IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns the Department of the Interior's ("***Interior***") denial of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation's ("***Tribe***") request for the Secretary of the Interior to "restore" the public lands within the exterior boundaries of the original Uncompahgre Reservation in Utah ("***Public Domain Lands***") to trust status under Section 3 of the Indian Reorganization Act ("***IRA***").[1] This denial was based, in part, on a legal opinion from the Office of the Solicitor, known as an M-Opinion ("***2018 M-Opinion***"), which concluded that because no congressional act entitled the Tribe to proceeds from these lands if the lands had been sold, Section 3 of the IRA does not authorize Interior to hold the Public Domain Lands in trust for the Tribe. A separate act of Congress would be required to change the lands to trust status. The 2018 M-Opinion reached this conclusion based on applicable statutes, legislative history, prior Interior memoranda and decisions, and relevant case law. The Tribe challenges Interior's decision under the Administrative Procedure Act ("***APA***").

Summary judgment should be granted in favor of Federal Defendants. Interior acted reasonably and with administrative record support in concluding that there was never a statutory basis to hold proceeds from the lands' sale for the Tribe's benefit and that the lands therefore do

[1] Originally approved by the Secretary in 1937 upon organizing under the IRA, the Tribe's government adopted a constitution and bylaws where the territorial jurisdiction of the "Uintah and Ouray Reservation" was described as "extend[ing] to the territory within the original confines . . . as set forth by Executive Orders of October 3, 1861 [Uintah Valley Reservation] and January 5, 1882 [Uncompahgre Reservation], and by the Acts of Congress approved May 27, 1902, and June 19, 1902, and to such other lands without such boundaries as may hereafter be added thereto under any law of the United States, except as otherwise provided by law." As of 1886, a military post was established at Fort Duchesne and the previously separate Uintah and Ouray Agencies were consolidated for joint administration whereafter they became collectively known as the "Uintah and Ouray Reservation." *Ute Indian Tribe v. Utah* ("***Ute I***"), 521 F. Supp. 1072, 1075, 1098 (D. Ut. 1981).

not qualify for "restoration" under Section 3 the IRA. Specifically, Interior concluded that the 1880 Act did not provide the Tribe with any compensable interest in the Public Domain Lands, and that the 1897 Act governing the disposal of unallotted lands within the original Uncompahgre Reservation in Utah did not call for proceeds to be for the Tribe's benefit. And Interior's conclusion is consistent with earlier agency conclusions relating to the same land. Interior's decision was not arbitrary, capricious, or contrary to law.

The Tribe's arguments to the contrary are unavailing. *See* Ute Indian Tribe of the Uintah and Ouray Indian Reservation's Motion for Summary Judgment, ECF No. 102 ("***Tr.'s Br.***"). The Tribe fails to show that it ever had a compensable interest in the Public Domain Lands that would qualify them for restoration under Section 3. First, the Tribe attempts to assert that the 1868 Treaty, which established a reservation for the Tribe in Colorado, is the basis for its compensable interest in the original Uncompahgre Reservation in Utah, which was set aside by an Executive Order in 1882. But, as the United States Supreme Court has already acknowledged, the Tribe ceded the Colorado land and terminated ownership in those reserved lands with an 1880 Agreement, which Congress subsequently codified in the 1880 Act. Since Congress terminated the Tribe's ownership interests in the ceded Colorado reservation land, that interest could not have transferred to a reservation later established in Utah by a President's executive order. Nor did the 1880 Act establish that the Tribe had a compensable interest in the Public Domain Lands. Nothing in the 1880 Act conferred title to the Tribe, and regardless, the 1880 Act did not establish the land at issue as a reservation. It was not until the 1882 Executive Order that the original Uncompahgre Reservation in Utah was established, and that Executive Order could not have conferred a compensable interest to the Tribe.

Throughout its brief, the Tribe attempts to apply the Tenth Circuit's holding in *Ute III* to claim that the Appeals Court has already determined that the Tribe has an interest in the land and that the interest has never been terminated. *See Ute Indian Tribe v. Utah ("**Ute III**")*, 773 F.2d 1087 (10th Cir. 1985).[2] But the Tribe's attempt at legal gymnastics ultimately fails. The pertinent question for restoration under Section 3 of the IRA is whether Congress ever entitled the Tribe to proceeds from the sale of the Public Domain Lands. That is, whether the Tribe has compensable title in the land at issue. This is not the question presented to the Court in *Ute III* and the related line of cases. Instead, as to the original Uncompahgre Reservation in Utah, *Ute III* focused on whether the reservation had been disestablished. *Ute III*, 773 F.2d at 1092. But reservation status and title are distinct legal concepts. *See infra* 24-25. Rather than supporting the Tribe's arguments, *Ute III* recognized the difference between reservation status and title, and identified that, with the 1880 Act, Congress intended that the Uncompahgres would *not* hold title to land reserved by the Act. *Ute III*, 773 F.2d at 1096-97.

Ultimately, the Tribe has failed to demonstrate that Interior's denial of its restoration request and the accompanying 2018 M-Opinion are arbitrary and capricious or contrary to law. Interior reasonably interpreted Section 3 of the IRA and other statutes at issue. The Tribe identifies no statute that created a compensable interest in the Public Domain Lands, and no court has determined otherwise. On this basis, summary judgment should be granted for Defendants United States of America, United States Department of the Interior, Deb Haaland, in her official capacity

[2] As discussed below, the Tribe misinterprets the *Ute III* holding and misapplies the Tenth Circuit *Ute* line of cases. *See infra* 24-27. Regardless, the United States was not a party to the *Ute* cases and would not be bound by the holdings in those cases.

as Secretary of the Interior, and Laura Daniel-Davis, in her official capacity as Acting Deputy Secretary (collectively the "***United States***" or "***Federal Defendants***").[3]

STATEMENT OF FACTS[4]

I. Section 3 of the IRA and the Tribe's Application

In June 2016, the Tribe requested that Interior "restore" the Public Domain Lands to trust status pursuant to Section 3 of the IRA. At the time of the Tribe's application (and presently), the Public Domain Lands are largely comprised of land "administered for multiple-use and sustained yield by the [Bureau of Land Management]." Uncompahgre_705.[5] These uses include oil and gas leasing and energy-related mineral activities. Uncompahgre_610-634.

Under Section 3, with certain exceptions:

> The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States[.]

