Case Nos. 16-8068, 16-8069
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING; STATE OF COLORADO; INDEPENDENT PETROLEUM ASSOCIATION; and WESTERN ENERGY ALLIANCE,
Petitioners-Appellees
and
STATE OF NORTH DAKOTA; STATE OF UTAH; and UTE INDIAN TRIBE,
Intervenors-Appellees
v.

S.M.R. JEWELL; NEIL KORNZE; U.S. DEPARTMENT OF THE INTERIOR; and U.S. BUREAU OF LAND MANAGEMENT,
Defendants-Appellants
and
SIERRA CLUB; EARTH WORKS; WESTERN RESOURCE ADVOCATES; WILDERNESS SOCIETY; CONSERVATION COLORADO EDUCATION FUND; and SOUTHERN UTAH WILDERNESS ALLIANCE,
Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, NOS. 15-CV-41/43 (HON. SCOTT W. SKAVDAHL)

RESPONSE BRIEF OF INTERVENOR-APPELLEE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

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Current appellants previously appealed from the District Court's grant of a preliminary injunction in the same underlying case. This Court dismissed that appeal as moot after the entry of the permanent injunction. 10th Circuit case nos. 15-8126; 15-8134.

GLOSSARY

BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
FLPMA	Federal Land Planning and Management Act
IMDA	Indian Mineral Development Act
IMLA	Indian Mineral Leasing Act

INTRODUCTION

The greatest concern of the Ute Indian Tribe of the Uintah and Ouray Reservation (the Tribe) in this case is that its independent arguments will get lost because of the size of the other main issue in this case. Even though the issues the Tribe is raising are extremely important to the Tribe, they are nevertheless dwarfed by the size of the issue related to fracking on federal lands. All of the Tribe's oil producing lands are at issue in this case. And the income the Tribe needs to fund its government, including educational programs, human services, infrastructure development, and much needed programs to diversify come from those oil producing lands and from the associated economic activity. The Tribe agrees with the arguments which are being raised by the other appellees (the states and industry groups), and if those parties prevail, this Court, like the District Court, would not need to rule on the Tribe's separate, stronger, arguments. But the Tribe has additional, stronger, independent arguments from those which apply to federal lands.

As applied to tribal land, BLM does not have any plausible argument: it is simply not the federal agency with authority to adopt regulations regarding tribal lands. BLM's own organic statute expressly excludes Indian lands from BLM's rule-making authority. And for good reason: BLM's lack of respect and concern for tribes was evident by its failure to consult with tribes and is further evident by its attempt use outdated and incorrect appeals to paternalism as a smoke screen to hide

the fact that it had and has no lawful basis for its attempt to enact regulations for tribal trust property.

The BLM does not even provide this Court with a developed argument for its contention that it has rulemaking authority related to tribal lands. Instead it: 1) provides a one sentence "argument" related to its attempt to seize regulatory control over tribal lands, which contains only a bare citation to statutes related to federal leasing and regulatory authority, without any analysis; and 2) occasionally, inappropriately sticks the clause "and Indian lands" into paragraphs which are discussing legal authorities which do not apply at all to Indian lands.

The Tribe's position is that this rudimentary discussion is an abandonment of any argument related to Indian lands. The Tribe should not be required to set out BLM's own argument before responding. Section II, infra. The remainder of the Tribe's brief are unnecessary if the Court resolves the matter under section II. Section III through V will discuss the issue that BLM chose not to brief—why BLM lacks rulemaking authority regarding tribal lands, and how it failed to consider the factors required under laws applicable to the Tribe.

It is one thing for BLM to adopt the Fracking Rule for <u>its own</u> lands, where it has the powers of both a government and the land owner; but it is something far different to paternalistically impose that exact same Rule against <u>tribal lands</u>, where BLM does not have the beneficial ownership, where Congress excluded BLM from

rulemaking, and where the Tribe has both governmental power and beneficial ownership. While the Tribe can have reasoned discussions with others regarding what is best for the Tribe, its lands, and its people, in the end it is, both in general and in the specific context here, for the Tribe to then make the decision. It is not for outsiders or the United States to attempt to impose their will on a Tribe which has been existing and living on these lands since before the United States was born.

DISCUSSION OF LAW

I. EVEN IF THIS COURT WERE TO REVERSE REGARDING FEDERAL LANDS, IT SHOULD AFFIRM WITH REGARD TO INDIAN LANDS.

In issuing the permanent injunction, the District Court correctly held that if the Rule is enjoined on federal lands, the rule must also be enjoined on tribal lands. The Appellants do not dispute that portion of the District Court's ruling, and instead only dispute the predicate that the rule should be enjoined on federal lands. Therefore, if this Court affirms with regard to federal lands, it must also affirm with regard to Indian lands.

But the inverse is not true: if this Court were to reverse with regard to federal lands, there would then remain for resolution the Tribe's substantially stronger argument that the Rule should remain enjoined on tribal lands.

The Tribe wholly agrees with the arguments of other appellees that Congress has not given BLM sufficient authority to impose the Rule on federal lands. But the

whole of the Tribe's brief to this Court is based upon the assumption arguendo that this Court were to reverse the District Court with regard to federal lands.

The Appellate Court should affirm the permanent injunction, either in whole as applied to both federal and Indian lands, or in part as applied to Indian lands if the injunction order is reversed as applied to federal lands.

It is well established that a court of appeals may affirm for any reason which is sufficiently established in the record. *E.g.*, *Cayce v. Carter Oil Co.*, 618 F.2d 669, 677 (10th Cir. 1980) ("This Court has held that an appellate court will affirm the rulings of the lower court on any ground that finds support in the record, even where the lower court reached its conclusions from a different or even erroneous course of reasoning."). The current appeal is based upon the administrative record, and that record here supports the issuing of a permanent injunction, and the District Court noted in its issuing of a preliminary injunction that the Tribe would likely succeed on the merits of its failure to consult claim. Therefore, the Appellate Court is free to look to the record and affirm the permanent injunction as applied to the Ute Tribe in this case. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981).

Although he Tribe's view is that this Court should affirm with regard to Indian lands for reasons sufficiently established in the record, it would be permissible, if this Court were to reverse regarding public lands, for this Court to remand the Tribe's separate issues to the District Court. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552

U.S. 379, 387 (2008). The District Court did not separately analyze the tribal issue in the permanent injunction order, thus the Appellate Court may decline to decide the Indian law issue on the merits, in which case it would remand those issues for the District Court to decide them in the first instance. *Id.* This would give the district court a chance to analyze the merits and determine whether to continue the permanent injunction for tribal lands.

The Tribe is confident that if this Court were to reverse regarding public lands, the Tribe would, upon proper analysis, easily prevail regarding Indian lands. Regardless of what procedure the Court employees, it must make sure that the Tribe's separate issues are fully and fairly resolved, that separate consideration is provided regarding the BLM's attempt to usurp rulemaking authority regarding Indian lands when BLM's own organic document expressly limits its rulemaking to public lands.

II. BLM ABANDONED ANY ARGUMENT THAT IT HAS REGULATORY AUTHORITY REGARDING TRIBAL LANDS.

It is well established in this Court that if an appellant only makes perfunctory statements on an issue, it has abandoned the issue on appeal. In *Holmes v. Colorado Coalition for Homeless Long Term Disability Plan*, 762 F.3d, 1195 (10th Cir. 2014), this Court provided a detailed discussion of this rule of law, complete with citation to numerous other precedents from this Circuit on the issue:

> Ms. Holmes has not met her burden of adequately briefing her challenges to the interlocutory orders on appeal and we will not consider them further. *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1223 n. 6 (10th Cir. 2008) (refusing to consider an argument where appellant failed to "'advanc[e] reasoned argument as to the grounds for the appeal'" (alteration in original) (quoting *Am. Airlines v. Christensen*, 967 F.2d 410, 415 n. 8 (10th Cir. 1992))); *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived...."); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n. 2 (10th Cir. 1994) (stating that "a few scattered" and "perfunctory" statements that failed to frame and develop an issue were insufficient to invoke appellate review); *see also* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain ... appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

762 F.3d at 1199.

As it relates to the Tribe, Congress expressly excludes tribal land from BLM's control. FLPMA §1702(e) defined the public lands which are subject to BLM's control:

> The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except . . . (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702(e) (emphasis added). Therefore, as it relates to lands held for the benefit of Indians, Aleuts and Eskimos, the threshold issue is whether BLM has rulemaking authority regarding those expressly excluded lands.

