CASE NO. 14-4034

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH, a federally recognized Indian tribe, Petitioner, v. THE STATE OF UTAH, GARY HERBERT, Governor of the State of Utah, SEAN D. REYES, Attorney General for the State of Utah, WASATCH COUNTY, SCOTT SWEAT, Wasatch County Attorney, TYLER J. BERG, Wasatch Deputy County Attorney, and the Honorable BRUCE S. JENKINS , U.S. District Court Judge, Respondents.	)

On Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Dee Benson
No. 2:13-cv-01070

UTE INDIAN TRIBE'S REPLY BRIEF

Jeffrey S. Rasmussen
Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
Matthew J. Kelly
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Both appellees and amicus Uintah County argue that additional factual development is necessary in the district court. However, the State and Wasatch County waived any entitlement to further factual development by not requesting an evidentiary hearing and by not challenging or refuting *any* of the evidence the Tribe submitted in support of its motion for a preliminary injunction.[1] The State in fact filed no written response of any kind to the Tribe's motion for a preliminary injunction. Wasatch County objected to the Tribe's motion solely on the ground that the Tribe had not established irreparable harm as a matter of law.[2] Indeed, at the injunction hearing, counsel for Wasatch County repeatedly insisted that no further factual development was necessary because, in counsel's view, the only proper forum for developing a factual record was in the state court.[3] By failing to request an evidentiary hearing and by failing to challenge or refute any of the Tribe's evidence, the appellees waived their right to challenge the Tribe's evidence and/or to insist that the case be remanded to the district court for the development of additional evidentiary facts.

---

[1] See App. Vol. I, pp. 35-62.
[2] See App. Vol. I, pp. 182-85; District Court Transcript, Vol. II, p. 383:12-15.
[3] App. Vol. II, p. 374:18-21; p. 376:7-12.

DISCUSSION OF LAW

Based on the undisputed evidence, the Tribe sufficiently established all requisites for the issuance of a preliminary injunction. The State of Utah, Wasatch County and Uintah County seek to avoid this result by raising new facts and issues far afield from what was presented to the district court, by erroneously asking this Court to further withdraw its *Ute III* mandate, and by replacing the Tribe's actual arguments with various straw man arguments. This Court must reject all these arguments and remand for entry of a preliminary injunction.

I. All land within the National Forest area that is within the original Uintah Valley Reservation is Indian Country, without any exceptions; and State prosecutorial jurisdiction for offenses against tribal members for all such lands is barred.

This Court ruled in *Ute III* that all land within the Tribe's Uintah Valley Reservation and all land within the Tribe's Uncompahgre Reservation remain Reservation and therefore "Indian Country." In *Ute V*, this Court refused to withdraw its mandate for the land currently at issue—the National Forest lands within the Uintah Valley Reservation—and this Court affirmed an injunction against State prosecutions of Indians from all lands within the National Forest area of the Uintah Valley Reservation. *Ute V* at 1520-21, 1529.

The State and County's primary argument is that because *Ute III* and *Ute V* did not, separately and redundantly, mention roadways within the Forest, the issue of jurisdiction over roadways within the Forest is "unresolved" by *Ute III* and *Ute V*, and thus open to litigation in the present matter and/or in *Ute Tribe v. Utah*, 10th Cir. case nos. 14-1028 and 14-1031. The State and counties assert they can perpetually relitigate so long as they can perpetually dream up new theories that were not previously adjudicated.

Contrary to their arguments, *Ute III* and *Ute V* did decide the status of all lands, including roadways within the Reservation. This Court did not hold "all lands except . . . ." It did not expressly or impliedly exclude roadways, nor under 18 U.S.C. § 1151 could the Court have excluded roadways from the Reservation. This Court did not hold "all lands except those lands the State of Utah claims are used by non-Indians," or "all lands except roads that the State of Utah claims it maintains," or any of the State and its subdivisions' other proffered exceptions. This Court held that all lands in the National Forest are Reservation, *Ute III* at 1091, *Ute V* at 1528-29, and that the State of Utah was properly enjoined from exercising civil or criminal jurisdiction on all lands within the National Forest, *Ute V* at 1529.

This is the simplest of logical constructions. The only factual predicate necessary to apply the mandate is to determine whether the location of the charged offense is within the National Forest of the Uintah Valley Reservation. Because it is, it necessarily follows that the State prosecution of Lesa Jenkins is barred.

The State and County provide a scattershot response to the Tribe's opening brief, however their shotgun was loaded almost exclusively with red herrings: factual and legal issues that are immaterial to the simple logical argument that applies to this case. While the Tribe will briefly reply to many of the scattershot arguments, the most significant of the State and its subdivisions' arguments is the logically fallacious argument that when this Court ruled that all National Forest lands within the Uintah Valley Reservation remain Reservation, this Court did not mean "all land," and that, consequently, the Tribe will not be irreparably harmed if the State is allowed to relitigate the question in its own criminal courts in the Tribe's absence, and that this Court cannot enjoin the State's ongoing violation of *Ute III* and *Ute V*.

