Docket No. 15-4080

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH,
Appellant/Plaintiff,

vs.

MYTON CITY, Appellee/Defendant.

On Appeal from the U.S. District Court for the District of Utah, Central Division
Honorable Judge Bruce Jenkins

Case No. 2:75-CV-00408 as consolidated Case No. 2:13-CV-00276

BRIEF OF APPELLEE MYTON CITY

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CORPORATE DISCLOSURE STATEMENT

Myton City is a municipality of the State of Utah. Accordingly, no corporate disclosure statement is required pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

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STATEMENT OF PRIOR OR RELATED APPEALS

The U.S. Supreme Court has issued a published decision related to this case:

1. *Hagen v. Utah*, 510 U.S. 399 (1994).

This Court has issued four published opinions from appeals arising out of *Ute Indian Tribe v. Utah, et al.* ("*Ute Indian Tribe I*"), 521 F. Supp. 1072 (D. Utah 1981), and *Ute Indian Tribe v. Utah, et al.* ("*Ute Indian Tribe IV"*), 935 F. Supp. 1473 (D. Utah 1996):

1. *Ute Indian Tribe v. Utah, et al.* ("*Ute Indian Tribe II*"), 716 F.2d 1298 (10th Cir. 1983), *vacated and reh'g en banc granted*, 773 F.2d 1087 (10th Cir. 1985).

2. *Ute Indian Tribe v. Utah, et al.* ("*Ute Indian Tribe III*"), 773 F.2d 1087 (10th Cir. 1985) (*en banc*), *writ of cert. denied*, 479 U.S. 994 (1986).

3. *Ute Indian Tribe v. Utah, et al.* ("*Ute Indian Tribe V*"), 114 F.3d 1513 (10th Cir. 1997), *writ of cert. denied* 522 U.S. 1107 (1998).

4. *Ute Indian Tribe v. Utah, et al*. ("*Ute Indian Tribe VI*"), 790 F.3d 1000 (10th Cir. 2015).

This appeal is related to two published opinions from the Utah Supreme Court:

1. *Utah v. Hagen*, 858 P.2d 925 (Utah 1992), *writ of cert. granted*, 506 U.S. 1019 (1992) (see above).

2. *Utah v. Perank*, 858 P.2d 927 (Utah 1992).

JURISDICTIONAL STATEMENT

Myton agrees with the Tribe's jurisdictional statement with two exceptions. First, the District Court did not deny Myton's motion to dismiss at the June 24, 2013 hearing, *see infra* pg. 21–22. Second, the Tribe's August 17, 2015 motion to suspend briefing before this Court, in which the Tribe claimed that this Court lacked appellate jurisdiction, was denied and the Tribe was instructed to address any jurisdictional challenge in its brief. (*See* Order of Aug. 18, 2015, doc. no. 01019477657.) The Tribe has not done so.

The Tribe had argued that the District Court lacked jurisdiction to dismiss Myton because other parties had appealed other collateral orders. (*See* Tribe's Expedited Motion to Suspend Briefing, Aug. 17, 2015, doc. no. 01019476593.) Filing a notice of appeal divests the district court of jurisdiction only "over those aspects of the case involved in the appeal." *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). Because the appeal in *Ute Indian Tribe VI* involved only collateral orders, *see* 790 F.3d 1000, 1005 (10th Cir. 2015), and Myton's motion to dismiss was unrelated to those collateral orders, the District Court had jurisdiction to address Myton's motion to dismiss, as does this Court.

STATEMENT OF THE ISSUES

1. Did the U.S. Supreme Court conclusively determine the jurisdictional status of Myton when the Court held that because the "Uintah Indian Reservation ha[d] been diminished by Congress . . . , the town of Myton . . . is not in Indian country" as defined by 18 U.S.C. § 1151? *Hagen v. Utah*, 510 U.S. 399 (1994).

2. Did the Tribe forfeit arguments of separation of powers, fraud upon the court, judicial estoppel, collateral estoppel, and evidence outside the complaint on which the Tribe now relies?

3. Did the District Court act within its discretion by striking the Tribe's third motion to reconsider its dismissal of Myton?

STATEMENT OF THE CASE

I. INTRODUCTION

Myton City ("Myton"), a small Utah municipality, is encompassed by the historic boundaries of the Uintah Valley Indian Reservation ("the Reservation"). Myton has a total population of 569, over 90% are non-Indian.[1]

Myton was originally created as a Presidential Townsite in 1905 when, after Congress had diminished the Reservation, President Theodore Roosevelt issued a Proclamation reserving the Myton Townsite. (Aplt. App. vol. VI at 968.) On July 26, 1905, the Commissioner of Utah's General Land Office ordered a survey of Myton, and a Townsite plat was entered in the official registry of the General Land Office on September 13, 1905. (*Id.* at 969.) In 1927, the people of Myton organized the town into a municipality under Utah law and elected a mayor and town council. (*Id.* vol. XV at 2156–57.)

Myton's legal authority to govern itself, was never challenged until the Tribe filed suit in 2013. It is undisputed that between 1975 and 2013, Myton was never a party to this or any tribal jurisdiction litigation. (Aplt. Br. at 2.) Myton was not a party to nor involved in any of the actions that gave rise to *Ute Indian Tribe I*, *Ute*

[1] Summary of Population and Housing Characteristics: Utah, 2010, Table 3, pg. 30, available at http://www.census.gov/prod/cen2010/cph-1-46.pdf (last visited October 6, 2015). The precise figure is uncertain given that sixteen individuals were classified as "Two or More Races." *Id.*

Indian Tribe II, *Ute Indian Tribe III*, *Ute Indian Tribe IV*, *Ute Indian Tribe V*, or this Court's most recent June 2015 decision in *Ute Indian Tribe VI*.

This appeal is from the District Court's order granting Myton's Rule 12(b)(6) motion to dismiss. The District Court ruled, under binding precedent from the U.S. Supreme Court and this Court, that Myton is "not in Indian country." (Aplt. App. vol. XVI at 2263.) The District Court dismissed all claims and causes of action alleged by the Tribe against Myton.

II. HISTORY OF THE *UTE INDIAN TRIBE* AND RELATED LITIGATION

A. Pre-*Hagen* Litigation – *Ute Indian Tribe I–III*

In October 1975, the Tribe filed a Complaint against the State of Utah ("Utah" or "the State"), Duchesne County, Roosevelt City, and Duchesne City, seeking declaratory and injunctive relief. This Court described *Ute Indian Tribe I* as a case where "the Tribe sought to exercise jurisdiction over all of the land originally encompassed in the Uintah Valley Reservation pursuant to the Tribe's newly enacted Law and Order Code." *Ute Indian Tribe V*, 114 F.3d 1513, 1516 (10th Cir. 1997). The District Court held that federal legislation between 1902 and 1905 opening unallotted lands within the Uintah Valley Reservation to settlement by non-Indians did not diminish the Uintah Valley Reservation as to those unallotted lands. *Ute Indian Tribe I*, 521 F. Supp. 1072, 1150 (D. Utah 1981). The jurisdictional status of land within Myton was never addressed or raised by the

District Court or by the Tribe.

The Tribe appealed the *Ute Indian Tribe I* ruling to this Court. Pertinent to Myton, the *Ute Indian Tribe II* court reversed the District Court and held that "the 1902 Act's language restoring the unallotted lands 'to the public domain' was sufficient to diminish the Uintah Valley reservation" and that the "1905 Act did not supersede Congress' intent to diminish the Reservation under the 1902 Act." *Ute Indian Tribe V*, 114 F.3d at 1518.

Sitting *en banc*, this Court disagreed with the panel in *Ute Indian Tribe II*, concluding that there was "no evidence, either explicit or implicit, in any congressional enactment that Congress intended to diminish or disestablish the Uncompahgre and Uintah Reservations." *Ute Indian Tribe III*, 773 F.2d 1087, 1093 (10th Cir. 1985) (*en banc*). Certiorari was denied.

B. *Perank* and *Hagen* – Utah Supreme Court

On July 17, 1992, the Utah Supreme Court issued two decisions involving Utah state felony prosecutions of Indians for criminal acts committed within Myton.[2]

[2] Under Utah law, Myton does not prosecute felony crimes; the State through the Duchesne County attorney does. Utah Code § 10-3-928(2); *id.* § 17-18a-401(1). Also, Myton had no police force. Thus, Myton had no role in the arrests or prosecutions.

1. *Perank*

Clinton Perank was convicted in state court of committing a burglary in Myton. *Perank*, 858 P.2d at 930. Perank appealed, and the Utah Court of Appeals certified the case to the Utah Supreme Court because of the importance of the questions raised. *Id.* at n.1. Perank argued that the state trial court lacked jurisdiction over him because he was an Indian and the offense occurred in Myton, which he asserted was Indian country. *Id*.

The question before the Utah Supreme Court was, therefore, "whether Myton, Utah, the site of the burglary, lies within Indian country," *Id.* at 933. To resolve that issue, the court had to consider "whether the unallotted and unreserved lands that were opened to entry in 1905 [by Congress] and not later restored to tribal ownership and jurisdiction by the 1945 'Order of Restoration' are within the present boundaries of the Reservation." *Id.* at 934.

The *Perank* court acknowledged *Ute Indian Tribe III* but believed it conflicted with two earlier Utah Supreme Court decisions interpreting the 1905 Act. *Id.* at 931 n.2, 951–52 (citing *Sowards v. Meagher*, 108 P. 1112 (Utah 1910) (treating the 1905 Act as restoring unallotted lands to the public domain), and *Whiterocks Irr. Co. v. Mooseman*, 141 P. 459 (Utah 1914) (same)). Although the *Perank* court invited the U.S. Department of Justice and the Tribe to file amicus briefs, neither the Tribe nor the Department of Justice argued that *Ute Indian Tribe*

III had preclusive effect upon the *Perank* case. *Id.* at 931.

After reviewing the language of the 1902–1905 Acts, several Presidential Proclamations, statements of various executive agencies, and the *Ute Indian Tribe III* decision, the court held that "the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain," and "[s]ince Myton, Utah, lies outside the boundaries of the Reservation so described, it is not within Indian country." *Id.* at 952–53.

2. *Hagen*

Robert Hagen pled guilty in Utah state court to distribution of a controlled substance. *Hagen*, 858 P.2d at 925. His plea affidavit stated that he sold marijuana from his residence in Myton. *Id*. Mr. Hagen later withdrew his guilty plea, arguing that the state court did not have jurisdiction over him because he was an Indian and his alleged crimes occurred on the Reservation. *Id*. The trial court denied the motion, but on appeal, the Utah Court of Appeals reversed Mr. Hagen's conviction, holding that *Ute Indian Tribe III* had conclusively determined Myton was in Indian country. *Id*.

The Utah Supreme Court granted certiorari and, in an opinion issued the same day as *Perank*, concluded that the Utah Court of Appeals erred in holding Myton was Indian country. *Id*. The court stated that, in light of *Perank*, "Myton, Utah, where [Mr. Hagen's] alleged criminal conduct occurred, is . . . not in Indian

country." *Id*.

C. *Hagen v. Utah* – U.S. Supreme Court

The U.S. Supreme Court granted a writ of certiorari to resolve the direct conflict between this Court's decision in *Ute Indian Tribe III* and the decisions in *Perank* and *Hagen*. Again the Tribe participated as an amicus; Myton did not. The Supreme Court was asked to decide "whether the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century." *Hagen*, 510 U.S. at 401. "If the reservation had been diminished, then the town of Myton, Utah, which lies on opened lands within the historical boundaries of the reservation, is not in 'Indian country', *see* 18 U.S.C. § 1151." *Id.* at 401–02. Thus, the central question in *Hagen* was whether Myton, was in Indian country.

The Supreme Court analyzed the operative language of several surplus land acts passed from 1902–1905 ("the 1902–1905 Acts") and held that the language indicated congressional intent to divest the Tribe of its land and diminish its boundaries. *Id.* at 412–16. The Court next reviewed the "contemporary historical evidence" to determine if it supported diminishment, concluding that such sources provided "clear evidence of the understanding at the time that the Uintah Reservation would be diminished by the opening of the unallotted lands to non-Indian settlement." *Id.* at 419–20. Finally, the Court considered the fact that the

then-current population of the opened lands was approximately 85% non-Indian and that "the State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened until the Tenth Circuit's *Ute Indian Tribe* decision." *Id.* at 421. The Court explained that "[t]his 'jurisdictional history,' as well as demographics in the Uintah Valley, demonstrates a practical acknowledgement that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Id.*

Applying the foregoing analysis, the Court concluded that the 1902–1905 Acts diminished the Reservation. *Id.* at 421. "Accordingly, the town of Myton, where petitioner committed a crime, is not in Indian country and the Utah court properly exercised criminal jurisdiction over him." *Id.* at 421–22. This is the direct and core holding of *Hagen*.

D. Post-*Hagen* Litigation – *Ute Indian Tribe IV* & *V*

After *Hagen*, both the Tribe and the State returned to the District Court. The Tribe argued that the defendants (Myton not being a party) were precluded from relying upon *Hagen* to relitigate issues resolved in *Ute Indian Tribe III*. *Ute Indian Tribe IV*, 935 F. Supp. at 1506. The District Court ruled that although *Ute Indian Tribe III* directly conflicted with *Hagen*, the court was bound by the mandate of *Ute Indian Tribe III* as the law of the case. *Id.* at 1524–25. Therefore, the District

Court certified the issue to this Court. *Id.*

In *Ute Indian Tribe V*, this Court concluded that its mandate in *Ute Indian Tribe III* should be modified "to the extent that it directly conflicts with the holding in *Hagen*." 114 F.3d at 1515. The Court concluded that *Hagen* diminished the reservation "to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902–1905 legislation, and not thereafter returned to tribal ownership." *Id.* at 1528.

E. Dismissal and Reinstatement of the 1975 Litigation

Following remand, the then-parties presented a map to the District Court stipulating that the jurisdictional status of Myton was "under review." (Aplt. App. vol. II at 366.) Another map reflecting ownership showed Myton as a "Presidential Townsite." (*Id.* vol. III at 367.) The District Court adopted the stipulation by the parties ordering that the maps create a rebuttable presumption as to the status of lands in the Uintah Valley. (*Id.* vol. II at 361–62.) The District Court then entered a stipulated order of dismissal, dated March 28, 2000, noting that "questions of jurisdiction on the various categories of land within the original boundaries" of the Reservation had been determined by the Supreme Court and the Tenth Circuit. (*Id.* vol. III at 370.) It also stated that the parties had "agreed to accept the decision and not seek to further litigate the boundaries of the Reservation." (*Id.* at 369–70.) The Tribe was a party to those stipulations. Myton was not.

In April 2013, the Tribe filed motions to enforce the court's judgment and also filed a new complaint naming the original state, county, and municipal defendants, for the first time naming Myton. (*Id.* at 374.) The complaint alleged a host of instances of the State prosecuting Indians for crimes committed in what the Tribe alleged was Indian country. (*Id.* at 380–81, ¶¶ 30–35.) None of the specific events complained against involved actions by Myton, which did not have a police force. The District Court, *sua sponte*, reopened the 1975 proceeding and consolidated the cases. (*Id.* vol. IV at 520.) For the first time since its establishment, Myton found itself a party to this, seemingly never-ending, jurisdictional litigation.

F. *Ute Indian Tribe VI*

In the course of the renewed proceedings, the District Court ruled on several dispositive motions involving the Tribe, the State, and the counties. *Ute Indian Tribe VI*, 790 F.3d at 1005. On appeal, this Court remanded with directions to enter a preliminary injunction against the State and Wasatch County preventing the prosecution of Lesa Jenkins and dismissed counterclaims against the Tribe. *Ute Indian Tribe VI*, 790 F.3d at 1010–13. Myton was neither a party to nor involved in any of the actions that gave rise to *Ute Indian Tribe VI*.

III. PROCEDURAL HISTORY

On May 9, 2013, in response to the Tribe's complaint, Myton filed a motion to dismiss or, alternatively, for judgment on the pleadings, arguing that *Hagen* resolved any question of Myton's jurisdictional status. (Aplt. App. vol. IV at 551, 553.) The Tribe opposed the motion, arguing that (1) *Hagen*'s reference to Myton was dicta, (2) Myton was precluded from challenging the status map that other parties had stipulated to *before Myton was involved in the litigation*, and (3) the mandate from *Ute Indian Tribe V* requires a lot-by-lot assessment of land within Myton to determine the question of jurisdiction. (*Id.* at 557–60.) A hearing was scheduled for June 24, 2013. (*Id.* vol. I at 56, 61.)

At the hearing, the District Court indicated that it required further information before ruling on the motion to dismiss. (*Id.* vol. IV at 580–81.) Despite the Tribe's repeated assertions to the contrary, the District Court did not deny Myton's motion. Rather, the District Court twice emphasized that it was not ruling on the motion at that time. (*Id.* at 580 ("I won't rule on your motion today."); *id.* at 581 ("I am not denying your motion.").) The court also assured the parties that a later hearing on the motion would be scheduled. (*Id.*)

The parties, thereafter, filed a number of other motions, including a motion for summary judgment filed by Myton in February 2014. (*Id.* vol. VI at 948.) A pretrial hearing was held on September 22, 2014. The Court's notice stated that

"all pending motions" would be heard at that time (*id.* vol. XII at 1727), which included Myton's motion to dismiss (*id.* vol. XXIII at 3146). At the September 22 hearing, Myton and the Tribe argued at length the jurisdictional history and status of Myton and the holding of *Hagen*. (*Id.* vol. XII at 1764–vol. XIII at 1815.) The District Court verbally granted the motion to dismiss at the conclusion of the argument and directed Myton to submit a proposed Order. (*Id.* vol. XIII at 1815.) After the Tribe objected to the proposed order, the court held a subsequent hearing on December 3, 2014. (*Id.* vol. XIII at 1996.) Following the hearing, the Tribe sought unsuccessfully for leave to supplement the record with several exhibits it had not previously presented to the court. (*Id.* vol. XIV at 2081–vol. XV at 2227.) The District Court issued a written order of dismissal on January 28, 2015. (*Id.* vol. XVI at 2258.)

Following the written order granting Myton's motion to dismiss, the Tribe filed four successive motions challenging the order, including a motion to clarify and three motions to reconsider. (*Id.* vol. XVI at 2327, 2368; *id.* vol. XVIII at 2519; *id.* vol. XIX at 2664.) In these motions, the Tribe reasserted its earlier arguments, raised several new arguments, and presented additional new evidence it could have presented earlier.

After a hearing on April 22, 2015 (*id.* vol. XX at 2771), the District Court struck the Tribe's third motion to reconsider and denied its other motions. The

court granted Myton's motion to certify the order of dismissal as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (*id.* vol. XVII at 2419; *id.* vol. XXIII at 3228), and the Tribe appealed.

SUMMARY OF THE ARGUMENT

This is the fifth time the *Ute Indian Tribe* litigation has come before this Court, but the first in which Myton is a party. Yet, the Supreme Court has already conclusively resolved the primary issue now on appeal, holding that Myton is not in Indian country. This Court adopted that holding in *Ute Indian Tribe V*. The District Court properly recognized that it was bound by those decisions, enforced them, and dismissed Myton.

Faced with successive appeals in the *Ute Indian Tribe* litigation, this Court has recognized the importance of finality and cautioned the parties not to relitigate what already has been resolved. The jurisdictional status of Myton has been resolved, and principles of *stare decisis* and law of the case require adherence to that resolution. Even if this Court were inclined to revisit that settled question, an examination of the evidence presented by the Tribe, including the 1945 Restoration Order ("the 1945 Order"), demonstrates that lands within Myton, including streets and alleyways, were never restored to reservation status.

The Tribe has repeatedly attempted to transform this case into a dispute over ownership of land. Myton does not dispute that the Tribe owns certain land within the city, but ownership is not synonymous with jurisdiction—the sole issue in this case—and the Tribe has failed to demonstrate that it has jurisdiction over any lots, streets, or alleyways within Myton. Further, regardless of whether this dispute is

about ownership, jurisdiction, or both, the Tribe's claims are barred by the doctrine of laches, which prohibits tribal claims asserted generations after an alleged dispossession that would disrupt the settled expectations of current residents.

Many of the arguments the Tribe advances in its effort to evade *Hagen* and *Ute Indian Tribe V* are forfeited because they were first advanced in a series of belated post-ruling motions to supplement the record, clarify, or reconsider the District Court's dismissal of the claims against Myton. These include the Tribe's new arguments of separation of powers, fraud upon the court, judicial estoppel, collateral estoppel, and arguments about volumes of exhibits unattached to the complaint, belatedly presented to the District Court, and not considered by the District Court in its ruling.

Although the District Court denied or struck all of the Tribe's post-ruling motions, on appeal the Tribe challenges only the District Court's striking of the Tribe's third motion to reconsider. The District Court acted fairly, impartially, and well within its discretion in striking that motion.

Myton recognizes that the Tribe has likely experienced injustice with respect to the Reservation. These injustices, however, are the result of Congressional actions and federal policies. Myton is not responsible for the federal actions that diminished the Reservation. Accordingly, the Tribe's claims for redress should be directed at the federal government. For this reason, any decision by this Court that

departs from the long-settled conclusion that Myton is not in Indian county will only replace one injustice for another by disrupting the long-settled expectations of the people of Myton.

ARGUMENT

I. THE U.S. SUPREME COURT AND THIS COURT HAVE CONCLUSIVELY DETERMINED THE JURISDICTIONAL STATUS OF MYTON.

Standard of Review: The District Court's grant of a Rule 12(b)(6) motion to dismiss is reviewed *de novo*, looking to the complaint and any documents or exhibits attached thereto or incorporated therein by reference, and "accepting as true all well-pleaded factual allegations in the complaint and viewing them in the light most favorable to the plaintiff." *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201 (10th Cir. 2011). This issue was presented to the District Court in Myton's motion to dismiss, Aplt. App. vol. IV at 551–53, which the court granted on January 28, 2015, Aplt. App. vol. XVI at 2258.

Despite the Tribe's attempt to confuse the issues and raise forfeited matters, the legal question before this Court is straightforward: Is Myton in Indian country, as defined by 18 U.S.C. § 1151?[3] The District Court properly granted Myton's motion to dismiss after it determined that the Supreme Court long ago settled this

[3] Section 1151 provides as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian depended allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

very question. "Myton . . . is not in Indian country." *Hagen*, 510 U.S. at 421.

In *Ute Indian Tribe V*, this Court recognized that *Hagen* produced "a clearly inconsistent judgment" from *Ute Indian Tribe III*. *Ute Indian Tribe V*, 114 F.3d at 1523. This Court, after careful and thoughtful analysis, resolved the conflict by holding that where *Ute Indian Tribe III* and *Hagen* conflict, *Hagen* controls. *Id.* at 1527. *Hagen* thus became law of the case on the status of Myton.