BLM knows that is the threshold issue. *E.g.*, UTSA_0026, 0053 (BLM discusses that threshold issue in detail). Yet BLM does not provide this Court with

any legal analysis of how it claims to have rulemaking authority over tribal land. Instead it merely asserts, directly contrary to the FLPMA, that it is the federal agency with "the duty to oversee operations on federal and Indian oil and gas leases." BLM Br. at 1. In fact, as applied to Indian lands, the allegation is frivolous. 43 U.S.C. § 1702. At the very most, the only even colorable claim of power that BLM has is a claim for some non-rule-making power which BIA allegedly delegated to BLM.[1]

As the Tribe will discuss in section III of this brief, BLM's argument that it has rulemaking authority regarding tribal lands is convoluted and incorrect. But this Court should not even need to review the Tribe's discussion of the obvious holes in BLM's argument because BLM has not provided any argument in its brief. Instead all it has done is provide a single paragraph, with bare citations to statutes which, in reality directly contradict its argument, and then provides the statement, and then concludes that it has rulemaking authority on tribal lands even though Congress expressly excluded tribal lands from BLM's rulemaking authority. BLM's actual argument (which the Tribe knows only because the United States did brief it in the Court below), contains multiple premises, *e.g.*, UTSA_0026, 0053, only the first of which they even mention (and even for that one they do not provide any analysis).

[1] BLM occasionally, and seemingly as an afterthought, adds the phrase "and Indian tribes" to discussions of other authorities which plainly do not apply to Indian lands. For example, on page 17 of its brief, asserting that black is white, BLM cites the FLPMA as providing express delegation for activities "on federal and Indian lands." The FLPMA does exactly the opposite: it expressly excludes Indian lands.

Their argument, in simplified form has the following five premises, with its conclusion dependent on BLM prevailing on all five:

1. Although the FLPMA expressly excludes tribal lands from BLM regulatory authority, 25 U.S.C. § 396d provides BIA with specified authority regarding leasing of tribal lands;
2. The statutes providing BIA with leasing approval somehow permit regulation of fracking, although BLM has never articulated an argument in support of this assertion;
3. Through regulations, BIA delegated its rulemaking authority for "restricted lands" to BLM, even though BIA regulations are directly contrary;
4. BLM then exercised that authority for "restricted lands";
5. "Restricted lands" somehow includes tribal trust lands, even though **"restricted lands" is a term of art that does not include trust lands**.

It is particularly bothersome that BLM's argument is dependent upon an assertion that trust lands are "restricted lands. BLM knows better, and should be more forthcoming with the Court: it has no plausible argument regarding tribal lands, and it should be admitting that, and not putting the Tribe to the expense to fight it on an argument that it knows is, bluntly, meritless.

BLM's convoluted, legally unsupported argument is set out in their briefs to the District Court. *E.g.*, UTSA_0026. (United States provides a 22-page brief in response to the Tribe's motion for preliminary injunction, discussing all of the issues above); UTSA_0048 at ¶5 (United States moved for leave to file an over length consolidated response to all other petitioners' motions for preliminary injunction, but also stated, "Federal Respondents plan to file a separate brief in response to Petitioner Ute Tribe because its brief largely raises unique arguments that do not overlap with the other three briefs.") (emphasis added); UTSA_0053, (BLM filed a 36 page response brief solely to the Tribe's arguments).

But when it filed its opening brief with this Court, BLM chose not to provide this Court with briefing related to the "unique arguments" which the Tribe raised below.

It may be very reasonable, based on law and on strategy, for the BLM to abandon its convoluted and incorrect attempt to seize rule-making authority over Indian lands and to focus exclusively on federal lands. It was going to lose anyway regarding tribal lands, its argument for rulemaking authority related to fracking on federal lands is stronger, its argument regarding federal lands applies to vastly more lands, and the United States has substantially greater interests in those federal lands. Whether by intention or otherwise, the United States did abandon the arguments regarding the Tribe's lands. The Court should not consider the BLM's conclusory

claim that it has rulemaking authority over tribal lands. That is the known consequence for failing to brief an issue, and the appellant here is BLM, not a pro se party or other party who might fit within narrow exceptions to the general rule.

III. APPLICATION OF THE RULE TO INDIAN LANDS EXCEEDS THE BLM'S AUTHORITY.

In its brief, BLM did not even address Congress' specific exclusion of Indian lands from BLM's authority in FLPMA. Although BLM was originally created in 1946 through the reorganization of two offices within Interior, FLPMA is the organic act for the modern day BLM. Enacted in 1976, FLPMA was intended to recognize and promote the values of the Nation's public lands and to guide federal agencies in the management of federal public lands. 43 U.S.C. §§ 1701-84. FLPMA establishes the standards for the BLM's obligations to protect public lands and to minimize adverse environmental impacts to the lands and resources held in trust for the public.

BLM's lack of authority over Indian lands is plainly set forth in FLPMA. In defining the "public lands" that BLM would manage under FLPMA, Congress specifically excluded Indian lands. Congress provided:

> The term 'public lands' means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except– . . . lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702 (e) and (e)(2) (emphasis added). Thus, when BLM exercises authority over public lands, that authority does not extend to Indian lands. Like every other federal agency, the Department of the Interior and BLM cannot supersede or ignore the specific direction of Congress.

Unlike the statutes governing Indian lands, FLPMA requires BLM to manage public lands for multiple use and sustained yield and to balance competing resource interests, including in part, historical, ecological, environmental, and archaeological values. *Id*. § 1701(a)(8). Because federal lands are held in trust for the general public, BLM must balance preservation with development.

FLPMA's land management standards differ from and are not compatible with the standards required of the federal government for the management of Indian trust lands. This is why Congress specifically excluded Indian lands from the application of FLPMA. 43 U.S.C. § 1702(e). In promulgating this Rule, BLM attempts to satisfy its obligations to public lands and to Indians lands with a single rule. However, by applying the FLPMA standard to Indians lands, BLM exceeded its delegated authority.

In its opening brief, BLM incorrectly cites to 25 U.S.C. § 396d as providing for federal regulation of oil and gas on Indian lands. Section 396d grants authority to the Secretary to promulgate regulations relating to any act affecting restricted Indian land:

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of Section 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

25 U.S.C. § 396d.

There are multiple errors in BLM's assertion that 396d provides BLM with rulemaking authority over tribal land. First, BLM's contention in the District Court below (which, as noted, it has not briefed to this Court), is that BIA delegated rulemaking authority under 396d to BLM, but the law clearly shows otherwise. IN its regulations under 396d, BIA exercised, not delegated rulemaking authority, and in exercising its rulemaking authority BIA was limited to incorporation of BLM regulations as they existed at the time of BIA rulemaking. Instead it is BLM which is seeking to seize power. Second, 396d is limited to "restricted lands,", which is a term of art which excludes Indian lands.

