No. 15-4080

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE,

Plaintiff-Appellant

v.

MYTON,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH (HON. BRUCE S. JENKINS)

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

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STATEMENT OF RELATED CASES

This case was previously before this Court in Ute Indian Tribe v. Utah (Ute III), 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986); Ute Indian Tribe v. Utah (Ute V), 114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998); and Ute Indian Tribe v. Utah (Ute VI), 790 F.3d 1000 (10th Cir. 2015).

INTEREST OF THE UNITED STATES

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States respectfully submits this amicus curiae brief. This case involves the boundaries of the Uintah Reservation which was set aside for the Ute Indians of the Uintah, Uncompahgre, and Whiteriver Bands. The Ute Indian Tribe, whose members are the modern-day descendants of those bands, has jurisdiction over the Reservation. Therefore, the location of those boundaries affects the scope of the United States' law-enforcement obligations under the Indian Major Crimes Act, 18 U.S.C. § 1153,

and other statutes that apply only in Indian country.[1] Furthermore, due to the United States' special relationship with the Indian tribes, the United States has an interest in cases determining whether lands within the boundaries of a diminished reservation remain Indian country. As such, the United States participated as amicus curiae in the original litigation and has an interest in ensuring that this Court's Ute III mandate, as modified by Ute V, which became final in 1998 when the Supreme Court denied certiorari, is enforced.

[1] "Indian country" is defined by 18 U.S.C. § 1151 as "(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 territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same." Generally, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the State. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 470-71 (1979). Congress has not granted the State of Utah jurisdiction over any Indian country pertinent here.

QUESTION PRESENTED

Whether the district erred in holding that the entire town of Myton, Utah, is not Indian country, in conflict with Ute III, Ute V, and Hagen v. Utah, 510 U.S. 399 (1994).

BACKGROUND

A. History of the Ute Indian Tribe's Reservation

The Uintah Valley Reservation was established in 1861 by presidential order. Executive Order of Oct. 3, 1861. Congress confirmed the President's action in 1864. Act of May 5, 1864, § 2, 13 Stat. 63. The predecessors of the members of the present-day Ute Indian Tribe were prevailed upon to move onto the reservation.

In 1902, Congress provided that, if a majority of the Tribe's adult male members consented, the Secretary of the Interior should make allotments by October 1, 1903, on the Uintah Reservation. Act of May 27, 1902, § 1, 32 Stat. 263-64. The 1902 Act also provided that after October 1, 1903, "all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws.

The allotment process, however, did not proceed as Congress had contemplated, and the opening date was extended twice. Act of Mar. 3, 1903, § 1, 32 Stat. 997-98; Act of Apr. 21, 1904, 33 Stat. 207-08. The 1903 Act also directed the Secretary to allot the land unilaterally if Indian consent was not obtained.

By Section 1 of the Act of March 3, 1905, 33 Stat. 1048, Congress again deferred the opening, this time until no later than September 1, 1905. Section 1 also provided that the unallotted and unreserved lands "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." Id.

On July 14, 1905, the President issued a proclamation declaring that the unallotted lands in the Reservation which were not otherwise reserved would "be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws." 34 Stat. 3120. That same day, the President, acting under a provision of the 1905 Act authorizing him to set aside Reservation lands as a forest reserve, designated some 1,010,000 acres within the Reservation as an addition to the Uintah Forest Reserve. 34 Stat. 3116. Approximately 282,460 acres of other unallotted Reservation lands remained reserved for tribal purposes. See Ute Indian Tribe v. Utah (Ute I), 521 F. Supp. 1072, 1125 (D. Utah 1981).

Not all the lands opened for settlement passed from federal ownership. In 1945, the Secretary, acting under Section 3 of the Indian Reorganization Act, 48 Stat. 984, as amended, 25 U.S.C. § 463, restored approximately 217,000 acres of opened lands to trust status and tribal ownership.[2] Some of those lands — located in the

[2] The United States holds title to the lands in trust for the benefit of the Tribe. See Appendix ("A") 2350, 2732. The Act of March 11, 1948, 62 Stat. 72, also "extended" the "exterior boundary" of the Reservations to include a tract of approximately 510,000 acres (the "Hill Creek Extension"), as did 18 Fed. Reg. 426 (Jan. 20, 1953); 21

town of Myton, a political subdivision of the State of Utah, in Duchesne County — are the focus of this appeal.

