CASE NO. 16-4021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION,

Plaintiff/Appellant,

v.

STATE OF UTAH, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge Bruce S. Jenkins
Consolidated Case Nos.
2:75-cv-00408, 2:13-cv-00276, & 2:13-cv-01070

APPELLANT'S OPENING BRIEF

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May 23, 2016

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

The Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe or Ute Tribe) respectfully submits its opening brief.

STATEMENT OF RELATED CASES

To date the Tenth Circuit has issued three decisions from appeals arising out of *Ute Indian Tribe v. State of Utah, et al.*, D. Utah, case number 2:75-cv-408, and one published decision from a companion case, case number 2:13-00276. Listed chronologically, those decisions are *Ute Indian Tribe v. Utah*, 716 F.2d 1298 (10th Cir. 1983) (*Ute II*), *rev'd en banc* 773 F.2d 1087 (10th Cir. 1985) (*Ute III*); *Ute Indian Tribe v.Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*); and *Ute Indian Tribe v.Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*).[1]

There are two additional related and pending interlocutory appeals, *Ute Indian Tribe v. Myton City*, case number 15-4080, and *Ute Indian Tribe v. Utah*, case number 15-4154.

The Tenth Circuit consolidated case numbers 15-4154 and 16-4021 by order dated 4/20/2016. The Court's order specified that Appellant's appendix submitted in case number 15-4154 will be used for both appeals, and the Court directed the Tribe to submit only a supplemental appendix in case number 16-4021.

[1] For convenience, the *Ute Indian Tribe* defendants will be referred to collectively as "the State defendants."

STATEMENT OF JURISDICTION

In 1975, the Tribe invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1362, seeking declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.[2] Following a four day court hearing conducted on January 19th through January 22, 2016, the district court entered an order that has the practical effect of denying an injunction to the Tribe as required under the terms of the *Ute V* and *VI* mandates.[3] The district court's order was entered on January 27, 2016. The Tribe's notice of appeal was timely filed twelve days later on February 8, 2016.[4] The Tribe invokes this Court's jurisdiction under 28 U.S.C. § 1292(a), or alternatively, under 28 U.S.C. § 1651. *See* pp. 31-33, *infra*.

STATEMENT OF THE ISSUES

1. Whether the district court has abused its discretion, committed legal error, and failed to comply with the *Ute V* and *Ute VI* mandates by withholding and failing to grant injunctive relief to the Ute Tribe.

2. Whether the Ute Tribe is being denied due process and equal treatment under the law by, *inter alia*, the district court's mercurial and capricious procedural rulings on injunctive relief, with the court first consolidating the hearing on

[2] Appendix Volume 1, 157 (hereafter "App.").
[3] Tribe's Supplemental Appendix, Volume 12, 2741(hereinafter "Supp. App.").
[4] Supp. App. 12, 2780 (Notice of Appeal, Dkt. 1127).

preliminary and permanent injunctive relief in June 2013, and then, more than two years later in August 2015, bifurcating the hearings without explanation and deferring a ruling on the Tribe's long-pending motions for injunctive relief while at the same time reopening discovery related to injunctive relief; then, by order entered January 27, 2016, announcing the court would conduct a three-week "evidentiary hearing," on the Tribe's summary judgment motions for a permanent injunction—a process that is neither recognized, nor authorized, under Rule 56 of the Federal Rules of Civil Procedure.

3. Whether this Court should review the Tribe's multiple summary judgment motions for injunctive relief and determine the Tribe's entitlement to a permanent injunction as a matter of law and undisputed fact.

4. Whether this Court should direct that this consolidated action be assigned to a different district court judge.

STATEMENT OF THE CASE

To avoid duplication, the Tribe incorporates by reference the background discussion of the original case, 2:75-cv-408, that is contained in the Tribe's opening brief in case number 15-4154. The Tribe also notes that the U.S. Supreme Court has denied the petitions for certiorari that were filed by Defendants Uintah County, Duchesne County, and Wasatch County, seeking Supreme Court review of the Tenth

Circuit's 2015 *Ute VI* ruling.[5] The Tribe will discuss the reopening of the original case in April 2013, and the district court's repeated postponement of a ruling on the Tribe's multiple motions for injunctive relief since April, 2013, under the Statement of Facts.

STATEMENT OF FACTS

A. The Commercial Interests That Seek To Diminish The U&O Reservation

At a court hearing on January 10, 2014, Duchesne County's retained counsel was surprisingly candid about the underlying source of tension between the Ute Indian Tribe and its non-Indian neighbors:

> Attorney Trentadue: And let's be honest, Your Honor, this whole thing raised its ugly head because there is a lot of money now out in the Uintah Basin because of the oil and gas production which is directly or indirectly related to lands that the Ute Tribe claims to control. And that is why we're here.[6]

The Tribe asks the Court to take judicial notice of an article published by the Salt Lake Tribune on March 3, 2012, captioned, "Utah's oil boom would be bigger without feds, officials say."[7] The article placed the value of oil and gas extracted

[5] Supp. App. 14, 3045-46.

[6] App. 12D, 2213 (1/10/14 Hearing Transcript, p. 78:5-9).

[7] *Id.*, 2216-20 (included as an exhibit to the Tribe's Motion to Dismiss Uintah County's Second Amended Complaint in this case, Dkt. 474, App. 11, 2102-45). When a party asks a court to take judicial notice of adjudicative facts and supplies the necessary information, Federal Rule of Evidence 201 "requires the court to comply with the request." *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997).

from the ground in Utah in calendar year 2011at four-billion dollars.[8] The article also quoted the Director of the Utah State Division of Oil, Gas and Mining as saying, "We're seeing more exploitation of state and private lands just because companies are seeing that it's getting more difficult on federal lands."[9]

In 2008, the United States sued one of the largest oil and gas companies in Utah, Questar Gas Management Company (Questar), for violations of the Clean Air Act (CAA) at five of the company's gas compressor stations. All five of the Questar facilities are located inside the boundaries of Ute Tribe's Uncompahgre Reservation. The Tribe asks the Court to take judicial notice of the docket and pleadings in that case, *United States v. Questar Gas Management Company*, U.S. District Court for the District of Utah, case number 2:08-cv-00167.

Among the attorneys who represented Questar in the CAA enforcement action was Attorney Blaine Rawson, who—coincidentally, or not—just happens to be lead private counsel for Uintah County in this case. Represented by Attorney Rawson, Questar defended against the CAA enforcement action by attempting to relitigate the legal existence of the Uncompahgre Reservation as determined by this Court in *Ute III* and *V*. Questar and Attorney Rawson challenged the regulatory authority of

[8] App. 12D, 2216.
[9] *Id.*

the federal government by arguing that *Ute III* and *V* were wrongly decided.[10] Questar and Attorney Rawson asserted that, contrary to the *Ute III* and *V* holdings, the Uncompahgre Reservation was disestablished, meaning that the Questar facilities are located "outside of Indian country" and therefore subject to state, not federal, regulation.[11] The Ute Tribe requested and was allowed to intervene in *United States v. Questar* in order to defend the legal existence of the Uncompahgre Reservation and this Court's *Ute III* and *V* holdings.[12] In the end, the district court agreed with the United States and the Ute Tribe and rejected Questar's challenge to the United States' regulatory authority within Indian country.[13]

Two years later, Attorney Rawson entered his appearance as private counsel for Uintah County in *Ute Tribe v. Utah*, and in that capacity Attorney Rawson has continued to advance legal argument that challenge both the legal existence of the

[10] This Court ruled in both *Ute III* and *V* that the Uncompahgre Reservation was "neither diminished nor disestablished." *Ute III*, 773 F.2d at 1093; *Ute V*, 114 F.3d at 1519.

[11] App. 12D, 2222-26, 2229 (Questar's First Amended Answer, pp. 69, 73, Twelfth and Twenty-Fifth, Affirmative Defenses, and Questar's Twenty-Fourth Affirmative Defense, submitted as exhibits to the Tribe's Motion to Dismiss Uintah County's Second Amended Complaint in this case, Dkt. 474, App. 11, 2102-45).

[12] App. 12D, 2231-50 (submitted as an exhibit to the Tribe's Motion to Dismiss Uintah County's Second Amended Complaint in this case).

[13] App. 12D, 2252-57, *United States v. Questar Gas Mgt. Co.*, 2011 WL 1793164, May 11, 2011 (submitted as an exhibit to the Tribe's Motion to Dismiss Uintah County's Second Amended Complaint in this case).

Uncompahgre Reservation and the binding effect of the Tenth Circuit's *Ute III* and *Ute V* rulings.

B. The State Defendants' Contempt for *Ute III* and *V*

The State defendants have never accepted, nor recognized the legitimacy of the Tenth Circuit's *Ute III* and *V* holdings. For example, Uintah County has refused to accept the *Ute III* and *V* holding that the Uncompahgre Reservation was neither disestablished nor diminished. Since the dismissal of the original *Ute Tribe v. Utah* case, 2:75-cv-00408, on March 28, 2000,[14] the Board of Commissioners of Uintah County has adopted various "Uintah County Transportation System" maps. As part of its exhibits in the district court below, the Tribe submitted full size and 8x11 copies of the Uintah County Transportation System Maps for calendar years 2005, 2010, 2013 and 2014.[15] These maps and various other Uintah County maps are now, or in the past have been, posted on Uintah County's internet website.[16]

As shown by the 2005 and 2010 Maps, Uintah County has refused to depict—and to thereby *acknowledge*—the boundary of the Uncompahgre Reservation, a reservation that has been in continuous existence since 1882 under the *Ute III* and *V* holdings. The map legend on the 2005 and 2010 Uintah County maps includes a

[14] App. 3, 365-68 (Dismissal Order, Dkt. 145).

