IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPT. OF INTERIOR, DEB HAALAND, SEC'Y OF INTERIOR, and LAURA DANIEL-DAVIS, ACTING DEP. SEC'Y OF INTERIOR Defendants.	)	Civil Action No. 1:18-CV-546-CJN

CONTENTS

DISCUSSION OF LAW

Although the Executive Branch attempts to hide its concessions through convoluted discussions, the parties agree that ***if*** the 1880 Act created compensable title for the land on the

Uncompahgre Reservation in Utah, ***then*** this Court must vacate the appealed decision and must direct the Executive Branch to treat that land as trust lands. As the United States clearly states before it starts obfuscating, "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. [Sic![1] That is, whether the Tribe has compensable title in the lands at issue." Haaland Br. at 9.

Section 3 of the 1880 Act did exactly what the Executive Branch, in the quote above, concedes is the creation of compensable title, and which the United States concedes is dispositive in this case.

As the Tribe discussed at length in its opening brief, the United States entered into treaties with the Uncompahgre Band in 1863 and 1868, to create a "permanent" reservation for the Band in Colorado. Just more than a decade later, the United States came back to the Band and "secured the 'consent' of the Uncompahgre Utes to a removal agreement." *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072 (D. Utah 1981) (*Ute I*).[2] Under that "agreement" the Band would give up 3.7 million acres of its Reservation in Colorado based upon the quid pro quo that the United States would "set apart" a new Reservation for the Band in either Colorado or Utah. Congress commanded and delegated to the Executive Branch the duty to find and "set apart" that replacement Reservation. 1880 Act` § 1. *See also* Cong. Rec. – House Dec. 18, 1879 at 179. ("Let us now remove them

[1] As discussed below, the 1880 Act specifically and expressly defines the lands that were to be "set apart" under the 1880 as different from "public domain lands," including and primarily by expressly providing that the Tribe is entitled to proceeds from sale!) No matter how many times the Executive Branch erroneously refers to the lands as "public domain lands," it cannot change or evade the express and clear language in the 1880 Act.

[2] In his decision in *Ute I*, Judge Jenkins use of quotes around the word "consent" reflects that the United States forced the Tribe to "consent" to give up their Reservation in Colorado in exchange for the replacement Reservation that was ultimately created in Utah.

from their present reservation. A suitable reservation can be found elsewhere, large enough for their wants and out of the reach of white settlements.")

The 1880 Act provided that at some point after the land was "set apart" and then allotted, non-Indians would be permitted to acquire the land through cash entry, not through homesteading. And, as is the definition of "compensable title—including the definition by the Executive Branch, quoted above--**the proceeds from sale of the lands that were "set apart" "shall be deposited in the Treasury as now provided for law for the benefit of said Indians." 1880 Act ¶3.**

As discussed in detail in the Tribe's opening brief, the President complied with Congress' directive to create the replacement Reservation. As required by the 1880 Act, he tasked other Executive Branch officers to locate land for the new Reservation and he then issued the 1882 presidential proclamation which "set apart" that replacement Reservation as required by the 1880 Act. Under the express language of the 1880 Act, once that land was "set apart" as required by the 1880 Act, it could only be sold for cash, with proceeds to the Tribe.

If the United States had eventually sold the land and put that money into that trust account, we would not be in this Court today. But the United States did not sell the land. For all of the land at issue in this case, the United States still owns the land, and it has been wrongly taken untold hundreds of millions of dollars from sales of the land or interests in the land.

While the remainder of this brief will pick apart the Executive Branch's convoluted and at times contradictory efforts to distract from the language of the 1880 Act, the result is patently obvious from the above. The Tribe has compensable title from the 1880 Act.

Redundant to the plain language of the 1880 Act creating compensable title in the land which was "set apart," once that land was set apart, only Congress could take that land from the

Tribe, and Congress never took the land. Because Congress never took the land, the Tribe's compensable title from the 1880 Act remains. The land is Ute Indian Tribe's land.

The 1880 Agreement was a very bad deal for the Ute Indian Tribe. The Tribe was forced to give up millions of acres of higher quality land in Colorado and later found out that all it got in return was a smaller reservation of uninhabitable (and still uninhabited) high desert in Utah.