A. BIA HAS NOT DELEGATED ITS RULEMAKING AUTHORITY TO BLM

BLM asserted below that it gets around Congress' exclusion of tribal lands from BLM's purview because BIA regulations <u>delegate</u> BIA's future rulemaking authority to BLM. It is wrong. Instead the regulations are by the BIA, through which BIA was exercising its congressional delegated rulemaking authority related

to tribes. In exercising its delegated authority, the BIA, at most, only adopted and incorporated BLM regulations. For example, in the two primary regulations cited by BLM below, 25 C.F.R. §211.4 and 25 C.F.R. §225.4 BIA,[2] exercising its rulemaking function, states that some BLM regulations from Title 43 "apply to leases and permits approved under this part." These BIA regulations do not state BIA is delegating rulemaking authority, and in fact show that BIA is exercising rulemaking authority over the issues. While the Tribe's position is that BIA could not delegate rulemaking authority to BLM even if BIA wanted to (because Congress expressly excluded tribal lands from BLM's purview), the Court does not need to reach that more difficult issue because BIA did not delegate.

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

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

[2] In addition to the two regulations discussed in the body of this brief, BLM cited three other regulations to the District Court for its claim that BIA delegated BLM rulemaking authority. In those three regulations, BIA adopting regulations regarding suspension of operations under specified conditions, 25 C.F.R. §211.44 (applying 43 C.F.R. § part 3160 subpart 3165), and required secretarial lease approval, 25 C.F.R. §§211.48, 225.32 (applying standards from other BIA and BLM regulations). None of these regulations purport to grant rulemaking authority or to adopt future amendments to any incorporated regulations.

adopt and incorporate unknowable future BLM regulations, i.e. as applicable here the Fracking Rule.

1. IMLA

As it relates to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a *et seq.* ("IMLA"), the legal analysis of this issue is simple, because 25 C.F.R. §211.4 shows that BIA was adopting 43 C.F.R. Part 3160 as it existed on July 8, 1996, that it was not even attempting or purporting to incorporate future changes which BLM might make to regulations in Part 3160. We can determine this by contrasting the relevant BIA regulation under the IMLA, 25 C.F.R. § 211.4 (adopted in 1996, and not incorporating future changes) with the relevant regulation under the Indian Mineral Development Act of 1982, Pub. L. 97-382, 25 U.S.C. § 2101 ("IMDA"), 25 C.F.R. § 225.4 (adopted in 1994, and purporting to incorporate future changes).

Other than minor grammatical changes, BIA, exercising its rulemaking authority, made only one change in-between the two regulations. In both regulations, BIA incorporates BLM regulations contained in 43 C.F.R. Parts 3160, 3160, 3180, 3260, 3280, 3480, and 3590. BIA's incorporation under the IMDA states: "These regulations, as amended, apply to minerals agreements approved under this part." 25 C.F.R. §225.4 (emphasis added). But in its later regulations

under the IMLA, BIA incorporated as follows: "These regulations, [sic][3] apply to leases and permits approved under this part." 25 C.F.R. §211.4.

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

A corollary of this rule is:

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

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

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

[3] The stray comma is in the published regulation, and appears to have been accidentally left when the phrase "as amended" was purposefully removed.

incorporate any future changes to the Federal regulations into the Maryland SIP." Conversely here, the deletion of "as amended" has the opposite intent and effect.

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

In the IMDA, the BIA expressly purported to incorporate future changes to the incorporated BLM regulations, while in the IMLA it was incorporating the regulations as they existed on the date of the regulation, without incorporating any unknown future changes that BLM might make nearly 20 years later. Therefore the BIA, when exercising its rulemaking authority under the IMLA purposefully chose not to include any future changes to 43 C.F.R. Part 3160, i.e. chose not to incorporate the Rule currently at issue.

2. IMDA

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

Congress delegated both the general power related to Indian Affairs and the specific power for rulemaking under the IMLA and IMDA to the BIA. Because Congress provided the duty and trust responsibility to BIA, BIA cannot simply say that whatever the BLM adopts at some future date is BIA's rule. BIA is not

clairvoyant, and it therefore did not know, in 1994, that the BLM was going to attempt to regulate fracking on Indian lands in regulations in 2015, nor did it know the contents of those far-in-the-future regulations. Adopting BLM's future rules would be an abdication, not an exercise, of a BIA's delegated authority. *E.g.*, *Shankland v. Washington*, 6 Pet. 390, 395 (1831). *Compare United States v. Paul*, 6 Pet. 141 (1831) (incorporation of state statute could not incorporate future changes) *with United States v. Sharpnack*, 355 U.S. 286 (1958) (holding that because Congress had demonstrated intent, through 123 years of periodically reincorporating current state law as federal law, the reincorporation could include future changes).

C. PART 3160 DOES NOT APPLY TO TRUST LANDS.

As applied to both the IMDA and IMLA, the allegedly incorporated regulations in 43 C.F.R. Part 3160 apply only to restricted Indian lands, not to tribal or individual trust lands. While it has not made any argument to this Court, BLM argued below that the Rule applies to tribal trust land based upon the provision in 43 C.F.R. § 3160.01(b) which states that 43 C.F.R. Part 3160 applies to federal regulation of oil and gas deposits from "restricted Indian Land leases."[4] In the District Court BLM correctly identified and quoted the applicable definition of restricted lands, which shows that tribal trust lands are not restricted Indian lands:

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

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

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

That BIA definition of "restricted land" is in contrast to BIA's definition of trust lands: "Trust land or land in trust status means land the title to which is held in trust by the United States for an individual Indian or a tribe." 25 C.F.R. §151.2(d) (emphasis added).[5]

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

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

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

> There is a distinction between a "trust patent" and a "restricted fee" patent. Indians holding lands under a trust patent are the beneficial or equitable owners of the lands. While the United States holds the legal

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

> title in trust for the Indian allottee. In the case of restricted fee patents both beneficial and legal title pass from the United States to the allottee, subject to restrictions on the power of the allottee to convey or otherwise encumber the land."

Title Examination of Indian Lands, 5C Rocky Mtn. Mineral Law Inst. Special Inst. 5 (1977).

Although attempting to avoid the fatal consequences of this distinction to the BLM's current attempt to usurp rulemaking authority, the United States itself understands the distinction. For example, in Memorandum, Solicitor, Department of the Interior, to Secretary of the Interior, M-37023, "Applicability of 25 U.S.C. §2719 to Restricted Fee Lands," (Jan. 18, 2009), the Solicitor concluded that a statute that used the term "trust lands" unambiguously excluded "restricted land."[6] *See also* Robert T. Coulter, *Native Land Law* §4.3 (noting same distinction); Act of May 17, 1906, 34 Stat. 197 (repealed 1971) (providing for restricted fee patents to Alaskan Native Americans); 25 C.F.R. Part 151 (regulations for United States' acquisition of land in trust for tribes or tribal members); 25 C.F.R. Part 152 (defining procedures for issuance of a restricted fee patent and for removal of restrictions).

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

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

At most, BIA delegated rulemaking authority to BLM only related to restricted land. BLM's argument here that it can now engage in rulemaking regarding tribal or individual trust lands is simply wrong. It has not been delegated that authority.

D. CONGRESS WISELY CHOSE NOT TO PROVIDE BLM WITH AUTHORITY OVER TRIBAL LANDS.

The Secretary's authority to manage tribal mineral agreements under the IMLA and the IMDA does not supersede Congress' explicit limitation of the authority delegated to the Secretary and to the BLM under FLPMA. But while the wisdom of Congress' decision to exclude tribal lands from BLM's realm is immaterial, the Tribe assumes BLM will attempt to make immaterial policy

arguments in its reply brief, and the Tribe therefore will provide a brief preemptive discussion of the issue. Through FLPMA, Congress charged BLM with regulating oil and gas and other activities on public lands, specifically for multiple use and sustained yield of natural resources in accordance with the land use plans developed by the agency. Congress excluded Indian lands under its definition of public lands in FLPMA.

The limitation of BLM's authority on Indian lands is logical. Public lands and Indian lands are to be managed according to very different standards. Managing Indian lands according to public interest standards violates the standards established for the management of Indian lands. The national standards set out in FLPMA Section 102 have no place in the management of Indian lands and resources.

