they were already restored to trust ownership under 1945 Restoration order. Here again, Mr. Jorjani's failure to analyze and failure to understand the Ute line of cases leads him to an erroneous legal conclusion. In the 1945 Restoration order, the Secretary proclaimed "restoration to tribal ownership of *all lands which are not or may hereafter be classified as undisposed of open lands* on the Uintah and Ouray Reservation will be in the public interest, and said lands will be restored to tribal ownership for use and benefit of [The Tribe.] 10 Fed. Reg. 12409 (Oct. 2, 1945).

One could ask whether, in 1945, the Secretary understood that the effect of his broadly worded order restoring all undisposed of open lands to the Tribe would include the lands at issue in this case. But even if one assumed that the lands are not trust lands based upon the 1880 Act, they would then become undisposed of open lands. There is no good faith argument to the contrary.

Third, even if one assumed contrary to all of the above, that the Executive Branch has authority to take tribal lands contrary to existing, unrepealed acts of Congress, and even if one assumed, contrary to the clear wording of the 1945 Restoration order, that the Secretary has not already exercised discretion to determine whether to restore undisposed of open lands that are still owned by the United States in trust, the Department of the Interior, as a matter of law, erred when it refused to exercise that discretion in the current matter based upon Mr. Jorjani's erroneous conclusion that the Secretary lacked that discretion. If this Court rejected the Tribe's arguments

on the first and second points above, it would still have to remand for the agency to exercise that discretion.

Dated this 11th day of March, 2024.

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