B. Litigation over the Reservation's Boundaries

In 1975, the Ute Indian Tribe enacted a Law and Order Code asserting jurisdiction over lands within the original boundaries of the Uintah and Uncompahgre Reservations ("the Reservation").[3] This assertion of jurisdiction was opposed by local non-Indian governments. The Tribe then brought this action seeking to establish the exterior boundaries of its Reservation, to define the effectiveness of the Law and Order Code within those boundaries, and to restrain the defendants from interfering with the Code's enforcement. The State of Utah intervened as a defendant.[4] Ute I, 521 F. Supp. at 1075-78.

The district court held that the opening of the "surplus" Uintah Reservation lands to non-Indian settlement in 1905 did not terminate the lands' reservation status.

Fed. Reg. 5015 (July 6, 1956); 24 Fed. Reg. 8175 (Oct. 8, 1959); and 26 Fed. Reg. 1718 (Feb. 28, 1961). See Ute I, 521 F. Supp. at 1144.

[3] The Uncompahgre Reservation was originally set aside for the Uncompahgre Band. Because this appeal does not involve the Uncompahgre Reservation, a discussion of its history is omitted. However, in Ute III this Court held that the Uncompahgre Reservation was neither disestablished nor diminished. 773 F.2d at 1093. Because Hagen did not directly address the Uncompahgre Reservation, this Court in Ute V declined to modify its Ute III holding regarding this part of the Reservation. See Ute V, 114 F.3d at 1529. Therefore, the United States continues to exercise jurisdiction over the Uncompahgre Reservation.

[4] For convenience, all the Ute Indian Tribe defendants will be collectively referred to as "the State," and the defendant-appellee in this appeal as "Myton."

The court also held, however, that the Uintah Reservation lands which had been set aside for national-forest purposes in 1905 were no longer reservation lands. The court further found that certain additional Uintah tracts (no longer at issue) had also lost reservation status. Id. The Tribe and the local governments appealed. The State of Utah did not appeal.

After this Court initially ruled against the Tribe on virtually all the issues contested on appeal,[5] Ute Indian Tribe v. Utah (Ute II), 716 F.2d 1298 (1983), the Court reheard the case en banc and ruled almost wholly for the Tribe, holding that the Reservation boundaries were intact. Ute Indian Tribe v. Utah (Ute III), 773 F.2d 1087 (1985). The Supreme Court denied certiorari. Utah v. Ute Indian Tribe, 479 U.S. 994 (1986).

Although the Tribe obtained a favorable federal-court declaratory judgment and the Supreme Court denied certiorari, no permanent injunction was entered. Utah state officials chose to disregard the binding effect of this Court's decision and relitigated the boundary dispute in a friendlier forum by prosecuting Indians in state court for conduct occurring on the Uintah Reservation. Thereafter, the Utah state courts considered three criminal cases in which the Indian defendants asserted that the State lacked jurisdiction because the offenses had occurred within either Myton or

[5] The district court had found that the "Gilsonite Strip" and certain lands withdrawn for a reservoir project were no longer within the Reservation's boundaries. The Tribe did not contest these rulings on appeal.

Roosevelt, which are towns within the Uintah part of the Reservation as defined by this Court's 1985 decision in Ute III. The Utah state trial court ruled for the State in all three cases, but the Utah Court of Appeals reversed.

The Utah Supreme Court, relying on the language of the 1902 Act regarding restoration of unallotted lands to the public domain, reversed the Utah Court of Appeals and ruled in favor of the Tribe. State v. Hagen, 858 P.2d 925 (1992); State v. Coando, 858 P.2d 926 (1992); State v. Perank, 858 P.2d 927 (1992). The Utah Supreme Court addressed the issues at length in Perank and issued summary opinions in Hagen and Coando.

In Perank, the Utah Supreme Court found that Perank was an Indian and that the state courts would lack jurisdiction over him if the offense, which had occurred in Myton, was within the Reservation. The court, however, concluded that the situs of the offense was not within the reservation. The court framed that issue as follows:

> The *only issue* in this case is whether the unallotted and unreserved lands that were opened to entry in 1905 *and not later restored* to tribal ownership and jurisdiction by the 1945 "Order of Restoration" are within the present boundaries of the Reservation.