Unlike federal public lands, Indian lands are held for the exclusive use and benefit of Indian tribes and managed according to specific treaties and the federal trust responsibility to Indian tribes. Indian lands are to be used for the best interest of the tribe, not to be preserved or protected for general public recreation, occupancy or use.

Congress has established entirely separate standards for the management of Indian lands. The Supreme Court has described the standard found in laws dealing with the management of Indian lands as trust or fiduciary standards. For example,

in a case concerning the management of timber and forest resources by Interior, the Supreme Court stated:

> All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."
>
> Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.
>
> . . . .
>
> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

United States v. Mitchell, 463 U.S. 206, 225-26 (1983) (citations and footnotes omitted). As discussed above, the Tenth Circuit cases applying the general rule to this specific context hold that the United States does have enforceable trust responsibilities. *E.g., Wood Petroleum. Corp. v U.S. Dep't of Interior*, 47 F.3d 1032 (10th Cir. 1995). Importantly, Indian tribes, not the public, are the beneficiaries of these laws and standards.

If any federal agency should engage in rulemaking regarding Indian lands, it is the BIA. Over the past several decades, the Secretary has developed an entirely

separate set of rules and regulations that BIA administers for Indian lands. BLM acknowledges that the Rule is not the only possible way to carry out the federal trust responsibilities. Nevertheless, BLM attempts to justify the Rule by finding it is more economical than letting the BIA comply with its trust responsibilities by exercising its own congressionally delegated rulemaking authority. This statement reveals BLM's misunderstanding of the United States' fiduciary obligations to tribes. While BIA is far from perfect in performing carrying out the federal obligation to tribes, it is far better than BLM, and perhaps BIA would have properly consulted with tribes listened to tribes, and proposed a rule which properly balanced tribal economic and other interests. BLM did not. Congress was therefore wise not to have given BLM the rulemaking power over tribal lands, and this Court should not let BLM take that power.

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

Under the APA this Court "hold unlawful and set aside agency action" determined to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (construing 5 U.S.C. § 706(2)(A)-(D) as providing "the

generally applicable standards"). The court must set aside an agency action "unless it is supported by substantial evidence in the administrative record." *Via Christi Regional Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (quoting *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (internal quotation omitted)). *See also* 5 U.S.C. § 706(2)(E). In determining whether substantial evidence supports the agency's decision, "the court must also consider that evidence which fairly detracts from the [agency's] decision." *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 854 (10th Cir. 2007).

Agency action must be "based on a consideration of the relevant factors." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). An agency must also "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). "The agency itself must supply the evidence of that reasoned decision making in the statement of basis and purpose mandated by the APA [*i.e.*, the rule's preamble]." *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984).

The above is all familiar to this Court and thoroughly briefed by numerous parties. The only aspect which is not universal to review of agency action is that when considering the agency's action as it relates to tribes, an agency's trust responsibility to a tribe can enhance the standard of review for a substantive agency

decision. "Three essential predicates must be met in order to seek specific relief against the federal government for breach of trust: subject matter jurisdiction; a statutory consent to suit, and the existence of a claim upon which relief can be granted." Cohen's, § 5.05[1][a].[7] *Id.* *Cohen's* then notes that many of these claims for specific relief for breach of trust are brought under the APA, which provides the first two predicates if the tribe can state a claim. In such suits "courts frequently have turned to the common law of trust to determine the nature and extent of duties owed to tribes and to apply the appropriate remedies." *Id.* (citing numerous cases). BLM loses under that applicable law. *E.g., Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972). An agency's obligations beyond what would be required under an administrative law analysis, and "[a]ctions that might well be considered within an agency's discretion because not 'arbitrary or capricious,' as stated in the APA, may nevertheless be held to violate the Secretary

[7] Because the BLM failed to brief the issue, the Tribe does not know how BLM might respond. In a response brief in the District Court, the BLM responded by erroneously seeking to limit its trust obligation to cases where is has violated the very different and higher standard for tribal claims for monetary damages against the United States for breach of trust. It is in those suits for money damages, and only in those suits, and solely because the suit must fit within the Indian Tucker Act's limited waiver of sovereign immunity, that a tribe is required to show breach of a statutorily defined trust duty. In fact, the Indian Tucker Act cases clearly draw the distinction between claims for specific relief (controlled by the standard discussed above, which the Tribe easily meets) and the more limited set of matters where there is a federal waiver of sovereign immunity for money damages. *E.g., United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011); *United States v. Navajo Nation*, 556 U.S. 287 (2009); *Mitchell v. United States* (*Mitchell II*), 463 U.S. 206 (1983).

of the Interior's trust responsibility to tribes." Cohen's § 5.05[3][c], at 430. The extent to which the trust doctrine sets limits on agency discretion is determined by "the extent to which the general law of trusts is applicable." *Id*. at 431.

Because BLM's final rule is both procedurally and substantive deficient, the District Court properly enjoined the rule. This is more clearly required where the Agency is violating its trust responsibilities, abusing powers it is supposed to use solely for the benefit of tribes, and using those powers to harm the Ute Indian Tribe. While sadly history illustrates this is nothing new to the Tribe or tribes, it is nevertheless deeply disappointing, and wrong, and contrary to the government-to-government relationship that the United States violated when it sought to impose its rules not only to land that it owned in fee but also to land to which the Tribe holds beneficial ownership.

A. THE RULE IS CONTRARY TO THE FEDERAL TRUST OBLIGATION TO INDIAN TRIBES

BLM simply did not conduct the required separate analysis of its rules based upon the factors that are to guide the rule maker's decision related to Indian lands. Instead BLM's position during the rulemaking process was that there is no difference between the factors applicable to federal lands from the factors applicable to tribal lands and therefore its one-size-fits-all rule is not only permissible but is required. It had adopted that position before it had engaged in any consultation with tribes, *e.g.*, UTSA_0098 (Letter from BLM to Wilson R. Benally, President, Navajo

Nation, Burnham Chapter (Dec. 9. 2011)) (In what appears to be the only letter of record to a tribal leader preceding the January 2012 consultation,[8] BLM states, "Any future rule on hydraulic fracturing will apply to both Federal and Trust lands.")(emphasis added), and BLM maintained the same throughout rulemaking, *e.g.*, 80 Fed. Reg. 16,128. Its attorneys are therefore in the unenviable position of being stuck with that losing argument in their brief.

Federal statutes can, and in the present matter do, provide the contours of an agency's trust responsibility. COHEN'S HANDBOOK at 430. For example, in *Pyramid Lake Paiute Tribe of Indians v. Morton*, the Secretary of the Interior was obligated to ensure that Pyramid Lake had sufficient water to satisfy the purposes for which the Reservation was created. 354 F. Supp. 252, 254. The Court explained that "[i]n order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake." *Id*. at 256. The Court further explained that the Secretary should be "judged by the most exacting fiduciary standards" because he had charged himself with the "moral obligations of the highest responsibility and trust." *Id*.

[8] BLM claims that it sent out numerous invitations to tribal leaders to attend what it euphemistically calls "consultations. In searching the administrative record, the Tribe was not able to locate any mailing list, or other original source document supporting that assertion. The only document it found was this single letter to a president of one of approximately 100 Navajo chapters, in which BLM invited that chapter officer to attend one of the January 2012 consultations.

An agency's discretion in enacting regulations affecting a tribe can be limited by the contours of the trust. *E.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1104 (D.D.C. 2001); *Pyramid Lake Paiute Tribe*, 354 F. Supp. 252. "In the absence of specific statutory duties, federal agencies discharge their trust responsibility if they comply with the statutes and general regulations." COHEN'S HANDBOOK, 431. However, where specific statutes impose a trust responsibility, federal administrative power is limited and the discretion of the agency is narrowed. *Id*.