Principles of finality, including *stare decisis*, law of the case, and laches, require this Court to reaffirm those holdings and prevent the Tribe's attempt to relitigate issues that have been fully and completely resolved for nearly two decades. In *Ute Indian Tribe VI*, this Court recognized the importance of finality: "For a legal system to meet th[e] promise [of finality] . . . both sides must accept—or, if need be, they must be made to respect—the judgments it generates." 790 F.3d at 1003. The jurisdictional status of Myton was conclusively determined in 1993 and reaffirmed in 1997.

Because it has been conclusively decided that Myton is not in Indian country, "the law simply affords no relief" to the Tribe, and dismissal of the complaint was therefore appropriate under Rule 12(b)(6). *Commonwealth Prop. Advocates*, 680 F.3d at 1202.

A. Far from being dicta, the jurisdictional status of Myton was the central holding in *Hagen*; *stare decisis* thus requires application of that holding here.

This Court has recognized that it must "follow the Supreme Court's directions, not pick and choose among them as if ordering from a menu." *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008). "If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance." *McCoy v. Mass. Inst. of Tech.*, 950 F.3d 13, 15 (1st Cir. 1991). The Tribe seeks to limit *Hagen* by arguing its holding that "Myton . . . is not in Indian country" is mere dicta and not binding on this Court.[4] The Tribe is incorrect. The jurisdictional status of Myton was the central holding of *Hagen*, and *stare decisis* requires application of that holding here.

Mr. Hagen challenged Utah's jurisdiction to prosecute him by arguing that he was an Indian and that the crime, which took place at his residence in Myton, occurred within Indian country. *Hagen*, 858 P.2d at 925. To adjudicate these defenses, the Utah Supreme Court was required to resolve two issues: (1) whether

[4] The Tribe could have and should have previously presented this argument before the District Court in *Ute Indian Tribe IV* and this Court in *Ute Indian Tribe V*, but failed to do so. This is yet another reason to deny the Tribe's attempt at relitigation.

Mr. Hagen was an Indian, and (2) as in the companion case of *Perank*, also before the same court, "whether the Uintah-Ouray Indian Reservation was diminished by an act of Congress, leaving Myton, Utah, outside the jurisdictional boundaries of that Reservation." *Perank*, 858 P.2d at 930.

The jurisdictional status of Myton was one of two central issues decided by *Perank* and incorporated into the holding of *Hagen*. *See Hagen*, 858 P.2d at 925. In his certiorari petition to the U.S. Supreme Court, Mr. Hagen focused squarely on jurisdiction. The Tribe makes much of the Supreme Court limiting its analysis to the question presented in Mr. Hagen's petition. (Aplt. Br. at 35.) While Mr. Hagen did not expressly mention Myton in his question presented, he did, in fact, phrase his request for relief in terms of Myton:

> "Petitioner, Robert P. Hagen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah in *State v. Hagen* holding that the Uintah and Ouray Indian Reservation has been diminished *and that Myton, Utah is therefore outside the boundaries of the reservation*."

(Aplee. Supp. App. vol. I at 23 (emphasis added)). The *Hagen* court acknowledged this and, in framing the issue, stated, "[if] the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century," "then Myton, Utah, which lies on opened lands within the historical boundaries of the reservation, is not in 'Indian country.'" *Hagen*, 510 U.S. at 401. Myton's jurisdictional status—not an abstract dispute over the

effect of nearly century-old legislation on some undefined area—was the Court's primary focus.

The Tribe also argues that the Utah Supreme Court in both *Perank* and *Hagen* considered only the "non-trust lands" within Myton when rendering their decisions. (Aplt. Br. at 33.) However, neither the Utah Supreme Court nor the U.S. Supreme Court limited their holdings to "non-trust" lands, or any other specific lots, within Myton. Both courts specify "Myton, Utah" as the area being determined. Neither court felt the need to provide either a legal description of Myton or a specific geographical boundary because the plain meaning of "Myton, Utah" is the entire city of Myton. *Cf. Cabell v. Markham*, 148 f.2d 737, 739 (2d Cir. 1945) ("It is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else."), *aff'd*, 326 U.S. 404 (1945).

This Court cannot disregard the express holding of *Hagen* that "Myton . . . is not in Indian country." *Hagen*, 510 U.S. at 401. "*Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 1089 (2014)). Adhering to this doctrine not only promotes the "integrity of the judicial process," it "also reduces incentives for challenging settled

precedents, saving parties and courts the expense of endless relitigation." *Id.* (internal quotation marks omitted). Thus, "any departure from the doctrine demands special justification." *Bay Mills Indian Cmty.*, 188 L. Ed. 2d at 1089 (internal quotation marks omitted). To prevail, the Tribe must do much more than simply assert that *Hagen* was wrongly decided, and it has failed to establish even that much. *See Kimble*, 135 S. Ct. at 2409 ("Respecting *stare decisis* means sticking to some wrong decisions.") *Hagen* thus controls.

Even if, *arguendo*, the Court's statement that "Myton . . . is not in Indian country," 510 U.S. at 421, actually *is* mere dicta, the Tribe still fails to acknowledge that this Court is bound by Supreme Court dicta "almost as firmly as by the Court's outright holdings," *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996), "particularly when the dicta is recent and not enfeebled by later statements," *id.*

Hagen is binding on this Court and on the Tribe, and *stare decisis* compels the conclusion that Myton is not in Indian country.

B. Under *Ute Indian Tribe V*, the law of the case requires application of the holding that Myton is not in Indian country.

The Tribe tries to evade *Hagen* by invoking the mandate of *Ute Indian Tribe V*. However, *Ute Indian Tribe V* expressly incorporated the holding of *Hagen*. Thus, if *stare decisis* were not enough, *Hagen* is binding as the law of this case as

well. Furthermore, even if *Hagen* did not squarely resolve the issue of Myton's jurisdictional status, this Court did so in *Ute Indian Tribe V*. That holding also binds the Tribe as law of the case.

"Under the law of the case doctrine, when a court rules on an issue of law, the ruling should continue to govern the same issues in subsequent stages in the same case." *Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014) (internal quotation marks omitted) (applying the doctrine to issues decided by "previous panels in prior appeals in the same litigation"). "This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotation marks omitted); *see also United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998) ("This doctrine is based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided." (internal quotation marks omitted)).

The law of the case doctrine applies to issues implicitly as well as explicitly decided. *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1036 (10th Cir. 2000). Although courts always have power to revisit their earlier rulings, "as a rule courts should be loathe to do so in the absence of *extraordinary* circumstances." *Christianson*, 486 U.S. at 817 (emphasis added).

The conclusion that Myton—in its entirety—does not lie in Indian country is law of the case and should not be disturbed. This Court adopted the holding of *Hagen* as part of the *Ute Indian Tribe* litigation, modifying the mandate of *Ute Indian Tribe III* "to the extent that it directly conflicts with the holding in *Hagen*." *Ute Indian Tribe V*, 114 F.3d at 1515. As demonstrated above, *supra* Part I.A, *Hagen* squarely resolved the jurisdictional status of Myton, and that holding became the law of the case through *Ute Indian Tribe V*.

Conducting a parcel-by-parcel assessment of the jurisdictional status of specific lots and streets within Myton would "directly conflict[] with the holding in *Hagen*." *Id.* This Court has acknowledged that principles of finality—which undergird the law of the case doctrine—have special force in this dispute, where "a stable, unchanging allocation of jurisdiction" is highly desirable: "Although a title search *may* be necessary to determine which lands were opened under the 1902–1905 legislation, the parties' respective jurisdictions will never change *once the status of those lands is conclusively determined*." *Id.* at 1530 (emphases added). The status of Myton was conclusively determined by *Hagen*, which has been adopted by this Court as the law of this case, and the District Court correctly refused to allow relitigation of that settled point.

Even if this Court were, for some reason, to adopt a restrictive interpretation of *Hagen* as not resolving the status of Myton in its entirety, *Ute Indian Tribe V*

resolved the issue. Grappling with the impact of the U.S. Supreme Court's then-recent *Hagen* decision, the parties in *Ute Indian Tribe IV*—which did not include Myton—disputed the status of particular lots within Myton and requested the District Court resolve the issue. *See Ute Indian Tribe IV*, 935 F. Supp. at 1528. The District Court declined to do so. *Id.* But the Tribe, unsatisfied with that deferral, reasserted its lot-by-lot argument on the appeal following *Ute Indian Tribe IV*.

In its appellate brief in *Ute Indian Tribe V*, the Tribe argued that even after *Hagen*, four categories of fee lands retained their status as Indian country:

> (1) lands that passed from trust to fee status under the Acts of 1902–1905 [("trust-to-fee lands")];
>
> (2) lands that were initially allotted to tribal members but since have passed into fee status (whether owned by an Indian or non-Indian) [("allotted lands")];
>
> (3) 211,430 acres of land that were distributed to former members of the Tribe under the Ute Partition Act, . . . [("distributed lands")]; and
>
> [(4)] former trust lands that passed into fee when they were exchanged by the Tribe for fee lands under the Indian Reorganization Act and the Indian Land Consolidation Act [("exchanged lands")].

(Aplee. Supp. App. vol. II at 257–58 (footnote and statutory citations omitted) (formatting added).) The Tribe identified three subcategories of land *within the first category* over which it claimed jurisdiction:

> (1) the non-patented subsurface estates of homesteaded lands [("subsurface estates")];

> (2) lands for which patents were never issued within the three townsites established on the Uintah Valley Reservation [("non-patented lands")]; and
>
> (3) dependent Indian communities [("dependent communities")].

(*Id.* at 262 (formatting added).) The Tribe specifically argued, in its *Ute Indian Tribe V* brief, that parcels within Myton—including "areas dedicated as streets or reserved for schools and parks"—fell within the non-patented lands subcategory, and that the 1945 Order restored those parcels to Indian country status. (*Id.* at 264.)

This Court rejected the Tribe's argument. The Court concluded that *Hagen* resolved the issue as to the trust-to-fee lands, removing that category of lands from the definition of Indian country:

> *Hagen* directly conflicts with the first category of non-trust lands, those lands passing in fee to non-Indians pursuant to the 1902–1905 allotment legislation. This was precisely the category of fee lands at issue in *Hagen*. Accordingly, we modify our mandate in *Ute Indian Tribe III* and hold in accordance with *Hagen* that these lands are no longer within Indian country under section 1151(a) subject to the jurisdiction of the Tribe and the federal government.

Ute Indian Tribe V, 114 F.3d at 1529, 1530. Thus, although the Court did not expressly mention Myton, its categorical rejection of the Tribe's argument as to

trust-to-fee lands necessarily, albeit implicitly, resolved the issue as to the non-patented lands within Myton.[5]

The Tribe now attempts to argue that this dispute involves tribal *trust* lands within Myton, the status of which, it contends, has not been resolved. (Aplt. Br. at 33–36.) The Tribe apparently believes that lands "for which patents were never issued," (Aplee. Supp. App. vol. II at 262) became tribal trust lands under the 1945 Order. Although this Court spoke explicitly only of "non-trust lands" in describing the various categories of land in dispute, *see Ute Indian Tribe V*, 114 F.3d at 1529, 1530, "non-trust lands" is best understood as shorthand for lands that were opened under the 1905 Act, despite the fact that the character of such lands could later change, *see Ute Indian Tribe IV*, 935 F. Supp. at 1496 (referring to the four categories of disputed "*non-trust*, or fee lands" in this case as involving "tracts of 'opened lands' which at some point were returned to tribal ownership, *trust*, and/or reservation status by congressional or administrative action" (emphases added)).

Therefore, resolution of what effect *Hagen* had on non-patented lands within Myton was "a necessary step in resolving the earlier appeal," *McIlravy*, 204 F.3d at 1036, and this Court's conclusion as to Myton's Indian country status applies

[5] Furthermore, the Tribe stipulated to the dismissal of the litigation in 2000. (Aplt. App. vol. III at 369–70.) If an open question remained about Myton after *Ute Indian Tribe V*, the Tribe had a duty to raise it before the District Court on remand. It did not. Rather, it agreed to dismiss the litigation with prejudice. The Tribe waived any further right to dispute the status of Myton.

regardless of whether those non-patented lands remained in fee or eventually became tribal trust lands. The law of the case and this Court's adherence to *Hagen* compel the conclusion that lands within Myton are not Indian country within the meaning of section 1151(a).

The purpose of the law of the case doctrine is to prohibit a party from doing what the Tribe now attempts—specifically, relitigating an issue that was already decided in the same case. *Alvarez*, 142 F.3d at 1247. In this matter, this Court has repeatedly and recently emphasized its "obligation to defend the law's promise of finality." *Ute Indian Tribe VI*, 790 F.3d at 1012. "[O]nce parties are afforded a full and fair opportunity to litigate, the controversy must come to an end and courts must be able to clear their dockets of decided cases." *Ute Indian Tribe V*, 114 F.3d at 1522.

Regardless of whether this Court views *Hagen* or *Ute Indian Tribe V* as having correctly resolved Myton's jurisdictional status, the conclusion that the Tribe lacks jurisdiction over Myton, and all of the lots and streets within it, is law of the case, and, absent extraordinary circumstances, that conclusion is binding here. Thus, the District Court properly followed *Hagen* and *Ute Indian Tribe V* by dismissing the Tribe's claims against Myton with prejudice.

C. Neither newly discovered evidence nor clear error calls for departure from the law of the case.

The jurisdictional status of Myton has been conclusively determined, and the Tribe's arguments—many of which are unpreserved, *see infra* Part II— cannot justify departure from the law of the case.

Three "exceptionally narrow circumstances" may justify departure from the law of the case: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *Alvarez*, 142 F.3d at 1247. "Generally courts read these exceptions narrowly, requiring district courts to apply the law of the case unless one of the exceptions specifically and unquestionably applies." *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991) (internal quotation marks omitted).

This Court has explained that for the first exception to apply, the new evidence must not have been available to the party invoking the exception at the time the earlier ruling was made. *See id.* (concluding that "[t]he 'different or new evidence' exception [did] not apply because . . . the additional evidence provided by the government at the supplemental hearing was evidence it had in its possession, but failed to produce, at the time of the original hearing"). (Because

the lack of any intervening change in controlling authority is beyond dispute, Myton will not discuss the second exception further.)

The Supreme Court has elaborated on the standard for the third exception, *i.e.*, whether the "clearly erroneous" exception applies, explaining that "as the doctrine of the law of the case is . . . a heavy deterrent to vacillation on *arguable* issues, such reversals should necessarily be exceptional . . . ." *Christianson*, 486 U.S. at 819 (emphasis added) (citation and internal quotation marks omitted). Thus, if the earlier ruling is "plausible," the inquiry into whether to alter the earlier ruling "is at an end." *Id.* Furthermore, this Court has emphasized that a litigant hoping to persuade a court to depart from the law of the case under the third scenario must demonstrate not only that the decision was clearly erroneous, but also that failure to correct the error would work a manifest injustice. *Alvarez*, 142 F.3d at 1247. None of these exceptions apply, nor has the Tribe even argued them.

1. **No different or new evidence**

The Tribe has not asserted that the evidence on which it now relies was unavailable when it was litigating *Ute Indian Tribe IV & V*. The Tribe's arguments focus on the effect of the 1945 Order. (*See* Aplt. Br. at 16, 21–24, 26–30, 33–36.) But the 1945 Order is far from new evidence. Indeed, the 1945 Order's scope was the subject of repeated arguments in the prior litigation that did not involve Myton, including arguments before the Supreme Court in *Hagen*. The Tribe argues that

Hagen is limited because the *Hagen* Court "never took into account—indeed was never informed of—the factual and legal impact flowing from the restoration of lands within the Myton Townsite to tribal ownership and jurisdiction under the 1945 Restoration Order." (Aplt. Br. at 21–22.)

However, the Tribe misstates the facts. The 1945 Order was discussed by Mr. Hagen in his brief to the Supreme Court (Aplee. Supp. App. vol. I at 130), and it was discussed by Utah in its brief to the Supreme Court (*id.* vol. II at 159, 183). Moreover, the complete text of the 1945 Order was set forth in *Perank*, *see* 858 P.2d at 950, a copy of which was included in the Joint Appendix filed with the Supreme Court in *Hagen*.[6] (Aplee. Supp. App. vol. II at 200–05.). That *Hagen* did not mention the 1945 Order does not mean that the Court was misled or misinformed. At most, it suggests that the Court did not find the 1945 Order dispositive regarding Myton's status. In fact, the briefing before the Supreme Court amply demonstrates that the 1945 Order was considered by the Court. The Tribe has pointed to nothing suggesting that public records relevant to its interpretation of the 1945 Order were unavailable at that time. Furthermore, as discussed above, *supra* Part I.B, the Tribe has already presented these same arguments about the 1945 Order, without success, to the District Court and this

[6] Notably, the Tribe could have discussed the 1945 Order in its amicus brief to either the Utah Supreme Court in *Perank* or the U.S. Supreme Court in *Hagen*, but it did not. (Aplee. Supp. App. vol. I at 10–17, 33–74.)

Court in *Ute Indian Tribe IV & V*.

2. **No clear error**

The Tribe has not demonstrated clear error—let alone manifest injustice[7]—in the conclusion that Myton is not Indian country. The Tribe repeatedly refers to trust lands within Myton, pointing to a map and general plan on Myton's website as if they were a smoking gun that conclusively establishes the Tribe's jurisdiction.[8] (Aplt. Br. at 6–7.) First of all, the map and general plan are not properly before this Court.[9] *See infra* Part II. Furthermore, no city map has any force of law in designating land ownership, let alone jurisdiction.

Myton has never disputed that the Tribe may own land within the Myton Townsite. However, Myton does dispute the Tribe's claim that it owns, or has jurisdiction over, Myton's streets, alleyways, and any land for which a patent cannot be produced, especially if such land has been continuously subject to municipal jurisdiction for over 100 years. Even if the map did show ownership of

[7] Not only does the Tribe fail to demonstrate any manifest injustice that would flow from adhering to the law of the case, but, as the discussion below regarding laches demonstrates, *infra* Part I.D, departing from the law of the case by declaring land within Myton to be under the jurisdiction of the Tribe would itself work a manifest injustice.

[8] Under Utah law, general plans are designed for planning purposes and, with one exception in applicable here, are advisory only. *See* Utah Code § 10-9a-405.

[9] Nor can the map be taken as an admission by Myton as to the status of the land. The map was not prepared by Myton, which, as a small town with a population of 569, lacks the resources to create maps and relies on maps made by others.

land, the issue of ownership was not before the District Court and is not the issue before this Court. To the contrary, the issue before this Court is whether Myton is subject to the Tribe's jurisdiction—not which land the Tribe may own.[10]

Whatever the Tribe's ownership interest may be, such an interest does not establish governmental jurisdiction. "Congress uncouple[d] reservation status from Indian ownership" in 1948 when it enacted section 1151. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984); *see also Ute Indian Tribe IV*, 935 F. Supp. at 1496 ("When located within a defined reservation boundary, jurisdiction remains constant even though trust status or ownership of a specific tract may change over time."); *id.* at 1505 ("As with Indian allotments, where such land exchanges take place within the existing boundaries of a reservation, the transition of a particular parcel into or out of tribal ownership or trust status has no impact on the existing jurisdictional limits.").

Furthermore, tribal trust land is not synonymous with tribal jurisdiction. *See* 18 U.S.C. § 1151 (defining "Indian country" without reference to "trust lands"); 1-

[10] As the Tribe's complaint demonstrates, the present case is solely about jurisdiction, not ownership. (Aplt. App. vol. III at 374–85.) Furthermore, at oral argument before a panel of this Court for *Ute Indian Tribe VI*, the Tribe reiterated that the scope of the 2013 complaint was limited to two claims: (1) "[F]or the State of Utah to not prosecute tribal members who are arrested for conduct occurring within those boundaries," and (2) "[T]o prevent the State of Utah from relitigating the tribe's reservation boundaries in its state courts . . . ." (Aplt. App. vol. XIX at 2644–45.)

15 Cohen's Handbook of Federal Indian Law § 15.03 ("The term 'trust land' is often used imprecisely in the case law, however, and it is important to distinguish between the use of the term for jurisdictional purposes and for describing tribal interests in property. . . . The land may be located within or outside the boundaries of a reservation."). Therefore, the existence of tribal trust land within Myton, does not resolve the only relevant issue here—jurisdiction over Myton.

The key inquiry is thus not ownership, but how congressional and executive action diminishing the reservation affected Myton. Far from being clearly erroneous, an examination of the history of Myton and the 1945 Order demonstrates that *Hagen*'s and *Ute Indian Tribe V*'s resolution of that issue is, in fact, quite correct.

Myton was created as a Presidential Townsite on July 31, 1905. Acting under the authority of the 1902–1905 Acts and laws governing the creation of townsites on public lands, *see* Rev. Stat. of 1878, §§ 2380–81, President Roosevelt declared that the area of what would later become

Myton was "reserved as [a] townsite[], to be disposed of by the United States under the terms of the statutes applicable thereto." (Aplt. App. vol. VI at 968.)

In 1934, Congress passed the Indian Reorganization Act ("Act"), authorizing the Secretary of the Interior to restore surplus lands to reservation status. The Act states in pertinent part:

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

Act of June 18, 1934, ch. 576, 48 Stat. 984, § 3, codified as amended at 25 U.S.C. § 463. However, nothing in the Act required or compelled the Secretary to restore any or all lands to tribal ownership. The Secretary was free not to restore or to restore only certain lands within a particular opened reservation boundary.

The Secretary chose to restore certain surplus lands to the Reservation in 1945. The 1945 Order explained that, following the 1902 opening of the Reservation, "approximately 217,000 acres of unallotted lands" remained undisposed of. 10 Fed. Reg. 12,409, 12,409 (Aug. 25, 1945). These "undisposed-of opened lands" were thus "restored to tribal ownership . . . and added to and made a part of the existing reservation, subject to any valid existing rights." *Id.* Explaining the reason for restoring this land to the Reservation, the order stated that the 217,000 acres "need[ed] closer administrative control in the interest of better conservation practices." *Id.*

The 217,000 acres restored to the Reservation do not include lots or streets within Myton. Although the Tribe points to unpreserved evidence indicating that the Department of the Interior, a non-party to this litigation, later asserted a contrary position (Aplt. Br. at 16–17, 25–26), nothing in the order itself supports

that interpretation.[11] By 1945, Myton City was an established municipality of the State of Utah. It had its own government, elected officials, and ordinances to ensure governance and control over its citizens and all land within its city limits. Myton did not require greater administrative control, nor, as a municipality, was it in need of more effective conservation practices.