858 P.2d at 934 (emphasis added).

The Utah Supreme Court, disagreeing with Ute III, answered the inquiry in the negative:

> We hold that the [restoration-to-the-public-domain] language in the 1902 Act established the necessary congressional intent to diminish the Reservation as to those lands restored to the public domain and that the

> restoration language in the 1902 Act remained operative statutory language when the Reservation was opened in 1905.

Ibid.

Mr. Hagen sought review in the United States Supreme Court. The Tribe moved to intervene, but its motion was denied. The Tribe then filed a brief as amicus curiae in support of petitioner Hagen. The United States also participated as amicus curiae in support of the petitioner.

The U.S. Supreme Court affirmed the Utah Supreme Court's judgment. Hagen v. Utah, 510 U.S. 399 (1994). The Court stated that it granted review "to resolve the direct conflict between these decisions of the Tenth Circuit and Utah Supreme Court on the question of whether the Uintah Reservation has been diminished." Id. at 409. Next, noting that Mr. Hagen had disavowed any reliance on preclusion principles, the Court found that there was no reason for the Court to consider that issue. Id. at 410.

Addressing the merits, the Court found that the phrasing of the 1902 Act stating that "all of the unallotted lands within said reservation shall be restored to the public domain" signaled an intent to diminish the reservation:

> [W]e 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.

Id. at 414.

The Court then concluded that the 1902 Act's intent as to the restoration of lands to the public domain was carried over into the 1905 Act. 510 U.S. at 415-17, 419-20. Therefore, in referring to the non-trust lands where Mr. Hagen had committed the crime, the Court stated that "the town of Myton, where petitioner committed a crime, is not in Indian country and the Utah courts properly exercised criminal jurisdiction over him." 510 U.S. at 421-22.

Meanwhile, after the Utah Supreme Court had announced its Perank, Hagen, and Coando decisions, the Tribe moved in the federal district court for a temporary restraining order and a preliminary injunction prohibiting the Utah Supreme Court from issuing the Perank remittitur and the final judgment.[6] The Tribe also moved for permanent injunctive relief. See Ute V, 114 F.3d at 1519.

The State and Tribe subsequently entered into a stipulation, which was incorporated into a district court order entered on September 2, 1992, whereby the State agreed to refrain from enforcing Perank and exercising jurisdiction within the exterior boundaries of the Reservation, as those boundaries were set forth in Ute III. See Ute V, 114 F.3d at 1519.

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[6] The United States' memorandum supporting the Tribe's motion for injunctive relief is included in the appendix. A147.

On April 24, 1994, after the Supreme Court ruled in Hagen, the State moved the district court to set aside the September 2, 1992 order and to dismiss the Tribe's motion for a permanent injunction. Ute V, 114 F.3d at 1519. The State also sought emergency relief from the September 2, 1992 order. The Tribe, supported by the United States as amicus curiae, opposed these motions.

On May 2, 1994, the court temporarily modified its September 2, 1992 order "to allow the state and local defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian country' as defined by 18 U.S.C. § 1151." Ute V, 114 F.3d at 1519. The court, however, stated that it was "not determining one way or another which lands may or may not constitute 'Indian country.'" Id.

After hearing argument, the district court entered its Opinion and Order on April 2, 1996. Ute Indian Tribe v. Utah (Ute IV), 935 F. Supp. 1473 (D. Utah 1996); A158. The court found that (1) neither Hagen nor any other authority supports a conclusion that the Uintah Reservation had been extinguished, rather than merely diminished, id. at 1487-93; (2) Hagen determined that the Uintah Reservation was diminished with respect to the unallotted and unreserved lands opened for entry in 1905 and that such lands which have not since been taken back into trust remain stripped of reservation status, id. at 1493-96; and (3) the post-1905 Reservation included (and still includes) the allotted lands and the lands which had been retained as lands reserved for tribal purposes at the time of the 1905 opening of the

reservation and also includes lands restored to the reservation by Congress or the Department of the Interior, id. at 1492-93.