25 U.S.C. § 5103(a); *see also* Uncompahgre_174-179. The Department of the Interior has long interpreted Section 3's authority—including with respect to prior requests by the Ute Tribe

[3] Failing to identify a statute that confers upon the Tribe a compensable interest in the Public Domain Lands, the Tribe attributes to Secretary Haaland a legal position that neither she nor the United States have taken in this litigation. Specifically, the Tribe's brief includes the following block quote attributed to Secretary Haaland through her attorney, citing the Federal Defendants' response to the Tribe's motion to amend: "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." Tr.'s Br. at 4. Secretary Haaland did not make that statement, directly or otherwise, and Federal Defendants did not cite *Lone Wolf* in its response brief (ECF No. 95).

[4] The Tribe's Statement of Facts, and Argument, fails to provide references to the Administrative Record and therefore it is often unclear what portions of the record the Tribe relies on in its motion.

[5] This citation formulation cites documents in the Administrative Record, bates stamped Uncompahgre_1-1373. *See* ECF No. 66, Ex.1.

regarding the same lands at issue here—to be limited to those remaining surplus lands of a reservation in which a tribe was entitled to proceeds from any sale of the lands. Uncompahgre_700; Uncompahgre_708-712; Uncompahgre_135-141; Uncompahgre_143; Uncompahgre_484-486; Uncompahgre 491-497; Uncompahgre_574-575; Uncompahgre_694-695.

In a letter dated March 2, 2018, the then-Deputy Secretary determined that the Public Domain Lands were not eligible for restoration under Section 3 and therefore denied the Tribe's request. Uncompahgre_698. The Deputy Secretary further concluded that special legislation would be necessary for those lands to be restored to the Tribe and held in trust by the United States. *Id.* In reaching that conclusion, the Deputy Secretary relied on a 2018 M-Opinion from the then-Solicitor of the Department of the Interior. *Id.* The 2018 M-Opinion concluded that the Public Domain Lands were not eligible for restoration because "the factual and legal history . . . reveal[s] no convincing evidence that the Tribe had a compensable ownership interest in the [original] Uncompahgre Reservation that would have been the basis to hold sales proceeds for the benefit of the Tribe or any predecessor group of Indians." Uncompahgre_700. The Solicitor's M-Opinions are binding on Department of the Interior staff. *See Citizens Against Casino Gambling in Erie Cnty. v. Chaudhuri*, 802 F.3d 267, 277 n.8 (2d Cir. 2015).

II. Relevant Historical Background

The historical context and then-governing statutes were key to the 2018 M-Opinion's (and, thus, the Deputy Secretary's) conclusion. In 1864, the Tabeguache (later known as the Uncompahgre) Band entered into a treaty with the United States, along with several bands of the Ute people. Uncompahgre_701, n.8 (citing 13 Stat. 673, Arts. II-III (Dec. 14, 1864) ("***1864 Treaty***")); *see also* Uncompahgre_119-125. In that Treaty, the Band relinquished all claims to lands within the United States in exchange for a reservation of lands within the Territory of Colorado. *Id.* According to its terms, nothing in the 1864 Treaty can be construed as the United

States admitting any title or interest other than what existed when the United States acquired the Colorado Territory from Mexico. *Id.* Because Mexico did not consider an Indian group's aboriginal title beyond a right of occupancy, the United States did not consider land "Indian country" when it acquired it from Mexico and only considered land Indian country when treaties established it as such. *Id.* In 1868, several bands of the Ute Indians (including the Uncompahgre Band) entered into a separate treaty with the United States where, in exchange for a reservation established in the Territory of Colorado, the bands relinquished any claims to any portion of the United States or its territories. Uncompahgre_700 (citing 15 Stat. 619-620, Arts. II-III (Mar. 2, 1968) ("***1868 Treaty***")); *see also* Uncompahgre_126-134.

But the Colorado Reservation as envisioned in those earlier treaties never came to be. In 1880, "Confederated" Ute bands (Southern, Uncompahgre, and White River Ute bands) agreed to cede their 1868 Treaty reservation in Colorado to the United States and settle on allotted lands in Colorado and Utah ("***1880 Agreement***"). Uncompahgre_700. Nine chiefs from the confederated Ute bands negotiated the specific provisions for the 1880 Agreement. Uncompahgre_700 n.7. The Uncompahgre agreed to remove to and settle near the mouth of the Gunnison River in Colorado or if land there was insufficient, then to unoccupied agricultural lands in Utah. *Id.*[6] Congress codified the 1880 Agreement in the 1880 Act. Uncompahgre_135-141 ("***the Act***" or "***the 1880 Act***"). The Act provided for "settlement upon lands in severalty" and provisions concerning "allotments in severalty of said lands." Uncompahgre_199-200.[7] In accord with the 1880 Act, in

[6] The Tribe does not cite to any document from the Administrative Record to support its statement that "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." Tr.'s Br. at 10-11. The Tribe instead inappropriately relies upon extra-record material. In any event, the history behind the 1880 Act is irrelevant. It is the statute's words and effect that matter.

[7] "Allotment" refers to Congress' past practice of "dividing" or allotting communal Indian lands into individualized parcels for private ownership by tribal members. *See Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984). The term "unallotted lands" as used hereinafter refers to lands within a

1882 President Arthur issued an Executive Order ("***1882 Executive Order***") setting aside 1.9 million acres of public domain lands in the Utah territory for a reservation for the Uncompahgre. *Id.; see also* Uncompahgre_142. The Tribe did not have any preexisting title interest in the area reserved by the 1882 Executive Order. Uncompahgre_700-01; *see also* Uncompahgre_142.

In 1894 and 1897, Congress then opened the original Uncompahgre Reservation in Utah to allotment and subsequent entry by non-Indian settlers. Uncompahgre_701. The 1894 Act provided that unallotted lands would be "restored to the public domain and made subject to entry [under the homestead and mineral laws of the United States]." *Id.* (quoting 18 Stat. 286, 337-338 ("***1894 Act***")); *see also* Uncompahgre 161. The Act further provided that Indians would pay $1.25 an acre for any allotment, but because Tribal members protested this payment provision, no allotments occurred under this act. Uncompahgre_701; Uncompahgre 161.

In 1897, Congress provided for allotment without payment by Tribal members and provided that unallotted lands would be "open for location and entry under all the land laws of the United States." Uncompahgre_701-02; 30 Stat. 62, 87 ("***1897 Act***"); *see also* Uncompahgre_ 162. Title to all lands containing gilsonite, asphalt, and other like substances was reserved to the United States. Uncompahgre_701-702; Uncompahgre_162. In 1933, the Secretary of the Interior withdrew the "vacant and unentered lands within the area embraced in [the] Executive Order of January 5, 1882" from further disposition "as a grazing reserve, in aid of legislation to make the withdrawal permanent." Uncompahgre_702; *see also* Uncompahgre_172-173 ("***Grazing Withdrawal Order***").