The weakness of the State parties' position is illustrated by the fact that many of their arguments on irreparable harm are unrelated to the facts of the present case, and the State generally does not even attempt to link arguments to the facts of the present case.

In this case, the undisputed facts are that:

- Ms. Jenkins is an enrolled member of the Ute Tribe of the Uintah and Ouray Reservation.
- The State of Utah initiated its prosecution of Ms. Jenkins in the State of Utah's court system.
- The location of the offense charged is within the National Forest Lands within the exterior boundaries of the Uintah Valley Reservation.

These are the facts—the State and counties do not get to change those facts. Under the facts presented, this is a simple case, and the State and counties plainly lose under the facts presented. The Tribe has litigated for years against the State of Utah, seeking and securing clear, complete, and controlling federal court rulings that all of the National Forest lands within the exterior boundaries of the Uintah Valley Reservation remain Indian County and that the State of Utah cannot prosecute tribal members for criminal offenses arising in that National Forest or other Indian Country.

But that is exactly and indisputably what the State defendants are attempting to do here, and as the Tribe discussed in detail in its opening brief, the State's deliberate violation of the Tribe's sovereignty constitutes an irreparable injury that must be enjoined.

In their duplicative response briefs, the State and County assert or imply that Ms. Jenkins was driving without a valid license off the Reservation. Wasatch Brief at 2, n 2, State Brief at 14. That speculative conjecture is immaterial. Ms. Jenkins is not charged with driving off the Reservation—she is charged with driving on the Reservation, in the National Forest. App. 40. The citation issued to Ms. Jenkins states the offense occurred on SR-35 at milepost 23. *Id.* That is the material location, and it is miles inside the Reservation and miles inside the National Forest. App. 130-131. It is that prosecution for an offense on the Reservation that the Tribe moved to enjoin, not some other unfiled, conjectural criminal case against Ms. Jenkins for an alleged off-Reservation offense.

The State and County also spend substantial time discussing whether the State officer was permitted to stop Ms. Jenkins. While that is an interesting legal question, it is not the question presented: the question presented is not the authority to stop Ms. Jenkins—it is authority to bring a criminal prosecution against Ms. Jenkins, a Ute tribal member, for an on-Reservation offense.

The State and County also imply that they do not know whether Ms. Jenkins is a tribal member, and that an evidentiary hearing is required to determine her status. That is not true. Appellees know Ms. Jenkins is a tribal member, and admitted as much below. App. 231, 385. Their arguments to the district court

were premised entirely on their disrespectful argument that the State does not have to obey the *Ute III-Ute V* mandate.

II. The State and Counties make numerous minor arguments that are without the slightest merit.

The State and County's briefs are full of red herring arguments, most of which can be disposed of with only brief analysis.

A. The State and County's argument that the Tribe is seeking a "safe haven or sanctuary for its members is patently false and grossly offensive.

Wasatch County asserts the Tribe is "seeking a safe-haven or sanctuary for its members who commit crimes within the State of Utah." Wasatch Resp. at 37. The State makes a similar assertion using slightly less inflammatory language.[4] State Brief at 17. The Tribe is not seeking a "sanctuary" for its members. Instead, stripping away Appellees' prejudicial hyperbole, the Tribe is only seeking what was secured to it in *Ute III* and *Ute V*, and what the United States Supreme Court

[4] While the State's current brief tones down its rhetoric, it has shown through other recent briefs and arguments that it fully shares the anti-Indian bias on display in Wasatch County's brief. In making the same false and offensive assertion that the Tribe seeks to have its reservation be a sanctuary for lawless, drunken, and uncivilized Indians, the State pejoratively called tribal members "These people." Ute Tribe v. Utah, D. Utah case no. 75-406, Sept. 22 Hrg. Transcript at 50. And in a recent filing in this Court the State topped that by writing, without any factual basis, that the Tribe's Reservation is "a lawless zone where there is no law enforcement against tribal drunken drivers", *Hackford v. Utah*, 10th Cir. case no. 14-4116, Doc. 01019319330 at 5, and that this Court needs to vacate the prior final decisions in *Ute III* and *Ute V* and give the State jurisdiction over that land because the Ute Indian Tribe and the United States itself are incapable of providing proper governance and law enforcement.

has repeatedly and consistently held is a retained aspect of tribal sovereignty—"the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 (1959)—specifically here, the right to establish the criminal law applicable to its own members on its own Reservation and to then prosecute its own members in its own tribal court system for violations of the Tribe's criminal laws.

The easiest way to strip away the State and counties' hyperbole is to substitute "Colorado" or some other state in place of "the Tribe." If Colorado were litigating to prevent Utah from encroaching on Colorado's right to prosecute its own citizens in its own court system, no one would equate that argument with an attempt by Colorado to have its lands be a sanctuary for lawlessness and drunkenness. The same holds here.