Secretary Haaland now argues that the deal was even worse for the Tribe than tribal members or the 1880 Congress thought. Secretary Haaland asserts, contrary to the express language of the Act, that the Tribe did not have the right to proceeds from the sales of the "set apart" lands. Instead, she claims, the only land the Uncompahgre got in return for millions of acres of good land in Colorado was a right for each of its members to obtain an allotment in uninhabitable desert in Utah. Even the Congress in 1880, which was no friend to Indians,[3] did not have the audacity to treat the Tribe as bad as Secretary Haaland now does. *E.g.*, Cong. Rec. Dec. 18, 1879 at 179. (House members on both sides of the debate recognized that they could not take the Uncompahgre Band's Treaty lands without providing an honorable quid pro quo. Some members

[3] *E.g.*, Cong. Rec – House Dec. 18, 1879 at 179 ("It is manifest destiny that they [the Bands of the Ute Indian Tribe in Colorado] should go. Let us, then, provide that their going be peaceful…")

seemed to believe that they could take land from the separate White River Band because that Band was involved in the "Meeker Massacre").[4]

I. INTERPRETATION OF THE 1880 ACT STARTS WITH THE LANGUAGE OF THE ACT, AS CONSTRUED UNDER THE INDIAN CANONS OF CONSTRUCTION.

As discussed in the Tribe's opening brief, this Court must decide two closely related legal issues. In the appealed Executive Branch decision, the Executive Branch claimed, as an issue of law, that it cannot treat the lands as trust. Under some fact scenarios very different from the current case. if lands on a Reservation are still owned by the United States, the Executive Branch has some discretion to determine whether or not to restore the lands. But here, the Agency did not claim to be exercising discretion. It claimed that its hands were bound by law—that it could not restore the lands even if it had wanted to. A court cannot affirm on a basis the agency did not rely upon, nor can a court, on review, make a discretionary decision for an agency. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Second, as the Tribe correctly discussed in its opening brief, in the current case, the agency has no discretion whatsoever. As an issue of law, the Executive Branch is required to treat the

[4] The Tribe encourages the Court to read the whole of the cited debate from December 18, 1879. It shows that the Congress at the time did not think they could do what Secretary Haaland now claims they did—take the Uncompahgre land in Colorado without a quid pro quo. They repeatedly discuss the immorality of what Secretary Haaland now argues for, and further discuss concern with how that immoral and illegal act would harm the United States' international standing. In that debate, many Congressmen (primarily from east of the Mississippi) discussed that forcing the Uncompahgre Band to move from their "permanent" Reservation in Colorado to Utah was legally and morally wrong; while multiple Congressmen from the west said in essence that Congressmen from the east were being hypocrites—that it was only after the Indians had been similarly forced from their states, often with similarly blatant federal violations of treaties, that the Congressmen from the east began claiming that tribal treaty rights should be honored. The current Executive Branch's position in this case – championing the argument that Congress took 3.7 million acres of land from the Tribe in 1880 in exchange for some allotments in uninhabitable desert in Utah—would be unconscionable to many in Congress in 1880. It is also unconscionable today.

land as trust lands based upon the applicable Act of Congress and the rule that only Congress can remove land from tribal trust ownership.

In interpreting a statute, the Court must begin with the language of the act. *Chemehuevi Tribe of Indians v. Fed. Power Comm'n*, 420 U.S. 395 (1975); *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020); *City of Clarksville v. FERC*, 888 F.3d 477, 482 (D.C. Cir. 2018); *Wash. Water Power Co. v. FERC*, 77F.2d 305 (D.C. Cir. 1985). Here, the plain language of 1880 Act required the Executive Branch to locate a new Reservation for the Uncompahgre Band and remove the Uncompahgre Band from their "permanent" Reservation in Colorado to that replacement Reservation.

In its opening brief, the Tribe quoted at length from the 1880 Act. Section I of the Act requires the "Government of the United States" to "set apart" the lands on the replacement Reservation for the Uncompahgre, and Section 3 then provides that for the lands that are "set apart" as required by section 1, the lands can only be sold for cash and that the proceeds from the sale "shall be deposited in the Treasury as now provided for by law for the benefit of the said Indian…and the interest thereon shall be distributed annually to them…"

That language is clear and unequivocal.