In 1934, Congress passed the IRA, including Section 3. *See* Act of June 18, 194, Ch. 576 § 3, 48 Stat. 984 *codified at* 25 U.S.C. § 5103) (*"**Section 3***")). The legislative history behind the IRA indicates that it was intended to restore certain categories of tribal land. Uncompahgre_705

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reservation that were not assigned or associated with any particular Indian claimant and left open for non-Indian settlement.

(noting that the Commissioner of Indian Affairs stated that the bill was meant to restore to tribes lands that had not been allotted, had been set aside to be sold, and that had been awaiting disposal); *see also* Uncompahgre_425-430. Discussion leading up to the IRA also demonstrated that certain allotment acts specifically provided that proceeds of the sale of the surplus lands would go toward the benefit of the tribe involved. Uncompahgre_706. Later in 1934, the Secretary of the Interior directed that any lands in which a tribe held a compensable interest would be temporarily withdrawn from any type of disposal. Uncompahgre_703; Uncompahgre_470-475. This 1934 Order of Withdrawal listed land on several reservations, with the intent that their being temporarily withdrawn would provide the opportunity to consider full restoration to tribal ownership under Section 3. Uncompahgre_703; Uncompahgre_470-475. The original Uncompahgre Reservation in Utah was not on that list. Uncompahgre_703; Uncompahgre_470-475.

In 1945, the Secretary restored about 217,000 acres of undisposed lands to the Uintah and Ouray Reservation. Uncompahgre_703; 10 Fed. Reg. 12,409 (Oct. 2, 1945) ("***1945 Order***"); *see also* Uncompahgre_477. In restoring that land under Section 3, the Secretary identified a 1902 Act that opened the Uintah Valley portion of the Reservation for allotment to the Uintah and White River Ute bands and specified that the unallotted land within that portion of the Reservation would be restored to the public domain for disposition under public land laws and provided that certain sale proceeds would be used for the Tribe's benefit. Uncompahgre_703-04, n.25 (citing 32 Stat. 263) ("***1902 Act***"); *see also* Uncompahgre_166-169. The 1945 Order did not reference the original Uncompahgre Reservation in Utah or the 1894 or 1897 Acts that had opened that Reservation for allotment. Uncompahgre_704; *see also* Uncompahgre_477. The next year, Interior's Office of the Solicitor issued a memorandum concluding that restoration of lands within the original Uncompahgre Reservation in Utah could be accomplished only through Congressional Act. Uncompahgre_704; *see also* Uncompahgre_478-479.

In 1948, Congress passed an act extending the boundaries of the Uintah and Ouray Reservation to include what is known as the Hill Creek Extension, an area partially overlapping with the original Uncompahgre Reservation boundaries. *Id.*, *citing* 62 Stat. 72, 73-78 ("***1948 Act***"); *see also* Uncompahgre_191-197. With that Act, Congress also directed the Secretary of the Interior to revoke the 1933 Grazing Withdrawal Order, and later that year the Secretary ordered that the "remaining lands" described in the 1933 Order, but that were outside the Hill Creek Extension—which are the Public Domain Lands at issue in our case—be administered for grazing purposes. Uncompahgre_704; *see also* Uncompahgre_191-197.

In 1946, Congress passed the Indian Claims Commission Act ("***ICCA***"), allowing Tribes to bring "historical claims against the United States for the taking of land and related actions." *W. Shoshone Nat'l Council v. United States*, 279 F. App'x 980, 982 (Fed. Cir. 2008). Pursuant to the ICCA, tribes were required to bring any and all claims that had accrued before August 13, 1946, within five years or they would be forever barred. Uncompahgre_704 n.30, *citing* 60 Stat. 1049 at 1052. The Tribe pursued numerous dockets before the Commission, including one alleging claims for breaches of the 1880 Agreement and 1880 Act, or land it believed to be improperly taken by the 1897 Act. *See* Uncompahgre_704, *citing* ICC Docket No. 349; *see also* Uncompahgre_223-230; Uncompahgre_662-685. Through that process, the Tribe received compensation (through a settlement) for alleged breaches of the 1880 Agreement and 1880 Act. Uncompahgre_704; Uncompahgre_662-685; Uncompahgre_231-248; Uncompahgre_249-253. The terms of that settlement also barred all such future claims or demands of any further action related to their ICC claims. Uncompahgre_704; *see also* ECF No. 76 at 6-7.

III. Analysis in the 2018 M-Opinion

With that historical background in mind, the 2018 M-Opinion focused on whether the Public Domain Lands qualified as "remaining surplus lands" for purposes of Section 3 of the IRA. Uncompahgre_708. The 2018 M-Opinion looked to, among other things, the Commissioner of

Indian Affairs' memorandum to the Secretary sent less than two months after the IRA's passage. Uncompahgre_709; *see also* Uncompahgre_470-475. In that memo, the Commissioner defined the type of lands subject to restoration under Section 3, concluding that it was limited to circumstances where the Indians were to receive the proceeds of any land sales. Uncompahgre_709. The Secretary agreed, ultimately leading to the 1934 Withdrawal Order discussed above. *See supra* 8.

The 2018 M-Opinion also noted that, in December 1934, the Chairman of the Ute Tribal Business Committee wrote the Secretary to seek clarity on whether the Public Domain Lands could be restored to the Tribe under Section 3. Uncompahgre_709. The Secretary responded that the lands comprising the "former Uncompahgre Reservation" that had been restored to the public domain under the 1897 Act "were not of a class for which restoration under Section 3 was intended," and that additional legislation was necessary for restoration. Uncompahgre_709; Uncompahgre_574-575. In another opinion, the Solicitor had also determined that, based on legislative history, Congress had limited the Secretary's authority under Section 3 to lands of reservations that were open to sale or disposal for the benefit of Indians. Uncompahgre_709; Uncompahgre_484-486. The M-Opinion noted that, since 1934, the Solicitor has issued twelve opinions that established a consistent approach to determine whether "remaining surplus lands" existed for purposes of restoration under Section 3: Interior consistently interpreted "surplus" lands as land held for the benefit of Indians. Uncompahgre_706 (citing the previous Solicitor opinions); *see also* Uncompahgre_480-499; Uncompahgre_507-508; Uncompahgre_525-527; Uncompahgre_530-566.