Turning to the Tribe's contentions concerning the asserted preclusive effect of this Court's 1985 decision (Ute III), the district court found that the proceedings were governed by the "law of the case" doctrine, rather than by res judicata and collateral estoppel. Id. at 1505-16. The district court declined to enter any permanent relief conflicting with this Court's 1985 mandate. Instead, the district court sought this Court's guidance. Id. at 1531-33. The district court, however, further modified its September 2, 1992 order to provide that the lands not within Indian country "include[] those unallotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905, *to the extent that those lands were not later restored to tribal ownership or otherwise reincorporated within the Reservation* by subsequent congressional and administrative action." Id. at 1531 (emphasis added).

On appeal, this Court declined to withdraw its prior mandate but modified it to the extent it was inconsistent with Hagen. Ute V, 114 F.3d at 1527. This Court's prior holding in Ute III that the Uncompahgre Reservation had not been disestablished therefore remained in effect; and the U.S. Forest Reserves, former allotted lands within the Uintah Valley, and, most significantly for this appeal, all lands restored to the Tribe therefore remained Indian country. Ute V, 114 F.3d at 1528-

29.[7] The United States Supreme Court denied certiorari. Duchesne County v. Ute Tribe, 522 U.S. 1107 (1998). Accordingly, the Ute III mandate, as modified by Ute V, became final in 1998.

In accord with Ute V, when a question arises regarding the Indian-country status of a particular parcel, the Department of the Interior's Bureau of Indian Affairs Realty Staff at the Uintah and Ouray Agency Office reviews the official plat books, consults with the Office of the Solicitor of the Interior, and certifies the particular parcel's status on a case-by-case basis.[8]

C. The Current Litigation

In 2013, the State of Utah again initiated prosecutions of Indians in the Utah state courts for the alleged commission of crimes within the Reservation boundaries as defined by this Court in Ute V. Upon learning of the State's actions, the Ute Tribe filed both a motion for supplemental proceedings in the original case and a new complaint for injunctive relief to enforce Ute V. Ute Indian Tribe v. Utah et al., Case

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[7] Ute V also held that certain other categories of fee lands remained part of the Reservation and thus Indian country, including lands apportioned to the Mixed Blood Utes under the Ute Partition Act, 25 U.S.C. §§ 677-677aa, lands allotted to individual Indians that passed into fee status after 1905, and lands that were held in trust after the Reservation was opened in 1905 but that have since been exchanged into fee status in an effort to consolidate the Tribe's land holdings. Ute V, 114 F.3d at 1528-30.

[8] The Bureau of Indian Affairs is in the process of finalizing a GIS map of the land status of every acre on the Reservation, which will be available to law-enforcement and civil government officials who deal with jurisdictional issues. The system is already in use by the Bureau of Indian Affairs, Office of Judicial Services.

No. 13-cv-276 (D. Utah Apr. 17, 2013). Although the town of Myton was not part of the original case, the new complaint named Myton as a defendant. The district court reopened the original action, consolidated that action with the new case, and denied the Tribe's request for a preliminary injunction. A386-87, 520-21. The Tribe appealed.

On June 16, 2015, this Court reversed the district court's judgment, reaffirmed its decision in Ute V, and ordered the district court to enjoin the State of Utah and Wasatch County from prosecuting tribal members on lands that qualify as Indian country under Ute V. See Ute VI, 790 F.3d at 1012-13.

In the meantime, while the preliminary-injunction appeal was pending, the district court on January 28, 2015, granted Myton's motion to dismiss the Tribe's claims against it in the new case. The district court dismissed Myton based on the dicta from Hagen stating that "the town of Myton, where petitioner committed a crime, is not in Indian country." A2263. On May 18, 2015, the district court entered an order denying the Tribe's various motions for clarification and reconsideration of the dismissal order and granted Myton's motion to certify the order as a final and appealable ruling under Federal Rule of Civil Procedure 54(b). A3228-30. The Tribe then filed this appeal.