The Executive Branch ignores the clear language of the statute. Without discussing the actual text of the 1880 Act, the Executive Branch states over and over again that the lands that were set apart for the replacement Reservation were "public lands." But its uninformed assertion is directly contrary to the pivotal plain language of Section 3 of the 1880 Act. Section 3 says that the land "shall be held and deemed to be public lands…***except as provide in this act:*** *Provided, that …"* Congress then expressly defined how the lands that would be "set apart" were different from public lands. Dispositive for current purposes, one difference was that the lands which were

"set apart" could only be sold for cash and that sale of the land had to be placed in trust for the Tribe.[5]

A. BECAUSE THE 1880 ACT IS A LAW FOR THE BENEFIT OF THE UTE INDIAN TRIBE, THIS COURT INTERPRETS THAT LAW DE NOVO, APPLYING THE CANON OF CONSTRUCTION APPLICABLE TO LAWS BENEFITTING TRIBES.

While the Tribe therefore does not need to resort to the Indian canons of construction or any other canons of construction, those canons make this Court's job easier still.

Contrary to the Executive Branch's assertion of the standard of review, Dkt.103-1 at 19, the Executive Branch does not have discretion to violate the 1880 Act of Congress, and this Court does not review the Executive Branch's ongoing violation of that statute under the arbitrary and capricious standard. *Artesian Indus. v. DHS,* 646 F. Supp. 1004 (D.D.C. 1986). This Court reviews matters of statutory construction and other questions of law de novo. 5 U.S.C. § 706(2).

> Based on the express language of the APA, the arbitrary and capricious standard applies only to "actions, findings and conclusions," *id.,* by an agency, excluding any questions of law. The APA explicitly empowers reviewing courts to decide "all relevant questions of law," 5 U.S.C. § 706 (1982), and the United States Court of Appeals for the District of Columbia Circuit has construed this language to mean what it says—questions of law are to be decided by courts, not agencies. *See NOW, supra,* 736 F.2d at 734–35.

Artesian Indus., Inc. 646 F. Supp. at 1006. *See also N.Ga. Bldg. & Constr. Trades Council v. Goldschmidt*, 621 F.2d 697 (5th Cir. 1980); *Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689 (3d Cir. 1979); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972). *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1373 (Fed. Cir. 2000) ("This Court reviews issues of statutory interpretation under a de novo standard of review.")

[5] If the Executive Branch were to attempt to shift to an argument that the lands that were "set apart" were not Reservation, that argument would similarly fail. Congress used the term "set apart" to describe the requirement to create the new Reservation and also used that exact same term to describe the lands for which the Tribe would have compensable title.

Based upon its legally erroneous starting premise, the Executive Branch repeatedly asserts that the Tribe must show that the Executive Branch's "interpretation" of the 1880 Act is "unreasonable," and it then feigns to criticize the Tribe for the Tribe not attempting to meet the supposed burden to show that the Executive Branch's current self-serving "interpretation" of the 1880 Act is unreasonable.

To be sure, the Executive Branch's current "interpretation" is unreasonable. It is directly contrary to the language of the statute. It is also contrary to many prior statements and decisions by the Executive Branch which were based upon the Tribe having compensable title to the Uncompahgre.[6] The United States current position cherry-picks documents supporting its current self-serving claim, while ignoring the language of the 1880 Act and the federal documents which are based upon the correct premise that the Tribe had compensable title and therefore the lands are held in trust. But the Tribe is not required to show that the Executive Branch's analysis of the issue of law is unreasonable. There is no deference applicable here.

The Executive Branch grounds nearly all of its arguments upon an assertion that it can take the Tribe's homeland from the Tribe as long as the Executive Branch can come up with a "reasonable interpretation" that it is not violating the 1880 Act, Halland Br. Heading for §III, id. at 21, 22; or that the Court would grant deference to the agency's interpretation. Haaland Br. Heading for §V.

[6] In its discussion of facts in its opening brief, the Tribe provided several pages of discussion of the 1887 Act, 24 Stat. 548 and other proposed legislation and Executive Branch actions in the decade after the 1882 Proclamation which shows that both Congress and the Executive Branch understood at that time that the Tribe had compensable title. Inexplicable, in its response brief, the Executive Branch evades that discussion of the most relevant federal actions based upon its incorrect assertion that the Tribe did not discuss Mr. Jorjani's cherry-picking of federal statements which supported his conclusion, and that Mr. Jorjani wrongly relied upon federal statements from decades later, which have no persuasive force for interpretation of the 1880 Act. The Tribe discussed that point in detail. The United States did not respond.