The 2018 M-Opinion also looked to previous Department recitations of the Tribe's allotment history after it ceded its Colorado reservation in 1880. It noted the Department's

conclusions that "no tribal rights or equities to this area were established in the Uncompahgres by the Executive Order of January 5, 1882" and that the lands at issue here are not within category of land intended for restoration under Section 3. Uncompahgre_710; Uncompahgre_691-95.

The 2018 M-Opinion disagreed with the Tribe's interpretation that the 1880 Act required the United States to compensate the Tribe for the future disposition of land where the Uncompahgre Utes might have eventually settled after ceding their Colorado land. The Opinion found this interpretation to be incorrect because: (1) neither the 1880 Act nor the 1882 Executive Order indicated that the public lands that would form a reservation originated in any of the Tribe's previously ceded land; (2) Congress never explicitly stated that the Tribe would be compensated for the Public Domain Lands, unlike its explicit provision applying to the Uintah Valley Reservation in Utah; and (3) the Executive Orders that establish a reservation, such as the original Uncompahgre Reservation in Utah, cannot convey compensable title (citing *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374-76 (Fed. Cir. 2000)). Uncompahgre_714-715, n.84; *see also* Uncompahgre_355-368.

The 2018 M-Opinion also concluded that neither the 1894 nor the 1897 Act provided a specific benefit to the Tribe resulting from the sale of the unallotted Uncompahgre lands and therefore did not satisfy the requirements for restoration under Section 3. Uncompahgre_702; Uncompahgre_712.[8] The Opinion noted that the 1897 Act superseded any controlling effect the 1880 Act may have had over disposition of land. Uncompahgre_715; *see also* Uncompahgre_459-466.

[8] The Tribe's brief states that either the 2018 M-Opinion or a certain letter noted that "in the 1897 Act, Congress did not restore the lands to the public domain," without citation to a specific source. Tr.'s Br. at 24. But the 2018 M-Opinion never reaches this conclusion. The Tribe does not provide any citation for its statement.

Finally, the 2018 M-Opinion considered several Solicitor opinions that all concluded that the Public Domain Lands within the original Uncompahgre Reservation in Utah did not qualify for restoration under Section 3 because the Tribe was not entitled to sale proceeds from that land. Uncompahgre_700; Uncompahgre_706; Uncompahgre_710. Based upon the above and other reasons, the Solicitor concluded that the Public Domain Lands were not eligible for restoration under Section 3 because the Tribe had not been intended to receive the benefit of any sale of surplus lands.

PROCEDURAL BACKGROUND

On March 8, 2018, Plaintiff filed its complaint in this case. ECF No. 1. On October 16, 2018, Federal Defendants moved to dismiss counts 1, 2, 3, and 5. ECF No. 35. On December 16, 2021, the Court issued its order and opinion, ECF No. 76, granting the United States' motion and dismissing Plaintiff's first, second, and third claims because those claims were barred by statute of limitations or otherwise failed to state a claim. ECF No. 76 at 11.

On January 31, 2022, the United States moved for reconsideration of the Court's denial of its motion as to the trespass claim. ECF No. 80. On August 16, 2022, the Court granted the United States' motion for reconsideration and dismissed the Plaintiff's fifth claim, concluding that the Quiet Title Act applied to the claim because it involved an alleged right, title, or interest in real property that conflicted with a right, title, or interest asserted by the United States. ECF No. 90, at 3-5. Therefore, the Quiet Title Act's statute of limitations also barred Plaintiff's fifth claim. *Id.* at 6.

The Tribe's remaining claim asks the Court to set aside Interior's March 2, 2018 denial of the Tribe's request for restoration of the Public Domain Lands as "arbitrary and capricious" under

the APA. ECF No. 1 at ¶¶ 112-117, *citing* U.S.C. § 706(2)(A).[9] The United States had provided Plaintiff a copy of the Administrative Record and filed a certified list of its contents on January 23, 2020. ECF No. 66.

STANDARD OF REVIEW

Judicial review of final agency action is governed by the "arbitrary or capricious" standard in the APA, which requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under this standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court's only role in applying this standard is to determine whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *N. Carolina Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007).

"Summary judgment is [ ] the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Friends of Animals v. Pendley*, 523 F. Supp. 3d 39, 52 (D.D.C. 2021) (alteration in original) (quotes and citation omitted). A court reviewing an agency's decision "review[s] the whole record or those parts of it cited by a party." 5 U.S.C. § 706. "[T]he focal point for judicial review should [therefore] be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

[9] The Tribe's Motion for Summary Judgment appears to try to argue its claims under 5 U.S.C. § 706(2)(A)-(C), *see* Tr.'s Br. at 15-16, but it only pleaded its remaining claim under 5 U.S.C. § 706(2)(A), *see* ECF No. 1 at ¶¶ 113, 117. It is improper to amend a complaint through a summary judgment motion, and Courts generally do not consider such newly asserted claims. *Trudel v. SunTrust Bank*, 288 F. Supp. 3d 239, 256 (D.D.C. 2018) (citations omitted).

ARGUMENT

The central question the 2018 M-Opinion, and Interior's consequent denial of the Tribe's request, considered in determining whether Interior could "restore" the Public Domain Lands pursuant to Section 3 of the IRA was whether Congress granted the Tribe an interest in the proceeds of the sales of the lands. Uncompahgre_714. After extensive review of the governing statutes, legislative history, prior Interior memoranda and opinions, facts, and applicable case law, the 2018 M-Opinion concluded there was no basis for "restoration" of the Public Domain Lands to trust status under Section 3. That conclusion—and the Deputy Secretary's reliance on it in denying the Tribe's request—is reasonable and consistent with applicable law. It should therefore be upheld.

The Tribe's effort to undercut Interior's reasoning starts with a false premise. The Tribe posits that the analysis of whether the Public Domain Lands could be restored under Section 3 begins with the question of whether Congress took these lands from the Tribe. Tr.'s Br. at 18. But the Tribe's proposed approach skips a critical question: whether Congress established a compensable interest in the Public Domain Lands for the Tribe in the first place. Interior interprets restoration under Section 3 of the IRA only to be available for lands in which proceeds of any sale were to be held for the Tribe's benefit. The Tribe does not challenge that conclusion. And consistent with the 2018 M-Opinion's conclusions, the Tribe fails to identify any Act of Congress that provided the Tribe with the necessary compensable interest in the Public Domain Lands. Nor has any court held that the Tribe holds such an interest in the Public Domain Lands. The result is that Interior did not act arbitrarily or contrary to law in denying the Tribe's request for restoration. Summary judgment should therefore be granted in favor of Federal Defendants on the Tribe's only remaining claim and final judgment should be entered.