SUMMARY OF ARGUMENT

As this Court recognized in Ute V, Hagen only affected "the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation

were unallotted, opened for settlement under the 1902-1905 legislation, *and not thereafter returned to tribal ownership*." Ute V, 114 F.3d at 1528 (emphasis added)[9] Lands that were returned to tribal ownership include undisposed-of opened lands restored to the Tribe under the Indian Reorganization Act and "added to and made part of the existing reservation" by the 1945 Order of Restoration. 10 Fed. Reg. 12,409 (Oct. 2 1945) ("the Restoration Order"). The town of Myton includes land returned to tribal ownership and now held in trust by the United States for the benefit of the Ute Tribe. Those parcels of land are Indian country, and Indians on those lands are not subject to prosecution by the State or its political subdivisions, including Myton.[10] The district court erred in not following this Court's mandate in Ute V and in relying instead on dicta in Hagen stating that Myton is not in Indian country.[11]

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[9] Although the President signed the Proclamation opening the Uintah Reservation to entry on the same day he established the Forest Reserve, this Court held in Ute III "that the withdrawal of the National Forest Lands did not diminish the Uintah Valley Reservation," and declined to recall that portion of the mandate in Ute V. 114 F.3d at 1528-1529.

[10] Crimes committed on those same lands by non-Indians against an Indian are also outside of Myton's jurisdiction. See 18 U.S.C. § 1152.

[11] This Court instructed the Tribe to address in its opening brief any concerns the Tribe may have about the district court's jurisdiction to rule on Myton's motion to dismiss. Order at 2, Ute Indian Tribe v. Myton, No. 15-4080 (10th Cir. Aug. 18, 2015), ECF No. 01019477657. This Court's Order was in response to a motion by the Tribe questioning whether pending appeals of three unrelated collateral orders focusing solely on the sovereign immunity of the Tribe and Uintah County and the denial of the Tribe's request for a preliminary injunction against Wasatch County had

ARGUMENT

This Court definitively determined the effect of Hagen in Ute V, holding that "*Hagen*'s only effect was to reduce (and not terminate) the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation were unallotted, opened for settlement under the 1902-1905 legislation, *and not thereafter returned to tribal ownership*." Ute V, 114 F.3d at 1528 (emphasis added). The counties' petition for certiorari in Ute V was denied. Duchesne County v. Ute Indian Tribe, 522 U.S. 1107 (1998). Accordingly, the district court was bound by Ute V, and the court plainly erred as a matter of law when it dismissed the Tribe's claims against Myton on the ground that Myton contained no Indian country. It is undisputed that Myton contains lands that were restored to tribal ownership and trust status under the 1945 Restoration

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deprived the district court of jurisdiction to rule on Myton's motion. See Expedited Motion to Suspend Briefing Pending a Ruling on Whether the Appellate Court has Jurisdiction over the Appeal, Ute Indian Tribe v. Myton, No. 15-4080 (10th Cir. Aug. 17, 2015), ECF No. 01019476593. In its opening brief, however, the Tribe does not argue that the district court lacked jurisdiction to consider the issues or that this Court consequently lacks appellate jurisdiction. See Br. at 11 (merely referencing the motion to suspend briefing). Regardless, the district court had jurisdiction to rule on Myton's motion because "the transfer [of jurisdiction] affects only those aspects of the case involved in the appeal. Thus, when an appeal is taken from a limited interlocutory ruling, as opposed to one that affects the litigation as a whole, the district court may proceed with the case." Howard v. Mail-Well Envelope Co., 150 F.3d 1227, 1229 (10th Cir. 1998) (citations omitted). Here, the appeals were confined to unrelated collateral orders, so the district court retained jurisdiction to rule on the merits of Myton's motion to dismiss.

Order,[12] which Ute V determined were part of the Reservation, and therefore are Indian country. Ute V, 114 F.3d at 1528; A2350; A2732.[13] This Court's Ute V ruling is binding on the district court.

Indeed, Ute V's holding was undoubtedly correct. In Perank, the Utah Supreme Court cast its holding in precise terms, explaining that the "only" issue before it was "whether the unallotted and unreserved lands that were opened to entry in 1905 *and not later restored to tribal ownership and jurisdiction by the*

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[12] Myton and the State failed to timely challenge the Restoration Order after it was issued in 1945, and the State did not dispute that the restoration orders made these lands part of the reservation in the original case. See Ute II, 716 F.2d at 1312-13. Myton was certainly aware of the Restoration Order's effect, as Myton's request that additional lands be sold to it was rejected by Interior because the open, ceded lands had been restored to the Tribe under the Restoration Order. See Restoration of Land to Tribal Ownership, 54 Interior Dec. 559 (M-34912) (Apr. 11, 1947).