More fundamentally, the Act did not authorize the Secretary of the Interior to restore land within a Townsite or municipality to reservation status. The Act authorized the restoration only of "surplus lands." 48 Stat. 984, § 3. Reference to "undisposed of" lands in the 1945 Order must be interpreted in light of the authorizing congressional act, which refers only to "surplus lands." The land within Myton had already been reserved as a Townsite by presidential proclamation in 1905. Once President Roosevelt reserved Myton as a Presidential Townsite, it was no longer "surplus land." *See* Rev. Stat. of 1878, § 2380 ("The President is authorized to *reserve from the public lands* . . . any natural or prospective centers of population."). Because land in Myton was not "surplus land," it was not subject to restoration under the Act via the 1945 Order.[12]

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[11] The argument that this evidence is unpreserved is discussed in Part II below.

[12] This conclusion is reinforced by contemporaneous historical documents. To the extent this Court decides to consider the Tribe's evidence that was neither attached to the complaint nor relied on by the District Court, it should take judicial notice of the public record. *See Conagra Foods, Inc. v. Americold Logistics, LLC*, 776 F.3d 1175, 1176 n.1 (10th Cir. 2015) (stating that appellate courts have authority to take

Thus, the Tribe thus cannot demonstrate any error in the conclusion that Myton is not Indian country, much less that the conclusion is "clearly erroneous." At best, the Tribe's evidence demonstrates only that the Tribe's position might be "arguable," but that is insufficient to disturb the law of the case. *See Christianson*, 486 U.S. at 819. These same arguments have been made by the Tribe without success at least twice before. *See supra* Part I.B. Not only is this the Tribe's third

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judicial notice of public records not part of the record on appeal). The Department of the Interior's apparent later interpretation of the 1945 Order cited by the Tribe conflicts with the Department's original intent, which excluded the townsites from the 217,000 acres that were the subject of the order.

Months before the order's promulgation, the Assistant Commissioner of Indian Affairs issued a memorandum explaining that these acres were "*unentered* ceded lands . . . without administration" that had been "overgrazed" and were being restored "to make their grazing capacity available for [the Tribe's] livestock industry." (Aplee. Supp. App. vol. I at 2.) Further, days after the order's promulgation, the Assistant Secretary of the Interior issued another memorandum that reiterated this interpretation and explained that the 217,000 acres were the ceded lands that remained *after* withdrawals "made for town sites" and other purposes and "represent lands in rough country which no homesteader would have." (*Id.* at 7.) Land within Myton, a settled and platted townsite with an elected mayor and city council does not qualify as "unentered" land "without administration" that "no homesteader would have."

The April 11, 1947 memorandum the Tribe cites is also limited to "certain lands" that were the subject to an Act of July 26, 1916, 39 Stat. 389, which authorized Myton to acquire six specific parcels, the vast majority of which were located outside of the townsite boundaries, including land which Myton sought for an airport. (Aplt. App. vol. XIV at 2087–88.) Thus, that memorandum has no bearing on lands within Myton not specifically mentioned in the Act of July 26, 1916, such as Myton's streets and alleyways. Further, the doctrine of laches bars the Tribe's claims, particularly over the long-developed portions of Myton. *Infra* Part I.D.

"bite at the apple," but it has failed, yet again, to show that *Hagen*'s conclusion was clearly erroneous. This Court should therefore affirm dismissal of Myton.

D. Equitable doctrines such as laches bar the Tribe's claims in light of longstanding observances and settled expectations and the Tribe's failure to challenge Myton's jurisdiction for over a century.

In this case, the Tribe seeks jurisdiction over all land within the City for which the City is unable to produce a patent. This includes all streets, highways, alleyways, rights-of-way, and school lots in the City. It also includes land that has been owned, controlled, and governed by non-Indians for over a century.[13] Prior to 2013, the Tribe never asserted jurisdiction or ownership claims against Myton. A finding that Myton is in Indian country would disrupt the justifiable expectations of the citizens of Myton and conflict with established Supreme Court precedent regarding the doctrine of laches, acquiescence, and impossibility.[14]

The Tribe asserted before the District Court that the "three-element test" in

[13] Although the Tribe's complaint ostensibly seeks only jurisdiction over Myton, throughout the proceedings the Tribe has also asserted ownership over streets, alleyways, and more than half of the lots in Myton. (*E.g.*, Aplt. App. vol. XIV at 2009–10, 2011, 2023.) But, as discussed above, *supra* pg. 34 n.9, the Tribe has conceded that jurisdiction is the only issue in this case.

[14] Although Myton did not raise this argument before the District Court in arguing or briefing the motion to dismiss, this Court is free to "affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) ("[W]e treat arguments for *affirming* the district court differently than arguments for *reversing* it."); *cf. City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005) (resolving jurisdictional dispute on equitable basis of laches, acquiescence, and impossibility, despite lack of briefing on those issues).

Ute Indian Tribe V (*see* Aplt. Br. at 11, 12), requires each city and county to produce a patent for each parcel of ground proving the land was sold by the United States prior to 1945. (Aplt. App. vol. XIII at 1778, 1808–09.) The Tribe maintains that, without a patent, *Ute Indian Tribe V* requires a holding that the land is unequivocally under Indian control and jurisdiction. (Aplt. Br. at 26, 28, 30, 33–34.) However, *Ute Indian Tribe V* never states that a patent is a prerequisite to find Myton is not Indian country. In fact, aside from its quotation of section 1151(a), *Ute Indian Tribe V* never uses the word "patent" anywhere within the decision.[15]

Ute Indian Tribe V stated that a "title search *may* be necessary to determine which lands were opened under the 1902–1905 legislation;" however, a U.S. patent is not the sole evidence available to prove that a parcel of ground was "opened under the 1902-1905 legislation." *Ute Indian Tribe V*, 114 F.3d at 1530 (emphasis added). Consideration of the land's use and occupation since 1905 is a prime example of an alternative manner of assessment. Moreover, the *Hagen* court recognized that surplus land acts that "provided for initial entry under the homestead and townsite laws" could effect diminishment. 510 U.S. at 416.

[15] The reference to 1151(a) is instructive, for the statute clearly envisions that the existence of a patent is not dispositive in resolving the question of jurisdiction. *See* 18 U.S.C. § 1151(a) (defining Indian country in part as "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" (emphasis added)).

Patents are not required.

For over 100 years, starting in 1905 when the reservation was opened to non-Indian settlement and the Presidential Townsite was reserved, Myton has "functioned as a municipality." (Aplt. App. vol. VI at 971.) It has "constructed and maintained streets, sidewalks, [and] alleys" (*id.*), treating them as public thoroughfares as provided under state law.[16] It has constructed "public infrastructure such as municipal water and sewer systems" (*id.*), "levied and collected taxes" (*id.*), enacted ordinances governing public health, safety, and welfare (*id.*), and exercised "misdemeanor criminal jurisdiction" (*id.*). Neither the Tribe nor the United States had ever challenged or questioned *Myton's* governance and jurisdiction until 2013, when the Tribe first named Myton as a defendant in this case.

This longstanding assumption of jurisdiction by Myton creates "justifiable expectations" that the City will maintain its jurisdictional rights. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 216 (2005); *Hagen*, 510 U.S. at 421. In *Hagen*, the Supreme Court found such justifiable expectations relevant

[16] *See* Utah Code Ann. § 25-1-1114 (1898) ("In all counties of [the State of Utah], all roads, streets, alleys, lanes, courts, places, trails, and bridges laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in action for the partition of real property, are public highways."); *id.* § 25-1-1115 ("A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.").

when it addressed the challenge to the State's felony jurisdiction in Myton. Specifically, the Court considered the long history of the State's "assumption of jurisdiction" over Myton, the fact that, at the time, approximately 85 percent of the population was non-Indian, and that Fort Duchesne, the seat of tribal government, was located on trust lands rather than opened lands. 510 U.S. at 421. Consequently, *Hagen* determined that Myton's "jurisdictional history," along with "the current population situation in the Uintah Valley, demonstrates a practical acknowledgement that the Reservation was diminished" and a conclusion that Myton was in Indian country "would seriously disrupt the justifiable expectations of people living in the area." *Id.* (internal quotation marks omitted).

Although *Hagen* considered the foregoing factors to determine congressional intent, the Court later expounded on and reinforced *Hagen*'s consideration of the "assumption of jurisdiction," "disruption," and "justifiable expectation" factors in *City of Sherrill*. 544 U.S. at 215 & n.9. The *Sherrill* Court explained that such factors are relevant to the equitable doctrines of "laches, acquiescence, and impossibility." *Id.* at 221.

In *Sherrill*, land within the city was unlawfully sold to non-Indians without federal government approval over 200 years ago. *Id.* at 210. The land thereafter remained in non-Indian hands, and part of the city, until the tribe purchased the land in 1997 and 1998 in open-market transactions. *Id.* Because the parcels were

within the former boundaries of the reservation, the tribe maintained that the properties were exempt from taxation. *Id.* A legal battle over jurisdiction to levy taxes ensued. The Second Circuit ruled that the parcels qualified as Indian country, but the Supreme Court reversed. *Id.* at 212.

Without disputing the fact that the land over which the tribe sought to assert sovereignty might qualify as Indian country under section 1151, *see id.* at 223 (Stevens, J., dissenting), the Court observed that the appropriateness of the relief the tribe sought "must be evaluated in light of the long history of state sovereign control over the territory." *Id.* at 214 (majority opinion). The "standards of federal Indian law and federal equity practice preclude the tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* (internal quotation marks omitted). The Court noted that (1) the properties involved had greatly increased in value since the 1800s, *id.* at 215, (2) recent population demographics showed that the city was "overwhelmingly populated by non-Indians," *id.* at 219, (3) the tribe and the federal government acquiesced or were indifferent to the State of New York's continuous governance of the territory, *id.* at 214–15, 218, and (4) it would be impractical to return to Indian control "land that generations earlier passed into numerous private hands," *id.* at 219.

"It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable

relief." *Id.* at 217. The Court also explained that, in the context of disputes over tribal jurisdiction, long acquiescence to state sovereign control and the impracticability of disturbing long-settled expectations are barriers to relief. *Id.* at 218-20. Given the passage of time in *Sherrill* and the justifiable expectations of the overwhelmingly non-Indian population, the Court held that the doctrines of laches, acquiescence, and impossibility rendered inequitable the tribe's claims to jurisdiction over the parcels it had obtained within the city. *Id.* at 221.

"[T]he import of *Sherrill* is that 'disruptive,' forward-looking claims . . . are subject to equitable defenses, including laches." *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 277 (2d Cir. 2005). But "the equitable defense recognized in *Sherrill* . . . does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury." *Oneida v. New York*, 617 F.3d 114, 127 (2d Cir. 2010).

Applying *Sherrill* here, it would be inequitable for the Tribe to take jurisdiction, let alone ownership, over Myton's streets and alleyways and other land that has long been governed by Myton. For 108 years, between 1905 and 2013, and 68 years between 1945 and 2013, the Tribe, the United States, Utah,

Duchesne County, Myton, and numerous private land owners recognized and accepted the jurisdiction and governance exercised by Myton as a Utah municipality.

According to the 2010 Census, over 90% of the population of Myton is non-Indian.[17] Applying *Sherrill* and *Hagen*, this creates a heavy presumption that granting the Tribe's claims will upset the justifiable expectations of the people in that area. It would be impractical and inequitable to ignore the Tribe's long acquiescence and bestow upon the Tribe jurisdiction over Myton, which has long governed itself. Whatever past injustices the Tribe has suffered cannot be remedied by imposing present and future injustices upon the people of Myton. *See, e.g.*, *Oneida*, 617 F.3d at 127 (balancing "historic injustice" against present and future inequities).

II. MOST OF THE TRIBE'S ARGUMENTS WERE NOT PRESERVED.

Standard of Review: Whether an argument has been properly preserved is an issue reviewed for plain error. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011). However, because the Tribe does not argue plain error on appeal, it has forfeited the benefit of that strict standard. *Id.* at 1130–31. The Tribe's various motions to reconsider or clarify appear in the record at Aplt. App. vol. XVI at 2327, *id.* at 2368, *id.* vol. XVIII at 2519, and *id.* vol. XIX at 2664. The District Court's denial of those motions appears at Aplt. App. vol. XXIII at 3228.

[17] Summary of Population and Housing Characteristics: Utah, 2010, Table 3, pg. 30, available at http://www.census.gov/prod/cen2010/cph-1-46.pdf (last visited October 6, 2015).

The Tribe raises a host of arguments on appeal that were first presented to the District Court in a flurry of post-Order motions asking the Court to reconsider and clarify its written Order dismissing Myton. These arguments include separation of powers, fraud upon the Supreme Court, judicial estoppel, and collateral estoppel. After the District Court ruled, the Tribe also presented several exhibits that were neither attached nor referred to in the complaint, nor in response to Myton's motion to dismiss. Because the District Court did not address these belated arguments and exhibits—a decision that was well within its discretion—they are not preserved for appeal and cannot be considered. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1038–39 (10th Cir. 2009).

Raising a new argument in a motion to reconsider is "not sufficient to preserve it for appeal." *Braswell v. Cincinnati Inc.*, 731 F.3d 1081, 1093 (10th Cir. 2013). Furthermore, simply "mention[ing] related points earlier" in the proceedings but "fail[ing] to argue the . . . issue explicitly" is insufficient to preserve the argument for appeal. *Elephant Butte Irrigation Dist. of N.M. v. United States DOI*, 538 F.3d 1299, 1303 (10th Cir. 2008) (internal quotation marks omitted).

Appellate courts will make an exception, treating an argument as preserved "if the district court had exercised its discretion to address [the belated] challenge."

Kleinsmith, 571 F.3d at 1038. But when the district court exercises its unquestioned discretion not to address a belated argument, *id.* at 1039; *Elephant Butte Irrigation Dist.*, 538 F.3d at 1303, "[i]t follows that the claim [is] not preserved for appeal," *Kleinsmith*, 571 F.3d at 1039. "Consequently, when a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review." *FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *see also Kleinsmith*, 571 F.3d at 1039 ("'The presentation of a previously unpled and undeveloped argument in a motion for reconsideration neither cures the original omission nor preserves the argument as a matter of right for appellate review.'" (internal quotations omitted).

Most of the Tribe's arguments on appeal were belated and not considered by the District Court. In its memorandum in opposition to Myton's motion to dismiss, the Tribe argued that (1) *Hagen*'s reference to Myton was dicta, (2) that Myton was precluded from challenging the status maps the other parties had stipulated to before Myton was even a party to this litigation, and (3) that the mandate from *Ute Indian Tribe V* requires a lot-by-lot assessment of how the 1945 Order affected jurisdiction within Myton. (Aplt. App. vol. IV at 557–60.)

At the June 24, 2013 hearing on the motion to dismiss, the Tribe did not present evidence or make any argument as to the effect of the 1945 Order on

Myton. (*See id.* at 578–80.) The District Court held a pre-trial conference on September 22, 2014, to hear and decide all pending motions before the court, including Myton's motion to dismiss. (*Id.* vol. XIII at 1727.) The Tribe argued at length about the meaning and scope of *Hagen* and its interpretation of *Ute Indian Tribe V*. (*Id.* vol. XIII at 1807–15.) The Tribe also argued that, according to new maps it referred to but did not produce, "much of the land" in Myton, including roads, "was not patented" and thus were restored to the reservation. (*Id.* at 1808–09.)

The District Court did not take up a lot-by-lot assessment of Myton. Rather, it granted the motion to dismiss (*id.* at 1815), explaining in its written order that it did so on the grounds that the Supreme Court had squarely resolved the issue of Myton's jurisdictional status in *Hagen* and that the Tenth Circuit, in *Ute Indian Tribe V*, had directed the application of that holding to this litigation (*id.* vol. XVI at 2263).

After the District Court granted the motion to dismiss but before it issued its written order, the Tribe requested leave to supplement the record, filing nearly 150 pages of exhibits, including maps, patents, documents relating to the incorporation of Myton, and a 1947 memorandum directed to the Secretary of the Department of the Interior. (*See id.* vol. XIV at 2081–vol. XV at 2227.) It was not until after the District Court issued its written ruling on January 28, 2015, that the Tribe first

asserted—in four separate motions to reconsider or clarify—that (1) applying *Hagen*'s conclusion regarding Myton would violate separation of powers principles by diminishing the Uintah Valley Reservation by judicial fiat (*id.* vol. XIX at 2676); (2) Utah committed a fraud upon the U.S. Supreme Court in *Hagen* by informing the Court that the entire town of Myton is located outside the Reservation (*id.* at 2670–72, 2678); (3) Myton is judicially estopped from taking positions contrary to those adopted by Utah in prior litigation to which Myton was not a party (*id.* vol. XVI at 2373; *id.* vol. XIX at 2673–74); and (4) collateral estoppel precludes the Tribe from being bound by *Hagen* (*id.* vol. XVIII at 2521–29).

The Tribe also presented numerous new attachments to these belated motions. (*Id.* vol. XVI at 2348, 2351–54; *id.* vol. XVIII at 2569–73; *id.* vol. XIX at 2700–16, 2724, 2733–37.) These arguments and attachments were not—but easily could have been—provided by the Tribe to the District Court prior to its ruling.[18]

The Tribe's belated production of new evidence and new arguments is

[18] The only exception would be a 1994 Department of the Interior memorandum that the Tribe attached to its opposition to Myton's summary judgment motion—on which the District Court never ruled—and then again to its third motion to reconsider. (Aplt. App. vol. VIII at 1181–96; *id.* vol. XIX at 2683–98.) As shown above, however, the Department's later interpretation conflicts with its contemporary interpretation of the 1945 Order. *See supra* pg. 38 n.11.

insufficient to preserve these issues for appeal, particularly in light of the fact that the District Court did not consider them. *See Kleinsmith*, 571 F.3d at 1038–39; *Noel*, 177 F.3d at 915. Had the District Court exercised its discretion to address the additional evidence, it would have effectively converted Myton's Rule 12(b)(6) motion into one for summary judgment. *See* Fed. R. Civ. P. 12(d); *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987) ("Since both parties have submitted additional evidence beyond the pleadings, and *since the district court relied on this information*, the motion was appropriately characterized as a motion for summary judgment" (emphasis added)). But it did not. Therefore, this Court must similarly limit its analysis to the facts pleaded in the complaint, and arguments made to the District Court prior to ruling.

Because the Tribe forfeited these arguments, it must show plain error. *Richison*, 634 F.3d at 1128. "In civil cases this often proves to be an extraordinary, nearly insurmountable burden[.]" *Id.* at 1130 (internal quotation marks omitted). Establishing plain error is the appellant's burden, *id.* at 1128, 1130–31, and the Tribe has not attempted to show how its unpreserved, unaddressed legal theories satisfy the plain error burden. "[T]he failure to argue for plain error and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court." *Id.* at 1130–31. The Tribe has thus forfeited its right to argue plain error. *See id.*

In any event, the Tribe's forfeited arguments are meritless even under the most favorable standard of review. First, contrary to the Tribe's accusations, no court has diminished the Reservation. Congress did. The courts have simply exercised their constitutional responsibility to say what Congress has done and apply that law to Myton. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Second, the Tribe's fraud-upon-the-court argument is fundamentally flawed because it presumes the correctness of its self-serving and overbroad interpretation of the 1945 Order, and that the 1945 Order was kept from the Supreme Court. The 1945 Order did not restore Myton to the Tribe's ownership and jurisdiction. *See supra* Part I.C. Also, the 1945 Order was not withheld from the Supreme Court. *See supra* Part I.C. Third, the Tribe's argument that Myton is judicially estopped from disagreeing with the State's interpretation of the 1945 Order is beside the point. Myton does not dispute the general effect of the 1945 Order. The State's representations about that order's general effect in no way estops Myton from arguing that the order did not address lands within Myton's boundaries. *See supra* Part I.C.

Finally, the Tribe's argument that it is not collaterally estopped from challenging *Hagen* is beside the point. *Hagen* binds the Tribe through the doctrines of *stare decisis* and the law of the case. *See supra* Parts I.A & I.B. Although collateral estoppel is related to these two doctrines of finality, each

doctrine applies in distinct circumstances. "'Stare decisis has the broadest application of all the relitigation doctrines, in the sense that it applies not only to the parties in the particular case and those in privity with them, *but also to strangers to the litigation*.'" *Ute Indian Tribe IV*, 935 F. Supp. 1473, 1509 (D. Utah 1996) (emphasis added) (quoting 1B James W. Moore et al., Moore's Federal Practice, P 0.401, at I-2) (2d ed. rev. 1993) (footnotes omitted).

Furthermore, because *Ute Indian Tribe V* incorporated *Hagen*'s holding into this dispute, the doctrine of the law of the case, rather than collateral estoppel, governs. *See* 18 James W. Moore et al., Moore's Federal Practice § 134.20[1], at 134-52 (3d ed. 2015) (stating that collateral estoppel applies to subsequent suits while the law of the case applies to subsequent stages of the same litigation). Finally, the appropriate time for the Tribe to challenge the preclusive effect of *Hagen* was in *Ute Indian Tribe V*. Indeed, the Tribe did so, and this Court squarely rejected that argument. *Ute Indian Tribe V*, 114 F.3d at 1524 ("[T]he Tribe's reliance on collateral estoppel is misplaced.").

Myton submits that this Court cannot consider the Tribe's unpreserved arguments as to fraud upon the court, separation of powers, judicial estoppel, collateral estoppel, or any of the documents submitted after the District Court had ruled.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING THE TRIBE'S THIRD MOTION TO RECONSIDER.

Standard of Review: This Court reviews a district court's ruling on a motion to reconsider for abuse of discretion. *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005). The Tribe's third motion to reconsider appears in the record at Aplt. App. vol. XIX at 2664, and the District Court's order striking that motion appears at Aplt. App. vol. XXIII at 3228.

The Tribe argues that the District Court erred in striking its third motion to reconsider. (Aplt. Br. at 49–52.) However, the District Court acted well within its discretion in doing so.

As the Tribe acknowledges, district courts have broad discretion under Rule 54(b) of the Federal Rules of Civil Procedure to reconsider rulings prior to the entry of final judgment. Fed. R. Civ. P. 54(b); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983). But arguments for reconsidering a ruling must be balanced against principles of finality. 18B Charles Alan Wright et al., Federal Practice & Procedure § 4478.1, at 694 (2d ed. 2002). Thus, district courts should only reverse a prior interlocutory ruling "if sufficient cause is shown." *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 12 n. 14.

Reconsideration of a final judgment is generally limited to the following narrow grounds: "(1) new and different evidence; (2) intervening controlling authority; or (3) a clearly erroneous prior decision which would work a manifest injustice." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011).