[15] App. 12A, 2154-56; App. 12B, 2158-61 (submitted as exhibits to the Tribe's Motion to Dismiss Uintah County's Second Amended Complaint in this case).

[16] See http://www.co.uintah.ut.us/gis/gis.php.

gray line to depict "Reservation Boundary." However, that boundary line depiction is incorrect in two respects: first, the line depicts only the boundary of the Uintah Valley Reservation, and secondly, it incorrectly lists that boundary as the boundary for the entire "Uintah and Ouray Reservation." In effect, Uintah County's maps for calendar years 2005 through 2010 incorrectly depict the U&O Reservation as excluding the Uncompahgre Reservation, and the Uncompahgre Reservation itself is depicted as nameless "Indian country" on the county maps. The words "Indian County" were used along the range line that delineates the northern boundary of the Uncompahgre Reservation,[17] and along the diagonal line that separates the eastern boundary of the Uintah Valley Reservation from the upper northwestern boundary of the Uncompahgre Reservation.[18]

Only to this limited extent did the 2005 through 2010 Uintah County Transportation System Maps give a seemingly grudging acknowledgment—albeit incorrect depiction of—the U&O Reservation and some undefined "Indian Country" within the land area of Uintah County. But the inaccuracies in the 2005 through 2010 Uintah County Transportation Maps pale in comparison to the wholesale

[17] This is the range line that runs between Townships 5 and 6 South, Salt Lake Meridian.

[18] The diagonal boundary line between the Uintah Valley Reservation and the Uncompahgre Reservation is also the boundary line between the Uintah Special Meridian and the Salt Lake Meridian; the Uintah Special Meridian is the meridian that was used to survey all lands within the Uintah Valley Reservation.

obliteration of both the U&O Reservation boundary lines and any reference to "Indian County" whatsoever under the Uintah County Transportation Maps for calendar years 2013 and 2014.[19] The grey line that was used on the 2005 through 2010 Uintah County maps to depict "Reservation Boundary" appears as nothing more than the diagonal boundary line between the Uintah Special Meridian and the Salt Lake Meridian[20] on the 2013 and 2014 Uintah County Transportation Maps.

In short, Uintah County has sought to eliminate the entire U&O Reservation—both the Uintah Valley Reservation and the Uncompahgre Reservation—from the land area of Uintah County by the simple expedient of *eliminating* the reservation boundaries from its county maps. At the January, 2016 pretrial hearing in this case, the District Court Judge asked the Tribe's attorneys how State and county law enforcement officers can be expected to know the location of the Reservation boundaries.[21] Clearly, a good starting point would be for the State defendants (*i*) to acknowledge the legitimacy of the Tenth Circuit's *Ute III* and *V* holdings, and (*ii*) to then develop maps that *accurately* depict the Reservation boundaries as those

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[19] App. 12B, 2158, 2161.

[20] The meridians used by the United States for the cadastral surveys of all lands within Utah; the first survey was of the lands encompassed within the Uintah Valley Indian Reservation, referred to as the Uintah Special Meridian, and the second survey of all the remaining lands within the State of Utah, including all lands within the Uncompahgre Reservation, referred to as the Salt Lake Meridian.

[21] Supp. App. 9, 2032 (1/19/16 Hearing Transcript, p. 18:10-12).

boundaries were determined by *Ute III* and *V*. In fact, the Reservation boundaries *are* accurately depicted on an official government map produced by the U. S. Department of Interior, Bureau of Indian Affairs. *See* Figure A, *infra*, (Official U.S. Map for U&O Reservation).

The U.S. Attorney's Office in Utah is the agency responsible for prosecuting Indian country crimes under federal law. To better perform that function the U.S. Attorney's Office for Utah has modified the Official U.S. Map for the U&O Reservation to distinguish between (*i*) the Uintah Valley Reservation (which was diminished under *Hagen* resulting in checkerboard state/federal/tribal jurisdiction), (*ii*) the Uncompahgre Reservation (which was "neither diminished nor disestablished" and consequently contains no checkerboard jurisdiction), and (*iii*) the lands that were added to the Reservation by Congressional action in 1948 under Public Law 440, 62 Stat. 72 (commonly referred to as the Hill Creek Extension which also contains no checkerboard jurisdiction). The modified Map of the U&O Reservation is shown in Figure B, *infra*.[22]

[22] App. 7A, 1321 (Dkt. 336-8, a copy of the U.S. Attorney's modified Map of the U&O Reservation was included as part of Exhibit G to the Tribe's first summary judgment motion, Dkt. 335, App. 6, 1193. The Tribe also enlarged the U.S. Attorney's modified Map of the U&O Reservation and used the modified Map as a demonstrative exhibit during oral argument to the district court on January 19, 2016, *see* Supp. App. 9, 2040-41, 1/19/16 Hearing Transcript, p. 26:16-27:12.

Figure A

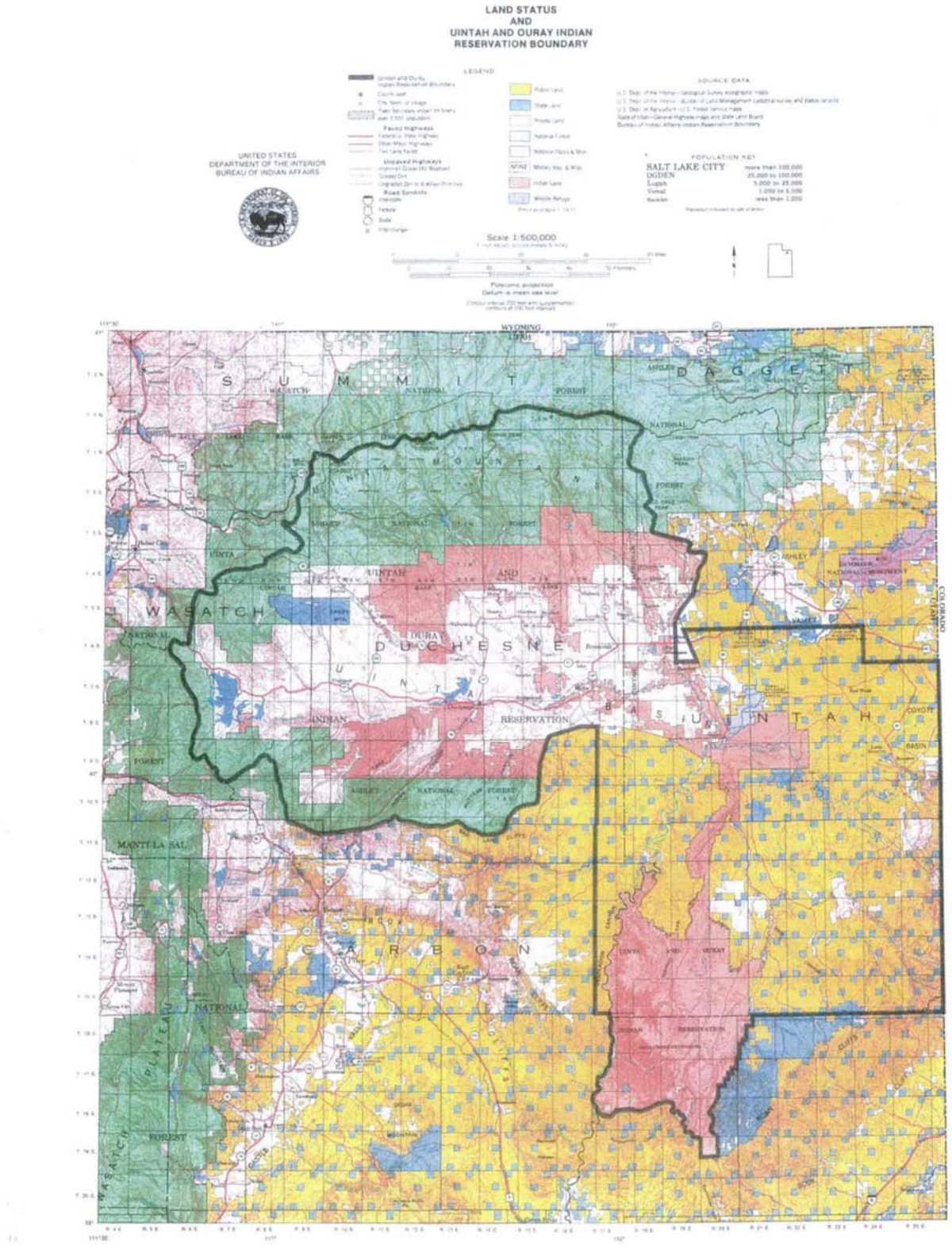
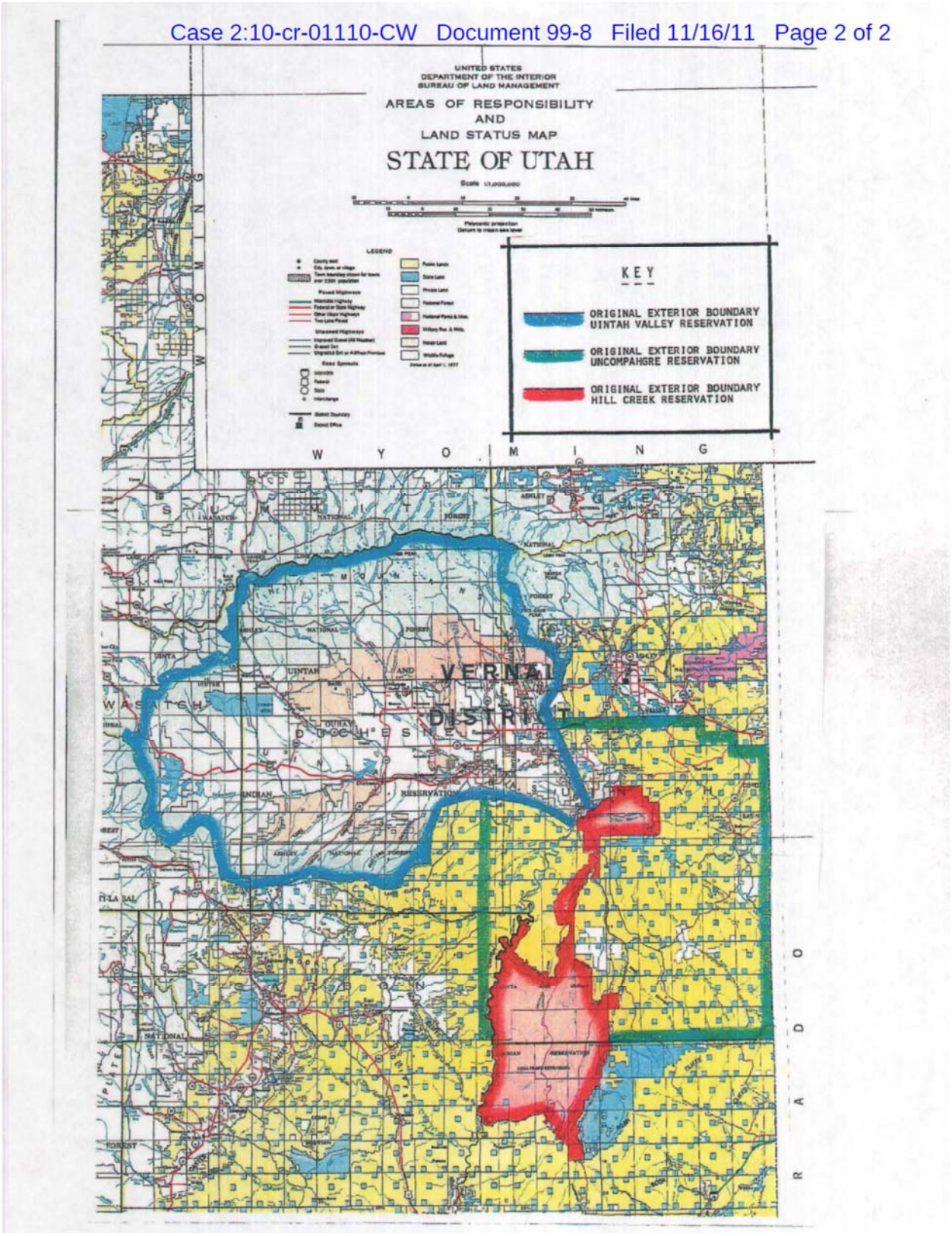