B. INDIAN LEASING MUST BE IN THE BEST INTEREST OF TRIBE.

The federal government holds Indian lands in trust for Indian tribes, not the general public. This established, indisputable, rule required BLM to conduct a vastly different analysis to determine whether to adopt any rule or what rule to adopt for tribal lands as compared to public lands. BLM did not even attempt to comply with its obligation as relates to tribal lands.

The IMLA and the more recent IMDA provide the contours of BLM's trust obligation. "Acting in the capacity as a trustee, the Secretary … must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues." *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) (emphasis added).

BLM cannot even claim in good faith that the Rule attempts to maximize the Ute Tribe's lease values. Instead, as BLM acknowledged in its response to the Tribe's motion for preliminary injunctive relief, BLM seeks to sacrifice lease values for other interests. Even if BLM could make that tradeoff for federally owned lands, BLM is simply not permitted to do it for tribally owned lands. *E.g.*, *id.* Instead it is the Tribe who can, and who does, make those decisions for its own lands.

For many rural tribes, including the Ute Tribe, energy production governed by the IMLA and IMDA is the primary source of funding for tribal governmental services.[9] Oil and gas development, spurred by advances in horizontal drilling technology and hydraulic fracturing, has propelled tribal economies where few other economic opportunities exist.[10] Since 2010, Indian tribes have seen royalty disbursements generated from energy development grow from $407 million to 860 million dollars in 2013.[11]

There is significant energy development on the Uintah and Ouray Reservation, which includes parts of Uintah County and Duchesne County. According to Utah's Division of Oil, Gas and Mining, oil production in Duchesne County increased from 10,916,561 barrels in 2010 to 19,478,038 in 2014.[12] Similar

[9] UTSA_0265-0287 *passim.*
[10] *Id.* at 1–4; UTSA_0130, 0134.
[11] UTSA_0537.
[12] State of Utah – Oil and Gas Program – Oil Production by County, *available at* http://www.oilgas.ogm.utah.gov/Statistics/PROD_Oil_county.cfm.

growth is present in Uintah County, where production more than doubled from 6,609,784 barrels in 2010 to 13,451,451 in 2014.[13] The same growth is present in natural gas development as production increased in Duchesne County from 35,831,642 mcf/year in 2010 to 53,050,603 mcf/year in 2014.[14] Natural gas production in Uintah County dramatically increased from 28,352,074 mcf/year in 2010 to 310,000,853 mcf/year in 2014.[15]

With respect to actions taken pursuant to the IMLA and IMDA, BLM must look out for the best interest of tribes and tribal members—regardless of the interests of the American general public. This is a very different standard from federal public lands that are held in trust for the American public. The Federal Land Policy and Management Act of 1976, Public Law No. 94-579, 43 U.S.C. § 1701 *et seq.* ("FLPMA") requires BLM to restrict or prevent unnecessary and undue degradation to tribal trust resources.

The United States is only supposed to take action under the IMLA and the IMDA when such action would be in the Indian mineral owner's "best interest." *Woods Petroleum Corp. v. Dep't of the Interior*, 47 F. 3d 1032 (10th Cir. 1995). Under these statutes, this Court is required to enforce this "best interest" requirement.

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[13] *Id.*
[14] *Id.*
[15] *Id.*

> In evaluating the Secretary's actions [regarding federal regulation of oil and gas on Indian lands], we must keep in mind that the Secretary and his delegates act as the Indians' fiduciary and thus must represent the Indians' best interests. *Cheyenne-Arapaho,* 966 F.2d at 588-89; *Cotton Petroleum,* 870 F.2d at 1524; *Kenai,* 671 F.2d at 386. The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners.

Id. at 1038. *See also* 25 U.S.C. §§ 2102, 2103

The Secretary defined its statutory "best interest" mandate in the regulations implementing the IMLA and the IMDA. Specifically, the regulations read:

> *In the best interest of the Indian mineral owner* refers to the standards to be applied by the Secretary in considering whether to take administrative action affecting interests of an Indian mineral owner. In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action . . . the Secretary shall consider any relevant factor, including, but not limited to: economic considerations . . . probable financial effects on the Indian mineral owner . . . marketability of mineral products; and potential environmental, social, and cultural effects.

25 C.F.R. §§ 211.3, 225.3 (emphasis in original); *see also* 25 C.F.R. § 225.22(c)(1); 61 Fed. Reg. 35634, 35640 (July 8, 1996) (comments 17 and 18, and BIA responses to the same); 25 U.S.C. § 2103(b).

Although BLM acknowledges that the Rule is not the only possible way to carry out the federal trust responsibilities, BLM, attempting to usurp BIA rulemaking authority, claims that one rule which covers both Indian lands and public lands is more economic than creating a parallel set of regulations and regulatory personnel in the BIA. *Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed.

Reg. 16,185 (March 26, 2015). While that might be easier for BLM, it is grossly inconsistent with the different policies and laws applicable to the two types of land. BLM, statement confirms its serious misunderstanding of the relevant factor analysis. Administrative economies of scale should not trump tribal concerns—especially when the Tribe can regulate itself.

C. FIDUCIARY RESPONSIBILITY

It alarmed the Tribe to see the inadequate and uncertain plan which BLM had in place for attempting to implement the Fracking Rule on Indian lands. Certainly, BLM should be able to point to something other than it being easier to administer a single rule to justify the significant curtailment of tribal sovereign authority and tribal revenues which BLM seeks to impose upon tribes. If operators spurn tribal development opportunities, of course the environment will not be harmed, because there will be virtually no human activity on the remote tribal lands at issue. But this is directly contrary to the Tribe's wishes and to BLM's duty to the Tribe. Additionally, the Tribe is more than capable of developing its own regulations that protect the environment while also support continued existence of a healthy tribal government. After all, development is necessary to supply tribal governments with the resources to perform fundamental governmental functions.

When taking action concerning tribal trust mineral leases, the United States' broad discretion is severally limited by the "fiduciary responsibilities vested in the

United States as trustee of Indian lands." *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 589 (10th Cir. 1992). Furthermore, the United States:

> Must manage Indian lands so as to make them profitable for the Indians. As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to *maximize* lease revenues.

Id. (citing *Kenai Oil and Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 386 (10th Cir. 1982) (emphasis supplied)). Consequently, BLM violates its duty by taking action that otherwise avoidably decreases the opportunities for tribes.

BLM has not provided a scintilla of evidence that this Rule is in the best interest of the Tribe. Nowhere has BLM identified a single documented instance of groundwater contamination on the Reservation that resulted from hydraulic fracturing.[16] Therefore, it will not remedy groundwater contamination or environmental disasters on the Reservation.[17] Simply, as applied to the Tribe's lands, there is no record of a problem which needs fixing, and therefore no basis for the harmful rule that BLM paternalistically seeks to impose upon the Tribe. Instead, BLM has merely given hypothetical scenarios (generally inapplicable to the land

[16] UTSA_0182, 0187-0188 (The Tribe notes that there has been fracking on Ute Reservation since 1934 without problems, and the BLM acknowledges "You are right in your area."); Joint Appendix, passim (The Tribe reviewed the administrative record and could not locate any reference to any such contamination.) The record contains substantial documentation that there has not been such contamination. *E.g*. UTSA_0182; UTSA_0179; UTSA_0235.

[17] *Id.*

formations on the Ute Reservation) that this rule will then, and only hypothetically, prevent or mitigate.[18]

Here is a very real scenario: this rule will hinder energy development on the Reservation.[19] It will limit job opportunities and push operators off the Reservation.[20] In fact, in its response to the Tribe's prior motion for injunctive relief, BLM cavalierly stated that the likely economic impact on Indian lands will "only" be about $10,000,000 per year, and that the "highest total costs are associated with operations in, inter alia," the Ute Tribe's Reservation. UTSA_0026. Perhaps $10,000,000 per year is not a big deal to the United States. It is to tribes. It is to the

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[18] UTSA_0143-0144 (in response to the BLM's request for input from its own Vernal Field Office Senior Petroleum Engineer, that engineer, Robin Hansen, emphatically concluded that based upon his considerable experience in the industry and in the Vernal office, "at least for our field office" the rule would have a "**major impact** upon the oil and gas operators" in the area, and "the **cost** of these new regulations as they stand will be high" but without providing any additional protection to usable water zones.) (emphasis in original). *See also* UTSA_0301 (noting that 60% of economy in the counties in which the Tribe is located comes from oil and gas production.