I. The Tribe does not even attempt to meet its burden.

As an initial matter, summary judgment should be entered in favor of Federal Defendants because the Tribe has not even attempted to meet its burden under the APA to demonstrate that the agency acted arbitrarily or contrary to law. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 715 (D.C. Cir. 2000). The Tribe never seriously engages with Interior's reasoning or the M-Opinion. Indeed, the Tribe's opening brief does not contain a single citation to the Administrative Record. The Tribe never mentions—let alone attempts to explain away—the prior Interior decisions reaching the same conclusion as the decision the Tribe now challenges. Instead, the Tribe claims "the bulk of [the] record supports the Tribe." Tr.'s Br. at 19. But the Tribe never details for the Court (or Federal Defendants) where that support is found. It is not the Court's responsibility to do a party's work for it. *Accord Hillman v. Am. Fed. of Gov't Employees*, 2020 WL 3498587 at *4 (D.D.C. June 29, 2020) (denying a party's Rule 56 motion where the party had not cited to the record to support its disputes of material fact).

II. The Tribe does not challenge Interior's interpretation of Section 3 of the IRA.

The Tribe does not challenge Interior's interpretation of its authority under Section 3 of the IRA. *See* Uncompahgre_708–712. As explained above, Interior has long interpreted its Section 3 restoration authority to be limited to those circumstances in which Congress intended the tribe making the restoration request to have been the intended beneficiary of proceeds from any public sales of unallotted lands. *See supra* 4-5. Because the Tribe has not challenged that interpretation, the only question before the Court is whether Interior acted arbitrarily or contrary to law in concluding that the Public Domain Lands in the Tribe's request were not eligible to be restored under Section 3.

III. Interior reasonably concluded that Congress never established a compensable interest for the Tribe in the Public Domain Lands; the Tribe has not shown otherwise.

The 2018 M-Opinion's conclusion that the Public Domain Lands are not eligible for restoration under Section 3 is well supported by the statutes on which Interior relied and by the Administrative Record. As explained above, the 2018 M-Opinion looked to the 1880 Act, 1894 Act, and 1897 Act and concluded that Congress never intended to make the Tribe the beneficiary of any post-allotment sales of what are now the Public Domain Lands in the original Uncompahgre Reservation in Utah. *See supra* 5-7. The 1880 Act did not set aside the original Uncompahgre Reservation for the Tribe's benefit. *See* Uncompahgre_135-141. Instead, the original Uncompahgre Reservation in Utah was established via the 1882 Executive Order. Uncompahgre_142. And reservations established by Executive Order cannot convey compensable title. *Karuk Tribe*, 209 F.3d at 1374-76; *see also* Uncompahgre_355-368. Interior's conclusion is supported by the statutes it interprets and is the same conclusion Interior reached with respect to the same lands shortly after Congress enacted Section 3. *See supra* 8-12.

Attempting to overcome Interior's reasonable statutory readings and conclusion, the Tribe suggests it obtained a compensable interest in the Public Domain Lands in several ways. First, it traces its interest back to the 1864 and 1868 Treaties setting aside a reservation for the Tribe in Colorado and asserts that courts have already determined that rights from those treaties transferred to the original Uncompahgre Reservation in Utah. Tr.'s Br. at 5, 22. Second, it claims that Congress provided the Tribe title to the Public Domain Lands through the 1880 Act. Tr.'s Br. at 25. Third, the Tribe contends that the 1945 Order already restored trust ownership to the Tribe. Tr.'s Br. at 26.

The Tribe's arguments fail. In the 1880 Agreement between the Tribe and the United States, and Congress' codification of that Agreement in the 1880 Act, the Tribe ceded its interest in all land that had been reserved under the 1868 Treaty. Congress did not transfer that interest to

the land in Utah eventually set aside by Executive Order for the purposes of providing allotments in severalty to individual Uncompahgre Band members. And while treaty provisions remain intact unless Congress abrogates them, the 1897 Act directly addressed the Tribe's interest (or lack thereof) in any proceeds from sale of the land, and the earlier Acts of 1880 and 1887 the Tribe cites are therefore irrelevant to determining that issue. Finally, the 1945 Order, did not reference the original Uncompahgre Reservation in Utah or the 1894 or 1897 Acts that had opened the Reservation for allotment. Uncompahgre_704. The 1945 Order only applied to the 217,000 acres of undisposed lands within the neighboring Uintah Valley Reservation and referenced the 1902 Act that opened those lands. The 1902 Act, unlike the 1897 Act at issue here, provided for proceeds from sales to be held for the benefit of the Tribe.

Because no subsequent congressional act, or order from the Secretary, provided the Tribe a compensable interest in the Public Domain Lands, Interior's denial of the Tribe's request to "restore" the lands to trust status was not arbitrary and capricious.

a. In the 1880 Act, Congress ceded the Tribe's land and interest in the original Colorado Reservation established by the 1868 Treaty.

The Tribe is misplaced in its effort to attribute its interest in the 1868 Treaty's Colorado Reservation to the Public Domain Lands. Tr.'s Br. at 4-5, 17. The Tribe suggests that its claimed compensable interest in the Public Domain Lands is rooted in the 1868 Treaty and that the 1880 Act subsequently provided that the Public Domain Lands in the original Uncompahgre Reservation in Utah garner the same status as those intended for the Colorado Reservation. Tr.'s Br. at 17; 25.

The 1880 Act does not support the Tribe's reading. The 1868 Treaty only applied to land in Colorado. Uncompahgre_126-134. In the 1880 Agreement, subsequently codified in the 1880 Act, the Tribe ceded its interest in all land that had been reserved under the 1868 Treaty. Uncompahgre_135-141. The 1880 Act explicitly codified that the Tribe "cede[s] to the United States all territory of the [then-]present Ute Reservation in Colorado." *Id.* After noting the cession

of lands in Colorado, the Act states: "The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Green 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 and in the Territory of Utah." *Id.* In contrast with the language in the 1868 Treaty for the Colorado lands (Uncompahgre_126-134), the 1880 Act says nothing about setting aside the Utah lands for the sole use and occupancy of the Uncompahgre Utes.