LAND STATUS
AND
UINTAH AND OURAY INDIAN
RESERVATION BOUNDARY
LEGEND
SOURCE DATA
POPULATION KEY
SALT LAKE CITY
OGDEN
Logan
Vernal
Rawlins
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Scale 1:500,000
WYOMING
UTAH
COLORADO
SUMMIT
DAGGETT
WASATCH
NATIONAL
FOREST
UINTAH
AND
OURAY
DUCHESNE
INDIAN
RESERVATION
UINTAH BASIN
MANTI-LA SAL
CARBON
WASATCH PLATEAU
ASHLEY
VALLEY
COYOTE
BASIN

Figure B


Case 2:10-cr-01110-CW Document 99-8 Filed 11/16/11 Page 2 of 2
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
AREAS OF RESPONSIBILITY
AND
LAND STATUS MAP
STATE OF UTAH
KEY
ORIGINAL EXTERIOR BOUNDARY
UINTAH VALLEY RESERVATION
ORIGINAL EXTERIOR BOUNDARY
UNCOMPAHGRE RESERVATION
ORIGINAL EXTERIOR BOUNDARY
HILL CREEK RESERVATION
W Y O M I N G
VERNAL
DISTRICT
UINTAH AND OURAY
RESERVATION
COLORADO

In addition, it should be emphasized that the U. S. Department of Interior is currently developing a map that will depict all Indian country within the Uintah Valley Reservation consistent with this Court's *Ute III* and *V* holdings. As the map is being developed, the Department of Interior is involving the parties to *Ute Tribe v. Utah* in the process, providing the parties with working copies of the draft map and seeking the parties' input and involvement.[23]

C. The State Defendants' Twenty-First Century Campaign To Further Diminish and Disestablish the Tribe's U&O Reservation

In 2012, the State defendants returned to the same playbook the State had employed so successfully in the 1990s to nullify a portion of the *Ute III* ruling *via Hagen v. Utah*,[24]—the State once again began prosecuting Ute tribal members for Indian county offenses in the Utah state courts with the intent of further diminishing the U&O Reservation through their own state courts. Individuals with knowledge of the plan have told the Tribe that the relitigation campaign was concocted by officials from one or more Utah counties and the plan was approved by the Attorney General for the State of Utah.[25]

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[23] Supp. App. 14, 3060 (email of 4/18/2016 from Grant Vaughn, Esq., Regional Solicitor for the U. S. Department of Interior to all counsel in *Ute Tribe v. Utah*).

[24] *Hagen v. Utah*, 510 U.S. 399 (1994).

[25] John Swallow and Mark Shurtleff, the Utah attorneys general during the relevant time period, were both subsequently arrested on multiple counts of public corruption. Supp. App. 14, 3079 (Dkt. 719-3, attached as an exhibit to the Tribe's Response to Duchesne County's supplementation of the record). Parenthetically,

The twenty-first century relitigation campaign began in May, 2012 when the State and Uintah County filed a second Criminal Information charging tribal member Keith Blackhair for the 2009 assault of another tribal member, Ramos Ray Cesspooch, within the Uncompahgre Reservation.[26] In doing so the State and Uintah County were fully aware that Mr. Blackhair had been convicted only four months earlier in federal court for that same 2009 assault of Mr. Cesspooch under 18 U.S.C. §113 (a)(4), entitled "Assault by Striking, Beating, and Wounding While Within Indian Country."[27] (underscore added) The State and Uintah County were also aware that the State's *first* prosecution of Mr. Blackhair, *State v. Blackhair I*, had been dismissed for lack of state jurisdiction.[28] Nonetheless, the State and Uintah County instituted a second state-court prosecution of Mr. Blackhair, *State v. Blackhair II*, and then opposed Mr. Blackhair's motion to dismiss for lack of state jurisdiction, arguing to the Utah state court that *Ute III* and *V* were "wrongly

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the Tribe's focus in this litigation is not to ferret out the nefarious machinations that led to this latest effort to diminish/disestablish the U&O Reservation but, rather, to secure meaningful injunctive relief.

[26] App. 7A, 1259-62, 1289-90 (Dkt. 336-5, attached as an exhibit to the Tribe's initial summary judgment motion, App.V6, 1193, Dkt. 335). The State and Uintah County first charged Mr. Blackhair for the 2009 assault in *State of Utah v. Keith Blackhair*, Case No. 091800519, Eighth Judicial District Court, Uintah County, Utah (hereinafter "*State v. Blackhair I*"). That case was dismissed because of the State of Utah's lack of jurisdiction over offenses committed within Indian Country.

[27] App. 7A, 1273 (Dkt. 336-5).

[28] *Id.*, 1255-57, 1259-64, 1269 (Dkt. 336-5, filed as an exhibit to the Tribe's first summary judgment motion, Dkt. 335, App. 6, 1193).

decided," and that Utah state courts are free to relitigate the U&O Reservation boundaries in the Tribe's absence through state court prosecutions of Indians for on-reservation conduct.[29]

Three months later, in a separate state court prosecution of a second tribal member for on-reservation conduct, *State v. Jaymoe Tapoof*, the State and Uintah County filed a motion advising the Utah state court that the State intended to use its state court prosecution of Mr. Tapoof to relitigate the U&O Reservation boundaries through:

> This case involves a deeply divided notion of jurisdiction. … The Defendant, an apparent member of the Ute Indian Tribe, is charged with reckless driving *on the Uncompahgre Reservation. The State seeks to prove that it has jurisdiction in this area*. (emphasis added).[30]

One month later, in a third prosecution of a Ute tribal member, *State v. Maria Josie Jenkins*, Uintah County attorneys signed a 57-page memorandum opposing Ms. Jenkins' motion to dismiss for lack of state jurisdiction, again arguing that *Ute III* and *V* were "wrongly decided" and that Utah state courts are free to relitigate the

[29] App. 7A, 1330 (from Dkt. 336-5, filed as an exhibit to the Tribe's first summary judgment motion).