The Appellees' argument, and their appeal to 19th century racial stereotypes, says more about their anti-Indian bias than anything else, and shows the continuing truth of the United States Supreme Court's observation that Indian tribes "owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). The Tribe is not seeking a sanctuary for its members—it is seeking to stop the State of Utah from

unlawfully prosecuting its tribal members for on-Reservation criminal offenses, in violation of the Tribe's well-established retained sovereign authority.[5]

B. The State and County's assertion that the Tribe never contested the State of Utah's prosecution of tribal members in the National Forest is plainly wrong.

Wasatch County asserts the Tribe has never contested the State's authority to issue citations to tribal members for on-Reservation offenses. That assertion is immaterial to this appeal. As noted above, citing tribal members is not at issue here—the issue here is the prosecution of tribal members. Additionally, the County offers absolutely no factual support for its sweeping assertion of history. In any event, the County is plainly wrong: the Tribe filed *Ute Tribe v. Utah* in 1975, and litigated against the State defendants for years precisely for the purpose of preventing the State's unlawful encroachment on the Tribe's criminal jurisdiction over its members.

[5] The State and Wasatch County assert, incorrectly, that the potential harm to the Tribe is years away and speculative. They base that assertion on clear misstatements of the Tribe's position. The harm here is from unlawful State prosecutions which violate the Tribe's retained sovereignty, prosecutions that would have been ongoing had this Court not enjoined that unlawful state prosecution pending this appeal.

C. The Tribe established the Reservation situs of the alleged offense through competent evidence.

On pages 32-34 of its brief, Wasatch County nominally disputes that there was evidence that the charged offense occurred on the portion of the National Forest held to be Reservation in *Ute III*; however, the County's subsequent legal discussion fails to establish any dispute. The Tribe established the Reservation status of the land through an affidavit of the Realty Specialist for the United States Bureau of Indian Affairs Uintah and Ouray Agency Office, who had personally reviewed the official records. App. 133-134. That office acts in a role analogous to a County Recorder, keeping the official federal land records for the Tribe's Reservation. *Id.* Neither in the district court nor in its brief to this Court does the County dispute the facts stated in the federal officer's affidavit, nor did the County offer any controverting evidence. Therefore the County conceded the facts presented in the Tribe's motion for preliminary injunction. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 578 (2001) (a party concedes matters not disputed below).

On pages 32-34 of its brief, the County shows that all it is actually "disputing" is the admissibility or adequacy of portions of two other documents, albeit *not* the affidavit of the federal officer establishing the Reservation situs of

the land. For one of those two documents (the letter from the United States), the Tribe disagrees with the County's assertion that the document is inadmissible or inadequate, but there is no need for this Court to decide that issue, since the County did not, and does not, dispute the federal officer's affidavit stating that the location was on the Reservation.

D. *Ute III* and *Ute V* are binding on Wasatch County.

In its opening brief, the Tribe provided a detailed discussion of an obvious legal rule: because Wasatch County is a subdivision of the State of Utah, and because *Wasatch County is prosecuting Ms. Jenkins in the name of the State* based on the alleged prosecutorial power of the State, Wasatch County is bound by this Court rulings in *Ute III* and *Ute V*. The Tribe analyzed numerous federal cases and other authorities that support its argument. Because the State lacks authority under *Ute III and Ute V* to prosecute Ms. Jenkins, Wasatch County cannot bring a State criminal case against her.

Without even attempting to respond to the Tribe's discussion of applicable law, and without citation to any pertinent authority, Wasatch County argues that because Wasatch County was not a named party in *Ute III/Ute V*, the County is free to collaterally attack the dispositive rulings in that case, and to relitigate, for a

fourth time, the boundaries of the Uintah Valley Reservation.[6] Wasatch County's sole basis for its assertion is its argument that if such decisions bind State subdivisions, then it "would have been unnecessary" for Duchesne County and Uintah County to have signed cooperative agreements which the State also signed with the Tribe.

There are numerous obvious flaws with Wasatch County's argument. First, the assertion is simply not responsive. The cooperative agreements do not overrule or nullify the decisional law, statutes, and constitutional provisions that the Tribe discussed. Second, contrary to the County's bald assertion, in actuality there are many reasons for Duchesne County and Uintah County to have signed the cooperative agreements which have nothing to do with whether they, as subdivisions of the State, would have been legally bound by the terms based upon the State's signature. Most obviously, their signatures would preclude them from making the exact same frivolous argument that Wasatch County is now making—that if they did not sign, they would be free to violate the contractual promises the State made. Additionally, Duchesne and Uintah Counties were named parties in *Ute Tribe v. Utah*, and so would be expected to sign cooperative agreements

[6] Contrary to Wasatch County's suggestion, the Ute Tribe is seeking to enforce the holdings in *Ute III* and *Ute V*, *not* the stipulated order of dismissal that was entered on March 28, 2000 in case no. 75-cv-408.

related to that case. Additionally, the cooperative agreements cover topics other than, and substantially different from, whether the State was barred from prosecuting tribal members for on-Reservation offenses. Finally, one of the purposes of the cooperative agreements was to indicate a reciprocal desire to cooperate on the subjects covered in the agreements. Although, under the undisputed law discussed by the Tribe, the State could have imposed most or perhaps all of its duties and obligations upon its subdivisions, the subdivisions' own signatures expressed their agreement to work cooperatively, not merely under compulsion from their superior.