Nor has any court determined that the Tribe's interests in the Colorado lands set aside in the 1864 and 1868 Treaties transferred to the original Uncompahgre Reservation in Utah, as set aside by Executive Order. *See* Tr.'s Br. at 22. The Tribe relies on *Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017), to contend that interest in land from the 1868 Treaty should apply to the Public Domain Lands. But *Jones* considered only the "bad men" provision from the 1868 Treaty and did not analyze other treaty provisions. *See id.* at 1348. The "bad men" provision covers "the person or property of the Indians." Uncompahgre_127. Certainly, nothing in the 1880 Act abrogated that treaty provision. *See* Uncompahgre_135-141. But that the "bad men" provision would apply to later reservation lands says nothing about whether Congress intended to grant the Tribe a compensable interest in those lands. And on that question, Interior concluded that Congress has been clear: the Tribe ceded any interest in the Colorado lands set aside in the 1868 Treaty and did not have an interest in the proceeds from any sale of surplus lands on the original Uncompahgre Reservation in Utah.

The Tribe relies on *Ute III* to contend that courts have concluded that "the Tribe did not understand" that they were ceding their Colorado reservation with the 1880 Act. Tr.'s Br. at 17 (citing *Ute III* at 1092, which does not discuss the 1880 Act). But, as discussed below, the issue

before the Tenth Circuit was the Tribe's jurisdiction under its Law and Order Code, not the extent of the Tribe's compensable interest in the land. *See infra* 25-27. Contrary to the Tribe's arguments, case law confirms that that the 1880 Act ended the ownership the Tribe had in reserved land that was the subject of the 1868 Treaty. The Supreme Court stated that "[t]he central feature of the Act of 1880 was the termination of tribal ownership in the reservation lands, and the limitation of Indian ownership to such lands as might be allotted in severalty to individual Indians." *United States v. S. Ute Tribe or Band of Indians*, 402 U.S. 159, 163 (1971). The 1880 Act completely extinguished the Tribe's rights and interests in those Colorado lands. *See id.* And the Tribe fails to identify any provision in the 1880 Act that required a so-called "replacement Reservation" for the Tribe. Interior acted reasonably in concluding that the treaties and statutes do not support the Tribe's argument that its land interest in the 1868 Treaty transferred to the original Uncompahgre Reservation established in Utah by the 1882 Executive Order. Interior reasonably concluded that the 1868 Treaty did not confer a compensable interest in the Public Domain Lands to the Tribe.

b. The 1897 Act is the pertinent act for analyzing whether the Tribe holds a compensable interest in the Public Domain Lands.

Instead of focusing on lands in Colorado reserved in the 1868 Treaty—and the interest in such lands that the Tribe later ceded in the 1880 Act—Interior properly focused on the question of whether Congress afforded the Tribe any compensable interest in the Public Domain Lands. Interior acted reasonably in concluding that the answer is "no" because: (1) the original Uncompahgre Reservation in Utah was established by the 1882 Executive Order; and (2) the 1897 Act did not provide the Tribe with any interest in proceeds from the sale of surplus lands within the original Uncompahgre Reservation after allotment. The Tribe's arguments to the contrary do not pass muster.

i. **The 1880 Act did not convey compensable title in the Public Domain Lands to the Tribe because the original Uncompahgre Reservation in Utah was established by executive order.**

The 1882 Executive Order created the Uncompahgre Reservation for the purpose of allotting lands in severalty to Uncompahgre Band members. *See* Uncompahgre_700. In 1882, President Chester A. Arthur signed an executive order delineating lands to be "withheld from sale and set apart as a reservation for the Uncompahgre Utes". Uncompahgre_142. As the Reservation was set aside by Executive Order, the Tribe did not obtain a compensable beneficial interest in the land. *Karuk Tribe*, 209 F.3d at 1374-76.

Plaintiff attempts to overcome this deficiency by contending that the Executive Order "was issued in execution of the 1880 Act of Congress." Tr.'s Br. at 24. But this contention misses the mark. Unlike the 1868 Treaty and the Colorado reservation, the 1880 Act did not "set apart" any land in Utah for the "absolute and undisturbed use and occupation" of the present-day Tribe or the Uncompahgre Utes, but rather contemplated that the lands would be allotted in severalty to individual Uncompahgre band members. *See* Tr.'s Br. at 25 (citing 1868 Treaty, Art. 2, p. 3). Specifically, the 1880 Act stated:

> The Uncompahgre Utes agree to remove to and settle upon agricultural in 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 on the La Plata River or its vicinity in the Territory of Utah.

Uncompahgre_135-141. And as Interior explained (Uncompahgre_700), the 1880 Act then envisioned that those lands would be surveyed and allotted to individual Indians "in severalty." Uncompahgre_135-141. So rather than providing *the Tribe* with a compensable interest in the Public Domain Lands, the 1880 Act unambiguously limits the conveyance of compensable title (via an allotment process) to *individual members* of the Uncompahgre Band "in [their] own right,

with no other person or community or tribe connected with the holder in point of interest." SEVERALTY, Black's Law Dictionary (11th ed. 2019).

While the 1882 Executive Order was consistent with the 1880 Act, nothing in the 1880 Act required the President to establish the original Uncompahgre Reservation in Utah through the order. *Ute III*, 773 F.2d at 1095 (Seymour, J., concurring). And as Interior recognized (Uncompahgre_715), absent action under authority delegated by Congress for him to do so, the President cannot convey compensable interest in land to a Tribe. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686-87 (9th Cir. 1976) ("[A]lthough Congress had delegated to the President the power to create reservations, it had never delegated the power to confer compensable property interests in the Indians. . . . [T]he status of executive order reservations can be summarized as follows: the Indians have the exclusive right to possession but title to the lands remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title.").

Interior reasonably concluded that the original Uncompahgre Reservation in Utah was never a "replacement reservation" for the Uncompahgre's former Colorado Reservation, and the Tribe points to nothing in the record or any law to support its contention that the Executive Order was issued to "execute" an act of Congress. Indeed, the Executive Order never mentions the 1880 Act. Nowhere did the 1880 Act require the President to set apart a new reservation under Executive Order. *See* Tr.'s Br. at 8-9. And the Tribe has not identified any specific language in the 1880 Act that directs the President to create a reservation.

Because the original Uncompahgre Reservation in Utah was established by Executive Order and not under the 1880 Act, the 1880 Act did not provide the Tribe a compensable interest in the Public Domain Lands. *See also* Uncompahgre_714 n.84.

ii. **The 1897 Act superseded the 1880 Act and the 1887 Act regarding the Tribe's property interest.**

Even if, in the 1880 Act, Congress had set aside the original Uncompahgre Reservation in Utah for the Tribe's benefit, it enacted legislation expressly addressing the subject of the disposal of unallotted lands in the 1897 Act. Accordingly, Interior reasonably concluded that the 1897 Act did not provide for payment from the sales of those lands to be made for the benefit of the Tribe.