[30] App. 7A, 1475-76 (Dkt. 336-18); App. 7A, 1457-59 (Dkt. 336-15, Declaration of Jaymoe Tapoof) (filed as exhibits to the Tribe's first summary judgment motion).

U&O Reservation boundaries in state criminal prosecutions to which the Tribe is not a party.[31]

Several months after that, the State of Utah and Wasatch County refused to dismiss charges against a fourth tribal member, Lesa Ann Jenkins, *State v. Lesa Ann Jenkins*, for alleged traffic violations in the National Forest lands of the Uintah Valley Reservation.[32]

D. The Chronology of Unreasonable Delay and Deprivation of the Tribe's Rights to Due Process and Equal Treatment Under the Law

The Tribe commenced this action more than three years ago, on April 17, 2013, seeking emergency, preliminary, and permanent injunctive relief against the State defendants' renewed campaign to relitigate the U&O Reservation boundaries. In the three years since then, the district court has issued only one injunction, an order that complies as nominally as possible with this Court's directive in *Ute VI*, requiring the district court to enter "appropriate" injunctive relief "forthwith" to enjoin the State's prosecution of Ms. Jenkins and "other tribal members for offenses in Indian county." *Ute VI*, 790 F.3d at 1007, 1012. The district court elected to

[31] App. 7A, 1390-1446 (Dkt. 336-13); App. 7A, 1373-74 (Dkt. 336-11, Declaration of Maria Jenkins, filed as an exhibit to Tribe's first summary judgment motion).

[32] App. 7B, 1494 (Dkt. 336-23, filed as an exhibit to Tribe's first summary judgment motion).

enjoin only Ms. Jenkins' prosecution, and only then "until further order of the court."[33]

The Tribe's opening brief in case number 15-4154 discusses the district court's decision in June, 2013 to consolidate the hearings on preliminary and permanent injunctive relief; the Tribe's formal objection to consolidation; the Tribe's subsequent summary judgment motions seeking entry of a permanent injunction filed on November 27, 2013, and January 2, 2014; and the district court's complete 180-degree reversal of course at the court hearing on August 31, 2015, in which the district court decoupled—or bifurcated—preliminary and permanent injunctive relief, and reopened discovery for the *third* time.[34]

From April, 2013, when the Tribe reopened the original action, until the *Ute VI* ruling on June 17, 2015, virtually all litigation in the district court had centered on the State's defendants' various counterclaims against the Tribe. Then in *Ute VI*, this Court upheld the Tribe's sovereign immunity against the counterclaims, and ordered the counterclaims dismissed. *Ute VI*, 790 F.3d at 1009-11.

The *Ute VI* mandate issued on July 17, 2015. The very next day the Tribe filed a motion captioned "Motion to Hear the Tribe's Long-Pending Motions for

[33] App. 23, 4460 (Dkt. 944, 9/11/2015).
[34] Tribe's Op. Brief, 15-4154, pp. 20-25.

Permanent Injunctive Relief at the Scheduled Hearing on August 4, 2015."[35] At that hearing, the district court set the matter for a pretrial hearing on August 31, 2015.[36] But once again—with the regularity of clockwork—defendants objected to a hearing on the Tribe's request for injunctive relief,[37] and the district court once again acceded to the defendants' objection, yet again postponing a hearing on injunctive relief, this time on the ostensible ground that Uintah County was thinking of filing a petition for a writ of certiorari seeking review of this Court's *Ute VI* decision. Thus, after first agreeing on 8/4/2015 to hear the Tribe's summary judgment motions, [38] sixteen days later on 8/20/2016, the district court again reversed course and announced that it would not hear the Tribe's summary judgment motions on August 31, 2015, after all:

> On August 20, 2015 Plaintiff Ute Indian Tribe asked that a pending motion for permanent injunctive relief be set for hearing. The Plaintiff had previously asked that it be heard at a prior scheduling conference on August 4, 2015. The 135-page motion was not heard at that time.[39] Uintah County has filed an opposition to the motion and has asked that hearing be stayed pending an anticipated Certiorari Petition in Ute 6. The scheduling of the motion and consideration of the requested stay

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[35] App. 20, 3615 (Dkt. 886).

[36] App. 36, 6555, 6566, 6570-73, 6591.

[37] App. 20, 3643 (Dkt. 892).

[38] App. 36, 6555, 6566, 6570-73, 6591.

[39] The reference to the Tribe's motion being 135 pages long suggests that after nearly two years the district court still had not read the Tribe's summary judgment motions (plural). The Tribe's summary judgment motion, Dkt. 335, is 34 pages in length (App. 6, 1193), and the summary judgment motion in the Lesa Jenkins case, Dkt. 18 in 2:13-cv-01070, is only 22 pages in length (App. 32, 5933).

> will be heard August 31, 2015 at a time when the parties will be before the Court on other matters.[40]

The Tribe objected to postponement in a pleading captioned, "Ute Tribe's Objection on Grounds of Constitutional Due Process and Equality Under the Law to any Further Delay in a Hearing and Ruling on the Tribe's Long-Pending Motions for Permanent Injunctive Relief."[41] The Tribe emphasized, *inter alia*, that the district court is not empowered to stay enforcement of *Ute VI*, as requested by Uintah County, that Uintah County was required to seek and secure a stay of enforcement of *Ute VI* under 28 U.S.C. § 2101 from either the Tenth Circuit or the Supreme Court itself.[42] Then, at the 8/31/2015 hearing, the following colloquy occurred between the Tribe's attorney and the district court:

> Tribe's Counsel: When we first came into your court … and we were at a hearing in front of you in June of 2013, and you said that you would not give us a ruling on our motion for preliminary injunction because you were going to consolidate our request for –
>
> The Court: Okay.
>
> Tribe's Counsel: —for preliminary with permanent. And now it seems to me that we have just flipped and you are not ruling on permanent injunction, instead we're dealing just with preliminary injunctions?

[40] App. 21, 3849 (Dkt. 920, Notice of Hearing, 8/21/2015).
[41] App. 23, 4324.
[42] *Id.* at 4326-27.

> The Court: Well, as to these now six matters, that is true. That is absolutely true.[43]

The District Court then announced that the Tribe's summary judgment motions would be heard at a four day "pretrial" to begin on January 19, 2016.[44] The Court directed the parties to submit a proposed "pretrial order," even if the parties disagreed as to the necessity, or contents, of the draft order.[45] In that draft order, the Tribe said that the Tribe's claim was limited to seeking enforcement of

> … the mandates issued by the Tenth Circuit in … *Ute III* … *V* … and *VI*. Specifically, the Tribe seeks a permanent injunction to enjoin the State of Utah and its political subdivisions and municipalities … from (*i*) relitigating the issues that were fully, fairly and conclusively adjudicated in *Ute III*, *V* and *VI*; and (*ii*) from encroaching on the Tribe's sovereignty by prosecuting Indians in Utah state courts for alleged violations of Utah state law based on conduct that occurs within the boundaries of the Uintah and Ouray (U&O) Reservation as those boundaries were adjudicated in *Ute III* and *V*.[46]

Under the section of the draft order captioned "Contested Issues of Fact," the Tribe stated:

> The Tribe contends there are no genuine issues of disputed material fact. The Tribe contends that all the Defendants' Statements of Contested Issues of Fact are either immaterial to the Tribe's request for injunctive relief, or alternatively, relate to issues that are barred by the mandate rule and the *Ute III*, *V* and *VI* mandates, the doctrines of res judicata (and/or collateral

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[43] App. 37, 6851 (Hearing Transcript, 8/31/15, p. 167:10-25).

[44] App. 24, 4622, (Dkt. 959, Order of 9/22/15).

[45] Supp. App. 4, 1033 (Hearing Transcript, 11/20/15, p. 59:14-23).

[46] Supp. App. 8B, 1809-10 (Dkt. 1094-2, Draft Pretrial Order, pp. 3-4).

> estoppel), law of the case, and stare decisis, or other legal defenses, including without limitation, the Tribe's sovereign immunity . . . . [47]

Yet, once again—this time after four days of hearing—the district court once again deferred ruling on the Tribe's summary judgment motions, and instead, at the urging of Uintah County, set the matter for a three week "evidentiary hearing."[48] In doing so, the Court angrily insisted that the Court was *not* denying the Tribe's motions for summary judgment, but was instead setting the summary judgment motions for a three week evidentiary hearing—a process that Rule 56 neither recognizes nor authorizes, and a process that, in fact, would be patently antithetical to the purpose underlying Fed. R. Civ. P. 56:[49]

> Tribe's Counsel: I don't understand what the Court is doing. It sounds to me like the Court is denying our motion for summary judgment without—
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> The Court: The fact that you characterize it that way is meaningless because I have not. I have not. I have not. I have set it for an evidentiary hearing. We'll set

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[47] Supp. App. 8B, 1843(Dkt. 1094-2, Draft Pretrial Order, p. 37).