But, after repeatedly asserting that the Executive Branch's implausible "interpretation" of the 1880 Act must be accorded deference, the United States belatedly but correctly acknowledges that this Court is required to apply the Indian cannon of construction when interpreting tribal treaties and acts like the 1880 Act and the 1897 Act. Haaland Br. §III.c. Contradicting its prior assertion of deference, the Executive Branch acknowledges that if the statutes were ambiguous, that ambiguity must be construed in favor of the Tribe. The United States sole response to the Tribe's discussion of the Indian canons is its assertion that the treaties and statutes are not ambiguous.

B. DEFENDANTS ARGUMENT FOR "*SKIDMORE* DEFERENCE" IS CONTRARY TO DEFENDANT'S CONCESSION THAT THE INDIAN CANON OF CONSTRUCTION APPLIES IF THE STATUE IS AMBIGUOUS AND CONTRARY TO THE CANON THAT THE TREATIES AND 1880 ACT MUST BE CONSTRUED AS TRIBAL MEMBERS UNDERSTOOD THOSE ACTS.

In Section V of its response brief, the United States makes an undeveloped assertion that the Executive Branch's interpretation of the 1880 Act would be entitled to "*Skidmore* deference." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "*Skidmore* deference," which is a misnomer since it is not a rule of deference, is very weak, and even if *Skidmore* deference applied, it would not tip the scale in favor of the Executive Branch's "interpretation" of the 1880 Act.

But the Tribe notes that *Skidmore* deference does not apply. If the scales were so evenly balanced, the Indian canon of construction would tip the scale in favor of the Tribe. In section III.c of its own brief, the Executive Branch correctly concedes that the Indian Canon applies if the statute is ambiguous. Defendant appears to have failed to notice the contradiction between its concession that the Indian canon applies and its contradictory citation to *Skidmore*, and it has not cited any case which holds that *Skidmore* deference trumps the Indian canons.

Plaintiff also has not located any federal court holding that *Skidmore* deference trumps the Indian canons, but the majority of the case law concludes that the Indian canon for interpretation

of a federal statute trumps *Chevron* deference. "Whereas *Chevron* promotes a general rule of deference to agency determinations, the Indian canon provides specific guidance regarding the interpretation of statutes relating to Indian tribes." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 851 (W.D. Mich. 2008). *See generally* Scott C. Hall, *The Indian Law Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 Conn. L. Rev. 495, 499 (2004).

By that same rational, the Indian canons would yet more easily trump the much weaker *Skidmore* deference. Here, the Executive Branch was supposed to interpret the statute consistent with the Indian canons. Notably in the appealed decision, the Executive Branch never discussed that duty, nor did it discuss how the members of the Tribe would have understood the statute in 1880. Instead of relying on these applicable canons of construction, the Executive Branch, in 2018, stuck to the conclusion in its own prior incorrect M-opinion, even though the legal assertion in that prior opinion was based upon the Executive Branch's subsequently rejected claim that the 1897 Act had disestablished the Reservation—a conclusion that the Executive Branch has now conceded was wrong. Unwilling to change its conclusion, the Agency now comes up with a new rationale for its prior incorrect conclusion. Its new rationale is even weaker than its own prior rationale, because its new rationale is directly contrary to the language in the 1880 Act.

II. THE 1897 ACT DOES NOT ALTER THE FACT THAT THE TRIBE HAS COMPENSABLE TITLE UNDER THE 1880 ACT.

In admirable sophistry, the United States begins section ____ of its brief with an assertion that the 1897 Act "superseded" the compensable title that the Tribe acquired in the 1880. After making that bold assertion, the remainder of the United States brief does not support that the 1897 Act superseded the provision for compensable title in the 1880 Act. Instead, the United States primary argument, Haaland Br. at 22-23, is exactly in agreement with the Tribe—that the 1897

Act did not alter whether the Tribe had compensable title from the 1880 Act. The United States actual argument is:

Premise 1: The Tribe did not have compensable title to the Uncompahgre Lands under the 1880 Act. As discussed above, that essential premise is wrong.