The State of Utah was a party to the *Ute Tribe v. Utah* case filed in 1975. Thus, based on the legal authorities cited in the Tribe's opening brief—arguments which neither the State nor Wasatch County rebut—the State and all of its subdivisions are bound by the holdings in *Ute III* and *Ute V*.

E. Wasatch County's argument based upon the supposed "State of Deseret" is frivolous.

Wasatch County begins its brief to this Court with an argument about an alleged "State of Deseret" which supposedly (and wholly unbeknownst to the Tribe!) had dominion and control over the Ute Indian Tribe, and which then

supposedly passed that dominion and control to the State of Utah upon Utah's entry into the Union. That argument is patently frivolous in multiple ways.

First, it is made many years too late. The claim is plainly inconsistent with this Court's binding and unalterable holdings in *Ute III* and *Ute V*.

Second, the County did not raise the argument below.

Third, this Court plainly does not even need to consider the County's alleged history of the supposed State of Deseret,[7] because it is undisputable that upon its entry into the Union, Utah agreed to the U.S. constitutional scheme which provided for federal supremacy in Indian affairs. In fact, in both the Utah Enabling Act and in a provision in its own constitution which exists to this day, the State of Utah expressly disclaims, *inter alia*, "all right and title … to all lands lying within [the State of Utah] owned or held by any Indian or Indian tribes." Utah Enabling Act of July 16, 1894, ch. 138, 28 Stats. 107; *see also* Utah Const., art. III.[8] The disclaimer is a disclaimer of *both* proprietary and governmental authority. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 173-74, 179-80 (1973) (the

[7] Several State subdivisions and officers of State subdivisions, represented by the same attorneys as Wasatch County, have repeatedly raised this same "State of Deseret" argument. To date, every other Court has implicitly rejected the argument without comment.

[8] Similar disclaimers were adopted in the state constitutions of Washington, Montana, North Dakota, South Dakota, Oklahoma, Arizona, and New Mexico as a condition of their admittance to the Union. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 479 n. 23 (1979).

Arizona tax code could not be extended extra-territorially inside the Navajo Reservation to apply to Navajo Indians); *see also Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (same); *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d 967, 976-81 (10th Cir. 1987) (same); *South Dakota v. Cummings*, 679 N.W.2d at 486 (South Dakota state criminal jurisdiction does not extend inside the Pine Ridge Reservation).

III. Ute III and Ute V are not in direct conflict with any subsequent United States Supreme Court decisions; they are completely in accord with current Supreme Court decisions limiting state criminal jurisdiction over Indians for on-Reservation offenses.

The Tribe is seeking injunctive relief to enjoin the State defendants' open and defiant refusal to abide by the holdings in *Ute III* and *Ute V*. Both in the district court and before this Court, the State and its subdivisions contradictorily switch back and forth, first claiming they are not openly defying this Court's rulings, to next contending they are not bound by the *Ute III-Ute V* mandate, and asserting they should not be enjoined from asking their own state court to correct this Court's supposed error. The State and County erroneously claim that *Strate v. A-1 Contractors, 520 U.S. 438 (1997)* and *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001) require this Court to overturn its *Ute III* ruling on the National Forest lands,

a ruling this Court expressly refused to modify in *Ute V*. State Brief at 14-16, Wasatch Brief at 36.

The appellees' arguments are not new: they are weaker versions of the same arguments the State parties argued to this Court in *Ute V*, and which this Court, after detailed discussion and analysis, rejected. The arguments must be rejected again, and should continue to be rejected every time the State continues its seemingly perpetual attempt to relitigate *Ute III* and *Ute V*.

A. There is no direct conflict between *Ute III* and any other case, and therefore no basis for further withdrawal of the mandate from *Ute III*.

In *Ute V*, this Court explained to the State the limited degree to which *Ute III* was inconsistent with *Hagen*, and why, under applicable law, this Court would only make a limited modification of its prior mandate. This Court discussed its prior mandate, the great importance of finality and of respect for judgments, and the specific and unique factual and procedural posture presented to it. It then held:

> [The general rule respecting finality] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. [Finality's] enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

Ute V, 114 F.3d at 1524 (quoting *Southern Pac. Ry. Co. v. United States*, 168 U.S. 1, 49 (1897)). The purpose of finality is to protect "litigants from burdensome relitigation" and to promote "judicial economy" where parties have already had an opportunity to fully and fairly litigate contested matters. *Id*. (quoting *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984)). Based upon this rule of law, this Court left *Ute III* untouched with respect to non-*Hagen* matters, stating "finality requires those decisions to remain undisturbed." *Id*.