The Tribe appears to argue that the 1897 Act did not restore lands to the public domain and therefore did not extinguish the Tribe's trust status in the Public Domain Lands, vaguely referencing *Ute III* for this proposition. Tr.'s Br. at 13-14. But the Tribe mistakenly ties its argument to the lands' reservation status. *Id.* As discussed below, the lands' reservation status is a distinct legal question from that of the Tribe's trust interest in the land, and whether the Tribe held a compensable interest in the Public Domain Lands was not at issue in *Ute III*. *See infra* 24-27.

Interior reasonably read the 1897 Act to convey Congress' intent that the Tribe did not hold compensable title in the lands. In the 1897 Act, Congress authorized allotment of the lands within the boundaries of the original Uncompahgre Reservation in Utah and declared that unallotted land would be "open for location and entry under the land laws of the United States." Uncompahgre_162. This direction to open the land was an end or total surrender of any compensable interest the Tribe may have had, as the land returned to the public domain. *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (The public domain is government-owned land that is "available for sale, entry, and settlement under the homestead laws, or other disposition under the general

body of land laws.") (citation omitted). And as Interior concluded, nothing in the 1897 Act "provided monetary benefit to the Tribe for the sale of" what are now the Public Domain Lands. Uncompahgre_715. "Without the specific inclusion that proceeds would be held for the benefit of the Tribe, the 1897 Act presumed that un-allotted lands in the public domain remained the absolute property of the United States." Uncompahgre_715.[10]

c. Neither the question before Interior nor Plaintiff's APA claim calls for application of the Indian Canons of Construction.

In its Motion for Summary Judgment, the Tribe asserts that, where ambiguous language exists in treaties and statutes, interpretations of those treaties and laws must be in favor of Tribes. Tr.'s Br. at 16-17. But, as the Tribe must acknowledge, "[t]he Indian law canon does not apply simply because the statute in question involves Indian law or Indian tribes." *Forest Cnty. Potawatomi Cmty. v. United States,* 330 F. Supp. 3d 269, 280 (D.D.C. 2018). Rather, the canons of construction requiring resolution of ambiguities in favor of Indians is not applied when a statute's language is clear. *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (where statute is unambiguous, there is "no occasion to resort to this canon of statutory construction"); *see also Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."). And the canons neither "permit[s] reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South*

[10] Nor is the Tribe's reliance on an 1887 act granting a railway a ROW through the original Uncompahgre Reservation in Utah and fixing compensation owed the Tribe relevant. Contrary to the Tribe's claim, the 218 M-Opinion did not simply rely on the lack of clarity around whether compensation was actually paid in determining this Act had no bearing on restoration under Section 3. Tr.'s Br. at 11 n.6. Rather, the 2018 M-Opinion identifies that regardless of what the 1887 Act might represent, the pertinent statute is the more recent 1897 Act, which superseded the 1880 Act and the 1887 Acts.

Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986). But the Tribe's cursory reference to the Indian canons of construction fails to meaningfully argue the basis for their application to the relevant statutes. The Tribe's reliance on this canon is misplaced.

The Indian canons of construction is not implicated here because the relevant statutory provisions are not ambiguous. The 1880 Act ceded the Tribe's interest in the Colorado lands and did not set aside the original Uncompahgre Reservation in Utah for the Tribe's benefit. And the 1897 Act plainly did not provide for the proceeds from the sale of unallotted lands to be held for the Tribe's benefit. The Tribe has not identified a specific provision or language in its cited statutes that is ambiguous. Absent such a showing of ambiguity, there is no justification for the application of the Indian canons of construction. The 1880 Act and 1897 Act are unambiguous in their terms and the Tribe's conclusory statement provides no evidence or argument to the contrary. Accordingly, the Indian canons of construction are not relevant to the 2018 M-Opinion or resolution of the Tribe's APA claim.

IV. No case law supports the Tribe's argument that it holds a compensable interest in the Public Domain Lands.

Without a treaty or statute to support its argument of an interest in the proceeds from the sale of the Public Domain Lands, the Tribe turns to judicial opinions and argues that its compensable interest in the lands has already been determined in *Ute III*. The Tribe asserts that, because the original Uncompahgre Reservation in Utah was created, the reserved lands are necessarily held in trust. Tr.'s Br. at 3, *citing Ute III*. But this argument incorrectly equates the location of land within the exterior boundaries of a reservation with tribal compensable interest to the land in question. "Adjudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian Law. . . . In other

words, who has title is not the same question as whether Congress has erased or altered a reservation's boundaries." *Murphy v. Royal*, 875 F.3d 896, 952 (10th Cir. 2017) (cleaned up).

Stated differently, there is an important distinction between whether a certain geographical area within an Indian reservation is "Indian county" for purposes of Federal and Tribal jurisdiction and whether a Tribe has title to the lands located within that reservation's boundaries. A reservation (and "Indian country") can exist even where a tribe does not hold a compensable interest in land located within the reservation's boundaries. *See Ute III*, 773 F.2d at 1097; *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020) ("[O]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Thus, in *Ute III*, a majority of the Tenth Circuit, sitting en banc, held that the original Uncompahgre Reservation in Utah remained "Indian country" while also recognizing "Congress' intent that the Uncompahgres hold no title to the land." 773 F.2d at 1097 (Seymour, J., concurring).

Whether the Public Domain Lands constitute "Indian country" is not at issue here. Nor is it relevant. The parties agree that the Tenth Circuit has determined that Congress did not diminish or disestablish the Uncompahgre Reservation. *Id.* at 1093. Interior's denial of the Tribe's request to "restore" the Public Domain Lands to trust status is unrelated to that issue. Rather, the key issue is whether Congress provided the Tribe the right to receive proceeds from the sale of the Public Domain Lands such that restoration of the lands could be accomplished under Section 3 of the IRA. Whether those lands constitute "Indian country" is immaterial.

Throughout its motion, the Tribe repeatedly asserts that its interest in the Public Domain Lands has already been recognized, citing the *Ute III* decision about reservation disestablishment. *See, e.g.*, Tr.'s Br. at 20. But the Tribe misstates the *Ute III* holding. Nowhere does the Tenth

Circuit in *Ute III* state or otherwise support the Tribe's contention that "Acts of Congress only allowed the United States to sell some of [the Public Domain Lands] as the Tribe's land broker." *Id.* Rather, the Tenth Circuit determined that Congress did not "diminish or disestablish the Uncompahgre . . . Reservation." *Ute III*, 773 F.2d at 1093. The Court's holding was purely in the context of determining jurisdictional boundaries, not land ownership or whether the lands were restored to the public domain. And Plaintiff simply ignores that the Tenth Circuit noted the Tribe never held compensable title to the original Uncompahgre Reservation in Utah. *Id.* at 1097 n.7 (Seymour, J., concurring).