Although a district court's discretion is not limited to these grounds when reconsidering an interlocutory decision, *id.* at 1251–52, it still may reject a motion for reconsideration of an interlocutory order on one of those bases, *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); *Ankeney v. Zavaras*, 524 F. App'x 454, 458 (10th Cir. 2013) (unpublished).

The District Court struck the Tribe's third motion to reconsider and denied its first and second reconsideration motions and its motion to clarify, explaining that the motions were "belated in time," and that the court "already had received and considered the same information and arguments" in making its initial ruling. (Aplt. App. vol. XXIII at 3228.) The District Court apparently viewed some arguments as not having been timely raised and others as largely "plow[ing] the same furrow," even though they were "elaborated somewhat by [additional] exhibits." (*Id.* vol. XX at 2812.) The District Court explained in its oral ruling that "the Supreme Court was fairly definitive" in *Hagen*, and it was bound to apply that holding. (*Id.* at 2812–14.) It also provided a separate rationale for one of the arguments raised in the third motion to reconsider that the District Court struck: the Tribe's argument about fraud upon the U.S. Supreme Court had to be brought before that Court, not the District Court. (*Id.* at 2786, 2801.)

Regarding the District Court's order striking the Tribe's third motion to reconsider, the Tribe argues that it did not have a chance to assert its arguments

any earlier because the District Court had already "rejected Myton's dismissal motion" at the June 24, 2013 hearing, only to reverse course at the September 22, 2014 hearing "without any advance notice to the Tribe." (Aplt. Br. at 49, 50.)

Whatever the Tribe's understanding may have been, the transcript of the June 24, 2013, hearing clearly speaks for itself: the District Court twice emphasized that it was not ruling on Myton's motion to dismiss that day. (Aplt. App. vol. IV at 580 ("I won't rule on your motion today."); *id.* at 581 ("I am not denying your motion.").) The District Court also assured the parties that a later opportunity to argue the motion would be provided. (*Id.*). These are hardly the statements of a Court that has ruled.[19]

On April 30, 2014, Myton notified the court that the motion to dismiss was ready to be submitted for decision. (Aplee. Supp. App. vol. II at 269–70.) Specifically, Myton stated that "[t]he Court requested additional information from Myton City prior to hearing argument from the parties. Myton is prepared to respond to the Court's inquiries. Therefore, the *Motion* is ready for decision." (*Id.*). Furthermore, the notice of hearing on September 22, 2014, indicated that "all pending motions" would be heard at the pretrial conference (*id.* vol. XII at 1727), and in the proposed stipulated pre-trial order of August 22, 2014, Myton listed its motion to dismiss as a pending motion and presented several arguments

[19] Moreover, no written order was entered followed the June 24, 2013 hearing.

for dismissal as issues to be decided. (*Id.* vol. XXII at 3008–12; *id.* vol. XXIII at 3146.)

If, despite all of this notice, the Tribe was somehow caught off guard, Myton and the District Court are guiltless. Nothing prevented the Tribe from preparing for and advancing all of its arguments prior to or at the September 22, 2014, hearing. The Tribe had ample time prior to and at the September 22, 2014 hearing to advance all arguments in its attempt to escape the binding effect of *Hagen*'s conclusion that "the town of Myton . . . is not in Indian country." *Hagen*, 510 U.S. at 421.[20]

Finally, the Tribe alleges bias as well as due process and equal protection violations. (Aplt. Br. at 51–52.) The claim of bias is frivolous. Not only is this argument raised for the first time on appeal, *see Hampton v. United States*, 504 F.2d 600, 604 (10th Cir. 1974) (refusing to consider allegations of bias raised for the first time on appeal), but the Tribe fails to cite a single instance in the record supporting its claim of bias. Instead, it improperly invites this Court to review every page in a 3,377-page transcript to root out evidence of bias the Tribe cannot point to. *See* Fed. R. App. P. 28(a)(8) (requiring an appellant's argument to contain "citations to the authorities and parts of the record on which the appellant

[20] Notably, although the Tribe attempts to reargue the merits of its unpreserved arguments, it does *not* argue that the District Court abused its discretion in denying its motion to clarify and its first two motions to reconsider.

relies"). Even if this Court were inclined to undertake such a herculean task, the record, not to mention the District Court's rulings in the Tribe's favor in the prior stages of this litigation, quickly belie any hint of bias against the Tribe. The Tribe is simply unhappy with the District Court's ruling. But an adverse ruling, without more, does not establish bias. *Estate of Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1058 (10th Cir. 2001). The Tribe's cursory allegations of due process and equal protection violations are equally unsupported by citation to any specific fact or legal authority. Therefore, the District Court did not abuse its discretion in striking the Tribe's third motion for reconsideration.

CONCLUSION

"[S]ooner or later every case must come to an end." *Ute Indian Tribe VI*, 790 F.3d at 1003. For the dispute over the jurisdictional status of Myton, that day has come. Therefore, for the reasons stated above, this Court should affirm the District Court's dismissal of Myton and its subsequent striking of the Tribe's third motion to reconsider.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested due to the complexity of the issues, the significant impact of the case on the parties, and the broad public impact of the issues raised herein.

Dated this 19 day of October, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated this 19 day of October, 2015

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CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that with respect to the foregoing: (a) all required privacy redactions have been made pursuant to Tenth Cir. R. 25.5; (b) if required to file additional hard copies, that the ECF submission of this motion is an exact copy of those documents; and (c) the digital submission of this motion has been scanned for viruses with the most recent virus scanning program [Managed Antivirus, version 6.2.5528.0, October 19, 2015].

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CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of October, 2015, I caused a true and accurate copy of the foregoing to be served via the Court's CMF/ECF service to the following:

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ADDENDUM A

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, v. THE STATE OF UTAH, DUCHESNE COUNTY, a political subdivision of the State of Utah, ROOSEVELT CITY, a municipal Corporation, DUCHESNE CITY, a municipal corporation, MYTON, a municipal corporation, and UINTAH COUNTY, a political subdivision of the State of Utah, Et. al Defendants,	**Order Dismissing Claims against Defendant Town of Myton** Consolidated Action Civil Nos. 2:75-cv-00408BSJ; 2:13-cv-00276BSJ 2:13-cv-01079BSJ The Honorable Bruce S. Jenkins Senior District Judge

On May 9, 2013, Myton, a municipal corporation, filed a motion to dismiss through its counsel, Amy F. Hugie. The motion seeks to dismiss Plaintiff Ute Indian Tribe's (the "Tribe") claims with prejudice insofar as the claims concern Myton.[1] The Tribe filed its opposition on May 28, 2013,[2] which Myton replied to on June 9, 2013.[3] On September 12, 2014, the court provided notice to parties that the court would hold a final pretrial conference, in the context of which all pending motions would be heard.[4] Pursuant to such notice, a final pretrial conference and motions hearing came before the court on September 22, 2014. J. Preston Stieff, Fredericks Peebles & Morgan LLP, Jeffrey Rasmussen, and associated counsel appeared representing the

[1](Myton City's Mot. to Dismiss and/or Mot. for J. on the Pleadings, filed May 9, 2013 (CM/ECF No. 200).)

[2](Mem. in Opp'n to Def. Myton's Mot. to Dismiss, filed May 28, 2013 (CM/ECF No. 221).)

[3](Myton City's Reply Mem. in Further Supp. of its Mot. to Dismiss and/or Mot. for J. on the Pleadings, filed June 9, 2013 (CM/ECF No. 244).)

[4](Notice of Hr'g on Mot., filed September 12, 2014 (CM/ECF No. 677).)

Tribe; the Utah State Office of Attorney General, Kathy Kinsman and Randy S. Hunter, Assist. Attorneys General, representing the State of Utah Defendants; Suitter Axland, PLLC, Jesse C. Trentadue and associated counsel appeared representing Defendant Duchesne County; Grant H. Charles representing Defendant Roosevelt City; Smith Hartvigsen PLLC, J. Craig Smith and associated counsel representing Myton and Duchesne City; and Ray, Quinney & Nebeker, P.C., E. Blaine Rawson, and associated counsel, representing Uintah County.

During the final pretrial conference, the court heard arguments from Myton and the Tribe concerning Myton's motion to dismiss. After considering the arguments, the court ruled from the bench, granting Myton's motion. The court requested counsel for Myton to prepare a suggested form of order.

On October 9, 2014, counsel for Myton submitted a suggested form of order to the court. On October 16, 2014, the Tribe filed their objections to Myton's proposed order.[5] Additionally, the Tribe submitted its own suggested form of order.[6] Myton responded to the Tribe's objections and alternative proposed order on October 24, 2014,[7] which the Tribe replied to on November 10, 2014.[8] The court set down settlement of the competing proposed orders for hearing, and the matter, as well as related matters, came before the court on December 3, 2014. Jeffrey Rasmussen, Frances Bassett, Jeremy Patterson, and Preston Stieff appeared on behalf of the Tribe; Clark Nielsen and Brett Coombs appeared on behalf of Duchesne City; Randy Hunter and

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[5](Ute Indian Tribe's Objection to Proprosed Order Regarding Townsite of Myton and Proposed Alternative Order, filed October 16, 2014 (CM/ECF No. 717).)

[6](*Id.*)

[7](Reply to the Ute Indian Tribe's Objection to Proposed Order Regarding Townsite of Myton and Proposed Alternative Order, filed October 24, 2014 (CM/ECF No. 722).)

[8](The Ute Indian Tribe's Reply in Supp. of its Objection to the Proposed Order Regarding Townsite of Myton and the Tribe's Proposed Alternative Order, filed November 10, 2014 (CM/ECF No. 731).)

Katharine Kinsman appeared on behalf of the State of Utah; Jesse C. Trentadue and Britton Butterfield appeared on behalf of Duchesne County; J. Craig Smith appeared on behalf of Myton; and Elizabeth Shaffer appeared on behalf of Richard Douglas Hackford. At the close of the hearing, the court reserved on the issue of the competing suggested orders for Myton's motion to dismiss, and the court stated it would prepare its own order.

Having considered parties' briefs and the arguments of counsel, and after careful analysis of the relevant law, the court holds the Tribe's claims against Myton shall be DISMISSED.

The Supreme Court in *Hagan v. Utah* considered the status of Myton, whether it be "Indian country" or not:

> In this case we decide whether the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century. If the reservation has been diminished, then the town of Myton, Utah, which lies on opened lands within the historical boundaries of the reservation, is not in "Indian country," see 18 U.S.C. § 1151, and the Utah state courts properly exercised criminal jurisdiction over petitioner, an Indian who committed a crime in Myton.

510 U.S. 399, 401-02 (1994).

Justice O'Connor, delivering the opinion of the Court, reviewed the legislative history surrounding the land reserved by President Lincoln in 1861 for Indian settlement, which Congress created into the Uintah Valley Reservation in 1864. *Id.*, at 402. First, Justice O'Connor analyzed Congress's 1902 Act:

> In 1902, Congress passed an Act which provided that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 263. The allotments under the 1902 Act were to be 80 acres for each head of a family and 40 acres for each other member of the Tribes. The Act also provided that when the deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public

> domain" and subject to homesteading at $1.25 per acre. *Ibid.* The proceeds from the sale of lands restored to the public domain were to be used for the benefit of the Indians.

Id., at 403-04 (footnote omitted).

Second, Justice O'Connor reviewed the period subsequent to the 1902 Act but prior to Congress's later 1905 Act:

> A month after the passage of the 1902 Act, Congress directed the Secretary of the Interior to set apart sufficient land to serve the grazing needs of the Indians remaining on the reservation. J.Res. 31, 57th Cong., 1st Sess. (1902), 32 Stat. 744. The resolution clarified that $70,000 appropriated by the 1902 Act was to be paid to the Indians "without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain." *Id.,* at 745.
>
> In January 1903, this Court held that Congress can unilaterally alter reservation boundaries. *Lone Wolf v. Hitchcock,* 187 U.S. 553, 567–568, 23 S.Ct. 216, 222, 47 L.Ed. 299. On March 3, 1903, Congress directed the Secretary to allot the Uintah lands unilaterally if the Indians did not give their consent by June 1 of that year, and deferred the opening of the unallotted lands "as provided by the [1902 Act]" until October 1, 1904. Act of Mar. 3, 1903, ch. 994, 32 Stat. 998. The 1903 Act also specified that the grazing lands specified in the 1902 Joint Resolution would be limited to 250,000 acres south of the Strawberry River. In 1904, Congress passed another statute that appropriated additional funds to "carry out the purposes" of the 1902 Act, and deferred the opening date "as provided by the [1902 and 1903 Acts]" until Mar. 10, 1905. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 207.

Id., at 404-05 (footnotes omitted).

Next, Justice O'Connor detailed Congress's 1905 Act:

> In 1905, Congress again deferred the opening date, this time until September 1, 1905, unless the President were to establish an earlier date. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1069. The 1905 Act repealed the provision of the 1903 Act limiting the grazing lands to areas south of the Strawberry River. The Act further provided:
>
> > "[T]he manner of opening [reservation] lands for settlement and entry, and for disposing of the same,

> shall be as follows: That the said unallotted lands ... shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof." *Ibid.*

All lands remaining open but unsettled after five years were to be sold for cash, in parcels up to 640 acres. The "proceeds of the sale of such lands" were to be "applied as provided in the [1902 Act] and the Acts amendatory thereof and supplemental thereto." *Id.,* at 1070.

The Government once again failed to obtain the consent of the Indians. On July 14, 1905, President Roosevelt issued the following Proclamation:

> "Whereas it was provided by the [1902 Act], among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of [$1.25] per acre.'
>
> "And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the [1903 Act], and was extended to March 10, 1905, by the [1904 Act], and was again extended to not later than September 1, 1905, by the [1905 Act], which last named act provided, among other things: ['That the said unallotted lands ... shall be disposed of under the general provisions of the homestead and townsite laws of the United States....']
>
> "Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation ... will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the

> general provisions of the homestead and townsite laws of the United States." 34 Stat. 3119–3120.
>
> The Proclamation went on to detail a lottery scheme for the allocation of the lands to settlers.

Id., at 406-08.

Having thus analyzed and having subsequently concluded that "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status," Justice O'Connor stated as follows:

> We conclude that the Uintah Indian Reservation has been diminished by Congress. Accordingly, the town of Myton, where petitioner committed a crime, is not in Indian country and the Utah courts properly exercised criminal jurisdiction over him. We therefore affirm the judgment of the Utah Supreme Court.

Id., at 421-22.

This court is bound by precedent set by the United States Supreme Court, as this court is bound by precedent set by the Tenth Circuit. And Tenth Circuit precedent makes clear that this court should follow the Supreme Court's decision in *Hagan*. In *Ute Indian Tribe of the Uintah & Ouray Res. v. Utah*, the Tenth Circuit stated, "Because we conclude that the boundaries of the Uintah Valley Reservation must be redetermined in light of *Hagen,* we modify our holding in *Ute Indian Tribe* to the extent that it directly conflicts with the holding in *Hagen.*" 114 F.3d 1513, 1515 (10th Cir. 1997).

Therefore, with clear direction from the Tenth Circuit to follow the Supreme Court's *Hagen* decision, and with *Hagen*'s determination that "the town of Myton, where petitioner committed a crime, is not in Indian country," this court finds as follows: (i) the town of Myton is not Indian country, and (ii) the Tribe's complaint and claims against Myton are each and all DISMISSED with prejudice.

DATED THIS 28th DAY OF JANUARY, 2015.

Bruce S. Jenkins
United States Senior District Judge
District of Utah

ADDENDUM B

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, v. THE STATE OF UTAH, DUCHESNE COUNTY, a political subdivision of the State of Utah, ROOSEVELT CITY, a municipal Corporation, DUCHESNE CITY, a municipal corporation, MYTON, a municipal corporation, and UINTAH COUNTY, a political subdivision of the State of Utah, Et al. Defendants,	**Order on April 22, 2015 Hearing Dismissing Plaintiff's Motions to Reconsider Or Clarify January 28, 2015 Order of Dismissal and Granting Rule 54(b) Certification of Order as Final** Consolidated Action Civil Nos. 2:75-cv-00408BSJ; 2:13-cv-00276BSJ 2:13-cv-01079BSJ The Honorable Bruce S. Jenkins Senior District Judge

These consolidated matters came before the Court on April 22, 2015, before the Honorable Bruce S. Jenkins, United States District Court Senior Judge, for hearing on Plaintiff's several motions to reconsider and to clarify the Court's January 28, 2015 Order Dismissing Claims Against Defendant Town of Myton (CM/ECF #786) and on Defendant Myton's Motion to Certify as Final the Order, under Rule 54(b), Federal Rule of Civil Procedure. Preston Stieff, Francis C. Basset, and Jeffrey S. Rasmussen, with associated counsel appeared representing the Plaintiff Ute Indian Tribe (the "Tribe"); Katharine H. Kinsman and Randy S. Hunter, Assist. Attorneys General, appeared representing the Defendant State of Utah; J. Craig Smith, Clark R. Nielsen, and Brett M. Coombs appeared representing the Defendants Town of Myton ("Myton") and Duchesne City; E. Blaine Rawson appeared representing Defendant Uintah County; and,

Tyler C. Allred, Grant Charles, and Britton Butterfield appeared representing Defendant Duchesne County. Other counsel were present for the various parties but their appearances were not entered on the record.

Pursuant to the Court's notices to the parties, the Court heard arguments on and considered the following pending motions and the memoranda filed by the various parties with respect to each one: Plaintiff's Motion to Clarify the Court's Order Dismissing Claims against the Town of Myton and Memorandum in Support (CM/ECF #795); Plaintiff's Motion to Reconsider the Order Dismissing Claims against the Town of Myton and Memorandum in Support (CM/ECF #796); Myton's Rule 54(b) Motion to Certify as Final the Order Dismissing Claims against Defendant Town of Myton and Memorandum in Support (CM/ECF #804); Plaintiff's Second Motion to Reconsider the Order Dismissing Claims against the Town of Myton (CM/ECF #814); and Plaintiff's [Third] Motion to Reconsider the Order Dismissing Myton on the Grounds of Constitutional separation of powers, violation of Federal Law, and Fraud Upon the Court and Memorandum in Support (CM/ECF #826).

After hearing and considering the oral arguments, claims, objections and proffers by counsel for Plaintiff Tribe, counsel for Defendant Myton, and counsel for the State of Utah and for Uintah County, and having carefully reviewed the memoranda, responses and authorities presented by each party, and with good cause appearing,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's [First] Motion to Reconsider (CM/ECF #795), Motion to Clarify (CM/ECF #796), and [Second] Motion to Clarify (CM/ECF #826) are each **DENIED.** The motions are belated in time and the Court already had received and considered the same information and arguments when it entered its Order. Plaintiff's [Third] Motion to Reconsider (CM/ECF #826) is **STRICKEN.**

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Myton's Rule 54(b) Motion to Certify as Final the January 28, 2015 Order Dismissing Claims Against Defendant Town of Myton (CM/ECF #804) is **GRANTED.** The Court's January 28, 2015 Order Dismissing Claims Against Defendant Town of Myton (CM/ECF No. #786) is a final adjudication by dismissal, with prejudice, of all Plaintiff's claims against the Town of Myton. The bases for the dismissal, and order to certify, is the binding precedent in *Hagen v. Utah*, 510 U.S. 399 (1993), and in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997) ("***Ute V***"). *Hagen* holds that Myton was diminished from the Reservation and is not in Indian country. Therefore, the factual and legal issues applicable to Myton are distinct to Myton, and are separable from the claims and issues against the other defendants. Since the question is not one of ownership, but of sovereignty and *Hagen* answers that question, Plaintiff's claims against Myton can be decided without delay. For these same reasons, the interest of judicial economy is best served by allowing an immediate appeal to be taken. In weighing the equities, the Court determines that the Town of Myton and the Ute Indian Tribe will both suffer undue hardship if the Court's dismissal order is not certified as final under Rule 54(b). For these reasons and for the reasons stated in the Court's Order of dismissal, the Court determines there is no just reason to delay entry of a final judgment as to the Ute Indian Tribe's claims against Defendant Myton. The January 28, 2015 Order (CM/ECF #804) is hereby **CERTIFIED** as a final order under Rule 54(b), Federal Rules of Civil Procedure.

DATED THIS 18th day of May, 2015

BY THE COURT:

Bruce S. Jenkins
United States Senior District Judge
District of Utah

ADDENDUM C

Hagen v. Utah

Supreme Court of the United States

November 2, 1993, Argued ; February 23, 1994, Decided

No. 92-6281

Reporter
510 U.S. 399; 114 S. Ct. 958; 127 L. Ed. 2d 252; 1994 U.S. LEXIS 1869; 62 U.S.L.W. 4118; 94 Cal. Daily Op. Service 1301; 93 Daily Journal DAR 2386; 7 Fla. L. Weekly Fed. S 770

ROBERT HAGEN, PETITIONER v. UTAH

Prior History: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH.

Disposition: 858 P. 2d 925, affirmed.

Syllabus

Petitioner, an Indian, was charged in Utah state court with distribution of a controlled substance in the town of Myton, which lies within the original boundaries of the Uintah Indian Reservation on land that was opened to non-Indian settlement in 1905. The trial court rejected petitioner's claim that it lacked jurisdiction over him because he was an Indian and the crime had been committed in "Indian country," see 18 U.S.C. § 1151, such that federal jurisdiction was exclusive. The state appellate court, relying on *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (CA10), cert. denied, 479 U.S. 994, 93 L. Ed. 2d 596, 107 S. Ct. 596, agreed with petitioner's contentions and vacated his conviction. The Utah Supreme Court reversed and reinstated the conviction, ruling that Congress had "diminished" the reservation by opening it to non-Indians, that Myton was outside its boundaries, and thus that petitioner's offense was subject to state criminal jurisdiction. See *Solem* v. *Bartlett*, 465 U.S. 463, 467, 79 L. Ed. 2d 443, 104 S. Ct. 1161 ("States have jurisdiction over . . . opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries").

Held: Because the Uintah Reservation has been diminished by Congress, the town of Myton is not in Indian country and the Utah courts properly exercised criminal jurisdiction over petitioner. Pp. 409-422.

(a) This Court declines to consider whether the State of Utah, which was a party to the Tenth Circuit proceedings in *Ute Indian Tribe*, should be collaterally estopped from relitigating the reservation boundaries. That argument is not properly before the Court because it was not presented in the petition for a writ of certiorari and was expressly disavowed by petitioner in his response to an *amicus* brief. Pp. 409-410.