This Court provided a detailed analysis of the distinction, which the State and County profess to not understand, between judgments and mandates on the one hand, and precedential authority on the other. *See also Ute IV* at 1513 ("At least as to parties with whom the State has litigated and lost, the State is not free to litigate the same issue arising under virtually identical facts against the same party over and over again until it obtains a more favorable result.") (Internal quotations omitted).

This Court ruled in *Ute V* that it would withdraw its *Ute III* mandate only "to the extent that it directly conflicts with the holding in *Hagen.*" *Ute V* at 1527 (emphasis added). *Ute V* then carefully analyzed *Hagen* for such direct conflicts, and held that there was no direct conflict between Hagen and *Ute III* regarding the

National Forest because the *Hagen* Court was not presented with any issue related to the National Forest.

Inexplicably, the State and its subdivisions now return to this Court and ask this Court to modify its mandate regarding the National Forest (and in a related case the Uncompahgre Reservation) based upon an alleged conflict between *Ute III* and *Strate* and *Hicks*. Applying the binding and correct analysis from *Ute V*, there is, unquestionably, no direct conflict. *Strate* and *Hicks* are cases from North Dakota and Nevada, not from Utah or the Ute Reservation. Because there is no direct conflict, there is no basis for a further withdrawal of the mandate from *Ute III*. Under that mandate, the National Forest lands are Reservation.

Ute V is the binding, and also the proper, application of the rule against perpetual relitigation by losing parties, and, as relevant to the current matter, it is the binding, and also the proper, application of the rule regarding judgments and mandates which this Court made in this case and applied to its own prior mandate from *Ute III*. It must be followed, regardless of whether the State and its subdivisions respect this Court or this Court's decisions.

B. The Tribe's Jurisdictional Claims Are Supported by Case Law.

Because *Strate* and *Hicks* do not directly conflict with the *Ute III/Ute V* mandate, the prior mandate cannot be further withdrawn. But independent from

that discussion, *Strate* and *Hicks* simply are not in conflict, directly or indirectly, with this Court's mandate.

Strate and *Hicks* are two "*Montana* Rule" cases, and like every other case under the *Montana* Rule,[9] they are holdings related to tribal court jurisdiction over non-Indians, not state jurisdiction over Indians. They do not overrule or alter the United States Supreme Court's holdings that states cannot prosecute tribal members for on-Reservation offenses. *E.g.*, *United States v. John*, 437 U.S. 634 (1978); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975)(in a non-Public Law 280 state, jurisdiction for offenses on the reservation "is in the tribe and the Federal Government"); *Williams v. United States*, 327 U.S. 711, 714 (1946) ("the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed" on an Indian Reservation); *Donnelly v. United States*, 228 U.S. 243, 271-72 (1913).

In fact, in its very own brief, the State of Utah noted that the holding in *Strate* is limited to matters involving non-Indians. "The right of way North Dakota acquired renders the 6.59 mile stretch equivalent for non-member governance purposes, to alienated non-Indian land." State Brief at 16 (quoting *Strate*, 520 U.S.

[9] Wasatch County also cites in a footnote *Montana v. King*, 191 F.3d 1108 (9th Cir. 1997), another inapposite *Montana* Rule case. That case held that the Fort Belknap Indian Community in Montana lacked regulatory jurisdiction to enforce its Tribal Employment Rights Ordinance to maintenance work on a highway running through the Tribe's reservation.

at 454-455 (emphasis added)). In addition to that limitation which the State itself emphasizes, *Strate* was a civil personal injury action, not a criminal case. In *Strate* the non-Indians were involved in an auto accident within reservation boundaries. The Supreme Court ruled that an Indian tribe lacks inherent power to adjudicate a civil lawsuit brought by one non-Indian against another non-Indian for personal injury claims arising within Indian Country. *Id*. But here again, at no time has the Ute Tribe ever asserted civil adjudicatory authority over claims brought by one non-Indian against another non-Indian for civil claims arising within the Tribe's reservation boundaries. Thus, *Strate* is inapposite.

The State and County also rely on *Hicks* for the argument that state regulatory authority is not completely excluded on a reservation. The Supreme Court explicitly addressed the scope of its holding in that case, declaring unequivocally that "[o]ur holding in this case is limited to the question of **tribal-court jurisdiction over state officers enforcing state law**." *Hicks*, 533 U.S. at 358 n.2 (emphasis added). *Hicks* is limited to the question of tribal court civil jurisdiction over state officers. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (In response to arguments for expansive interpretation of *Hicks*, the United States Supreme Court again reiterated the limited scope of the holding). The present case does not involve tribal court

jurisdiction over state officers; rather, it involves state criminal jurisdiction over *Indians within Indian country*. Thus, *Nevada v. Hicks* is inapposite.