Premise 2: the 1897 Act did not create compensable title.

Conclusion: The Tribe did not have compensable title at any time.

This crucial and obvious logical error by the United States permeates their argument. It is the reason they misunderstand the *Ute Indian Tribe* line of cases. In *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. en banc 1985) (*Ute III*), the State of Utah and the United States acknowledge that the replacement Reservation had been created, and they argued that the 1897 Act disestablished the Reservation. The State of Utah and their amicus United States lost on that issue. Had they won, that may have meant that the 1897 Act took the Tribe's compensable title. But they lost. The 1897 Act did not return the lands to the public domain, did not disestablish the Uncompahgre Reservation, and did not alter whether or not the Tribe had compensable title under the 1880 Act.

The Executive Branch agrees with the Tribe that the *Ute Indian Tribe* line of cases was focused on the 1897 Act and on whether the land remained Reservation, and that ownership and Reservation status are not always coterminous.[7] Although the Executive Branch discusses that that limitation on the *Ute Indian Tribe* line of cases, the Executive Branch contradicts itself by arguing that pure dicta from a concurring opinion in *Ute III* shows that the Tribe did not have

[7] Whether the Reservation status and beneficial tribal ownership were coterminous in 1880 or 1897 is debatable. The General Allotment Act was passed in 1887, and the first cases which held that Reservation status and ownership were not coterminous come after the passage of that Act. This Court has no reason to decide that issue in the current case, because the 1880 Act provided that the Tribe had compensable title to the lands that were set apart.

compensable title. That dicta, which did not analyze the language of the 1880 Act, is of no value. It is, instead, an illustration of why courts should avoid making dicta statements.

Unlike the Court in *Ute III*, this Court is required to analyze the language of the 1880 Act, and determine whether it provides the Tribe with compensable title. If the 1880 Act creates that compensable title, then (as the Tribe discussed at length in its opening brief), the holding in *Ute III* supports the Tribe's position and contradicts the Executive Branch's position. The 1897 Act did not impact compensable title. *Ute III*; Haaland Br. 30-31. The 1880 Act created compensable title, and that compensable title continues for all of the land which the United States owns on the Uncompahgre Reservation.

III. THE UNITED STATES TWO UNDEVELOPED ARGUMENTS ABOUT THE ADMINISTRATIVE RECORD ARE WITHOUT MERIT.

In its brief, the United States makes two undeveloped arguments related to the administrative record. Both arguments are incorrect on the law and on the facts.[8] Additionally, neither is of any importance to the merits issue. This Cour should reject the Executive Branch's attempt to distract from the merits issue.

First, it makes a general complaint that the Tribe did not cite to the administrative record. But the Tribe's brief does not discuss anything for which a citation to the administrative record was appropriate or required. This case is not a fact-based case. It presents an issue of law, and the Tribes' citations, other than the appealed decision, are to statutes, congressional debates, cases, history books and legal treatises. Under bluebook rules, one is supposed to use the legal citation

[8] The United States is correct that two of the Tribe's citations were erroneous. Those were placeholder references to pages in the 1879 Congressional debates. The Tribe had intended to replace them with the citation to the Congress Report, but missed those in its citation check near the end of drafting. The current brief contains corrected citations, and contains exact quotes from the congressional debate.

if it is available. *See also Indian Coal Council v. Hodel*, 118 F.R.D. 264 (D.D.C. 1988)[9] (the legislatively history … is 'law' not 'evidence.' … Particularly in this type of case, involving administrative review, the "evidence" is generally the administrative record itself. The legislative history of SMCRA will be part of the legal argument made on behalf of different interpretations of the statutes and regulations, and not part of the record reviewed by the Court.")

Citation to the primary legal source also provides greater clarity for the brief; and the Tribe assumes that when this Court issues its decision, the Court will also cite to the legal source instead of pages in an administrative record, so that this Court's decision is usable by more than just the few attorneys in this case. The Executive Branch's brief (which the Tribe views as *wrongly* citing the administrative record for legal sources) illustrates the lack of clarity when a brief cites legal sources to an administrative record.