(b) Under this Court's traditional approach, as set forth in *Solem* v. *Bartlett, supra*, and other cases, whether any given surplus land Act diminished a reservation depends on all the circumstances, including (1) the statutory language used to open the Indian lands, (2) the contemporaneous understanding of the particular Act, and (3) the identity of the persons who actually moved onto the opened lands. As to the first, the most probative, of these factors, the statutory language must establish an express congressional purpose to diminish, but no particular form of words is prerequisite to a finding of diminishment. Moreover, although the provision of a sum certain payment to the Indians, when coupled with a statutory expression of intent, can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion. Throughout the diminishment inquiry, ambiguities are resolved in favor of the Indians, and diminishment will not lightly be found. Pp. 410-412.

(c) The operative language of the Act of May 27, 1902, ch. 888, 32 Stat. 263 -- which provided for

allotments of some Uintah Reservation land to Indians, and that "all the unallotted lands within said reservation shall be *restored to the public domain*" (emphasis added) -- evidences a congressional purpose to terminate reservation status. See, *e. g., Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354-355, 7 L. Ed. 2d 346, 82 S. Ct. 424. *Solem, supra*, at 472-476, distinguished. Contrary to petitioner's argument, this baseline intent to diminish was not changed by the Act of March 3, 1905, ch. 1479, 33 Stat. 1069. Language in that statute demonstrates that Congress clearly viewed the 1902 Act as the basic legislation upon which the 1905 Act and intervening statutes were built. Furthermore, the structure of the statutes -- which contain complementary, nonduplicative essential provisions -- requires that the 1905 and 1902 Acts be read together. Finally, the general rule that repeals by implication are disfavored is especially strong here, because the 1905 Act *expressly* repealed a provision in the intervening statute passed in 1903; if Congress had meant to repeal any part of any other previous statute, it could easily have done so. Pp. 412-416.

(d) The historical evidence -- including letters and other statements by Interior Department officials, congressional bills and statements by Members of Congress, and the text of the 1905 Presidential Proclamation that actually opened the Uintah Reservation to settlement -- clearly indicates the contemporaneous understanding that the reservation would be diminished by the opening of the unallotted lands. This conclusion is not altered by inconsistent references to the reservation in both the past and present tenses in the post-1905 legislative record. These must be viewed merely as passing references in text, not deliberate conclusions about the congressional intent in 1905. Pp. 416-420.

(e) Practical acknowledgment that the reservation was diminished is demonstrated by the current population situation in the Uintah Valley, which is approximately 85 percent non-Indian in the opened lands and 93 percent non-Indian in the area's largest city; by the fact that the seat of local tribal government is on Indian trust lands, not opened lands; and by the State of Utah's assumption of jurisdiction over the opened lands from 1905 until the Tenth Circuit decided *Ute Indian Tribe*. A contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area. Pp. 420-421.

Counsel: Martin E. Seneca, Jr., argued the cause for petitioner. With him on the briefs was Daniel H. Israel.

Ronald J. Mann argued the cause for the United States as amicus curiae urging reversal. With him on the briefs were Solicitor General Days, Acting Assistant Attorney General Flint, Acting Deputy Solicitor General Kneedler, Edward J. Shawaker, and Martin W. Matzen.

Jan Graham, Attorney General of Utah, argued the cause for respondent. With her on the brief were Carol Clawson, Solicitor General, and Michael M. Quealy, Assistant Attorney General. *

Judges: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which SOUTER, J., joined, post, p. 422.

Opinion by: O'CONNOR

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* Robert S. Thompson III, Sandra Hansen, and Jeanne S. Whiteing filed a brief for the Ute Indian Tribe as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of South Dakota et al. by Mark Barnett, Attorney General of South Dakota, and John P. Guhin, Deputy Attorney General, and for the Attorneys General of their respective States as follows: Grant Woods of Arizona, Daniel E. Lungren of California, Marc Racicot of Montana, Frankie Sue Del Papa of Nevada, and Susan B. Loving of Oklahoma; for Duchesne County, Utah, by Herbert Wm. Gillespie and Jesse C. Trentadue; for Fremont County, Wyoming, et al. by James M. Johnson; for Uintah County, Utah, by Tom D. Tobin and Kenn A. Pugh; and for the Council of State Governments et al. by Richard Ruda and Charles Rothfeld.

Briefs of amici curiae were filed for the Navajo Nation by Paul E. Frye; and for Roosevelt City by Craig M. Bunnell.

Opinion

[*401] [***259] [**960] JUSTICE O'CONNOR delivered the opinion of the Court.

[1A]In this case we decide whether the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century. If the reservation has been diminished, then the town of Myton, Utah, which lies on opened lands within the historical boundaries of the reservation, is not in "Indian country," see 18 U.S.C. [*402] § 1151, and the Utah state courts properly exercised criminal jurisdiction over petitioner, an Indian who committed a crime in Myton.

[**961] I

On October 3, 1861, President Lincoln reserved about 2 million acres of land in the Territory of Utah for Indian settlement. Executive Order No. 38-1, reprinted in 1 C. Kappler, Indian Affairs: Laws and Treaties 900 (1904). Congress confirmed the President's action in 1864, creating the Uintah Valley Reservation. Act of May 5, 1864, ch. 77, 13 Stat. 63. According to the 1864 Act, the lands were "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." *Ibid*. The present-day Ute Indian Tribe includes the descendants of the Indians who settled on the Uintah Reservation.

In the latter part of the 19th century, federal Indian policy changed. See F. Cohen, Handbook of Federal Indian Law 127-139 (1982 ed.). Indians were no longer to inhabit communally owned reservations, but instead were to be given individual parcels of land; any remaining lands were to be opened for settlement by non-Indians. The General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, granted the President authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus [***260] lands to [non-Indian] settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau* v. *District County Court for Tenth Judicial District*, 420 U.S. 425, 432, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975).

Pursuant to the General Allotment Act, Congress in 1894 directed the President to appoint a commission to negotiate with the Indians for the allotment of Uintah Reservation lands and the "relinquishment to the United States" of all unallotted lands. Act of Aug. 15, 1894, ch. 290, § 22, 28 Stat. 337. That effort did not succeed, and in 1898 Congress directed the President to appoint another commission to negotiate [*403] an agreement for the allotment of Uintah Reservation lands and the "cession" of unallotted lands to the United States. Act of June 4, 1898, ch. 376, 30 Stat. 429. The Indians resisted those efforts as well. Various bills that would have opened the reservation unilaterally (*i. e.*, without the consent of the Indians) were subsequently introduced in the Senate but were not enacted into law. See Leasing of Indian Lands, Hearings before the Senate Committee on Indian Affairs, S. Doc. No. 212, 57th Cong., 1st Sess., 3 (1902).

In 1902, Congress passed an Act which provided that if a majority of the adult male members of the Uintah and White River Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Reservation. Act of May 27, 1902, ch. 888, 32 Stat. 263. [1] The allotments under the 1902 Act were to be 80 acres for each head of a

[1] The 1902 Act provided in relevant part:

"That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided*, That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further*, That . . . the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United

family and 40 acres for each other member of [*404] the Tribes. The Act also provided that when the deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to [**962] the public domain" and subject to homesteading at $ 1.25 per acre. *Ibid*. The proceeds from the sale of lands restored to the public domain were to be used for the benefit of the Indians.

A month after the passage of the 1902 Act, Congress directed the Secretary of the Interior to set apart sufficient land to serve the grazing needs of the Indians remaining on the reservation. J. Res. 31, 57th Cong., 1st Sess. (1902), 32 Stat. 744. [2] The resolution clarified that $ 70,000 appropriated [***261] by the 1902 Act was to be paid to the Indians "without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain." *Id.*, at 745.

In January 1903, this Court held that Congress can unilaterally alter reservation boundaries. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567-568, 47 L. Ed. 299, 23 S. Ct. 216. On Mar. 3, 1903, Congress directed the Secretary to allot the Uintah lands unilaterally if the Indians did not give their consent by June 1 of that year, and deferred the opening of the unallotted lands "as provided by the [1902 Act]" until October 1, 1904. Act of Mar. 3, 1903, [*405] ch. 994, 32 Stat. 998. [3] The 1903 Act also specified that the grazing lands specified in the 1902 Joint Resolution would be limited to 250,000 acres south of the Strawberry River. In 1904, Congress passed another statute that appropriated additional funds to "carry out the purposes" of the 1902 Act, and deferred the opening date "as provided by the [1902 and 1903 Acts]" until

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States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided." 32 Stat. 263-264.

[2] The 1902 Joint Resolution provided in relevant part:

"In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

. . . .

"The item of seventy thousand and sixty-four dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain." 32 Stat. 744-745.

[3] The 1903 Act provided in relevant part:

"[Money is hereby appropriated to] enable the Secretary of the Interior to do the necessary surveying and otherwise carry out the purposes of so much of the Act of May twenty-seventh, nineteen hundred and two, . . . as provides for the allotment of the . . . Uintah and White River Utes in Utah . . .: *Provided, however*, That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act: *And provided further*, That the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, be confined to the lands south of the Strawberry River on said Uintah Reservation, and shall not exceed two hundred and fifty thousand acres: *And provided further*, That the time for opening the unallotted lands to public entry on said Uintah Reservation, as provided by the Act of May twenty-seventh, nineteen hundred and two, be, and the same is hereby, extended to October first, nineteen hundred and four." 32 Stat. 997-998.

Mar. 10, 1905. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 207. [4]

[*406] [***262] [**963] In 1905, Congress again deferred the opening date, this time until September 1, 1905, unless the President were to establish an earlier date. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1069. [5] The 1905 Act repealed the provision of the 1903 Act limiting the grazing lands to areas south of the Strawberry River. The Act further provided:

> "The manner of opening [reservation] lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands . . . shall be [*407] disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof." *Ibid.*

All lands remaining open but unsettled after five years were to be sold for cash, in parcels up to 640 acres. The "proceeds of the sale of such lands" were to be "applied as provided in the [1902 Act] and the Acts amendatory thereof and supplemental thereto." *Id.*, at 1070.

The Government once again failed to obtain the consent of the Indians. On July 14, 1905, President Roosevelt issued the following Proclamation:

> "Whereas it was provided by the [1902 Act], among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain: Provided, That persons entering any of said lands under the homestead laws shall pay therefor at the rate of [$ 1.25] per acre.'
>
> "And, whereas, the time for the opening of said unallotted lands [***263] was extended to October 1, 1904, by the [1903 Act], and was extended to March 10, 1905, by the [1904 Act], and was again extended to not later than September 1, 1905, by the [1905 Act], which last named act provided, among other things: ['That the said unallotted lands . . . shall be disposed of

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[4] The 1904 Act provided in relevant part:

"That the time for opening the unallotted lands to public entry on the Uintah Reservation, in Utah, as provided by the Acts of May twenty-seventh, nineteen hundred and two, and March third, nineteen hundred and three, be, and the same is hereby extended to March tenth, nineteen hundred and five, and five thousand dollars is hereby appropriated to enable the Secretary of the Interior to do the necessary surveying, and otherwise carry out the purposes of so much of the Act of May twenty-seventh, nineteen hundred and two, . . . as provides for the allotment of the Indians of the Uintah and White River Utes in Utah." 33 Stat. 207-208.

[5] The 1905 Act provided in relevant part:

"That so much of the Act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one, of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

"That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: . . . *And provided further*, That all lands opened to settlement and entry under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the Act of Congress of May twenty-seventh, nineteen hundred and two, and the Acts amendatory thereof and supplemental thereto." 33 Stat. 1069-1070.

under the general provisions of the homestead and townsite laws of the United States . . . .']

"Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said [*408] reservation . . . will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and [**964] disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3119-3120.

The Proclamation went on to detail a lottery scheme for the allocation of the lands to settlers.

II

In 1989, petitioner was charged in Utah state court with distribution of a controlled substance. The offense occurred in the town of Myton, which was established within the original boundaries of the Uintah Indian Reservation when the reservation was opened to non-Indian settlement in 1905. Petitioner initially pleaded guilty, but subsequently filed a motion to withdraw his guilty plea. The basis of the motion was that the Utah state courts lacked jurisdiction over petitioner because he was an Indian and the crime had been committed in Indian country. The trial court denied the motion, finding that petitioner is not an Indian.

[2]The state appellate court reversed. It concluded that petitioner is an Indian, a determination that is not at issue in this Court. The court also held that Myton is in Indian country, relying on *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994, 93 L. Ed. 2d 596, 107 S. Ct. 596 (1986), in which the Tenth Circuit held that the Uintah Indian Reservation was not diminished when it was opened to settlement in 1905. Because Congress has not granted criminal jurisdiction to the State of Utah to try crimes committed by Indians in Indian country, cf. *Negonsott* v. *Samuels*, 507 U.S. 99, 103, 122 L. Ed. 2d 457, 113 S. Ct. 1119 (1993); *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 471-474, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979), the appellate court held that the state courts lacked jurisdiction over petitioner. The court accordingly vacated petitioner's conviction.

[*409] The Utah Supreme Court reversed on the authority of *State* v. *Perank*, 858 P.2d 927 (1992), in which the court had held (on the same day as the decision in petitioner's case) that the reservation had been diminished and that Myton was outside its boundaries, and thus that petitioner's offense was subject to state criminal jurisdiction. 858 P.2d 925 (1992); see *Solem* v. *Bartlett*, 465 U.S. 463, 467, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984) ("As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries"). [***264] The court accordingly reinstated petitioner's conviction.

We granted certiorari, 507 U.S. 1028 (1993), to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished.

III

[3A] [4]We first address a threshold question: whether the State of Utah, which was a party to the Tenth Circuit proceedings, should be collaterally estopped from relitigating the reservation boundaries. In *Perank*, the Utah Supreme Court noted that "neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* has res judicata effect in this case." 858 P.2d at 931. Because "res judicata is an affirmative defense in both criminal and civil cases and therefore is waivable," *id.*, at 931, n.3, the court went on to consider the merits of the State's claim.

[3B]Petitioner's only recourse would have been to attack the judgment in *Perank* on the ground that the

Utah Supreme Court failed to give effect *sua sponte* to the prior determination in *Ute Indian Tribe* that the reservation had not been diminished. Although that issue is one of federal law, see Restatement (Second) of Judgments § 86 (1982), it was not presented in the petition for a writ of certiorari. It therefore **[*410]** is not properly before us. *Yee* v. *Escondido*, 503 U.S. 519, 535-536, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992); see *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, **[**965]** 510 U.S. 27, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993) (*per curiam*). Moreover, petitioner disavowed the collateral estoppel argument at the petition stage, in response to a brief filed by the Ute Indian Tribe:

> "The question presented in the petition was whether the reservation had been diminished by acts of congress. [This Court's Rule 14.1(a)] does not appear to allow different issues to be raised. The Ute Indian Tribe argues that the Supreme Court of the State of Utah should have reached a different decision in *[Perank]* based on the doctrine of collateral estoppel . . . . Regardless of the opinion held by the Ute Indian Tribe of the *Perank* decision, *the decision has been made and is controlling in petitioner's case*." Supplemental Brief for Petitioner 2 (filed Dec. 2, 1992) (emphasis added).

Because we see no reason to consider an argument that petitioner not only failed to raise, but also expressly refused to rely upon in seeking a writ of certiorari, we turn to the merits.

IV

[5]In *Solem* v. *Bartlett*, we recognized:

> "It is settled law that some surplus land Acts diminished reservations, see, *e. g., Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 51 L. Ed. 2d 660, 97 S. Ct. 1361 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975), and other surplus land Acts did not, see, *e. g., Mattz* v. *Arnett*, 412 U.S. 481, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962). The effect of any given surplus land Act depends on the language of the Act **[***265]** and the circumstances underlying its passage." 465 U.S. at 469.

In determining whether a reservation has been diminished, "our precedents in the area have established a fairly clean **[*411]** analytical structure," *id.*, at 470, directing us to look to three factors. The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. *Ibid*. We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. *Id.*, at 471. Finally, "on a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." *Ibid*. Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment. *Id.*, at 470, 472; see also *South Dakota* v. *Bourland*, 508 U.S. 679, 687, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993) ("'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'" (quoting *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 116 L. Ed. 2d 687, 112 S. Ct. 683 (1992) (internal quotation marks omitted))).

[6]The Solicitor General, appearing as *amicus* in support of petitioner, argues that our cases establish a "clear-statement rule," pursuant to which a finding of diminishment would require both explicit language of cession or other language evidencing the surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians. See Brief for United States as *Amicus Curiae* 7-8. We disagree. First, although the statutory language must "establish an express congressional purpose to diminish," *Solem*,

465 U.S. at 475, we have never required any particular form of words before finding diminishment, see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 588, 51 L. Ed. 2d 660, 97 S. Ct. 1361, and n.4 (1977). Second, we noted in *Solem* that a statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation [**966] had been diminished. 465 [*412] U.S. at 470-471. While the provision for definite payment can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion. In fact, the statutes at issue in *Rosebud*, which we held to have effected a diminishment, did not provide for the payment of a sum certain to the Indians. See 430 U.S. at 596, and n.18. We thus decline to abandon our traditional approach to diminishment cases, which requires us to examine all the circumstances surrounding the opening of a reservation.

A

[1B]The operative language of the 1902 Act provided for allocations of reservation land to Indians, and that "all the unallotted lands within said reservation shall be *restored to the public domain*." 32 Stat. 263 (emphasis [***266] added). The public domain was the land owned by the Government, mostly in the West, that was "available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws." E. Peffer, The Closing of the Public Domain 6 (1951). "From an early period in the history of the government it [was] the practice of the President to order, from time to time, . . . parcels of land belonging to the United States to be reserved from sale and set apart for public uses." *Grisar* v. *McDowell*, 73 U.S. 363, 6 Wall. 363, 381, 18 L. Ed. 863 (1868). This power of reservation was exercised for various purposes, including Indian settlement, bird preservation, and military installations, "when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain." *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 471, 59 L. Ed. 673, 35 S. Ct. 309 (1915).

[7A]It follows that when lands so reserved were "restored" to the public domain -- *i. e.*, once again opened to sale or settlement -- their previous public use was extinguished. See *Sioux Tribe* v. *United States*, 316 U.S. 317, 323, 86 L. Ed. 1501, 62 S. Ct. 1095 (1942) (President ordered lands previously reserved for Indian use "'restored to the public domain[,] . . . the same being no longer [*413] needed for the purpose for which they were withdrawn from sale and settlement'"); *United States* v. *Pelican*, 232 U.S. 442, 445-446, 58 L. Ed. 676, 34 S. Ct. 396 (1914). Statutes of the period indicate that Congress considered Indian reservations as separate from the public domain. See, *e. g.*, Act of June 25, 1910, § 6, 36 Stat. 857 (criminalizing forest fires started "upon the public domain, or upon any Indian reservation") (quoted in *United States* v. *Alford*, 274 U.S. 264, 266-267, 71 L. Ed. 1040, 47 S. Ct. 597 (1927)). Likewise, in *DeCoteau* we emphasized the distinction between reservation and public domain lands: "That the lands ceded in the other agreements were *returned to the public domain, stripped of reservation status*, can hardly be questioned . . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" 420 U.S. at 446 (emphasis added).

In *Solem*, the Court held that an Act which authorized the Secretary of the Interior to "'sell and dispose of'" unallotted reservation lands merely opened the reservation to non-Indian settlement and did not diminish it. 465 U.S. at 472-474. Elsewhere in the same statute, Congress had granted the Indians permission to harvest timber on the opened lands "'as long as the lands remain part of the public domain.'" *Id.*, at 475. We recognized that this reference to the public domain "supported" the view that a reservation had been diminished, but that it was "hardly dispositive." *Id.*, at 475. We noted that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.*, at 475, n.17. The Act in *Solem*, however, did not "restore" the lands to the public domain. More importantly, the reference to the public

domain did not appear in the operative language of the [**967] statute opening the reservation lands for [***267] settlement, which is the relevant point of reference for the diminishment inquiry. Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to terminate reservation status.

[*414] In *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962), for example, the question was whether the Colville Reservation, in the State of Washington, had been diminished. The Court noted that an 1892 Act which "'vacated and restored to the public domain'" about one-half of the reservation lands had diminished the reservation as to that half. *Id.*, at 354. As to the other half, Congress in 1906 had provided for allotments to the Indians, followed by the sale of mineral lands and entry onto the surplus lands under the homestead laws. This Court held that the 1906 Act did not result in diminishment: "Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain." *Id.*, at 355. This Court subsequently characterized the 1892 Act at issue in *Seymour* as an example of Congress' using "clear language of express termination when that result is desired." *Mattz*, 412 U.S. at 504, n.22. And in *Rosebud*, all nine Justices agreed that a statute which "'restored to the public domain'" portions of a reservation would result in diminishment. 430 U.S. at 589, and n.5; *id.*, at 618 (Marshall, J., dissenting).

[1C] [7B]In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not terminate a reservation, *Ute Indian Tribe*, 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co.* v. *Yazzie*, 909 F.2d 1387, 1400, cert. denied, 498 U.S. 1012, 112 L. Ed. 2d 586, 111 S. Ct. 581 (1990).

[*415] [1D]Until the *Ute Indian Tribe* litigation in the Tenth Circuit, every court had decided that the unallotted lands were restored to the public domain pursuant to the terms of the 1902 Act, with the 1905 Act simply extending the time for opening and providing for a few details. *Hanson* v. *United States*, 153 F.2d 162, 162-163 (CA10 1946); *United States* v. *Boss*, 160 F. 132, 133 (Utah 1906); *Uintah and White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 21-23, 152 F. Supp. 953 (1957); *Sowards* v. *Meagher*, 37 Utah 212, 108 P. 1112, 1114 (Utah 1910). Petitioner argues, however, that the 1905 Act changed the "manner" in which the lands were to be opened. That Act specified that the homestead and townsite laws would apply, and so superseded the "restore to the public domain" language of the 1902 Act, language that was not repeated in the 1905 Act. We disagree, because the baseline intent to diminish the reservation expressed in the 1902 Act survived the passage of the 1905 Act.

[***268] Every congressional action subsequent to the 1902 Act referred to that statute. The 1902 Joint Resolution provided an appropriation prior to the restoration of surplus reservation lands to the public domain. 32 Stat. 744. The 1903 and 1904 Acts simply extended the deadline for opening the reservations in order to allow more time for surveying the lands, so that the "purposes" of the 1902 Act could be carried out. 32 Stat. 997; 33 Stat. 207. And the 1905 Act recognized that they were all tied together when it provided that the proceeds of the sale of the unallotted lands "shall be applied as provided in the [1902 Act] and the Acts amendatory thereof and supplementary thereto." 33 Stat. 1070. The Congress that passed the 1905 Act clearly viewed the 1902 statute as the basic legislation [**968] upon which subsequent Acts were built.