[48] Supp. App. 12, 2717-23. (1/22/16 Hearing Transcript). Counsel for Uintah County emphasized that a three-week evidentiary figure was a "minimum" estimate. Supp. App. 12, 2722 (1/22/16 Hearing Transcript, p. 662:3-10). Parenthetically, the evidentiary hearing has not occurred because proceedings in the district court are stayed pending a resolution of the Tribe's motion to recuse Judge Jenkins, filed on 3/1/16 (Supp. App. 15, 3081, filed under seal).

[49] *E.g.*, 10 A Fed. Prac. & Proc. Civ. § 2712 (3d ed.) (collecting numerous cases for the obvious proposition that a court cannot set an evidentiary hearing on a summary judgment motion).

> it for an evidentiary hearing. Anybody who suggests otherwise is just not listening.[50]

Not only is an evidentiary hearing not authorized by Rule 56, but a three-week evidentiary hearing would be "obscenely expensive" in the words of the Tribe's Utah counsel J. Preston Stieff. By way of comparison, the bench trial on the substantive merits of the case took only two *days* in 1979.[51]

E. Grounds For Reassignment To A Different District Court Judge

Since the *Ute VI* remand in July, 2015, the district court has made repeated statements that simultaneously (*i*) are dismissive of the Tribe's request for a permanent injunction, and (*ii*) minimize the State's defendants' repeated violations of federal law and the federal court mandates in *Ute Tribe v. Utah*. For instance, the district court has opined that the State defendants have "learned their lesson,"[52] that "people repent;"[53] and that the Court believes the State defendants "have given up"[54] challenging the U&O Reservation boundaries—a statement the Court made even as the Court was fully aware that defendants were at that moment "rapping on" the door of the U. S. Supreme Court with petitions for certiorari that did attempt to relitigate

[50] Supp. App. 12, 2721 (1/22/16 Hearing Transcript, p. 661:19- 662:2).
[51] App. 213, Docket in cv-2:75-cv-00408 for August 1979.
[52] Supp. App. 1, 103(10/22/15 Hearing Transcript, p. 81:11).
[53] Supp. App. 11, 2524 (1/21/16 Hearing Transcript, p. 470:4-7).
[54] Supp. App. 9, 2120, (1/19/16 Hearing Transcript, p. 106:9-25).

the Tribe's reservation boundaries.[55] At the January, 2016 hearing, the District Judge equated the State defendants' repeated violations of federal law and federal court mandates to a simple matter of a moral lapse and redemption, saying, "it's a little tough where people have genuinely repented if they sinned to begin with or if they genuinely repented so that we're dealing with a different ball game, then you're dealing with current affairs."[56] Throughout the four day hearing in January 2016, the district court repeatedly questioned the need for a permanent injunction.[57] Astonishingly, the Court repeatedly asked the Tribe to specify how the State defendants were relitigating issues decided by *Ute III* and *V*,[58] even as the State's attorney admitted openly to doing precisely that, telling the Court, "Has the state argued that [the] Uncompahgre has been disestablished? We did so before *Ute VI* absolutely. We had the right to do that. *Ute VI* has answered that question. *Ute VI* has been appealed. There is a petition for cert pending and we believe that that argument should be allowed to proceed through those petitions for certiorari."[59]

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[55] Supp. App. 10, 2318-24 (1/20/16 Hearing Transcript, p. 300:2 -306:7).

[56] *Id.*, 2319 (1/20/16 Hearing Transcript, p. 301:15:19).

[57] Supp. App. 9, 2120-26 (1/19/16 Hearing Transcript, pp. 106:14-22; 111:22-23; 112:3-20; Supp. App. 10, 2318-24 (1/20/16 Hearing Transcript, pp. 300-306).

[58] Supp. App. 9, 2121-26 (1/19/16 Hearing Transcript, pp. 107:8-16; 111:22-23; 112:9-20).

[59] Sup. App. 9, 2170-71 (1/19/16 Hearing Transcript, pp. 156:21 – 157:2).

SUMMARY OF ARGUMENT

The district court has abused its discretion, committed legal error, and failed to follow the *Ute V* and *Ute VI* mandates in addressing the Tribe's multiple motions for injunctive relief. The Tribe is being denied due process and equal treatment under the law by, *inter alia*, the district court's mercurial and capricious rulings on injunctive relief, with the district court first consolidating the hearing on preliminary and permanent injunctive relief in June 2013,[60] then, more than two years later in August 2015, bifurcating the hearings without explanation or justification and deferring yet again a ruling on the Tribe's long-pending summary judgment motions for a permanent injunction while at the same time reopening discovery related to injunctive relief *for the third time*; then, following a four day hearing in January, 2016, the court again refusing to issue either a preliminary or a permanent injunction and, instead, scheduling a three week evidentiary hearing on the Tribe's summary judgment motions. Given the district court's 2013 consolidation order, the Tenth Circuit should review the Tribe's summary judgment motions and should determine the Tribe's entitlement to a permanent injunction as a matter of law and undisputed fact. In addition, this Court should order the case reassigned to a different district court judge on remand.

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[60] App. 5, 1042 (Dkt. 269); App. 6, 1092 (Dkt. 326); App. 34, 6296:9 – 6298:9, Hearing Transcript.

STANDARD OF REVIEW

This Court reviews a ruling on injunctive relief to determine whether the district court abused its discretion or based its rulings on erroneous conclusions of law or clearly erroneous factual findings. *Ute VI*, 790 F.3d at 1005-07 (this Court reversed the district court's denial of the Ute Tribe's motion for preliminary injunction, rejecting the district court's "one sentence" finding of no irreparable harm). *See also Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) (same). "A district court abuses its discretion where it commits a legal error or relies on clearly erroneous factual findings, or where there is no rational basis in the evidence for its ruling." *Clark v. State Farm Mut. Auto. Ins. Co.,* 433 F.3d 703, 709 (10th Cir.2005) (quotations omitted).

The question of reassignment to a different district court judge is entrusted to this Court's discretion. *See Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE TRIBE'S APPEAL

A. The Order of 1/27/2016 is Appealable Under 28 U.S.C. § 1292(a)(1)

The practical effect of the district court's order of 1/27/2016 was to once again delay, defer, and effectively deny *either* or *both* a preliminary and a permanent injunction. The court's earlier order of 9/22/2015 had expressly set for hearing on

January 19, 2016, the Tribe's motions for *both* preliminary *and* permanent injunctive relief:

> Plaintiff's Second Motion for Preliminary Injunction [CM/ECF No. 361] (filed on 12/20/2013) will be heard within the context of pretrial at the same time as Plaintiff's Motion for Partial Summary Judgment and a Permanent Injunction Barring Defendants from Relitigating Issues that have been Conclusively Adjudicated and from Exercising Criminal Jurisdiction Over Native Americans Inside the Uintah and Ouray Reservation [CM/ECF No. 335] (filed on 11/27/2013).
>
> A parallel (summary judgment) Motion was filed in 2:13-cv-1070 [CM/ECF No. 18] on January 2, 2014. . . . That in turn will be considered at Final Pretrial within the context of pretrial on January 19, 2016, at 10:00 a.m.[61]

Yet—after appearing for the *third* time for a "final prehearing" in this case—the Ute Tribe at the conclusion of the four-day hearing on January 19-22, 2016, once again left the courtroom with *neither* a preliminary injunction *nor* a permanent injunction. Thus, the practical effect of the 1/27/2016 order was to once again delay, defer, and effectively deny *either* or *both* a preliminary and a permanent injunction. Moreover, it was the *sixth* time since 2013 that the Utah district court has delayed, deferred and effectively denied the Tribe's multiple motions for injunctive relief.

Under 28 U.S.C. § 1292(a)(1), circuit courts have jurisdiction to review "[i]nterlocutory orders … granting, continuing modifying, refusing or dissolving injunctions." Regardless of how a district court characterizes its order, Section

[61] App. 24, 4623 (Dkt. 959, Order of 9/22/2015).

1292(a) applies to any order that has the practical effect or granting or denying an injunction.

> The Tenth Circuit has recognized "two stands of analysis" for § 1292(a)(1) appeals under which we have jurisdiction. (citation omitted) The first strand applies to orders regarding "express motions for injunction" and the second applies to orders with the "practical effect" of disposing of a request for injunctive relief. (citation omitted) We believe the district court order is appealable under either analysis.

Forest Guardians v. Babbitt, 174 F.3d 1178, 1184-86 (10th Cir. 1999) (observing in n. 11 that the "labels" used by the parties and the district court "cannot be dispositive of whether an injunction has been requested or denied," citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2962 at 413 (1995)).

A case directly on point is *Cedar Coal Co. v. United Mine Workers of Am.*, in which the Fourth Circuit ruled that the trial court's indefinite continuance of a coal company's motion for a preliminary injunction was tantamount to a denial of an injunction and was appealable as such. *Cedar Coal*, 560 F.2d 1153, 1161-62 (4th Cir. 1977). Another case strikingly similar to the case at bar is *Lynd v. United States*, 301 F.2d 818 (5th Cir. 1962). Like the Tribe in *Ute Tribe v. Utah*, the United States in *Lynd* "was completely frustrated" in its efforts to enforce federal law before the very tribunal that is charged by law with enforcing federal law—a U.S. district court. The Court in *Lynd* had declined "either to grant or refuse a temporary injunction," but instead, had merely issued a procedural order—much like the 1/27/2016 order

here—that granted the defendants additional time "to prepare for proving their defensive case." *Lynd*, at 821.