The Appellees' assertion that this Court should vacate the *Ute III - Ute V* mandate based upon *Hicks* and *Strate* clearly must be rejected. Instead what is controlling is 18 U.S.C. § 1151, the applicable federal statute defining "Indian Country" (which this Court expressly cited and followed in *Ute V*), and the numerous cases consistent with that statute which bar State prosecution of tribal members for on-Reservation offenses. This is a long-settled issue of law in the eyes of everyone except the State of Utah.

18 U.S.C. § 1151(a) defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." The words "all land" and "notwithstanding the issuance of any patent" and "including rights-of-way" are terms that were intended by Congress to avoid checkerboard jurisdiction. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962); *accord Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477-479 (1976). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 3.04[2][c], p. 192 (2012 ed.).

"If there was any confusion as to the status of rights-of-way through Indian reservations, it was cleared up by Congress in 1948 by the enactment of 18 U.S.C. sec. 1151." *Wisconsin v. Webster*, 338 N.W.2d 474, 479 (Wis. 1983) (ruling the State of Wisconsin lacks jurisdiction to prosecute tribal members for traffic violations on state highways within Indian country) (emphasis in original).

This Court's ruling in *Ute V* is consonant with the weight of authority. Other federal circuits and state courts have long recognized that State highways running through an Indian reservation remain part of the reservation and within the territorial jurisdiction of Indian tribes. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1174 (8th Cir. 1990)(absent tribal consent, South Dakota has no jurisdiction over public highways running through Indian lands); *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983) (state traffic laws do not apply to Indians within Indian country), *rev'd on other grounds, United States v. Chapel*, 55 F.3d 1416 (9th Cir. 1995); *Ortez-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (tribal police officer could investigate violations of state and federal law on roadways within Indian country); *Konaha v. Brown*, 131 F.2d 737 (7th Cir. 1942)(Wisconsin lacks jurisdiction to prosecute a tribal Indian for traffic offenses committed on a Wisconsin state highway); *Washington v. Pink*, 185 P.3d 634 (Wash. Ct. App. 2008) (roadway easement granted by Quinault Tribe did not

eliminate tribal jurisdiction over tribal members for offenses committed on the roadway); *Wisconsin v. Webster*, 338 N.W.2d 474, 482-83 (Wis. 1983) (Wisconsin lacks criminal jurisdiction over tribal members for offenses arising on public highways located within Indian country); *Enriquez v. Superior Court*, 565 P.2d 522, 523 (Az. App. 1977)(easement for highway running through the reservation does not alter the Indian country status of the lands traversed by the highway); *Schantz v. White Lightning*, 231 N.W.2d 812, 816 (N.D. 1975) (state highways traversing an Indian reservation are within Indian country); *Signa v. Bailey*, 164 N.W.2d 886, 889-91 (Minn. 1969) (apart from compliance with process mandated by federal law, state has no criminal or civil jurisdiction over tribal members within Indian country); *In re Denetclaw*, 320 P.2d 697 (Ariz. 1958) (federal government's grant of roadway easement to State of Arizona did not affect the Indian country status of land encumbered by the easement).

Under our constitutional scheme, Congress has plenary power over Indian law, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978), and Congress has clearly defined Indian Country for criminal law purposes to include rights of way and all other land within an Indian Reservation. That congressional definition is not in conflict with the *Montana* line of cases, which deal with tribal *civil* jurisdiction over non-Indians. And that congressional definition was quoted and

adopted by this Court in *Ute V*. It is controlling here, and the State's attempt to prosecute Ms. Jenkins for an offense that is unquestionably Indian Country under 18 U.S.C. § 1151, *Ute III*, and *Ute V*, should have been enjoined by the district court.

IV. The Anti-Injunction Act and *Younger* abstention do not bar this Court from enjoining the State's attempt to relitigate Reservation boundaries in State court criminal proceedings.

Contrary to the appellees' argument, the Anti-Injunction Act, 28 U.S.C. § 2283 and *Younger* abstention do not preclude an injunction against the State's unlawful prosecution of Ms. Jenkins.

A. *Younger* abstention and the Anti-Injunction Act are not jurisdictional bars and therefore cannot be raised on appeal without a cross-appeal.