Furthermore, the structure of the statutes requires that the 1905 Act and the 1902 Act be read together.

Whereas the 1905 Act provided for the disposition of *unallotted* lands, it was the 1902 Act that provided for allotments to the Indians. [*416] The 1902 Act also established the price for which the unallotted lands were to be sold, and what was to be done with the proceeds of the sales. The 1905 Act did not repeat these essential features of the opening, because they were already spelled out in the 1902 Act. The two statutes -- as well as those that came in between -- must therefore be read together.

[1E] [8]Finally, the general rule that repeals by implication are disfavored is especially strong in this case, because the 1905 Act *expressly* repealed the provision in the 1903 Act concerning the siting of the grazing lands; if Congress had meant to repeal any part of any other previous statute, it could easily have done so. Furthermore, the predicate for finding an implied repeal is not present in this case, because the opening provisions of the two statutes are not inconsistent: The 1902 Act also provided that the unallotted lands restored to the public domain could be sold pursuant to the homestead laws. Other surplus land Acts which we have held to have effected diminishment similarly provided for initial entry under the homestead and townsite laws. See *Rosebud, supra*, at 608; *DeCoteau*, 420 U.S. at 442.

B

[1F]Contemporary historical evidence supports our conclusion that Congress intended to diminish the Uintah Reservation. As we have noted, the plain language of the 1902 Act demonstrated the congressional purpose to diminish the Uintah Reservation. Under the 1902 Act, however, the consent of the Indians was required before the reservation could be diminished; that consent was withheld by the Indians living on the reservation. After this Court's *Lone Wolf* decision in 1903, Congress authorized the Secretary of the Interior to proceed unilaterally. The Acting Commissioner for Indian Affairs in the Department of the Interior directed Indian Inspector James McLaughlin to travel to the Uintah Reservation to "endeavor to obtain [the Indians'] consent to the [*417] allotment of lands as provided in the law, and to the restoration of the surplus lands." Letter from A. C. Tonner to James McLaughlin (Apr. 27, 1903), reprinted in S. Doc. No. 159, 58th Cong., 3d Sess., 9 (1905). The Acting Commissioner noted, however, [***269] that the effect of the 1903 Act was that "if the [Indians] do not consent to the allotments by the first of June next the allotments are to be made notwithstanding, and the unallotted lands . . . are to be opened to entry" according to the terms of the 1902 Act. *Id.*, at 8-9.

Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation:

> "'By that decision of the Supreme Court, Congress has the legal right to legislate in regard to Indian lands, and Congress has enacted a law which requires you to take your allotments.
>
> . . . .
>
> "'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation*.'" Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, from May 18 to May 23, 1903, excerpted in App. to Brief for Respondent 4a-5a (emphasis added).

Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding, by him conveyed to the Indians, that the reservation would be diminished by operation of the 1902 and 1903 Acts notwithstanding [**969] the failure of the Indians to give their consent.

The Secretary of the Interior informed Congress in February 1904 that the necessary surveying could

not be completed before the date set for the opening, and requested [*418] that the opening be delayed. Letter from E. A. Hitchcock to the Chairman of the Senate Committee on Indian Affairs (Feb. 6, 1904), reprinted in S. Doc. No. 159, *supra*, at 17. In the 1904 Act, Congress accordingly extended the time for opening until March 10, 1905, and appropriated additional funds "to enable the Secretary of the Interior to do the necessary surveying" of the reservation lands. 33 Stat. 207. The Secretary of the Interior subsequently informed Congress that a further extension would be necessary because the surveying and allotments could not be completed during the winter. Letter from E. A. Hitchcock to the Chairman of the House Committee on Indian Affairs (Dec. 10, 1904), reprinted in S. Doc. No. 159, *supra*, at 21.

The House of Representatives took up the matter on January 21, 1905. The bill on which debate was held provided that "so much of said lands as will be under the provisions of said acts restored to the public domain shall be open to settlement and entry by proclamation of the President of the United States, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered." H. R. 17474, quoted in 39 Cong. Rec. 1180 (1905). Representative Howell of Utah offered as an amendment "that for one year immediately following the restoration of said lands to the public domain said lands shall be subject to entry only under the homestead, town-site, and mining laws of the United States." *Ibid*. Significantly, Representative Howell [***270] offered his amendment as an addition to, not a replacement for, the language in the bill that explicitly referred to the lands' restoration to the public domain. He explained:

> "In the pending bill these lands, when restored to the public domain, are subject to entry under the general land laws of the United States, coupled with such rules and regulations as the President may prescribe. In my humble judgment there should be some provision such as is embodied in my amendment, limiting the lands in the reservation to entry under the homestead, town-site, [*419] and mining laws alone for one year from the date of the opening. . . .
>
> "Congress should see to it that until such time as those lands easy of access, reclamation, and irrigation are settled by actual home makers the provisions of the homestead law alone shall prevail. This policy is in accord with the dominant sentiment of the time, viz, that the public lands shall be reserved for actual homes for the people." *Id.*, at 1182.

Although the amendment was rejected in the House of Representatives, *id.*, at 1186, the Senate substituted the current version of the 1905 Act, which is similar to the amendment offered by Representative Howell but omits the restoration language of the House version. *Id.*, at 3522. In the hearings on the Senate bill, Senator Teller of Colorado had stated that "I am not going to agree to any entry of that land except under the homestead and town-site entries," because "I am not going to consent to any speculators getting public land if I can help it." Indian Appropriation Bill, 1906, Hearings before the Senate Subcommittee of the Committee on Indian Affairs, 58th Cong., 3d Sess., 30 (1905). Thus, although we have no way of knowing for sure why the Senate decided to limit the "manner" of opening, it seems likely that Congress wanted to limit land speculation. That objective is not inconsistent with the restoration of the unallotted lands to the public domain: Once the lands became public, Congress could of course place limitations on their entry, sale, and settlement.

The Proclamation whereby President Roosevelt actually opened the reservation to settlement makes clear that the 1905 Act did not repeal the restoration language of the 1902 Act. In that document, the President stated that the 1902 Act provided that the unallotted lands were to be restored to the public domain, that the 1903, 1904, and 1905 [**970] Acts extended the time for the opening, and that those lands were [*420] now opened for settlement under the homestead laws "by virtue of the power in [him] vested *by said Acts of Congress*." 34 Stat. 3120

(emphasis added). President Roosevelt thus clearly understood the 1905 Act to incorporate the 1902 Act, and specifically the restoration language. This "unambiguous, contemporaneous, statement, by the Nation's Chief Executive," *Rosebud*, 430 U.S. at 602, is clear evidence of the understanding at the time that the Uintah Reservation would be diminished by the opening of the unallotted lands to non-Indian settlement.

[9]The subsequent history is less illuminating than the contemporaneous evidence. Since 1905, Congress has repeatedly referred to the Uintah Reservation in both the past and [***271] present tenses, reinforcing our longstanding observation that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 348-349, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963) (internal quotation marks omitted). The District Court in the *Ute Indian Tribe* case extensively cataloged these congressional references, and we agree with that court's conclusion: "Not only are the references grossly inconsistent when considered together, they . . . are merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905." 521 F. Supp. 1072, 1135 (Utah 1981). Because the textual and contemporaneous evidence of diminishment is clear, however, the confusion in the subsequent legislative record does nothing to alter our conclusion that the Uintah Reservation was diminished.

C

[1G]Finally, our conclusion that the statutory language and history indicate a congressional intent to diminish is not controverted by the subsequent demographics of the Uintah Valley area. We have recognized that "when an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains [*421] Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S. at 471-472, n.12. Of the original 2 million acres reserved for Indian occupation, approximately 400,000 were opened for non-Indian settlement in 1905. Almost all of the non-Indians live on the opened lands. The current population of the area is approximately 85 percent non-Indian. 1990 Census of Population and Housing, Summary Population and Housing Characteristics: Utah, 1990 CPH-1-46, Table 17, p. 73. The population of the largest city in the area -- Roosevelt City, named for the President who opened the reservation for settlement -- is about 93 percent non-Indian. *Id.*, Table 3, p. 13.

The seat of Ute tribal government is in Fort Duchesne, which is situated on Indian trust lands. By contrast, we found it significant in *Solem* that the seat of tribal government was located on opened lands. 465 U.S. at 480. The State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened until the Tenth Circuit's *Ute Indian Tribe* decision. That assumption of authority again stands in sharp contrast to the situation in *Solem*, where "tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing . . . the opened lands during the years following [the opening in] 1908." 465 U.S. at 480. This "jurisdictional history," as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area. Cf. *Rosebud, supra*, at 604-605.

V

[1H]We conclude that the Uintah Indian Reservation has been diminished by Congress. Accordingly, the town of Myton, where petitioner committed a crime, is not in Indian [***272] country and the Utah courts properly [**971] exercised criminal jurisdiction [*422] over him. We therefore affirm the judgment of the Utah Supreme Court.

So ordered.

Dissent by: BLACKMUN

Dissent

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, dissenting.

"Great nations, like great men, should keep their word," *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142, 4 L. Ed. 2d 584, 80 S. Ct. 543 (1960) (Black, J., dissenting), and we do not lightly find that Congress has broken its solemn promises to Indian tribes. The Court relies on a single, ambiguous phrase in an Act that never became effective, and which was deleted from the controlling statute, to conclude that Congress must have intended to diminish the Uintah Valley Reservation. I am unable to find a clear expression of such intent in either the operative statute or the surrounding circumstances and am compelled to conclude that the original Uintah Valley Reservation boundaries remain intact.

I

A

Two rules of construction govern our interpretation of Indian surplus-land statutes: we must find clear and unequivocal evidence of congressional intent to reduce reservation boundaries, and ambiguities must be construed broadly in favor of the Indians. [1] Congress alone has authority to divest [*423] Indians of their land, see *United States* v. *Celestine*, 215 U.S. 278, 285, 54 L. Ed. 195, 30 S. Ct. 93 (1909), and "Congress [must] clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found." *Solem* v. *Bartlett*, 465 U.S. 463, 470, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984), quoting *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 615, 51 L. Ed. 2d 660, 97 S. Ct. 1361 (1977); see also *DeCoteau* v. *District County Court for Tenth Judicial District*, 420 U.S. 425, 444, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975); *Mattz* v. *Arnett*, 412 U.S. 481, 505, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1973). Absent a "plain and unambiguous" statement of congressional intent, *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 346, 86 L. Ed. 260, 62 S. Ct. 248 (1941), we find diminishment only "when events surrounding the [Act's] [***273] passage . . . *unequivocally* reveal a widely held, contemporaneous understanding" that such was Congress' purpose. *Solem*, 465 U.S. at 471 (emphasis added).

In diminishment cases, the rule that "legal ambiguities are resolved to the benefit of the Indians" also must be given "the broadest possible scope." *DeCoteau*, 420 U.S. at 447; see also *Carpenter* v. *Shaw*, 280 U.S. 363, 367, 74 L. Ed. 478, 50 S. Ct. 121 (1930) ("Doubtful expressions are to be resolved in favor of the [Indians]"); *United States* v. *Nice*, 241 U.S. 591, 599, 60 L. Ed. 1192, 36 S. Ct. 696 (1916); *United States* v. *Celestine*, 215 U.S. at 290. For more than 150 years, [2] we have [**972] applied this canon in all areas of Indian law to construe [*424] congressional ambiguity or silence, in treaties,

[1] "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians," *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U.S. 226, 247, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985), and the Indians' unequal bargaining power when agreements were negotiated, see, *e. g., Choctaw Nation* v. *United States*, 119 U.S. 1, 28, 30 L. Ed. 306, 7 S. Ct. 75 (1886); *Jones* v. *Meehan*, 175 U.S. 1, 11, 44 L. Ed. 49, 20 S. Ct. 1 (1899). "Treaties were imposed upon [the Indians] and they had no choice but to consent. As a consequence, this Court often has held that treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970). Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts "have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, Handbook of Federal Indian Law 221 (1982 ed.) (hereinafter Cohen). The principle "has been applied to the particular issue of reservation termination to require that the intent of Congress to terminate be clearly expressed." *Id.*, at 43.

[2] The maxim that ambiguous provisions should be construed in favor of the Indians was first articulated by Justice McLean in *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832) (concurring opinion) ("The language used in treaties with the Indians should never be construed to their prejudice"); see also *Choate* v. *Trapp*, 224 U.S. 665, 675, 56 L. Ed. 941, 32 S. Ct. 565 (1912) ("This rule of construction has been recognized, without exception, for more than a hundred years").

statutes, executive orders, and agreements, to the Indians' benefit. [3]

Although the majority purports to apply these canons in principle, see *ante*, at 410-411, it ignores them in practice, resolving every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation.

B

The special canons of construction are particularly relevant in the diminishment context because the allotment statutes are often ambiguous regarding their effect on tribal jurisdiction and reservation boundaries. During the 19th century, land was considered Indian country and thus subject to tribal jurisdiction "whenever the Indian title had not been extinguished." *Bates* v. *Clark*, 95 U.S. 204, 208, 24 L. Ed. 471 (1877). In passing the General Allotment Act of Feb. 8, 1887, 24 Stat. 388, and related statutes, Congress no doubt assumed that tribal jurisdiction would terminate with the sale of Indian lands [***274] and that the reservations eventually would be abolished. [*425] See *Solem*, 465 U.S. at 468. The General Allotment Act itself did not terminate the reservation system, however, but was intended to assimilate [4] the Indians by transforming them into agrarians and opening their lands to non-Indians. See *Mattz*, 412 U.S. at 496. After this goal of the allotment policies proved to be a disastrous failure, [5] Congress reversed course with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. § 461 *et seq.* (1988 ed. and Supp. IV), which [**973] allowed surplus-opened Indian lands to be restored to tribal ownership. Finally, in 1948 Congress resolved the ensuing jurisdictional conflicts by extending tribal jurisdiction to encompass lands owned by non-Indians within reservation boundaries. See Act of June 25, 1948, 62 Stat. 757 (codified as 18 U.S.C. § 1151 (defining "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government")). [6] Reservation boundaries, [*426] rather than Indian title, thus became the measure of tribal jurisdiction.

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[3] The canon has been applied to treaties and statutes to preserve broad tribal water rights, see, *e. g., Choctaw Nation* v. *Oklahoma*, 397 U.S. at 631; *Winters* v. *United States*, 207 U.S. 564, 576, 52 L. Ed. 340, 28 S. Ct. 207 (1908), hunting and fishing rights, see, *e. g., Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979); *Antoine* v. *Washington*, 420 U.S. 194, 199-200, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975); *Menominee Tribe* v. *United States*, 391 U.S. 404, 406, n.2, 413, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (1968); *Tulee* v. *Washington*, 315 U.S. 681, 684-685, 86 L. Ed. 1115, 62 S. Ct. 862 (1942); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89, 63 L. Ed. 138, 39 S. Ct. 40 (1918), and other land rights, see, *e. g., County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U.S. at 247-248; *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 354, 86 L. Ed. 260, 62 S. Ct. 248 (1941); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 396, 46 L. Ed. 954, 22 S. Ct. 650 (1902); and to protect tribes from state taxation authority, see, *e. g., Bryan* v. *Itasca County*, 426 U.S. 373, 392, 48 L. Ed. 2d 710, 96 S. Ct. 2102 (1976); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7, 100 L. Ed. 883, 76 S. Ct. 611 (1956); *Carpenter* v. *Shaw*, 280 U.S. 363, 366-367, 74 L. Ed. 478, 50 S. Ct. 121 (1930); *Choate* v. *Trapp*, 224 U.S. at 675; *The Kansas Indians*, 72 U.S. 737, 5 Wall. 737, 760, 18 L. Ed. 667 (1867).

[4] "The theory of assimilation was used to justify the [allotment] legislation as beneficial to Indians. Proponents of assimilation policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers. The taking of these lands was justified as necessary for the progress of civilization as a whole." Cohen 128.

[5] The 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934. See 2 F. Prucha, The Great Father 896 (1984). John Collier testified before Congress that nearly half of the lands remaining in Indian hands were desert or semidesert, and that 100,000 Indians were "totally landless as a result of allotment." Hearings on H. R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 17 (1934); see also D. Otis, The Dawes Act and the Allotment of Indian Lands 124-155 (Prucha ed. 1973) (discussing results of the allotments by 1900).

[6] Congress' extension of tribal jurisdiction to reservation lands owned by non-Indians served pragmatic ends. "Where the existence or non-existence of an Indian reservation, and therefore the existence or non-existence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the State or Federal Government. Such an impractical pattern of checkerboard

As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen. It resolves the resulting statutory ambiguities by requiring clear evidence of specific congressional intent to diminish a reservation based on the language and circumstances of each individual land Act. See *Solem*, 465 U.S. at 469. Accordingly, statutory language alone of sale and settlement to non-Indians is insufficient to establish diminishment. "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U.S. at 586-587; see also *DeCoteau*, 420 U.S. at 444 ("Reservation status may survive the mere opening of a reservation to settlement"). "Some surplus land Acts diminished reservations, . . . and other surplus land Acts did not," *Solem*, [***275] 465 U.S. at 469, and we have refused to find diminishment based on language of opening or sale absent additional unequivocal evidence of a congressional intent to reduce reservation boundaries or divest all Indian interests. Thus, in *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962), the Court found no diminishment under a statute providing for the settlement and entry of surplus lands under the homestead laws, and in *Mattz*, 412 U.S. at 495, the Court concluded that a statute opening the reservation "'subject to settlement, entry, and purchase under the laws of the United States granting homestead rights'" did "not, alone, recite or even suggest that Congress intended thereby to terminate the . . . Reservation," *id.*, at 497. Most recently, in *Solem*, 465 U.S. at 472, we unanimously agreed that a statute authorizing the Secretary of [*427] the Interior to "'sell and dispose'" of surplus Indian lands did not diminish the reservation.

In contrast, the only two cases in which this Court previously has found diminishment involved statutes and underlying tribal agreements to "'cede, sell, relinquish, and convey to the United States all [the Indians'] claim, right, title, and interest'" in unallotted lands, *DeCoteau*, 420 U.S. at 439, n.22, or to "'cede, surrender, grant, and convey to the United States all [the Indians'] claim, right, title, and interest'" in a defined portion of the reservation, *Rosebud*, 430 U.S. at 591, n.8. The Court held that in the presence of statutory language "precisely suited" to diminishment, *id.*, at 597, supported by the express consent of the tribes, "the intent of all parties to effect a clear conveyance of all unallotted lands was evident." *DeCoteau*, 420 U.S. at 436, n.16. [7] I need hardly add that no such language or underlying Indian consent accompanies the statute at issue in this case.

[**974] II

A

The majority opinion relies almost exclusively on the fact that the Act of May 27, 1902, 32 Stat. 263, "restored [the unallotted lands] to the public domain" to conclude that the Uintah Valley Reservation was diminished. I do not agree that this ambiguous phrase can carry the weight of evincing a clear congressional purpose. We never authoritatively have defined the public domain, and the phrase "has no official definition. In its most general application, a public domain is meant to include all the land owned by a government -- any government, anywhere." E. Peffer, The Closing [*428] of the Public Domain 5 (1951) (footnote omitted). [8] Most commonly, the public [***276] domain and public lands "have been defined as those lands subject to sale or other disposal under the general land laws." *Utah Div. of State Lands*

jurisdiction was avoided by the plain language of § 1151." *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962) (footnote omitted).

[7] Other statutes have used express language of geographical termination. See 15 Stat. 221 ("the Smith River reservation is hereby discontinued") and 33 Stat. 218 ("the reservation lines . . . are hereby, abolished").

[8] Although the phrase "public domain" appears infrequently in our precedents, this Court has used it interchangeably with references to "public land[s]." See, *e. g., United States* v. *Midwest Oil Co.*, 236 U.S. 459, 468, 59 L. Ed. 673, 35 S. Ct. 309 (1915). Black's Law Dictionary 1229 (6th ed. 1990) defines the public domain as "land and water in possession of and owned by the United States and the states individually . . . . *See also*

v. *United States*, 482 U.S. 193, 206, 96 L. Ed. 2d 162, 107 S. Ct. 2318 (1987), quoting E. Baynard, Public Land Law and Procedure § 1.1, p. 2 (1986); see also *Kindred* v. *Union Pacific R. Co.*, 225 U.S. 582, 596, 56 L. Ed. 1216, 32 S. Ct. 780 (1912) (the term "public lands" ordinarily was "used to designate such lands as are subject to sale or other disposal under general laws"); *Union Pacific R. Co.* v. *Harris*, 215 U.S. 386, 388, 54 L. Ed. 246, 30 S. Ct. 138 (1910); *Newhall* v. *Sanger*, 92 U.S. 761, 763, 23 L. Ed. 769 (1876) ("The words 'public lands' are habitually used . . . to describe such as are subject to sale or other disposal under general laws").

Nothing in our precedents stating that lands reserved from the public domain were "reserved from sale," *Grisar* v. *McDowell*, 73 U.S. 363, 6 Wall. 363, 381, 18 L. Ed. 863 (1868), or "withdrawn from sale and settlement," *Sioux Tribe* v. *United States*, 316 U.S. 317, 323, 86 L. Ed. 1501, 62 S. Ct. 1095 (1942) (internal quotation marks omitted), however, demonstrates that restoration of those lands to the public domain was "inconsistent" with continued reservation status, *ante*, at 416. Under 19th-century Indian-land policies, non-Indians could not purchase, and generally could not enter, lands reserved for exclusive use by Indian tribes. Indian reservations obviously were not part of the public domain to the extent that they were reserved from non-Indian purchase. The opening of these lands under the allotment Acts, on the other hand, necessarily restored *all* such lands to the public domain, in the sense that the lands were made **[*429]** available for entry and sale. Restoration of lands to the public domain thus establishes only that the lands were opened to access by non-Indians and to settlement and purchase, a condition "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497.

In our most recent diminishment case, we unanimously rejected the argument adopted by the majority here -- that "Congress would refer to opened lands as being part of the public domain only if the lands had lost all vestiges of reservation status." *Solem*, 465 U.S. at 475. Instead, we observed that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.*, at 475, n.17; see also Whether Surplus Lands in Uintah and Ouray Reservation are Indian Lands, 2 Op. Sol. 1205 (1943) ("Restored to the public domain" is "only a method of indicating that the lands are to be subject to disposition under the public land laws"). *Solem* concerned an allotment statute that referred to opened lands as "part of the public domain," 465 U.S. at **[**975]** 475, and as "within the respective reservations thus diminished," *id.*, at 474 (internal quotation marks omitted). The Court refused to infer diminishment from this language, however, finding "considerable doubt as to what Congress meant in using these phrases." *Id.*, at 475, n.17. **[***277]** We concluded that when balanced against the applicable statute's stated goal of opening the reservation for sale to non-Indians, "these two phrases cannot carry the burden of establishing an express congressional purpose to diminish." *Id.*, at 475.