> The first objection of the defendants … is that the trial judge did not enter a formal order 'refusing' a temporary injunction. He simply failed to do so. . . . The movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a 'refusal,' so as to satisfy the requirements of Section 1292, 28 U.S.C.A. We hold, therefore, that the failure of the trial judge to grant the temporary injunction constituted an 'interlocutory order of the district court * * * refusing * * * an injunction.' Such order is appealable.

Id., at 822. *See also Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 146 (7th Cir. 2011) (an order deferring a ruling on preliminary injunction "had the effect of denying an injunction" making immediate appeal proper; *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 846 (Fed. Cir. 2008) (circuit court had jurisdiction to review "the effective denial" of plaintiff's motion for a preliminary injunction, as well as pendent jurisdiction over "other interlocutory orders, which ordinarily would be nonappealable standing alone" (citation omitted)); *Cobell v. Kempthorne*, 455 F.3d 317, 321-23 (D.C. Cir. 2006) ("The only question is whether the order has 'the practical effect of granting or denying an injunction.'" (citation omitted)); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d , 1441, 1449-50 (9th Cir. 1992) (by delaying a hearing on injunctive relief, the district court had "effectively denied the motion"); *Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 702-03 (3rd Cir. 1991) (order staying application for a preliminary injunction was reviewable because it had

the "practical effect" of denying injunctive relief); *Great Am. Audio Corp.*, 938 F.2d 16, 18 (2d Cir. 1991) (construing an oral ruling from the bench and finding appellate jurisdiction to consider the district court's ruling on a preliminary injunction).

Here, the Tenth Circuit has jurisdiction over the Tribe's appeal under § 1292(a)(1) because the appeal is from an order of the district court that (*i*) effectively denies injunctive relief, (*ii*) results in irreparable harm to the Tribe, and (*iii*) is an order the Tribe can effectively challenge only through an immediate appeal. *See United States v. Colorado*, 937 F.2d 505, 507-08 (10th Cir. 1991) (orders that have irreparable consequences are immediately appealable); *Melendez v. Singer-Friden Corp.*, 529 F.2d 321, 323 (10th Cir. 1976) (interlocutory orders that impair injunctive relief are immediately appealable).

Last year in *Ute VI*, this Court affirmed the Tribe's entitlement to injunctive relief in this case. In particular, this Court expressly determined that the Tribe is suffering irreparable harm as a result of the State defendants' ongoing prosecutions of Indians in Utah state courts for on-reservation conduct, and the defendants' use of the state prosecutions—as well as this federal enforcement action—to relitigate the Tribe's reservation boundaries:

> [T]he harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time. Not only is the prosecution of Ms. Jenkins itself an infringement on tribal sovereignty, but the tortured litigation history that supplies its backdrop strongly suggests it is part of a renewed campaign to undo the tribal boundaries settled by *Ute III*

> and *V*. Neither do the defendants' briefs offer any reason to hope otherwise.
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> * * * *
>
> On the record before us, there's just no room to debate whether the defendants' conduct "create[s] the prospect of significant interference with [tribal] self-government" that this court has found to constitute "irreparable injury." … [citation omitted] …By any fair estimate that appears to be the whole point and purpose of [defendants'] actions.

Ute VI, 790 F.3d at 1005-06. None of the material facts in this case are genuinely disputed.[62] The State defendants themselves have admitted, both in sworn testimony and in court pleadings, that they have used the illegal prosecution of Indians in Utah state courts for the purpose of relitigating the Tribe's reservation boundaries, both in the state criminal prosecutions and in this federal enforcement action.[63] Accordingly, if the district court had applied *Ute VI*'s injunction analysis to the undisputed material facts under the Tribe's summary judgment motions, the court would have entered a permanent injunction. Alternatively, at a bare minimum, the court should have granted the Tribe a preliminary injunction. Instead, the district

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[62] Supp. App. 8B, 1826-37, Ute Tribe's Statement of Undisputed Facts in the 1/15/2016 Draft Pretrial Order.

[63] *See, e.g.,* App. 7A, 1330-70 (Dkt. 336-10, an exhibit to the Tribe's first summary judgment motion, Dkt. 335 App. 6, 1193); App. 7B, 1390-1446 (Dkt. 336-13, another exhibit to the Tribe's first summary judgment motion); App. 7B, 1475-76 (Dkt. 336-18, another exhibit to the Tribe's first summary judgment); App. 25, 4793 (Deposition Testimony of Uintah County Attorney, G. Mark Thomsas, p. 86:14-24, submitted as an exhibit to the Tribe's third motion for summary judgment, Dkt. 982, filed on October 12, 2015, App. 25, 4717).

court's order of January 27, 2016, requires the Tribe to appear for a three-week "evidentiary hearing" on the Tribe's summary judgment motions[64] —a process that is neither recognized, nor authorized, under Rule 56 of the Federal Rules of Civil Procedure, and a process that, in fact, would be patently antithetical to the purpose underlying Fed. R. Civ. P. 56.

B. The Court has Pendent Jurisdiction to Determine the Tribe's Other Issues

When, as here, the Court of Appeals has jurisdiction under Section 1292(a)(1), "the court as a matter of law may justifiably, though cautiously, decide other generally nonappealable legal issues." *Tri-State Gen. and Transmission Ass'n, Inc.*, 874 F.2d 1346, 1352-53 (10th Cir. 1989). "Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by [the appellate court] without further trial court development." *Id*. (quoting 16 C. Wright , A. Miller, E. Cooper, E. Gressman, *Federal Practice and Procedure* § 3921, at 17).

C. Alternatively, this Court Should Treat the Appeal as a Petition for a Writ of Mandamus under 28 U.S.C. § 1651

Alternatively, the Tribe invokes this Court's discretionary power to treat the Tribe's appeal as a petition for a writ of mandamus. *See State Farm Mut. Auto. Ins.*

[64] Supp. App. 12, 2741, Dkt. 1101.

Co. v. Scholes, 601 F.2d 1151, 1154 (10th Cir. 1979) ("[W]e may treat the 'appeal' as an application for … mandamus"); *see also Ukiah Advestist Hosp. v. F.T.C.*, 981 F.2d 543, 548 n.6 (D.C. Cir. 1992) ("[W]e shall treat the appeal in this case as a petition for mandamus, as other circuits have done in similar circumstances").

As grounds for a writ of mandamus, the Tribe notes that a litigant such as the Ute Tribe, who has obtained an appellate court mandate "after a lengthy process of litigation, involving several layers of courts, should not be required to go through the entire process again" simply to obtain execution of the mandate. *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978). Mandamus is available to litigants like the Ute Tribe who are faced with a lower court that refuses to give "full effect" to a higher court's mandate. *Id*. (citing *Vendo Co. v. Lektro-Vend Corp*. 434 U.S. 425 (1978), and *Sanford Fork & Tool Co.*, 160 U.S. 247 (1895)). It is equally well established that if a "district court persistently and without reason refuses to adjudicate a case properly before it, the Court of Appeals may issue the writ 'in order that (it) may exercise the jurisdiction of review given by law.'" *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978) (quoting from *Ins. Co. v. Comstock*, 16 Wall 258 (1873)).

As pertinent to this case:

- the Ute Tribe brought the original case, no. 2:75-cv-0408, to secure a declaratory judgment that (*i*) the State defendants could not exercise criminal jurisdiction over Indians within the U&O Reservation boundaries, and (*ii*) that the Tribe was free to "exercise the full panoply

of its governing powers within those same boundaries free from interference" by the State defendants. *Ute Tribe v. Utah*, 521 F. Supp. 1072, 1078 (D. Utah 1981) (*Ute I*).

- after the *en banc* ruling in *Ute III*, the question of the U&O Reservation boundaries and the Tribe's jurisdiction within those boundaries was no longer "no longer sub judice after December 9, 1986." *Ute V*, 114 F.3d at 1521.

- in *Ute V* the Tenth Circuit remanded the case to the district court with instructions to consider the Tribe's request for permanent injunctive relief. *Id*. at 1531. Eighteen years later, the Tenth Circuit in *Ute VI* again remanded the case to the district court with instructions to the district court to "forthwith" consider the Tribe's request for injunctive relief. *Ute VI*, 790 F.3d at 1007, 1012.

To date, the district court has failed and refused to grant meaningful injunctive relief to the Ute Tribe. Therefore, if the Tenth Circuit determines that it lacks jurisdiction under Section 1292(a)(1), the Tribe alternatively asks that this Court issue a writ of mandamus in order to insure that the district court complies with this Court's *Ute V* and *VI* mandates.

II. THE UTE TRIBE IS ENTITLED TO INJUNCTIVE RELIEF

A. The Tribe is Being Denied Due Process and Equal Treatment Under the Law

Litigants are deprived of constitutional due process by excessive delays in the adjudicative process. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 547 (1985) (delay of administrative hearing would at some point become a constitutional violation); *Fusari v. Steinberg,* 419 U.S. 379, 389 (1975) (length of delay important factor); *Kraebel v. NYC Dep't of Housing Pres. and Dev.,* 959 F.2d

395, 405 (2d Cir. 1992); *Schroeder v. City of Chicago,* 927 F.2d 957, 960 (7th Cir.1991) ("Justice delayed is justice denied, the saying goes: and at some point delay must ripen into deprivation"); *Coe v. Thurman,* 922 F.2d 528, 530–31 (9th Cir.1990) (delay in state appeal); *Rodrigues v. Donovan,* 769 F.2d 1344, 1348–49 (9th Cir.1985); *Kelly v. R.R. Ret. Bd.,* 625 F.2d 486, 490–91 (3d Cir. 1980) (four year delay in reviewing disability application).