[13] The Restoration Order states that "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*," 10 Fed. Reg. 12,409 (emphasis added). As the Tribe points out in its alternative motion to reconsider, A2376-77, which the district court denied, A3228, to the extent that Myton or the State argues that the Restoration Order lands are no longer part of the reservation, these lands would still be Indian country. Once these lands were restored to trust status, they fit within the Supreme Court's definition of dependent Indian community under the Indian-country statute, 18 U.S.C. § 1151(b), because the lands were set aside by the federal government (pursuant to the Indian Reorganization Act) for the use of the Tribe and are under federal superintendence. See Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) (holding that § 1151(b)'s "dependent Indian community" status is satisfied upon finding a federal set-aside and federal superintendence); Hydro Resources, Inc. v. E.P.A., 608 F.3d 1131, 1164-65 (10th Cir. 2010) (approving a "straightforward application of *Venetie*" to scattered trust lands, and rejecting the "community of reference" test that the Tenth Circuit had used prior to Venetie) (citation omitted).

1945 'Order of Restoration' are within the present boundaries of the [Uintah] Reservation." 858 P.2d at 934 (emphasis added). The United States Supreme Court, in turn, announced that it had granted review "to resolve the direct conflict between these decisions of the Tenth Circuit and Utah Supreme Court on the question of whether the Uintah Reservation has been diminished," 510 U.S. at 409; and it agreed with the Utah Supreme Court that "the Uintah Reservation [was] diminished by the opening of the unallotted lands to non-Indian settlement," id. at 420.

The United States Supreme Court resolved the conflict between this Court and the Utah Supreme Court by ruling only on the facts before it: The U.S. Supreme Court held that lands within the original boundaries of the Uintah Reservation (and within the town limits of Myton) that were opened to public entry in 1905 and that have not since been restored to tribal ownership do not fall within the current boundaries of the Uintah Reservation and thus are not "Indian country" under 18 U.S.C. § 1151(a). None of the crimes committed by Perank, Coando, or Hagen occurred on lands subject to the 1945 Restoration Order; so the Supreme Court did not address the status of lands restored to tribal ownership under the 1945 Restoration Order.

Indeed, the State's U.S. Supreme Court brief in Hagen acknowledged that "[t]here is no dispute that . . . the surplus lands restored to tribal ownership and reservation status in 1945 . . . are also Indian country." Brief of Respondent, Hagen v.

Utah, 1993 WL 384805, at *9 (1993); A2392. There were no factual or legal challenges to the status of the lands subject to the 1945 Restoration Order before the Court in Hagen. While the Supreme Court stated that "the town of Myton, where petitioner committed a crime, is not in Indian country," the Court's holding dealt only with lands that had *not* been restored to the Tribe. The status of lands restored to the Tribe was not before the Hagen Court. As a result, the holding in Hagen is limited to the status of lands that were patented to non-Indians under the 1902-1905 acts, not the status of the lands in Myton that were returned to the Tribe in the 1945 Restoration Order (or any of the restoration orders).

To the extent that the Court's Hagen opinion suggested that the entire town of Myton was not in Indian country, that statement was dicta. This Court's Ute V decision confirms that "Hagen's only effect was to reduce . . . the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation were unallotted, opened for settlement under the 1902-1905 legislation, *and not thereafter returned to tribal ownership*." Ute V, 114 F.3d at 1528 (emphasis added). Therefore, the district court erred in relying upon the dicta in Hagen and not adhering to this Court's mandate in Ute V.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of the Ute Indian Tribe's claims against the town of Myton because the dismissal conflicts with Hagen, Ute III, and Ute V.

October 19, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the applicable volume limitations because it is proportionally spaced and contains 4,121 words. I relied on my word processor program to obtain the word count, and that program is Microsoft Office Word 2013. I certify that the information on this form is true and correct to the best of my and knowledge and brief formed after a reasonable inquiry.

s/ Gina L. Allery
GINA L. ALLERY

ADDITIONAL CERTIFICATIONS

I hereby certify that:

- There is no information in this brief subject to the privacy redaction requirements of 10th Cir. R. 25.5; and
- The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and
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s/ Gina L. Allery
GINA L. ALLERY

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will serve the brief on the other participants in this case.

/s/ Gina L. Allery
Gina L. Allery