Rather than confirming that Congress provided for any compensable title in the Public Domain Lands, *Ute III* supports the opposite. The majority of the Tenth Circuit's en banc panel stated that the 1880 Act contemplated that unallotted land would become public lands and that the United States would hold title to that land. *Ute III*, 773 F.2d at 1096-97 (Seymour, J., concurring) ("the 1880 Act spoke only in terms of title to land. . . . [T]he 1882 Executive Order in no way interfered with Congress' intent that the Uncompahgres hold no title to the land. It merely provided a reservation within which, until the allotment process was complete, the Uncompahgres had temporary occupancy of the whole."). The 2018 M-Opinion noted the same limited occupancy of the Uncompahgre Reservation as the *Ute III* majority when it observed that Congress differentiated the Uncompahgre from the Uintah relative to their rights in their respective lands: "Uncompahgre Indians have no title to any of the lands within the [Uncompahgre] reservation [and] nothing more than the privilege of temporary occupancy." Uncompahgre_701. (quoting H. Rpt. No. 660, 53rd Cong., 2nd Sess. (1894)); *see also* Uncompahgre_713 n.81.

For that reason, there is no contradiction between the 2018 M-Opinion and "'the finality of' the [Tenth Circuit holding] on the Reservation's boundary and 'Indian country' status for

jurisdictional purposes." *See* Tr.'s Br. at 23; Uncompahgre_699. Nor did the Tenth Circuit reject the Solicitor's analysis in the 2018 M-Opinion, as the latter addressed entirely different questions than what was before the Court in *Ute III*. *See* Tr.'s Br. at 21. The *Ute* line of cases do not resolve the distinct question of whether the Tribe has a compensable interest in the lands. *See* Tr.'s Br. at 23 (quoting Uncompahgre_699). Indeed, the Tribe ignores the logical observation that its request to have the lands *restored* to trust status demonstrates that Tenth Circuit *Ute* cases did not resolve this issue. Uncompahgre_699.

In *Ute III*, the question before the Tenth Circuit, sitting en banc, was whether the original Uncompahgre Reservation in Utah had been disestablished, not whether the Tribe held compensable title to land within the reservation. *Ute III*, 773 F.2d at 1092. The 2018 M-opinion correctly identifies that *Ute III* holding is irrelevant to the Tribe's request for restoration of the Public Domain Lands.

V. Even if the Tribe had put forth a plausible reading of the 1880 Act and 1897 Act, Interior's reading would be entitled to deference.

To the extent the foregoing discussion of the 2018 M-Opinion's analysis does not resolve the issue and some question remains about the 1880 Act and 1897 Act, Interior's reading is entitled to deference. The deference accorded to an agency's interpretation depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Orton Motor, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 884 F.3d 1205, 1211 (D.C. Cir. 2018). Deference under *Skidmore* is "more than acknowledgement that the agency's position is more convincing than its adversaries,' as would be true any time it submitted the more convincing brief." *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1254 (D.C. Cir. 2003). Interpretations

by agencies, which possess "a body of experience and informed judgment," *Skidmore*, 323 U.S. at 140, "warrant respect" from the courts, *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003).

Here, the 2018 M-Opinion reflects the reasoned judgment of the Department of the Interior. It relied extensively on past Interior memoranda and decisions, including those that were contemporaneous with the passage of the IRA, and on more recent decisions. Courts have already acknowledged Interior's consistent reading of Section 3 as well reasoned and supported. Uncompahgre_711 (citing *Bowman v. Udall*, 243 F. Supp. 672 (D.D.C. 1965)). This reasoned judgment is entitled to deference under *Skidmore*.

Courts have applied *Skidmore* deference to Solicitor's Opinions and this Court should do the same. *See McMaster v. United States*, 731 F.3d 881, 892 (9th Cir. 2013) ("We conclude that the Solicitor's Opinion is entitled to respect under *Skidmore*. It is a well-reasoned, formal, signed, twenty-two page opinion . . . that is thorough in its consideration, and ultimately persuasive.") (cleaned up); *Manning v. United States*, 146 F.3d 808, 814 n.4 (10th Cir. 1998). For these reasons, the 2018 M-Opinion is not arbitrary and capricious and should be upheld.

VI. The Court should not consider extra-record materials the Tribe cites.

As noted above, the Tribe's Motion for Summary Judgment fails to provide any citation to the Administrative Record. To the extent the Tribe requests that the Court rely on the materials cited with its motion for summary judgment that are not part of the Administrative Record to support its substantive APA claim, the Court should ignore arguments that rely on those documents.[11] Review of claims brought under the APA is limited to the administrative record. *See*

[11] *See, e.g.*, Tr.'s Br. at 3, n.1 (citing C. Joseph Genetin-Pilawa, Crooked Paths to Allotment: The Fight over Federal Policy after the Civil War (2012); Tr.'s Br. at 9 (citing Cohen's Handbook of Federal Indian Law, Section 1.04); Tr.'s Br. at 9 (citing "SO418006" and "SO518006," bates

Camp v. Pitts, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). The rationale for this rule is that when considering a determination that an agency makes, the reviewing court should review only the materials that were before the agency when it made its decision. *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947). So too here, the Court should confine its review to the Administrative Record.

CONCLUSION

Plaintiff has failed to show that the 2018 M-Opinion and Interior's subsequent denial of its request to restore the Public Domain Lands to trust status is arbitrary and capricious or contrary to law. The 2018 M-Opinion interprets the law and reasonably concludes that because no congressional act entitled the Tribe to proceeds from the sale of lands in the Public Domain Lands, Section 3 of the IRA does not authorize Interior to hold those lands in trust for the Tribe. Therefore, Interior's denial of the Tribe's request should be upheld. For the reasons discussed above, the Court should grant Federal Defendants' cross-motion for summary judgment and deny the Tribe's cross-motion for summary judgment on Plaintiff's remaining claim in its Complaint. Final judgment should then be entered.

numbers that are not in the Administrative Record); Tr.'s Br. at 10 (citing Report of Utah Expedition, printed in Desert News, Sept. 26, 1961, quoted in Charles Wilkinson, Fire on the Plateau, 150 (Island Press 2004) (citing Peter Decker, "The Utes Must Go!": American Expansion and the Removal of a People, Ch. 6 (2004)).

Respectfully submitted this 26th day of April, 2024.

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