[19] *E.g.*, UTSA_0226-0231 (discussing surveys of producers which shows that the inordinate delays in permitting do cause substantial shifts of production away from Indian lands) (UTSA_04173) (discussing in detail why the rule will lead to "production away from states with large allocations of BLM land" *Id.* at 4176), UTSA_0301(Letter from Cody Stewart, Energy Advisor to Utah Governor to Tommy Beaudreau, Acting Asst. Sec'y Land and Minerals Mgmt, U.S. Dept. of Int. (Aug 23, 2013) (discussing issue in context of Vernal Utah office). See also, e.g., UTSA_0262; UTSA_0194; UTSA_0652; UTSA_0656; UTSA_0658; UTSA_0660; UTSA_0674; UTSA_0734; UTSA_0854 (examples of industry discussions that the rule will impact their decisions).

[20] *See* n. 11.

Ute Tribe. Oil companies are not going to absorb these increased costs,[21] and because the Tribe competes with lessors who will not be subject to the Fracking Rule, standard economic rules lead to the conclusion that the increased regulatory costs will fall to the mineral rights owners—here the Ute Tribe. Somehow, BLM, in a throwback to the failed federal policy of paternalism, has decided it knows what is best for the Tribe, whether they like it or not, and is forcing the Tribe into a position where it must fight to prevent federal regulations that will sabotage the economic engine of the Tribe's government and people and the rest of the Uintah Basin. [22]

Instead of ignoring tribal requests, BLM should have spent the last four years working with tribes so that they can develop their own hydraulic fracturing regulations. The Tribe is willing and capable to regulate activities on tribal lands to address the issues on the Tribe's homeland in Utah. It is willing to listen to scientists and other experts and analyze the issues. But it is not willing to then let others make the decision. Here, BLM and its codefendants are not attempting to use reason (and the record in this matter shows why—because reason and science are not on their side), and are instead seeking to force their position on the Tribe. Instead of BLM deciding what is best for the Tribe, the current federal policy is for the Tribe to decide

[21] *See* n.11supra.
[22] UTSA_03010-0311; UTSA_0265.

what is best for itself. BLM can be a beneficial partner in that endeavor, providing expertise and suggestions, but here it cannot merely impose this harm upon the Tribe by fiat. The Tribe is very cognizant of the protection of its land and water while also preserving the livelihoods of those that live and work on their homeland. Both can happen, but not under the Fracking Rule.

V. BLM DID NOT COMPLY WITH ITS OBLIGATION TO CONSIDER SOCIO-ECONOMIC IMPACTS ON TRIBES.

BLM did not adequately consider the devastating economic impact that the Rule will have on Indian lands. For energy-producing tribes such as the Ute Indian Tribe, the Rule will eliminate revenue sources for the tribal government, harm tribal businesses, and decrease opportunities and services for tribal members. Equally concerning, BLM did not properly consider how the Rule would affect the decision of operators to develop Indian minerals. Here, the Secretary is required to not only take only such actions that would be in the Indian mineral owner's best interest, but she also "must manage Indian lands so as to make them profitable for the Indians." 25 U.S.C. §2101 (emphasis added). Thus, BLM should have actually analyzed how the Rule would impact Indian mineral development rather than stopping at an unsupported conclusion that lacks any adequate explanation or evidence of a reasoned analysis.

Instead of conducting the required analysis, BLM merely assumed the very issue it was required to analyze: even if its dubious estimate of the amount of the

increased costs are accurate, what impact would the regulation have on tribes? Although producers repeatedly stated that the regulations would impact their decisions on when and where they would drill, BLM dismissed all of those statements without even gathering any data on factors that would influence producers' decisions. It did not gather information on profit margins, on whether there would be a difference in such margins if the producers did move down the road to a location not subject to the Rule, or other alternatives that producers might have. People will pick a gas station because its price is $.02 cheaper per gallon. Would a producer not pick a location which was $11,719 cheaper (or more)? UTSA_0404. Here, we don't know, because BLM merely assumed, without analysis, that the producer would pick the more expensive location because it was only 1% or so more expensive.

BLM's economic analysis is based upon the assumption that its rule will not alter even one decision to drill, but it has no analysis to support that assumption. A decision to forego even one well would have a major, and unanalyzed, impact. UTSA_0190 (notes indicating that a decision to forego one well would cost the Tribe $5,000,000 over a five-year period).

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

estimates of compliance costs by the industry and states or the much higher estimate of BLM's own Senior Petroleum Engineer in its Vernal office, who wrote that as it relates to land under the Vernal office the regulation would have a "major impact" and that "the cost of these new regulations as they stand will be high." UTSA_0301. [23] BLM's assumption that others will make decisions based upon BLM central office's dubious analysis is unreasonable, and is contrary to the record. The record shows that the industry will be making its decisions based upon its own estimates, not BLM's estimates. [24]

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[23] UTSA_0301 (Letter from Cody Stewart, Energy Advisor to Utah Governor to Tommy Beaudreau, Acting Asst. Sec'y Land and Minerals Mgmt, U.S. Dept. of Int. (Aug 23, 2013) (noting that "as of May 2013, the Vernal Field office had 30 vacancies and 1,350 backlogged Application to Drill Permits", and computing that even under the BLM's dubious statistics, the Vernal office would need to add 3 full time equivalent employees, and discussing examples of the difficulty the Vernal office has in attracting qualified engineers and geologists) (emphasis added) UTSA_0193 (email from Steven Wells, BLM Division Chief, Fluid Minerals, noting that in the BLM's Vernal office "they just can't fill key vacancies") (Mr. Wells' position is not identified in the cited email, but is identified in numerous other emails and documents, e.g., UTSA_0625). See also UTSA_0187 (BLM acknowledges to the Ute Tribe that "everybody knows that we have personnel shortages" and BLM states they are "hoping" that they will get more resources to remedy shortages). A senior petroleum engineer at the Vernal Field Office sent a comment on the proposed rule that was requested by the BLM Lead Petroleum Engineer in the Washington D.C. Office of the BLM stating: "In theory the new information required from the operators with this proposed rule is more detailed than that which is required under our current regulations and it will add much girth to our official paper files, but it will also add up to 230 work weeks (4.4 years) to our current annual work load in the Vernal Field Office . . . ." UTSA_0143.

[24] The Administrative Record does not contain any substantive response to the consistent industry statements and supporting surveys cited in n. 21. Admin Record, *passim*.

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

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

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

did not conduct the required economic analysis, and that the minimal discussion of economic consequences that it has provided is based upon assumptions unsupported by the record or contrary to the record. The lower Court therefore properly preliminarily enjoined the rule.

Simply concluding that the Rule will not impact the industry's decision to drill on Indian lands because the added cost of the Rule is only a smaller fraction of the costs of drilling does not constitute an adequate reasoning process. Without the benefit of an accurate and complete regulatory impact analysis, the BLM's uninformed decision to implement the Rule on Indian lands was arbitrary and capricious.

It seems that BLM overlooked these impacts because Indian minerals are only a small percentage of total federal minerals. The Ute Indian Tribe leases out less than 400,000 mineral acres. The United States owns approximately 700 million mineral acres. Therefore, when BLM considered the balance between alleged environmental protections and energy development—and whether the Rule will adversely impact jobs, revenue, and effective government—it found the impacts to be nominal. This may be true for federal public lands, but it is certainly not true for Indian lands, and in particular it is not true for the Ute Tribe's lands.