Wasatch County moved to dismiss the Tribe's suit based upon the Anti-Injunction Act and *Younger* abstention, App. 174, and the district court denied the motion to dismiss. App. 348, 354. The County did not cross appeal from the denial of its motion to dismiss; the State of Utah did not even file a brief in opposition to the Tribe's motion for injunctive relief. Yet both now assert that they can raise abstention and the Anti-Injunction Act on appeal without a cross appeal because the issues are jurisdictional. They cannot. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (*Younge*r Abstention is not jurisdictional); *Ohio*

Bureau of Empl. Servs. v. Hodory, 431 U.S. 471 (1977) (The Supreme Court declined to decide *Younger* abstention sua sponte); *Swisher v. Brady*, 438 U.S. 204, 213 n. 11 (1978) (same); *Tyler v. Russel*, 410 F.2d 490 (10th Cir. 1969) (28 U.S.C. § 2283 is not jurisdictional and only goes to the form of relief permitted); *In re Mooney Aircraft, Inc.*, 730 F.2d 367, 5th Cir. 1984 (same). *See generally* E. Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying Younger Abstention to Claims for Monetary Damages and Raising Younger Abstention Sua Sponte on Appeal*, 81 N.D. L. Rev. 475, 476 (2005).

B. As correctly and repeatedly determined in the Tribe's 1975 suit, and as held by the district court below, the Anti-Injunction Act and *Younger* abstention do not bar an injunction against State prosecution of tribal members for on-Reservation offenses.

As with most of the appellees' other arguments, their argument regarding the Anti-Injunction Act and *Younger* abstention merely repeat arguments which they have previously raised, and which the federal courts have repeatedly previously rejected. *E.g.*, *Ute V* at 1522 and n. 3; App. 354. In granting the Tribe's motion for an injunction pending appeal, this Court has already rejected the State and County's arguments on these same theories.

The prior rulings are clearly correct. In *Ute III* and *Ute V* this Court conclusively adjudicated the status of the land where the alleged offense occurred.

Therefore the express anti-litigation exception in the Anti-Injunction Act, 28 U.S.C. § 2283, clearly, obviously, and unequivocally applies. Consequently, this Court is not barred from enjoining the State's attempt to violate the binding mandate of this Court; and for substantially similar reasons *Younger* abstention also does not apply.

Whether under the doctrine of stare decisis, res judicata, or collateral estoppel, both as a matter of law and a matter of equity, the Ute Tribe is entitled to injunctive relief to prevent the State defendants from relitigating—for the fourth time—the boundaries of the Uintah Valley Reservation. *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir. 1986) (permanently enjoining a state court relitigation of matters litigated in earlier federal court proceeding); *see also G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1106-07 (9th Cir. 2002) (permanently enjoining litigants from attempting to circumvent a federal court ruling through Hawaii state courts); *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556, 565 (2d Cir. 1991) (permanently enjoining a litigant from relitigating federal securities claims, "no matter how denominated"); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992) (enjoining a state court relitigation of issues adjudicated in earlier federal court action); *Browning Debenture Holders' Committee v. DASA Corp.*, 454 F. Supp. 88,

97 (S.D. New York 1978) (permanently enjoining a litigant from "starting this six-year-old action all over again in a new forum"), *aff'd* 605 F.2d 35 (2nd Cir. 1978).

A case on all fours with the current case is this Court's prior decision in *Jackson v. Carter Oil Co.*, 179 F.2d 524, 526 (10th Cir. 1950). In *Jackson* this Court affirmed a lower court order that perpetually enjoined a litigant from relitigating a matter that—like the case here—had been "in the courts" for decades and was before the Tenth Circuit for "the third time." *Id.* at 525-526 (emphasis added).

> Cases are legion which affirm the exercise of a federal court's power to prevent state court action from interfering with federal jurisdiction and from undermining federal court judgments. Many of these cases arose in situations such as the present where a federal court has forged remedies to protect the rights under federal law of a disadvantaged minority, only to be called immediately to defend its judgment from hostile flanking movements in state court.

United States v. Michigan, 508 F. Supp. 480, 488 (quoting *United States v. Washington*, 459 F. Supp. 1020, 1029 (1978)); *see also Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Here, the district court correctly held that the State's attempt to prosecute Ms. Jenkins was not barred by 28 U.S.C. § 2283.

Regarding *Younger*, the underlying state proceeding does not implicate "important state interests, matters which traditionally look to state law for their

resolution or implicate separately articulated state policies," and therefore *Younger* abstention does not apply. *Pueblo of Santa Ana v. Nash*, 854 F.Supp. 2d 1128, 1141 (D.N.M. 2012) (internal citation omitted). The Appellees' argument overlooks the threshold question raised by the Tribe—whether the state court has jurisdiction in the first place to exercise criminal jurisdiction over Indians for on-Reservation crimes. That threshold jurisdictional question implicates tribal and federal jurisdiction over Indian country, an issue this Court has long-recognized to be paramount and federal. *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 713 ("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country"); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1204–05 (10th Cir. 2003) (affirming the district court's conclusion that the threshold question of whether the state had jurisdiction to tax a tribe "was a matter of federal, not state, law").