Next the Executive Branch makes an undeveloped argument that the Tribe cannot cite *Cohen's Handbook of Federal Indian Law* –the preeminent legal treatise on Indian law—and that the Tribe cannot cite history books for general background. It is wrong. *Cohen's Handbook of Federal Indian Law* has been cited in more than 900 federal court decisions, including at least 75 citations by the United States Supreme Court and numerous citations in administrative appeals.[10] Citations to history books for general background are also proper. For example, in *Karuk Tribe*, 209 F.3d 1366, which Defendants cite and which is discussed in more detail below, the Court of Appeals cited multiple scholarly books on the history of the Karuk, Yurok, and Hoopa Valley

[9] In *Indian Coal Council*, the United States argued that legislative history is not even properly part of the administrative record.

[10] The Tribe obtained these statistics by a search of all federal cases in Westlaw, with a search for Cohen /5 "handbook of federal Indian law"

Tribes. *See also Texas & Pac. Ry. Co. v. Pottorff,* 291 U.S. 245 (1934), *Akira Ono v. U.S.,* 267 F. 359, 362 (9th Cir.1920).

IV. KARUK TRIBE SUPPORTS THE TRIBE, NOT THE DEFENDANTS.

Central to the United States argument in this case is its illogical "interpretation" of *Karuk Tribe,* 209 F.3d 1366. The United States mistakenly or misleadingly cites *Karuk Tribe* for the proposition that an Executive Order never creates compensable title. That is simply not the holding in that case, nor is there any case which contains such a holding. Instead, as discussed above, the first rule of statutory construction is that a court must look to the language of the underlying congressional acts at issue. Karuk Tribe only holds the executive orders in *that particular case,* under a very different congressional act, did not provide sufficient basis for a takings claim for the Karuk Tribe and other individual plaintiffs.

There are innumerable large distinctions between that case and the current case, but most significantly, the Executive Order in *Karuk Tribe* was based upon a federal statute that gave the president *discretionary authority* to create reservations in California. The president exercised that discretionary authority to issue multiple executive orders which created, expanded, and altered a reservation on which multiple tribes lived. Congress ultimately intervened to resolve ongoing disputes regarding which tribes or Indians had rights in that land, and the plaintiffs asserted the congressional act seeking to resolve the ongoing disputes constituted a taking of their interests in that land.

It was in this context that the court held that the Executive Orders issued under that *discretionary authority* did not create compensable title for the specific plaintiffs who had brought suit.

The Executive Branch's attempt to overgeneralize the decision in *Karuk Tribe* to the current case shows one of the errors in the Executive Branch's core argument. In the 1800s, an

executive order creating a Reservation did not *always* create compensable title, but it is equally true that an Executive Order does create compensable title where, as here, the President is issuing the executive order based upon a directive by Congress to create and set apart land for a particular tribe with payment to the Tribe for sale of the land set aside, and redundantly where the congressional Act at issue required that proceeds from eh sale of the land which was set aside must be held in trust for the Tribe. Again, the basic rule for statutory construction is to start with the language of the particular statute at issue. Here, it is not to start with the statute for some tribes in California.

As is obvious, and as the Tribe discussed in its opening brief, the 1882 Executive Order in the current case was in execution of Congress' 1880 directive. The Tribe discussed the steps the Executive Branch took to comply with the 1880 Act—identifying land for the new Reservation, cajoling the Tribe to move to that land, etc.

If the President had issued an executive order without an Act like the 1880 Act, the Executive Branch would have a stronger argument (though still likely wrong for other reasons). But its assertion that the1882 Executive Order is independent from the 1880 directive to set aside land for the Uncompahgre Band is simply contrary to history. It weas in execution of the 1880 Act.

CONCLUSION

This case presents the same issue that arises every day in federal courts. Congress passed a statute, and the Executive Branch has the duty to execute and comply with that statute. If the Executive Branch fails to comply, parties bring suit to obtain an order from the Court requiring compliance.

Here, the Executive Branch is not complying with the 1880 Act. The 1880 Act gave the Tribe compensable title, and the Executive Branch admits that if the Act gives the Tribe

compensable title, the land should be held in trust for the Tribe. This Court should issue the order requiring the United States to comply with its duty.

Dated this 17th day of June, 2024

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