In *Nance v. Environmental Protection Agency*, the Crow Tribe challenged the EPA's approval of the Northern Cheyenne Tribe's redesignation of air quality on its

reservation from Class II to the Class I standard. 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981). The Crow Tribe argued that the more stringent Class I standards would interfere with mineral development on the Crow Reservation, which is situated adjacent to and west of the Northern Cheyenne's reservation. *Id.* Examining whether EPA in substance fulfilled its trust obligations, the court found,

> The primary concern of the Crow from the beginning of the redesignation procedure was clearly the potential impact of such a redesignation on their ability to mine coal. It is in this respect that they now claim that the EPA failed to exercise its trust responsibilities. However, in specifically finding that the redesignation would not, under the law as it stood at that time, have any effect on strip mining, the EPA adequately addressed the Crow's interest in this regard. That the assumption may have turned out as a result of subsequent events to have been wrong does not affect the answer to the question of whether the fiduciary responsibilities were fulfilled in the first place.

Id. at 711. Thus, the court concluded that EPA had fulfilled its fiduciary responsibility to the Crow tribe because it specifically analyzed the issue. *Id*. at 711-12.

Here, BLM has not specifically analyzed socio-economic impacts of the Rule on the lands of energy-producing tribes.[25] Instead of focusing on the purported environmental protections for all federal lands, BLM should have studied how this rule will place tribes such as the Ute Indian Tribe at a competitive disadvantage.[26]

A. FEDERAL CONTROL LIMITS OPPORTUNITIES FOR TRIBES

As described below, the federal staff regulations and lack of staffing to carry out those regulatory duties related to tribal oil and gas development already create a large incentive for producers to avoid tribal land and to factor in the federal delays into lower amounts that they pay to tribes. As applied to the Ute Reservation, the Fracking Rule will significantly add to already overburdened and understaffed federal regulator officers,[27] and BLM failed to adequately consider this additional

[25] The Administrative Record does not evidence the socio-economic analysis repeatedly requested by energy producing tribes. The Administrative Record reveals that the impact of the Rule on reservations was a concern to Indian tribes. UTSA_0288-0300. In a 2014 prepared response to Mandan, Hidatsa, and Arikara Nation Chairman Tex Hall's concern about a lack of an analysis on the impact of the Rule to tribal economies, the BLM stated, "We are working on a path forward that best integrates the interests of the tribes, supports economic development on the reservations, reduces unnecessary duplication, and still allows the Department to fulfill its broad fiduciary trust responsibility to provide for economic opportunities and protect natural resources." UTSA_0312, 0315. The closest the BLM comes to providing a socio-economic analysis can be found in documents such as: UTSA_0321, UTSA_0410; UTSA_0432, 0435-0437; UTSA_0426-0431; UTSA_0265-0287.

[26] UTSA_0504.

[27] *See* n. 20-25, supra.

harm to the Tribe.[28] Federal agencies control nearly every aspect of Indian energy development, raising the costs to develop tribal minerals significantly, due to the overwhelming amount of federal oversight. Specifically, the BLM must review and approve an operator's application for permit to drill ("APD") before Indian oil and gas minerals can be developed.

Delays in this review process increase costs for operators. At the Vernal Field Office, which services the Tribe, delays far outpace those field offices serving federal public lands. The Vernal Field Office has a well-documented backlog of pending permits.[29] In 2012, the Tribe informed the BLM that it took approximately 480 days for the Vernal Field Office to process an APD.[30] Those numbers have not improved much. This is because the office has nearly forty job openings and lacks sufficient engineers, geologists, and other technical professionals.[31] In contrast, in

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[28] *See* n. 20-25, supra.

[29] UTSA_0301. The record shows the understaffing is not a funding issue: the positions at issue are open but chronically unfilled. UTSA_0301, 0193. Additionally, combining the backlog and the structure of the phase-in for the rule, new drilling on the Ute Reservation would be shut down completely for a year or more, and BLM's low-ball estimate of costs does not even consider that shut-down. The backlog for ADP approval is 16 months. UTSA_0226, 0229-0230. Under the Rule, ADP applications in the pipeline will need to be resubmitted unless drilling starts within the phase in period. The phase in period is no longer than six months.

[30] UTSA_0226, 0229-0230 (noting that the Vernal Office requires 480 days to process an APD on tribal land, but in contrast processes applications for APDs for federal lands in a relatively lighting speed of only 288 days.

[31] *See* n. 10-15, supra.

Utah operators can receive an APD to develop state minerals in approximately three months.[32]

Tribes compete with nearby state and private lands for development opportunities. Instead of eliminating unnecessary bureaucratic red tape or bolstering tribal regulatory authority or providing other methods of eliminating the federal delays which harm the Tribe's economy and government, the Rule would have compounded problems of a sluggish, costly, and excessively burdensome regulatory review process that exists for oil and gas development on Indian lands.

B. THE RULE WILL PUSH OPERATORS AWAY FROM DEVELOPING TRIBAL MINERALS

Compliance with federal and tribal mineral regulations is costly because it involves at least four federal agencies and the tribe's energy and minerals department. Operators are increasingly cautious about developing tribal minerals due to the overwhelming amount of federal oversight, which saddles otherwise appealing development opportunities with additional costs and bureaucratic delays. Nor has BLM explained how the Vernal Field Office can effectively process the increased workload that will result from the Fracking Rule.[33] BLM rejected commenters' concerns that BLM lacks the staffing, budget, or expertise to

[32] UTSA_0226, 0229-0230.

[33] Admin. Record, *passim.* *E.g.*, UTSA_0187 (BLM acknowledges to the Ute Tribe that "everybody knows that we have personnel shortages" and BLM states they are "hoping" that they will get more resources to remedy shortages).

administrate the Rule, *see* 80 Fed. Reg. 16,177, but it has not articulated any plan for how the agency intends to meet the additional administrative responsibilities at the Vernal Field Office.[34] If the Rule would have been implemented, operators and investors would avoid tribal and allotted lands and would instead invest their capital in state and fee minerals, many of which are immediately adjacent to Indian lands and tribal communities.

Had BLM performed the requisite economic analysis, it would have understood the cause and effect of the Tribe's recent success. Moreover, it would have understood just how this rule would roll back hard-fought advancements that improved the lives of tribal members. BLM should know better than to take action that denies Indian communities a valuable source of revenue that is critical to Tribal governments and the very economic life of their members.

Unlike the federal government, the Tribe does not have a plethora of resources to pull from when one income stream dries up. There is not an abundance of good-paying jobs on the Reservation outside of the energy industry. The Tribe knows oil and gas development and knows it well. For decades, the Tribe has relied upon oil and gas development to fill the ever-increasing shortfalls in federal funding. The Rule unseats the economic driver on the Reservation that has been the tool for tribal members to pull themselves out of poverty.

[34] *See* n. 25, supra

VI. LACK OF GOVERNMENT-TO-GOVERNMENT CONSULTATION

A. BLM HAD A STATUTORY DUTY TO CONSULT WITH TRIBES.

Via multiple statutes, Congress statutorily mandated that the United States consult with tribes on a government-to-government basis before issuing, revising, or amending rules and regulations that will impact tribal mineral interests. 25 U.S.C. § 2107; 25 U.S.C. § 3501n (under the Energy Policy Act of 2005, "the Secretary of the Interior *shall* . . . involve and consult with tribes").

The BLM's statutory obligation to engage in government-to-government consultation prior to beginning the rulemaking process begins with the IMDA. The BLM claims that it relies on the IMDA for its authority to adopt rules regarding oil and gas on Indian lands. The explicit language of the IMDA requires the United States (through the BIA, not the BLM, as discussed above) to "consult with national and regional Indian organizations and tribes with expertise in mineral development both in the initial formulation of rules and regulations and any future revision or amendment of such rules and regulations." 25 U.S.C. §2107 (emphasis added). In fact, in the comment and response section of the Final Rule, BLM actually referenced the BLM's "statutory responsibilities" to engage in tribal consultation on the proposed rule. 80 Fed. Reg. at 16184.