The majority's focus on the fact that the public domain language in *Solem* was not in the operative portion of the statute, see *ante*, at 413, ignores the *Solem* Court's additional conclusion that the public domain is an ambiguous concept that is not incompatible with reservation status. Furthermore, the fact that the public domain language in *Solem* was not operative and did not use the word "restored" should **[*430]** be irrelevant under the majority's own analysis, since the character of the lands as "part of the public domain" would be "inconsistent" with their continued reservation status. *Ante*, at 413, 416. Under the majority's present interpretation, the opened lands could not have been both part of the

Public Lands." See *Amoco Production Co.* v. *Gambell*, 480 U.S. 531, 549, n.15, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987) ("rejecting the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute").

public domain and part of the reservation. *Solem*, however, concluded precisely the opposite. [9]

In light of this Court's unanimous reasoning in *Solem* and our common interpretation of the public domain as lands "subject to sale . . . under general laws," *Kindred*, 225 U.S. at 596, therefore, I cannot conclude that the isolated phrase "restored to the public domain" is an "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests," *Solem*, 465 U.S. at 470. This language bears no relation to the "plain and unambiguous" language that our precedents require or that we found controlling in *DeCoteau* and *Rosebud*. Restoration to the public domain simply allowed Indian lands to be sold, something we repeatedly have said is never sufficient to establish an intent to diminish.

B

Although the Court relies on the negotiation history of the 1902 Act and that of the Act of Mar. 3, 1903, ch. 994, 32 Stat. 998, to support its conclusion, nothing in the negotiations with the Ute Indian Tribe "unequivocally reveal[s] a widely held, contemporaneous understanding" that the Uintah Reservation [*431] boundaries would be diminished. *Solem*, 465 U.S. at 471. The ever-present Inspector James McLaughlin, who negotiated the *Rosebud* and *DeCoteau* agreements that this Court found to contain express language of disestablishment, used no comparable language here. [10] Instead, McLaughlin spoke largely in terms of "opening" the [***278] reservation to use by non-Indians. [11] [**976] The Indians similarly responded primarily in terms of "opening" and opposed the proposed sale. [12]

The Court isolates a single comment by McLaughlin from the six days of negotiations to argue that diminishment was understood. But McLaughlin's "picturesque" statement that "'there will be no outside boundary line to this [*432] reservation, '" *ante*, at 417, cannot be understood as a statement that the reservation itself was being abolished, since the Uintah Valley Reservation unquestionably survived the opening. McLaughlin's discussion, which went on to explain that each Indian "will have a boundary to your individual holdings," Minutes 368a, is more readily understood as a reference to a change in *title* to the reservation lands, which clearly would have occurred under the Acts, or to the fact

[9] The Court never before has held that an isolated reference to the public domain is sufficient to support a finding of diminishment. In every case relied upon by the majority for this contention, the relevant public domain language was accompanied by express additional language demonstrating such intent. See *DeCoteau*, 420 U.S. at 446 ("returned to the public domain, *stripped of reservation status*") (emphasis added). Three of the cases cited by the majority, in fact, discuss the same statute, 27 Stat. 62. See *Seymour*, 368 U.S. at 354 ("'*vacated* and restored to the public domain'") (emphasis added); *Mattz* v. *Arnett*, 412 U.S. 481, 504, n.22, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1973) (same); *United States* v. *Pelican*, 232 U.S. 442, 445, 58 L. Ed. 676, 34 S. Ct. 396 (1914) (same).

[10] In negotiating the 1901 Agreement, for example, McLaughlin explained to the Rosebud Sioux Indians that "'the cession of Gregory County' by ratification of the Agreement 'will leave your reservation a compact, and almost square tract . . . about the size and area of Pine Ridge Reservation.'" *Rosebud*, 430 U.S. at 591-592.

[11] See, *e. g.*, Minutes of Councils Held by Inspector James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians, at Uintah Agency, Utah, from May 18 to May 23, 1903, excerpted in App. to Brief for Duchesne County, Utah, as *Amicus Curiae* 333a, 336a (herein-after Minutes) ("After you have taken your allotments the remaining land is to be opened for settlement"), *id.*, at 342a ("The surplus lands will be opened to settlement"), *id.*, at 354a ("As certainly as the sun rises tomorrow [your reservation] is to be opened"), *id.*, at 358a ("It is not for you to say whether your reservation is to be opened or not"), *id.*, at 359a ("Do not lose sight of the fact that the reservation is to be opened"), *id.*, at 363a ("The reservation will certainly be opened").

[12] See, *e. g.*, *id.*, at 339a ("When they put us on the reservation . . . they were not to open it"), *id.*, at 340a ("The president made this reservation here for the Indians and it ought not to be opened up"), *id.*, at 343a ("I don't want you to talk to us about opening our reservation . . . . We don't want this reservation opened, and we do not want White people coming in among us"), *id.*, at 344a ("We do not want this reservation thrown open"), *ibid.* ("They told us that this land would be ours always and that it would never be opened"), *id.*, at 346a ("We are not going to talk about opening our reservation"), *ibid.* ("We do not want to have the reservation thrown open"), *id.*, at 351a ("I am on this reservation, and I do not want this land thrown open"), *id.*, at 357a ("The Indians do not want the reservation opened").

that the lands within the reservation boundary would be open to entry by non-Indians.

McLaughlin's statements immediately following this passage strongly suggest that some Indian interests survived the opening. In response to Indian concerns regarding lifting of the reservation line, McLaughlin stated:

> "You fear that you are going to be confined to the tract of land allotted. That is not so, and I will explain a little more clearly . . . . Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests." *Id.*, at 368a-369a.

Elsewhere, McLaughlin confirmed this statement: "My friends, when you take your allotment you are deprived of no privileges you have at the present time." *Id.*, at 365a.

Although the discussions regarding the allotments concededly are subject to varying interpretations, none of them provides the type of unequivocal evidence of an intent to diminish boundaries or abolish all Indian interests that we require where statutory intent to diminish the reservation is not express. On their face, the negotiations establish that the 1902 Act would have done [***279] "no more than open the way for non-Indian settlers to own land on the reservation." *Seymour*, 368 U.S. at 356. Moreover, the record contains no evidence whatsoever of the Indians' contemporaneous understanding regarding the Act of Mar. 3, 1905, 33 Stat. 1069, which is the operative Act in this case.

[*433] What the negotiations do show is that the Indians over-whelmingly opposed the allotments. After six days of meetings between McLaughlin and the Ute Tribe, only 82 of the 280 adult male Utes agreed to sign the allotment agreement, see Letter of May 30, 1903, from McLaughlin to the Secretary of the Interior, reprinted in H. Doc. No. 33, 58th Cong., 1st Sess., 5 (1903), and McLaughlin reported that the Ute Indians were "unanimously opposed to the opening of their reservation." *Id.*, at 7. Although after *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 47 L. Ed. 299, 23 S. Ct. 216 (1903), Congress unquestionably had authority to terminate reservations unilaterally, we relied heavily on the presence of tribal consent in *Rosebud* and *DeCoteau* to find a contemporaneous intent to diminish. In *Solem*, by contrast, we held that the surrounding circumstances "failed to establish a clear congressional purpose to diminish the reservation" because [**977] the 1908 Act there "did not begin with an agreement between the United States and the Indian Tribes." 465 U.S. at 476. To the extent that the absence of formal tribal consent counseled against a finding of diminishment in *Solem*, therefore, the Ute Indians' persistent withholding of consent requires a similar conclusion here.

III

A

Even if the 1902 Act's public domain language were express language of diminishment, I would conclude that the Uintah Valley Reservation was not diminished because that provision did not remain operative in the 1905 Act. It was this latter Act that actually opened the Uintah Valley Reservation to sale and settlement, and that Act's language on its face does not support a finding of diminishment. The Act provided in relevant part:

> "That the time for *opening to public entry* the unallotted lands on the Uintah Reservation in Utah having been fixed by law . . . it is hereby provided that the time [*434] for *opening said reservation* shall be extended . . . and that the *manner of opening such lands for settlement and entry*, and for disposing of the same, shall be as follows: That the said unallotted lands . . . *shall be disposed of under the general provisions of the homestead and town-site laws of the United States and shall be opened to settlement and entry . . . . And provided further*, That . . . the proceeds of the sale of such lands shall be applied as provided in the Act of Congress of May twenty-seventh, nineteen hundred and two, and the Acts amendatory thereof and supplemental thereto." 33 Stat. 1069-1070 (emphasis added in part).

This language, which speaks only of opening the lands for entry and settlement, is indistinguishable from that which we previously have concluded "cannot be interpreted to [***280] mean that the reservation was to be terminated." *Mattz*, 412 U.S. at 504; see also *Solem*, 465 U.S. at 473; and *Seymour*, 368 U.S. at 356. Neither the Court nor the parties dispute this conclusion.

Nor did the 1905 Act preserve the 1902 Act's public domain provision. In contrast to the Act of Apr. 21, 1904, 33 Stat. 207, the 1905 Act did not open the lands "as provided by" the 1902 Act, *ibid.*, nor was it passed expressly to "carry out the purposes of" the 1902 Act, as were both the 1903 and 1904 Acts. See 32 Stat. 997 and 33 Stat. 207. On its face, the 1905 Act preserved only one portion of the earlier statute -- that portion regarding payment of the proceeds from the unallotted land sales. Other provisions of the 1902 Act unquestionably were superseded, since the 1905 Act restricted settlement of the opened lands to that under "the general provisions of the homestead and town-site laws," 33 Stat. 1069, rather than under the general laws as provided by the 1902 Act. Thus, the plain language of the 1905 Act, which actually opened the reservation, did *not* restore the unallotted [*435] lands to the public domain, but simply opened the lands for settlement.

Nothing in this case suggests that the 1902 Act established a baseline intent to diminish the reservation like that the Court confronted in *Rosebud*. In that case, an original statute and agreement with the Indians to "cede, surrender, grant, and convey" all their interests in designated lands unequivocally demonstrated a collective intent to diminish the Great Sioux Reservation. See 430 U.S. at 591, n.8. Both the legislative history of two subsequent allotment statutes and the presence of majority tribal consent to those land allotments established that this original intent to diminish was preserved. All parties agreed that the later statutes "must have diminished [the] reservation if the previous Act did." See *Solem*, 465 U.S. at 473, n.15.

By contrast, the 1902 Act contains no equivalent language of diminishment, and none of the Acts at issue here were supported by Indian consent. Prior congressional attempts to open the Uintah Valley Reservation demonstrate that the requirement of the "consent thereto of the majority [**978] of the adult male Indians of the Uintah and the White River tribes" was central to the 1902 Act. 32 Stat. 263. In 1894, 1896, 1898, and 1902, Congress enacted statutes requiring Indian consent to open the Uintah Valley Reservation, but none of these Acts became effective because that consent was not forthcoming. [13] After [***281] the passage of the 1903 Act and the [*436] decision in *Lone Wolf*, Congress dispatched Inspector McLaughlin to negotiate the allotments with the Tribe. Throughout this period, the Ute Tribe resisted the allotments, twice sending delegations to

[13] The Indian Appropriations Act of Aug. 15, 1894, ch. 290, § 20, 28 Stat. 337, authorized a commission to allot the Uncompahgre Reservation unilaterally, but required that the same commission "negotiate and treat" with the Uintah Valley Reservation Indians for the relinquishment of their lands, "and if possible, procure [their] consent" to such allotments. See § 22, *ibid.* A House Report explained that in contrast to the Uncompahgre Indians, who had "no title to the lands they occupy" and occupied them only temporarily, the Uintah Indians were "the owners of the lands within the reservation, because [the enabling Act] . . . provided that the lands within the Uintah Reservation should be 'set apart for the permanent settlement and exclusive occupation of the Indians.'" H. R. Rep. No. 660, 53d Cong., 2d Sess., 1, 2-3 (1894), quoting Act of May 5, 1864, ch. 77, 13 Stat. 63. In order to allot the Uintah Reservation lands, therefore, it was "first necessary to obtain the consent of the Indians residing thereon." H. R. Rep. No. 660, at 3. The Act of June 10, 1896, ch. 398, 29 Stat. 341-342, and the Act of June 4, 1898, ch. 376, 30 Stat. 429, also conditioned opening of the reservation on Indian consent. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1111-1114 (Utah 1981) (discussing pre-1902 efforts to open the Uintah Reservation).

Congress rebuffed all subsequent attempts to allot the reservation unilaterally, see Hearings before the Senate Committee on Indian Affairs, S. Doc. No. 212, 57th Cong., 1st Sess., 111 (1902) (proposal of Rep. Sutherland of Utah), or to sever large portions of the reservation, see S. 145, 57th Cong., 1st Sess. (1902), reproduced in S. Doc. No. 212, at 3-4 (proposal of Sen. Rawlins of Utah). In hearings regarding the reservation in 1902, Indian Affairs Commissioner Jones testified: "There is a sort of feeling among the ignorant Indians that they do not want to lose any of their land. That is all there is to it; and I think before you can get them to agree . . . you have got to use some arbitrary means to open the land." *Id.*, at 5. Congress did not heed this advice, however, but again required the Ute Tribe's consent in the 1902 Act.

Washington to voice their opposition. See *Ute Indian Tribe* v. *Utah*, 521 F. Supp. 1072, 1113, 1125 (Utah 1981). When Congress finally opened the Uintah Reservation to non-Indian settlement in 1905, it removed the public domain language from the opening statute and severely restricted non-Indian access to the opened lands. Even if the 1902 Act contained express language of termination, then, the facts of this case would much more closely mirror those in *Mattz*, 412 U.S. at 503-504, where Congress ultimately abandoned its prior attempts to "abolish" the reservation in favor of simply opening the lands to entry and settlement.

Concededly, nothing in the 1905 Act expressly repealed the 1902 Act's public domain language, and the 1905 Act could [*437] be construed as either preserving that provision or replacing it. Ordinarily under these circumstances, the canon that repeals by implication are disfavored might require us to construe the later Act's silence as consistent with the earlier statute. See *ante*, at 416. The Court's invocation of this canon here, however, "fails to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indians law." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766, 85 L. Ed. 2d 753, 105 S. Ct. 2399 (1985).

In *Blackfeet Tribe*, the Court refused to rely on the rule against repeals by implication under circumstances analogous to those presented here. That case involved the question whether a 1924 provision authorizing States to tax tribal mineral royalties remained in force under a 1938 statute which was silent on the taxation question but which repealed all prior inconsistent provisions. The State argued that because the 1938 statute neither expressly repealed the earlier taxation provision nor was inconsistent with it, the rule against repeals by implication required a finding that the State's taxation power remained intact. The Court rejected this argument as, among other things, inconsistent with two fundamental canons of Indian law: that a State may tax Indians only [**979] when Congress has clearly expressed such an intent, and that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Ibid*. Cf. *Carpenter* v. *Shaw*, 280 U.S. 363, 366-367, 74 L. Ed. 478, 50 S. Ct. 121 [***282] (1930); *Choate* v. *Trapp*, 224 U.S. 665, 675, 56 L. Ed. 941, 32 S. Ct. 565 (1912).

A similar construction is required here. The 1905 Act does not purport to fulfill the "purposes" of the 1902 Act nor to preserve its public domain language; the Act instead simply opens the lands for settlement under the [***283] homestead and townsite laws. Under these circumstances, both the requirements that congressional intent must be explicit and that ambiguous provisions must be construed in favor of the Indians compel a resolution in favor of petitioner Hagen. Although a "canon of construction is not a license to disregard [*438] clear expressions of tribal and congressional intent," *DeCoteau*, 420 U.S. at 447, no such clear expression is evident here.

B

The legislative history of the 1905 Act supports the conclusion that Congress materially altered the operative language in the 1902 Act by deleting the public domain provision. Like the 1902 Act, the House version of the 1905 bill, H. R. 17474, provided "that so much of said lands as will be under the provisions of said acts *restored to the public domain* shall be open to settlement and entry" under the general land laws. 39 Cong. Rec. 1180 (1905) (emphasis added). Representative Howell of Utah, in a proposed amendment that was *not* ultimately adopted, sought to limit non-Indian entry under this bill "to entry only under the homestead, town-site, and mining laws of the United States." *Ibid*. Howell's proposal, however, would have referred to the public domain in two places:

> "so much of said lands as will be under the provisions of said acts *restored to the public domain* shall be open to settlement and entry by proclamation of the President . . . . *And further*

> *provided*, That for one year immediately following the *restoration of said lands to the public domain* said lands shall be subject to entry only under the homestead, town-site, and mining laws of the United States." *Ibid.* (emphasis added in part).

Senate bills later introduced by Senator Smoot of Utah, S. 6867 and S. 6868, 58th Cong., 3d Sess. (1905) (which ultimately were adopted in relevant part as the 1905 Act), also limited the opening to entry under the homestead and townsite laws but struck the House bill's public domain language. In its place, S. bill 6867 stated

> "that the time for *opening to public entry* the unallotted lands having been fixed by law . . . it is hereby provided that the *manner of opening* such lands for settlement **[*439]** and entry, and for disposing of the same shall be as follows: That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and town site laws of the United States" (emphasis added).

No subsequent attempt was made to reintroduce the public domain language into the Senate bills. When the House and Senate bills were submitted to the Conference Committee, the Committee again struck the House version containing the public domain language and replaced it with the Senate bill. See 39 Cong. Rec. 3919 (1905). Congress adopted this conference bill as the 1905 Act.

The legislative history thus demonstrates that Congress both removed the public domain language from the 1905 Act and restricted entry to the homestead and townsite laws. Although the Court attempts to dismiss the altered language of the 1905 Act as evidence that "Congress wanted to limit land speculation," *ante*, at 419, this reasoning explains only the presence of the homestead and townsite limitation; it does not explain Congress' simultaneous *deletion* of the public domain language. We do not know why this latter change was made. Possibly Congress thought the language had no substantive meaning at all; possibly the deletion was a response to the Indians' continued withholding **[**980]** of consent, or it is possible that opening lands under the homestead and townsite laws was incompatible with their restoration to the public domain and thus to sale "under general laws." See *Newhall* v. *Sanger*, 92 U.S. at 763. We do know, however, that we must construe doubt regarding Congress' intent to the Indians' benefit when we are left, as we are here, without the "clear statement of congressional intent to alter reservation boundaries," necessary for a finding of diminishment. *Solem*, 465 U.S. at 478.

President Theodore Roosevelt's Proclamation shed no competing light on Congress' intent, but simply summarized the language of the allotment statutes. The operative portion **[*440]** of the Proclamation declared that "all the unallotted lands" would "in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws." 34 Stat. 3120. Thus, the crucial portion of the Proclamation under which the lands actually were opened restricted the opening to the terms of the 1905 Act. Furthermore, all other contemporaneous Presidential Proclamations regarding the reservation universally referred to the 1905 Act rather than the 1902 Act as the opening authority. See Presidential Proclamation of July 14, 1905, 34 Stat. 3116 (Uintah forest reserve); Proclamation of Aug. 3, 1905, 34 Stat. 3141 (Uintah reservoir and agricultural lands); Proclamation of Aug. 14, 1905, 34 Stat. 3143 (townsites); Proclamation of Aug. 14, 1905, 34 Stat. 3143-3144 (reservoir lands).

C

Although contemporary demographics and the historical exercise of jurisdiction may provide "one additional clue as to what Congress expected" in opening reservation lands, *Solem*, 465 U.S. at 472, in that case, we unanimously agreed:

> "There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. *When both an Act and its*

> *legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands*, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening. *Mattz* v. *Arnett*, 412 U.S. at 505; *Seymour* v. *Superintendent*, 368 U.S. 351, 7 L. Ed. 2d 346, 82 S. Ct. 424 (1962)." 465 U.S. at 472 (emphasis added).

Absent other plain and unambiguous evidence of a congressional intent, we never have relied upon contemporary [***284] demographic [*441] or jurisdictional considerations to find diminishment. Cf. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 51 L. Ed. 2d 660, 97 S. Ct. 1361 (1977). While these factors may support a finding of diminishment where congressional intent already is clear, therefore, the Court properly does not contend that they may be controlling where Congress' purpose is ambiguous.

Aside from their tangential relation to historical congressional intent, there are practical reasons why we are unwilling to rely heavily on such criteria. The history of the western United States has been characterized, in part, by state attempts to exert jurisdiction over Indian lands. Cf. *United States* v. *Kagama*, 118 U.S. 375, 384, 30 L. Ed. 228, 6 S. Ct. 1109 (1886) ("[The Indians] 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"). And the exercise of state jurisdiction here has not been uncontested. The Constitution of the Ute Indian Tribe, which was approved by the Secretary of the Interior in 1937, defines the Tribe's jurisdiction as extending "to the territory within the original confines of the Uintah and Ouray Reservation," quoted in *Ute Indian Tribe*, 521 F. Supp. at 1075. See also Ute Law and Order Code § 1-2-2 (1975), set forth in *Ute Indian Tribe*, 521 F. Supp. at 1077, n.8. More than two decades ago, *amicus* Roosevelt City agreed to the limited exercise of tribal jurisdiction within its city limits. [**981] See Memorandum of Agreement between Roosevelt City and the Ute Tribe, Jan. 11, 1972, cited in *Ute Indian Tribe*, 521 F. Supp. at 1077, n.8. Federal agencies also have provided services to Indians residing in the disputed areas for many years. In fact, after reviewing the substantial jurisdictional contradictions and confusion in the record on this question, the District Court in *Ute Indian Tribe* concluded: "One thing is certain: the jurisdictional history of the Uintah and Ouray Reservation is not one of 'unquestioned' exercise of state authority." *Id.*, at 1146.

[*442] IV

One hundred thirty years ago, Congress designated the Uintah Valley Reservation "for the permanent settlement and exclusive occupation of" the Ute Indians. Act of May 5, 1864, ch. 77, 13 Stat. 63. The 1905 opening of the reservation constituted a substantial breach of Congress' original promise, but that opening alone is insufficient to extinguish the Ute Tribe's jurisdiction. Nothing in the "face of the Act," its "surrounding circumstances," or its "legislative history" establishes a clear congressional purpose to diminish the Uintah Reservation. *DeCoteau*, 420 U.S. at 445 (internal quotation marks omitted). I appreciate that jurisdiction often may not be neatly parsed among the States and Indian tribes, but this is the inevitable burden of the path this Nation has chosen. Under our precedents, the lands where petitioner's offense occurred are Indian country, and the State of Utah lacked jurisdiction to try him for that crime. See 18 U.S.C. § 1151.

I respectfully dissent.