Multiple, repeated, and ongoing state prosecutions of tribal members for on-reservation conduct causes "significant interference with [tribal] self-government." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) citing *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 716 (10th Cir. 1989). State encroachment on tribal sovereignty is an *irreparable* injury because the harm to tribal self-government is "not easily subject to valuation," and because there is no "monetary relief" available to tribes "because of the state's sovereign immunity."[65]

All the more then is "justice delayed, justice denied" when the action sought to be enjoined is the Utah state defendants' openly-acknowledged, unabashed,

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[65] *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1250; *see also Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. OKla. 2010) (remedies at law are inadequate to remedy illegal assertions of state jurisdiction in Indian Country); *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d 1217, 1222 (D. Kansas 2002) (monetary damages are not sufficient "to undo the damage" caused by illegal seizures of property and encroachments on tribal sovereignty).

ongoing "invasion" of the Ute Tribe's federally-protected sovereignty—an infringement the *Ute VI* judges unanimously characterized as "*as serious as any to come our way in a long time*." (emphasis added) *Ute VI*, 790 F.3d at 1005. Indeed, the *Ute VI* Court described the State defendants' infringement in this case as "much greater" than the infringements that warranted injunctive relief in *Wyandotte Nation v. Sebelius* 443 F.3d 1247, 1255 (10th Cir. 2006) (involving an illegal raid and seizure of property from a tribal casino) or *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1250-51 (10th Cir. 2001) (involving citations of multiple tribal members for having tribal, rather than state-issued, motor vehicle registrations).

In the face of this on-going and irreparable harm, the Ute Tribe is being denied constitutional due process and equal treatment under the law by the district court's continued failure to grant the Tribe meaningful injunctive relief after more than three years of litigation.

B. *Ute VI* Has Already Determined the Tribe's Entitlement to Injunctive Relief

The district court in this case is not faced with a difficult question of first impression. In fact, the *Ute VI* holding is dispositive of the Tribe's entitlement to injunctive relief because the only difference in the requirements for a preliminary injunction and a permanent injunction is that (*i*) a permanent injunction requires a showing of actual success on the merits, whereas (*ii*) a preliminary injunction requires only a showing substantial likelihood of success on the merits. *Prairie Band*

Potawatomi Nation v. Wagnon, 476 F.3d 818, 822 (10th Cir. 2007). The Tribe's success on the merits has already been established under this Court's holdings in *Ute III*, *V* and *VI*, as well as other long-standing statutory and decisional law, including but not limited to:

(i) the Ute Treaties of 1863 and 1868, 13 Stat. 673 and 15 Stats. 619;

(ii) the Utah Enabling Act of 1894 in which the State of Utah "forever" disclaimed all right and title to "all lands … owned or held by any Indian or Indian tribes," 28 Stats. 107;[66]

(iii) 18 U.S.C. §§ 1151 and 1152 which statutorily define Indian Country and preclude state jurisdiction within Indian Country;

(iv) 25 U.S.C. §§ 1321-1326, which prescribes the exclusive means by which the State of Utah may exercise criminal and civil jurisdiction over Indians within Indian Country in Utah; and

(v) the Supremacy Clause of the U.S. Constitution, art. VI, § 2.

Indeed, apart from the U.S. District Court for the District of Utah, all other federal courts to consider the question have for many years recognized that Indian tribes are

[66] The disclaimer disclaims both proprietary and governmental authority. *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d at 710, 716 (considering the disclaimer in the Oklahoma Enabling Act which is identical to the Utah Enabling Act of 1894); *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d 967, 976-81 (10th Cir. 1987) (same).

entitled to an injunction to enjoin a state's *threatened* or *actual* assertion of state criminal jurisdiction over tribal members within Indian country.[67]

It is equally well established that litigants such as the Ute Tribe are entitled to injunctive relief against recalcitrant litigants who attempt to relitigate settled disputes again and again.[68]

C. Injunctive Relief May Not Be Withheld Indefinitely Until There Has First Been a Tract-by-Tract Determination of Land Status in the Uintah Valley Reservation

After nearly three years of unreasonably delay, the district court, without critical review or analysis, adopted the State defendants' smoke and mirrors fallacy that:

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[67] *Id.*

[68] *See, e.g., Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir. 1986) (permanently enjoining a state court relitigation of matters litigated in earlier federal court proceeding); *Jackson v. Carter Oil Co.*, 179 F.2d 524, 525-26 (10th Cir. 1950) (affirming a lower court order that *perpetually* enjoined a litigant from relitigating a matter that—like the case here—had been "*in the courts*" for decades and was before the Tenth Circuit for "*the third time*"). *See also G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1106-07 (9th Cir. 2002) (permanently enjoining litigants from attempting to circumvent a federal court ruling through the state courts in Hawaii); *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556, 565 (2d Cir. 1991) (permanently enjoining a litigant from relitigating federal securities claims, "no matter how denominated"); *Royal Ins. Co. of Am. V. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992) (enjoining a state court relitigation of issues adjudicated in earlier federal court action); *Browning Debenture Holders' Committee v. DASA Corp.*, 454 F. Supp. 88, 97 (S.D. New York 1978) (permanently enjoining a litigant from "*starting this six-year-old action all over again in a new forum*"), *aff'd* 605 F.2d 35 (2nd Cir. 1978).

- the Ute Tribe must be denied *all* injunctive relief (both preliminary and permanent) against the defendants' *admitted* illegal State court prosecutions of Indians for *on-reservation* "Indian country" offenses

- until the district court *first* adjudicates the status of all *non-Indian country* lands within the boundary of *one* of the Tribe's *two* Indian reservations, i.e., the nearly 400,000 acre land mass—sometimes called the "donut hole"—that the district court and defendants refer to as the *non-Indian lands* "carved out" of the Uintah Valley Reservation as a result of the *Hagen* ruling.[69]

The Tribe contends that there is no legal justification whatever for deferring indefinitely a ruling on the Tribe's multiple pending motions for injunctive relief until there has first been an adjudicatory delineation of *non-Indian country* lands in the Uintah Valley Reservation. Moreover, the defendants' and district court's illogical precondition presents a question of law, not a factual dispute. There are multiple reasons to reject such an patently fallacious legal premise: first, the parties already have stipulated to the jurisdictional boundaries of the Uintah Valley Reservation;[70] second, the boundaries of the Tribe's second, *undiminished* Indian

[69] Only the Uintah Valley Reservation was diminished; under the Tenth Circuit's *Ute III* and *V* rulings, the Uncompahgre Reservation was neither disestablished nor diminished, meaning that all land within the Uncompahgre Reservation is Indian country.

[70] App. V3, 355, 358, and 363, a copy of the Uintah Valley Reservation Jurisdiction Map dated 10/21/1997, the parties' stipulation related to the Jurisdiction Map, Dkt. 99, and the district court's order adopting the parties' stipulation, Dkt. 100, App. 3, 358. The "donut hole" or "carve out" is the largely contiguous area depicted in blue on the Jurisdiction Map. NOTE: a full size copy of this map was transmitted to the Tenth Circuit as part of the record on appeal in case number 15-4080, *Ute Tribe v. Myton City*.

reservation—the boundaries of the Uncompahgre Reservation—are legally delineated under the 1882 Executive Order that established the reservation;[71] third, seven (7) of the eight (8) cases of illegal state prosecutions included under the Tribe's summary judgment motions are based on crimes that allegedly occurred in the *undiminished* Uncompahgre Reservation, the boundary of which, as just stated, is delineated under the 1882 Executive Order establishing the Reservation (and quite obviously, the State has no good faith basis for prosecuting tribal members for criminal offenses that occur within the boundaries of an *undiminished* reservation that has been in continuous existence for *133 years*); fourth, the single remaining illegal prosecution of a tribal member (i.e., the 8th of 8 illegal prosecutions) included under the Tribe's summary judgment motions is the Lesa Jenkins case, a state prosecution of a tribal member based on conduct that occurred in the National Forest lands of the Uintah Valley Reservation—reservation lands that, likewise, have long been delineated, not just in the 1997 Uintah Valley Indian Reservation Jurisdiction Map to which the parties stipulated,[72] but also in the 1905 Presidential Proclamation that withdrew Uintah Reservation lands for incorporation into the Uintah Forest

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[71] Supp. App. V12, 2761. The State defendants simply refuse to depict the boundaries of the undiminished Uncompahgre Reservation on the maps used by state law enforcement.

[72] App. V3, 363. The National Forest lands are included in the lands depicted in yellow and identified as "Indian Country" on the 1997 Jurisdiction Map. NOTE: a full size copy of this map was transmitted to the Tenth Circuit as part of the record in case number 15-4080, *Ute Tribe v. Myton City*.