Numerous legal authorities specify procedures as to how federal Departments, agencies, and bureaus are to carry out the statutorily mandated government-to-

government consultation with tribes. *E.g.* White House Indian Affairs Executive Working Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols, and Guidance at 1-4 (2009), available at http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version_6-09.pdf. In the recent past, Presidents Obama, Bush and Clinton have all made clear that executive branch agencies have an obligation to tribes to both respect their sovereignty and to engage in government to government consultations as to all actions affecting tribal lands, tribal resources and tribal economics. Further, the Executive Orders require agencies to consult with tribal governments early in the development of any regulation or action impacting tribes prior to issuing the regulation. These Executive Orders serve as evidence that meaningful consultation is an integral component of any agency action that may impact tribal interests.

The Department of the Interior's Departmental Manual includes detailed policies, responsibilities, and procedures for operating on a government to government basis with tribes. Office of American Indian Trust, Departmental Responsibilities for Indian Trust Resources, 512 DM § 2 (Dec. 1, 1995). The Departmental Manual states, "[i]n the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s)…" *Id.* at § 4(B).

According to the Department's policy, consultation includes the duty to engage tribes in consultation to discuss tribal implications of a proposed action "as early as possible." Department of the Interior Policy on Consultation with Indian Tribes at §VII, E, 1. The Manual specifically requires each Bureau and Office in the Department to have an "open and candid" consultation with tribal governments prior to any decision so that the "bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes." *Id.* The "shall consult" language pervasive throughout this section reflects that Interior intended this document to be binding authority. 011 DM § 1.2(B) (2001); *Hymas v. United States*, 117 Fed. Cl. 466, 502 (2014) (holding that the Fish and Wildlife Service's failure to comply with the Departmental Manual was arbitrary and capricious).

Proper tribal consultation is an expression of the unique legal relationship between Indian tribes and the federal government, the federal trust responsibility, and the right of self-government for tribes. It is based upon the exact opposite of the outdated philosophy upon which BLM operated here. It is in fact both telling and concerning that BLM still continues to attempt to justify its paternalism in this case, instead of conceding that vis-a-vis tribes, it was simply wrong, and that the United States must start over.

Consultation must begin early in the rulemaking process so that tribes can be involved in designing effective rules from the outset. Tribal consultation also helps

the federal government ensure that future federal action is achievable, comprehensive, long-lasting, and reflective of tribal input. For Indian tribes, proper tribal consultation is not a trivial issue.

BLM's straw-man argument has a second fault which this Court should note. BLM's argument is that it "did not intend to announce substantive rules enforceable by third parties in federal courts" because it "did not publish the draft policy in the federal register." 10th Cir. Case 15-8126, United States Br. at 48. As noted above, BLM does not need to "announce" that it has a substantive duty, because Congress has already made that announcement. But even putting that aside, the BLM's argument is wrong on the facts, and application of its argument to the facts leads to a conclusion exactly the opposite of that put forward by BLM. The Department's draft Policy on Consultation with Indian Tribes was published in the Federal Register. 76 Fed. Reg. 28446 (May 17, 2011). Using BLM' own logic, the fact that the Department did publish the draft policy in the Federal Register, "show[s] that the Department did [] intend to announce substantive rules enforceable by third parties in federal court." 10th Cir. Case 15-8126, United States Br. at 48. Taken together, the explicit language of the statutes and the Department's regulations and policies establish that consultation is required and legally enforceable in this case.

B. BLM DID NOT COMPLY WITH ITS STATUTORY DUTY TO CONSULT WITH TRIBES.

BLM did not comply with its statutory legal duty to consult. BLM did not brief the issue in the current appeal, but it did provide a one paragraph discussion of the issue in its brief in the prior related appeal. 10th Cir. Case 15-8126, United States Br. at 49. In that brief, it cited only two secondary documents which it claimed were related to consultation, UTSA_0117-0119 and UTSA_0135-0142. Both cover the same ground, but the former is a draft document and the latter more comprehensive.[35] As described in document UTSA_0135, BLM held public forums related to fracking in 2010 and 2011, and also met with "industry service providers state and Federal regulators academics environmental groups and many others stakeholders" in 2011. But BLM acknowledges that it did not begin tribal consultation until 2012. By that time, BLM had made all of the key decisions regarding its fracking rule. In fact its letter to tribes setting up the first of the meetings that BLM calls "consultation" stated "Any future rule on hydraulic

[35] The Tribe also notes that document UTSA_0117, which was only a draft document, contains a potentially seriously misleading typo. What BLM refers to as "Consultation with tribes" began in 2012, after BLM had already made all of the key decisions. UTSA_0117 references a meeting held on March 13, 2011 at the request of a coalition of eastern and southern tribes. There was no such meeting in 2011. All other documents refer to that meeting occurring on March 13, 2012, not Sunday March 13, 2011. *E.g*. UTSA_0137, 0191.

fracturing will apply to both Federal and Trust lands." (emphasis added). UTSA_0098.[36]

Finally, BLM asserted in the prior related appeal that its consulting was not a paternalistic charade because it made two changes to its regulations "based upon" their consultation. For one of the two, a tribal chairman was discussing his tribe's position that it should be permitted to opt out of some of the regulations. BLM disagreed, but during the discussion, BLM noticed that one subsection might be clearer if it was broken into two subsections. UTSA_0221-0225. The other change is the only one that was suggested by a tribal officer. The tribal officer suggested that BLM correct an obvious oversight by adding the word "tribal" to a provision which required operators to certify that they had complied with some "applicable federal, state, or local laws." UTSA_2133.

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

[36] BLM claims that it invited "178 tribal leaders" for consultation which was to take place in January 2012. UTSA_0125. In searching the administrative record, the Tribe was not able to locate any mailing list, or other original source document supporting that assertion. The only document it found was this single letter to a president of one of approximately 100 Navajo chapters, in which BLM invited that chapter officer to attend one of the January 2012 consultations.

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

CONCLUSION

As BLM's Senior Petroleum engineer for its Vernal Field Office stated, the Fracking Rule would have a "major impact upon the oil and gas operators" in the oil field that is located on the Ute Reservation. UTSA_0144. The Tribe and producers in the area informed BLM of this same thing. And because the Vernal Field Officer has a huge backlog of work and is chronically understaffed, it takes so long to approve applications that the phase in period for the Rule would have completely shut down new drilling on the Reservation for a year. By enjoining the rule, the District Court thankfully avoided that potentially devastating, irreversible, and irreparable impact (both financial and to the Tribe's sovereign governmental powers) to the Tribe. That decision must be affirmed as it relates to the tribal land because BLM did not have the rulemaking authority in the first instance, then refused

to consult with tribes as required by statute, and then failed to understand, care about, or consider the impact the Rule would have on tribes. For all of the reasons stated above, the Court affirm the District Court's permanent injunction of the rule within the Ute Tribe's lands.

STATEMENT REGARDING ORAL ARGUMENT

The Ute Indian Tribe believes that because of the importance of the issues presented, oral argument would assist the Court in resolving this appeal.

Respectfully submitted this 16th day of September, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 13,432 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. Local Rule 32(b). I relied on my word processor to obtain the count and it is Microsoft Office Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14 point font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ Jeffrey *S. Rasmussen*
Attorney for Plaintiff/Appellant

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **RESPONSE BRIEF OF INTERVENOR-APPELLEE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 9/16/16, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Jeffrey Rasmussen*
Jeffrey Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2016, a copy of this **RESPONSE BRIEF OF INTERVENOR-APPELLEE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION** was served via the ECF/NDA system which will send notification of such filing to all parties of record.

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