References

19 Federal Procedure, L Ed, Indians and Indian Affairs 46:10538 Am Jur Trials 573, Defense of Narcotics CasesL Ed Digest, Courts 648; Indians 50L Ed Index, IndiansALR Index, Indians; Jurisdiction Annotation References:Supreme Court.Supreme Court.

ADDENDUM D

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made. Lands excepted.

Warning is hereby expressly given to all persons not to make settlement upon the lands reserved by this proclamation. Reserved from settlement.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 25th day of July, in the year of our Lord one thousand nine hundred and five, and of [SEAL.] the Independence of the United States the one hundred and thirtieth.

THEODORE ROOSEVELT

By the President:
ALVEY A. ADEE
Acting Secretary of State.

BY THE PRESIDENT OF THE UNITED STATES. July 31, 1905.

A PROCLAMATION

Whereas, on June 7, 1905, the Secretary of the Interior directed the Commissioner of Indian Affairs to cause to be selected, by the Uintah Allotment Commission, one or more tracts of land, suitable for townsite purposes, in the Uintah Indian Reservation Lands, State of Utah, to the end that the same might be reserved under the provisions of section 2380 of the Revised Statutes of the United States; Uintah Indian Reservation, Utah. Preamble. *Ante*, p. 3122. R. S., sec. 2380, p. 436.

And whereas, on July 6, 1905, the Acting Commissioner of Indian Affairs reported that said commission had selected, as suitable for townsite purposes and as natural and prospective centers of population, certain described lands which he recommended be reserved under the provisions of said section 2380;

And whereas, on July 7, and 27, 1905, the Department of the Interior approved said selection and recommendation so far as it related to the following described lands in the Uintah land district, Utah, and has requested that they be reserved for townsites to be created under existing statute, to-wit:

Lots four, six, and seven, the southwest quarter of the northeast quarter, the south half of the northwest quarter, the southwest quarter, and the west half of the southeast quarter of section twenty-five, lot two, the southeast quarter of the northeast quarter, and the east half of the southeast quarter of section twenty-six, in township three south of range two west of the Uintah special meridian; Lands designated for townsites.

Also the southwest quarter of the southeast quarter of section thirty-six, in township three south of range five west, the north half, and the north half of the south half of section one, the east half of the northeast quarter, and the northeast quarter of the southeast quarter of section two, in township four south of range five west of the Uintah special meridian.

And also the south half of the northeast quarter, the southeast quarter, and the southeast quarter of the southwest quarter of section

seven, and the northeast quarter of the northwest quarter of section eighteen, in township three south of range two east of the Uintah special meridian;

Townsites reserved. R. S., secs. 2380, 2381, p. 436.

Now therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power in me vested by sections 2380 and 2381 of the Revised Statutes of the United States, do hereby declare and make known that said lands are hereby reserved as townsites, to be disposed of by the United States under the terms of the statutes applicable thereto.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 31st day of July in the year of our Lord one thousand nine hundred and five, and of [SEAL.] the Independence of the United States the one hundred and thirtieth.

T. ROOSEVELT

By the President:
ALVEY A. ADEE
Acting Secretary of State.

August 2, 1905.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Uintah Indian Reservation, Utah. Preamble.

WHEREAS, it was declared in my proclamation of July 14, in the year of our Lord 1905, prescribing the manner in which certain lands within the Uintah Indian Reservation should be opened to settlement and entry under the homestead and townsite laws of the United States, among other things as follows:

Ante, p. 3121.

Commencing on Monday, August 28, 1905, at 9 o'clock a. m., the applications of those drawing numbers 1 to 50, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 51 to 100, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

And, whereas, there now appear to be ample reasons for a modification of said provision;

Modifying provisions for drawings.

Now therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said act of Congress, and for the purpose of modifying the provision of said proclamation above quoted, do hereby declare and direct that said provision be modified to read as follows:

Commencing on Monday, August 28, 1905, at 9 o'clock a. m., the applications of those drawing numbers 1 to 111, inclusive, must be presented at the land office in the town of Vernal, Utah, in the land district in which said lands are situated, and will be considered in their numerical order during the first day, and the applications of those drawing numbers 112 to 222, inclusive, must be presented and will be considered in their numerical order during the second day, and so on at that rate until all of said lands subject to entry under the homestead law, and desired thereunder, have been entered. If any applicant fails to appear and present his application for entry when the number assigned to him by the drawing is reached, his right to enter will be passed until after the other applications assigned for that day have been disposed of, when he will be given another opportunity to make entry, failing in which he will be deemed to have abandoned his right to make entry under such drawing.

ADDENDUM E

sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders, or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

31 Mar., 1830, c. 48, s. 4, v. 4, p. 392.

Fackler *v.* Ford, 24 How., 331.

Agreements to pay premium to purchasers at public sales.

SEC. 2374. If any person before, or at the time of the public sale of any of the lands of the United States, enters into any contract, bargain, agreement, or secret understanding with any other person, proposing to purchase such land, to pay or give to such purchasers for such land a sum of money or other article of property, over and above the price at which the land is bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void.

31 Mar., 1830, c. 48, s. 5, v. 4, p. 392.

Fackler *v.* Ford, 24 How., 331.

Recovery of premiums paid to purchasers at public sales.

SEC. 2375. Every person being a party to such contract, bargain, agreement, or secret understanding, who pays to such purchaser any sum of money or other article of value, over and above the purchase-money of such land, may sue for and recover such excess from such purchaser in any court having jurisdiction of the same.

31 Mar., 1830, c. 48, s. 5, v. 4, p. 392.

Discovery of agreements to pay premium by bill in equity.

SEC. 2376. If the party aggrieved have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same; but every such suit either in law or equity shall be commenced within six years next after the sale of such land by the United States.

31 Mar., 1830, c. 48, s. 5, v. 4, p. 392.

Limitation of entries by agricultural-college scrip.

SEC. 2377. In no case shall more than three sections of public lands be entered at private entry in any one township by scrip issued to any State under the act approved July two, eighteen hundred and sixty-two, for the establishment of an agricultural college therein.

27 July, 1868, c. 256, v. 15, p. 227.

Grant to new States.

SEC. 2378. There is granted, for purposes of internal improvement, to each new State hereafter admitted into the Union, upon such admission, so much public land as, including the quantity that was granted to such State before its admission and while under a territorial government, will make five hundred thousand acres.

4 Sept., 1841, c. 16, s. 8, v. 5, p. 455.

Foley *v.* Harrison, 15 How., 433.

Selections and locations of lands granted in last section.

SEC. 2379. The selections of lands, granted in the preceding section, shall be made within the limits of each State so admitted into the Union, in such manner as the legislatures thereof, respectively, may direct; and such lands shall be located in parcels conformably to sectional divisions and subdivisions of not less than three hundred and twenty acres in any one location, on any public land not reserved from sale by law of Congress or by proclamation of the President. The locations may be made at any time after the public lands in any such new State have been surveyed according to law.

4 Sept., 1841, c. 16, s. 8, v. 5, p. 455.

CHAPTER EIGHT.

RESERVATION AND SALE OF TOWN-SITES ON THE PUBLIC LANDS.

Town-sites to be reserved.

3 Mar., 1863, c. 80, s. 1, v. 12, p. 754.

3 *Mar.*, 1877, *c.* 113, *v.* 19, *p.* 392.

SEC. 2380. The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town-sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

Reservations to be surveyed into lots.

3 Mar., 1863, c. 80, s. 2, v. 12, p. 754.

SEC. 2381. When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land-office in the district in which the reservations may be situated, in accordance with the instructions of the Commissioner of the General Land-Office.

Town or city sites in public lands.

1 July, 1864, c. 205, s. 2, v. 13, p. 343.

SEC. 2382. In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land-Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land-district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land-Office it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements shall be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale.

When towns established upon unsurveyed lands, extension limits, how adjusted.

1 July, 1864, c. 205, s. 3, v. 13, p. 344.

SEC. 2383. When such cities or towns are established upon unsurveyed lands, it may be lawful, after the extension thereto of the public surveys, to adjust the extension limits of the premises according to those lines, where it can be done without interference with rights which may be vested by sale; and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases.

When transcript maps of town are not filed in twelve months, proceedings by Secretary of Interior.

1 July, 1864, c. 205, s. 4, v. 13, p. 344.

SEC. 2384. If within twelve months from the establishment of a city or town on the public domain, the parties interested refuse or fail to file in the General Land-Office a transcript map, with the statement and testimony called for by the provisions of section twenty-three hundred and eighty-two, it may be lawful for the Secretary of the Interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot.

Where size of lots or town plat vary from general rule.

3 Mar., 1865, c. 107 s.2, v.13, p. 530.

SEC. 2385. In the case of any city or town, in which the lots may be variant as to size from the limitation fixed in section twenty-three hundred and eighty-two, and in which the lots and buildings, as municipal improvements, cover an area greater than six hundred and forty acres, such variance as to size of lots or excess in area shall prove no bar to such city or town claim under the provisions of that section; but the minimum price of each lot in such city or town, which may contain a greater number of square feet than the maximum named in that section, shall be increased to such reasonable amount as the Secretary of the Interior may by rule establish.

Title to lots subject to mineral rights.

3 Mar., 1865, c. 107, s.2, v.13, p.530.

SEC. 2386. Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

Entry of town authorities in trust for occupants.

2 Mar., 1867, c. 177, v. 14, p. 541.
23 *June*, 1874, *c.* 469, *s.*3, *v.*18, *p.*254.

SEC. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

Entry under preceding section, when to be made.

2 Mar., 1867, c. 177, v. 14, p. 541.
23 *June*, 1874, *c.* 469, *s.*3, *v.*18, *p.*254.

SEC. 2388. The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town-site shall be filed with the register of the proper land-office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any Territory in which a land-office may not have been established, such declaratory statements may be filed with the surveyor-general of the surveying-district in which the lands are situated; who shall transmit the same to the General Land-Office.

Entry in proportion to number of inhabitants.

2 Mar., 1867, c. 177, v. 14, p. 541.
23 *June*, 1874, *c.* 469, *s.*3, *v.*18, *p.*254.
3 *Mar.*, 1877, *c.* 113, *ss.* 2, 4, *v.* 19, *p.* 392.

SEC. 2389. If upon surveyed lands the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred, and less than one thousand, shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed.

Authorities of Salt Lake City, rights of, as to entry.

1 July, 1870, c. 193, v. 16, p. 183.
23 *June*, 1874, *c.* 469, *s.* 3, *v.* 18, *p.* 254.

SEC. 2390. The words "not exceeding five thousand in all," in the preceding section, shall not apply to Salt Lake City, in the Territory of Utah; but such section shall be so construed in its application to that city that lands may be entered for the full number of inhabitants contained therein, not exceeding fifteen thousand; and as that city covers school-section number thirty-six, in township number one north, of range number one west, the same may be embraced in such entry, and indemnity shall be given therefor when a grant is made by Congress of sections sixteen and thirty-six, in the Territory of Utah, for school purposes.

Certain acts of trustees to be void.

2 Mar., 1867, c. 177, v. 14, p. 541. 23 *June*, 1874, *c.* 469, *s.* 3, *v.* 18, *p.* 254.

SEC. 2391. Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void.

No title acquired to gold-mines, &c., or to mining-claim, &c.

SEC. 2392. No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining-claim or possession held under existing laws.

2 Mar., 1867, c. 177, v. 14, p. 541. 8 June, 1868, c. 53, v. 15, p. 67. 23 *June*, 1874, *c.* 469, *s.* 3, *v.* 18, *p.* 254.

Military or other reservations, &c.

SEC. 2393. The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land-Office by title derived from the Crown of Spain, or otherwise.

2 Mar., 1867, c. 177, v. 14, p. 541. 28 *Feb.*, 1877, *c.* 74, *v.* 19, *p.* 264.

Inhabitants of towns on public lands, right of, to enter.

SEC. 2394. The inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine; and in addition to the minimum price of the lands embracing any town-site so entered, there shall be paid by the parties availing themselves of such provisions all costs of surveying and platting any such town-site, and expenses incident thereto incurred by the United States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made or may hereafter make entries, and elect to proceed under other laws relative to town-sites in this chapter set forth.

8 June, 1868, c. 53, v. 15, p. 67. 23 *June*, 1874, *c.* 469, *s.* 3, *v.* 18, *p.* 254.

CHAPTER NINE.

SURVEY OF THE PUBLIC LANDS.

Rules of survey.

SEC. 2395. The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

18 May, 1796, c. 29, s. 2, v. 1, p. 465. 10 May, 1800, c. 55, s. 3, v. 2, p. 73. 3 *Mar.*, 1877, *c.* 105, *v.* 19, *p.* 348.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles; and by making a corner on each of such lines, at the end of every mile. The

ADDENDUM F

Congress approved February 28, 1931, June 9, 1932, and June 13, 1933, are hereby extended one and three years, respectively, from June 13, 1934.

Amendment.

SEC. 2. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, June 18, 1934.

[CHAPTER 576.]

AN ACT

June 18, 1934.
[S. 3645.]
[Public, No. 383.]

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Indian affairs.
Future allotment in severalty prohibited.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Existing trust periods extended.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further*, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*,

Provisos.
Existing valid rights not affected.

Lands in reclamation projects.

Order temporarily withdrawing Papago Reservation lands from mineral entry, etc., revoked.

Resulting damages to be paid tribe; limitation.

Annual rental to be paid.

Applicant for mineral patent must first make deposit of rent.

That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Patentee to pay, to credit of Indians, damages, for loss of improvements.

Refund, if not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

Rights of way, etc., not restricted.

Vol. 46, p. 1202

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

No transfers of restricted Indian lands, etc.; exception.

Provisos.
Lands may descend only to Indian tribe or successor corporation.

Descent, etc., according to applicable laws.

Voluntary exchanges for proper consolidations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

Acquisitions, for providing lands for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

Appropriation authorized.

Proviso.
Not to be used outside boundary lines of Navajo reservation.

Ante, p. 960.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Balances available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Title vested in United States in trust
Lands exempt from taxation.

Indian forestry units
Regulations governing.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

New Indian reservations on lands acquired by proclamation.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

Proviso.
Additions, for exclusive use of Indians.

Holdings for homesteads outside of reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

Sum for defraying expenses of tribal organization herein created.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

Establishment of revolving fund, to make loans for economic development.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

Repayments to be credited to revolving fund
Report to Congress.

Vocational and trade school.
Annual appropriation for loans, to provide payment for tuition, etc.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

Proviso.
Indian students in secondary, etc., schools

Reimbursable.

Standards of health, ability, etc., to be established.

Appointments.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Provisions dealing with Indian corporations, education, etc., applicable to Alaska.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided*, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of

Designated sections inapplicable to various tribes.

such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

Protecting treaty rights with Sioux Indians.
Continuation of allowances, etc.
Vol 23, p. 894; Vol. 29, p. 334; Vol. 25, p. 451.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

No person to receive more than one allowance.

No Indian claim or suit impaired by this Act.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

Indians residing on same reservation may organize for common welfare.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

Effective, when ratified.

Revocation, amendments, etc.

Additional powers vested in tribe.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Secretary to advise tribe of contemplated appropriation estimates.

Charters.
Issue of, to each tribe, upon petition therefor.
Proviso.
Ratification condition precedent to operation.
Powers conferred.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Revocation.

Inapplicable to reservation rejecting proposition.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Term "Indian" defined.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

"Tribe."

"Adult Indians."

Approved, June 18, 1934.

[CHAPTER 577.]

June 18, 1934.
[S. 3742.]
[Public, No. 384.]

AN ACT

Granting the consent of Congress to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a toll bridge across Lake Champlain at or near West Swanton, Vermont.

Lake Champlain.
Vermont may bridge, at West Swanton.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby granted to the State Board of Public Works of the State of Vermont to construct, maintain, and operate a bridge and approaches thereto across Lake Champlain, at a point suitable to the interests of navigation, between a point at or near East Alburg, Vermont, and a point at or near West Swanton, Vermont, in accordance with the provisions of an Act entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906, and subject to the conditions and limitations contained in this Act.

Construction.
Vol. 34, p. 84.

Toll rates to be adjusted to provide cost of operation and sinking fund.

SEC. 2. If tolls are charged for the use of such bridge, the rates of tolls may be so adjusted as to provide a fund sufficient to pay (a) the reasonable cost of maintenance, repair, and operation of the said bridge and its approaches, and (b) the amortization within a reasonable time, and not exceeding twenty-five years from the

ADDENDUM G

TITLE 49—TRANSPORTATION AND RAILROADS

Chapter II—Office of Defense Transportation

PART 500—CONSERVATION OF RAIL EQUIPMENT

MERCHANDISE TRAFFIC

CROSS REFERENCE: For an exception to the provisions of § 500.2, see Part 520, *infra*.

[Gen. Permit ODT 1-7]

PART 520—CONSERVATION OF RAIL EQUIPMENT; EXCEPTIONS AND PERMITS

MERCHANDISE TRAFFIC

In accordance with the provisions of paragraph (g) § 500.2 of General Order ODT No. 1, as amended, it is hereby authorized, that:

§ 520.9 *Loading of not less than five net tons of merchandise freight in refrigerator cars permitted under stated circumstances.* Notwithstanding the provisions of § 500.2 of General Order ODT No. 1, as amended, any carrier by railroad may accept for shipment or forwarding, load or forward, from the city or town at which such car is originated, any RS type refrigerator car containing not less than five net tons of merchandise freight, when such car is forwarded westward to any destination in the States of California, southern Idaho (on the Union Pacific main and branch lines across southern Idaho, including the line from Pocatello to the Montana-Idaho State line and the branches north of Blackfoot, Idaho), Arizona, Nevada, or Utah, and moves in the direction of the normal flow of empty refrigerator cars: *Provided, however,* That any such car shall move from point of origin direct to point of destination, by-passing all transfer stations and not stopping for transfer of the freight en route.

General Permit ODT 1-6 is hereby revoked as of the effective date of this General Permit ODT 1-7.

This General Permit ODT 1-7 shall become effective October 1, 1945.

(E.O. 8989, as amended, 6 F.R. 6725, 8 F.R. 14183; General Order ODT No. 1, as amended, 7 F.R. 3046, 3213, 3763, 9744)

Issued at Washington, D. C., this 27th day of September 1945.

J. M. JOHNSON,
Director,
Office of Defense Transportation.

[F. R. Doc. 45-18135; Filed, Sept. 28, 1945; 3:20 p. m.]

Notices

DEPARTMENT OF THE INTERIOR.

Office of the Secretary.

UINTAH AND OURAY INDIAN RESERVATION, UTAH

ORDER OF RESTORATION

Whereas, pursuant to the provisions of the act of May 27, 1902 (32 Stat., 263), as amended, the unallotted lands of the Uintah and Ouray Indian Reservation in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and

Whereas, there are now remaining undisposed of within said area approximately 217,000 acres of unallotted lands, which need closer administrative control in the interest of better conservation practices, and

Whereas, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within this class of undisposed-of opened land, and

Whereas, the Tribal Council, the Superintendent of the Uintah and Ouray Agency, and the Commissioner of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of surplus unallotted lands in the said reservation,

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat., 984), I hereby find that restoration to tribal ownership of all lands which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation will be in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and are added to and made a part of the existing reservation, subject to any valid existing rights.

HAROLD L. ICKES,
Secretary of the Interior.

AUGUST 25, 1945.

[F. R. Doc. 45-16280; Filed, Aug. 31, 1945; 9:42 a. m.]

FEDERAL POWER COMMISSION.

[Docket No. G-604]

CHICAGO DISTRICT PIPELINE CO.

NOTICE OF APPLICATION

SEPTEMBER 28, 1945.

Notice is hereby given that on September 17, 1945, an application was filed with the Federal Power Commission by Chicago District Pipeline Company (Applicant), an Illinois corporation with its principal place of business at Joliet, Illinois, for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act as amended, to authorize the construction and operation of certain facilities hereinafter described.

Applicant is engaged in the purchase, transmission and sale of natural gas for resale to The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois, Western United Gas and Electric Company, and Northern Indiana Public Service Company. It obtains its natural gas supply from Natural Gas Pipeline Company of America at a point in Rutland Township, LaSalle County, near Wedron, Illinois, and at a point in Joliet Township, Will County, near Joliet, Illinois.

Applicant's present gas transmission system consists of two transmission pipe lines extending from a point near the City of Joliet, Illinois, to the City of Chicago, Illinois. One of its transmission pipe lines, known as the Calumet line, consists of approximately 41 miles of 24-inch pipe and extends easterly from a point near the City of Joliet through the City of Chicago Heights and thence northerly to a point of connection with the gas main of The Peoples Gas Light and Coke Company. Applicant's other line, known as the Crawford line, consists of approximately 34 miles of 24-inch and 20-inch pipe and extends northeasterly from a point near the City of Joliet, Illinois, following generally the north bank of the drainage canal of the Sanitary District of Chicago to a connection with a gas main of The Peoples Gas Light and Coke Company at the western City limits of Chicago, Illinois. Applicant's transmission system also has connections with the gas distribution systems of Public Service Company of Northern Illinois, Western United Gas and Electric Company, and Northern Indiana Public Service Company.

Applicant seeks authority to construct and operate two sections of 24-inch pipe line aggregating approximately 23 miles, paralleling two sections of its Crawford line in Will, Cook and DuPage Counties, Illinois, and additional necessary appurtenant facilities, and to serve the Public Service Company of Northern Illinois at a new point of delivery located near Volo, Lake County, Illinois.

The Applicant asserts that The Peoples Gas Light and Coke Company is engaged in the distribution and sale of gas to the general public in the City of Chicago, Illinois; that Public Service Company of Northern Illinois is engaged in the distribution and sale of natural gas in the communities of Ottawa, Streator, Marseilles, Seneca, in LaSalle County, Pontiac in Livingston County, and Morris in Grundy County, Illinois, and in contiguous areas through which its mains extend, in Kankakee, Will, Cook and Lake Counties, all in the State of Illinois; that Western United Gas and Electric Company is engaged in the distribution and sale of gas and electricity to the general public in and in the vicinity of certain Illinois municipalities located generally west of the City of Chicago; and that Northern Indiana Public Service Company is engaged in the distribution and sale of gas and electricity to the general public in and in the vicinity of certain municipalities located in northwestern portion of the State of Indiana.

The application recites that the capacity of the Crawford line will be increased from its present capacity of 140,000 Mcf of gas per day to 220,000 Mcf per day. It is further asserted by Applicant that the increase in the capacity of its Crawford line is intended to permit transmission through that line of additional natural gas which Natural Gas Pipeline Company of America proposes to make available to Applicant at Joliet and also to permit transmission through that line of the gas ordinarily to be transported through Applicant's Calumet line if the operation of the latter line