Accordingly, due to the primacy of this federal jurisdictional issue, the State's interest in the criminal proceedings is not sufficiently significant to justify *Younger* abstention. *Seneca–Cayuga Tribe*, 874 F.2d at 714 (when a state court is asked to decide "issues of federal law where federal interests predominate," such as state jurisdiction in Indian Country, "the State's interest in the litigation is ... not important enough to warrant *Younger* abstention"); *Fort Belknap Indian Cmty. of*

the Fort Belknap Indian Reservation v. Mazurek, 43 F.3d 428, 431–32 (9th Cir. 1994) (finding the "threshold question"—whether the state had jurisdiction to prosecute—to be "paramount and federal," making *Younger* abstention inappropriate); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (finding *Younger* abstention inappropriate where threshold issue was whether state had jurisdiction to prosecute Indians pursuant to state gaming laws) (quotations and citations omitted).

The federal issues in this case are antecedent to the state prosecution. Federal law determines the jurisdiction of the Tribe and federal government. The central and threshold issues in this case are federal Indian law issues and issues that were fully, fairly, and conclusively adjudicated in *Ute III* and *Ute V*. Indeed, it is ironic that the State and County seek to employ *Younger*—a case premised on comity—as a sword to enable them to vitiate the *Ute III* and *Ute V* holdings through their state courts. The State has no legal authority for seeking now to relitigate the Tribe's reservation boundaries, and this Court has the authority and the obligation to prevent the State from relitigating this question for the fourth time. The Anti-Injunction Act and *Younger* abstention do not bar the federal courts from ruling on the Tribe's request for injunctive relief.

The whole of the State and County's argument to the contrary is based on their incorrect premise that they are not bound by this Court's rulings in *Ute III* and *Ute V*, or alternatively that this Court's holding that all lands within the National Forest lands within the Uintah Valley Reservation somehow excludes the roadways contained within those same lands. As discussed above, their argument on these points is without merit.

V. Uintah County's Amicus Arguments Should be Rejected.

Over the Tribe's objection, this Court provisionally allowed Uintah County to file an amicus brief and supplemental appendix. The brief and nearly 2,000-page supplemental appendix should be stricken because they seek to raise issues far afield from the issues that were presented to and ruled upon by the district court. *Wyoming Farm Bureau v. Babbit*, 199 F.3d 1224, 1230 n.3 (10th Cir. 2000). To the extent the Court considers the amicus brief, the Tribe's reply to the appellees should adequately address Uintah County's erroneous factual legal and legal contentions.

CONCLUSION

Based on the facts and authorities cited herein and in the Tribe's opening brief, this Court must reverse the district court and remand for entry of a

preliminary injunction barring the State from prosecuting an Indian for an on-Reservation criminal offense.

Dated this 7th day of October, 2014.

Respectfully submitted,

FREDERICKS PEEBLES & MORGAN LLP

By: /s/ *Jeffrey S. Rasmussen* (Digital)
Jeffrey S. Rasmussen
Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
Matthew J. Kelly
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839
Email Addresses:
jrasmussen@ndnlaw.com
fbassett@ndnlaw.com
tfredericks@ndnlaw.com
jpatterson@ndnlaw.com
mkelly@ndnlaw.com

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

> [] this brief uses a monospaced typeface and contains 6998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

> [] this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

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.

Date: October 7, 2014.

By: /s/ *Jeffrey S. Rasmussen* (Digital)
Attorney for Petitioner

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **UTE INDIAN TRIBE'S REPLY BRIEF**, 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 Sunbelt Vipre Enterprise version 6.2.5.1, dated 8/24/2014, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Debra A. Foulk* (Digital)
Assistant to Jeffrey S. Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2014, a copy of the foregoing **UTE INDIAN TRIBE'S REPLY BRIEF** was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

RANDY S. HUNTER
KATHARINE H. KINSMAN
PARKER DOUGLAS
BRIDGET K. ROMANO
Assistant Attorneys General
SEAN D. REYES
Utah Attorney General
Utah Attorney General's Office
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
sreyes@utah.gov
randyhunter@utah.gov
kkinsman@utah.gov
pdouglas@utah.gov
bromano@utah.gov

Attorneys for Respondent State of Utah

JESSE C. TRENTADUE
CARL F. HUEFNER
NOAH M. HOAGLAND
BRITTON R. BUTTERFIELD
Suitter Axland, PLLC
8 E. Broadway, Ste. 200
Salt Lake City, UT 84111
jesse32@sautah.com
chuefner@sautah.com
nhoagland@sautah.com
bbutterfield@sautah.com

Attorneys for Respondents Wasatch County, Scott Sweat, Tyler J. Berg

E. BLAINE RAWSON
GREGGORY J. SAVAGE
CALVIN R. WINDER
Ray Quinney & Nebeker P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111

Attorneys for Amicus Curiae Uintah County

HONORABLE BRUCE S. JENKINS
U.S. District Judge for District of Utah
U.S. District Court, District of Utah
350 South Main Street, Room 150
Salt Lake City, UT 84101-2180

/s/ *Debra A. Foulk* (Digital)
Assistant to Jeffrey S. Rasmussen