Reserve;[73] and finally, fifth, the *Ute V* mandate does not authorize an *adjudicatory* delineation of the lands diminished from the Uintah Valley Indian Reservation: the *Ute V* decision requires that the diminished, non-Indian country lands be determined based on land title records showing whether individual tracts of land within the Uintah Valley Reservation were "unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership." *Ute Tribe v. Utah*, 114 F.3d 1513, 1528 (10th Cir. 1997).[74] The question of what the *Ute V* mandate requires is a question of law—not a matter of disputed material fact, or smoke and mirror pronouncements. The Tribe formally objected to denying injunctive relief on such a flawed legal premise in a pleading captioned "Ute Tribe's Response to Defendants' Request to Defer Ruling on Injunctive Relief Until a Tract-by-Tract Delineation of the Uintah Valley Indian Reservation Has Been Completed," filed on January 15, 2016 (before the start of the January 19-22nd pretrial conference).[75] Thereafter, the Tribe submitted a proposed draft permanent injunction order, and the Tribe's draft order shows how reasonably injunctive relief

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[73] Supp. App. V12, 2763, Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116.

[74] The Tribe contends that a three-week evidentiary hearing to adjudicate the "*non-Indian country*" lands of the Uintah Valley Reservation would exceed "the ministerial dictates" of the *Ute V* mandate. *See, e.g., Colo. Interstate Gas Co. v. Nat'l Gas Pipeline Co. of Am.*, 962 F.2d 1528, 1534 (10th Cir. 1992).

[75] Supp. App. V9, 1989, Dkt. 1095.

can be granted without resorting to the absurdly expensive tract-by-tract adjudicatory delineation of nearly 400,000 acres of *non-Indian country* lands within the Uintah Valley Reservation that the defendants and district court insist upon as a precondition to injunctive relief.[76] Of particular note, the Tribe's proposed injunction order would only enjoin bad faith prosecutions of Indians, i.e., prosecutions in which the State defendants have no objectively good faith basis for believing that an individual prosecuted by the State is (*i*) not an Indian, or (*ii*) that the offense(s) allegedly committed by an Indian occurred outside the boundaries of the U&O Reservation as those boundaries were adjudicated in *Ute III* and *V*.[77]

D. There is Neither Confusion Nor a Disputed Issue of Material Fact as to Indian Status or Reservation Location of the State-Prosecuted Offenses in *Any* of the Individual Prosecutions Included Under the Tribe's Summary Judgment Motions

A fact is only "material" under Rule 56 if it might affect the outcome of the case. "Ergo, whether a fact qualifies as 'material' hinges on the substantive law at

[76] Supp. App. V12, 2749. The 400,000 acre figure is a matter of simple mathematics. In 1902, the Uintah Valley Reservation contained approximately 2,039,040 acres, of which 1,010,000 were added to the Uintah National Forest; 669,040 acres were opened to non-Indian settlement; 56,000 to 60,000 acres were set aside for non-Indian reclamation and reservoir projects; 360,000 acres were apportioned for Indian allotments, grazing lands and other lands reserved for Indian use; and 217,000 acres of opened but unsettled lands were later restored to tribal ownership and made a part of the Reservation under the Restoration Order of 1945. *See Ute Tribe v. Utah*, 521 F. Supp. 1072, 1125 (D. Utah 1981); *State v. Perank*, 858 P.2d 927, 934 n.10 (Utah 1993).

[77] Supp. App. V12, 2756, Dkt. 1117-1, pp. 8-9, ¶ 16.

issue."[78] Under the applicable substantive law here, there are only two material facts: First, whether the State defendants since calendar year 2012, have been illegally prosecuting Indians for alleged violations of Utah state law for on-reservation conduct. Second, whether the State defendants have used the illegal prosecutions to relitigate the Tribe's U&O Reservation boundaries. Under the undisputed facts in the Tribe's summary judgment motions, the answer to both questions is an unequivocal "yes." Moreover, not a single one of the illegal state court prosecutions under the Tribe's summary judgment motions occurred within the "checkerboard" area of the Uintah Valley Reservation—thereby refuting the State defendants' and district court's insistence upon an absurdly expensive tract-by-tract adjudicatory delineation of nearly 400,000 acres of *non-Indian country lands* as a prerequisite to granting *any* injunctive relief to enjoin illegal state court prosecutions of Indians for *on-reservation*, *Indian country* offenses.

The Tribe's third and fourth summary judgment motions are based on evidence of the State's prosecution of tribal members Melanie Santio Johnson, Cyrus Aaron Cush, Debra Penningjack, and Athan D. Standing Rock for traffic offenses that occurred in the Uncompahgre Reservation (the "undiminished" reservation

[78] Steven Baicker-McKee, William M. Janssen, and John B. Corr, Federal Civil Rules Handbook, p. 1136 (2015).

whose boundaries have been delineated for 133 years).[79] In each case the State initiated or is continuing to prosecute tribal members under the very same Utah state statues that the *Ute VI* panel unanimously ruled the State defendants have "no authority" and "no legal entitlement" to prosecute when the offenses occur in Indian country.[80] *Ute VI*, 790 F.3d at 1004, 1007. Following *Ute VI*, the State defendants "repackaged" their legal arguments and now assert, for the first time, a novel theory of "concurrent jurisdiction"—essentially asserting that the State of Utah can enact criminal statutes that, by mere enumeration of elements, *implicitly* extend state criminal jurisdiction inside the U&O Reservation, even when the alleged violations of state law occurs exclusively within Indian country. The Defendants' argument ignores not only the holding in *Ute VI*, but the supremacy clause of the U.S. Constitution, art. VI, and the entire body of federal statutory and decisional law on which *Ute VI* is based. In fact, Defendants' new argument is so patently devoid of merit the Tribe has filed sanction motions based in part on this frivolous argument.[81] In any event, the "concurrent jurisdiction" theory presents a pure question of law, not a disputed issue of material fact.

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[79] App. 32, 5933, 5965, Dkts. 982, 983; App. 38, 6860, Dkt. 1088.

[80] Utah Code Ann. §§ 41-ca-518.2(3) (operating or being in control of a vehicle without an ignition interlock system); 53-3-227(3)(a) (driving on a suspended/revoked driver's license).

[81] Supp. App. V7, 1576, 1590 and 1601, Dkts. 1091, 1092 and 1093, filed on January 12, 2016.

E. This Court Should Decide the Tribe's Entitlement to a Permanent Injunction Based on the Defendants' Judicial Admissions and Other Undisputed Facts

It is well established that appellate review in an interlocutory injunction appeal "properly extends to all matters inextricably bound up with the injunction decision … [and] may extend further to allow disposition of all matters appropriately raised by the record, perhaps leading to final disposition of the case." 16 Fed. Prac. & Proc. Juris. § 3921.1 (3d ed). *Amandola v. Town of Babylon*, 251 F.3d 339, 343-44 (2d Cir. 2001) (on appeal from denial of a preliminary injunction, the court reversed with directions to enter a permanent injunction for plaintiffs).

In this case, the Tribe has provided the Tenth Circuit with all pleadings related to the Tribe's pending summary judgment motions, and the Tribe asks the Tenth Circuit to rule on the merits of the Tribe's summary judgment motions seeking entry of a permanent injunction.[82] This is especially warranted given the prejudice to the Tribe that has occurred as a result of the tortured procedural history in the district court.

[82] App. V6, 1193 and V7A and V7B, the Tribe's first summary judgment and exhibit appendix, Dkts. 335 and 336 (filed on 11/27/2013); App. V32, 5933 and 5965, the Tribe's second summary judgment motion filed in case number 2:13-cv-00276 before that case was consolidated into the original action (filed on 1/2/2014); App. V25, 4717, 4763, Dkts. 982 and 983 (filed on 10/12/2015); and Supp. App. V7, 1503, Dkt. 1088, the Tribe's fourth summary judgment motion.

III. THE TENTH CIRCUIT SHOULD ORDER THIS CASE ASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE

A. The Standard for Reassignment

The Court's authority to order reassignment of this case is not open to dispute. "A fair trial in a fair tribunal is a basis requirement of due process," and our system of law "has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

Precisely because *Ute III* and *V* left nothing for the district court to address "beyond the 'ministerial dictates of the mandate,'" any objective observer should ask why, after three years of costly litigation, the district court still has not entered any meaningful enforcement of the *Ute III*, *V* and now *VI* mandates?[83] It appears to the Tribe that the district court has overtly aligned itself with the State defendants, and has actively facilitated the defendants' efforts to reopen "the door" that was closed by *Ute III*, with the predictable result that much of the last three years has been consumed by the State defendants' unrelenting efforts to relitigate *both* the Tribe's reservation boundaries and the Tribe's jurisdiction within its boundaries.

[83] App. V19, Dkt. 944, 9/11/2015. *Ute VI* directed the District Court to enter "appropriate" injunctive relief "forthwith" to enjoin the State's prosecution of Lesa Jenkins and "other tribal members for offenses in Indian county." *Ute VI*, 790 F.3d at 1007, 1012. As noted above, the district court elected to enjoin only the Lesa Jenkins prosecution, and only then until "further order" of the Court.

When due process is in question, the power to reassign cases on remand is part of the appellate court's supervisory authority over the district courts. *Offutt v. United States*, 348 U.S. 11, 16 (1954) (ordering reassignment to different district judge based, *inter alia*, on the presiding judge's "infusion of personal animosity" into the case); *Mitchell v. Maynard*, 80 F.3d at 1449-50 (ordering reassignment to different judge in order to best serve the interests of justice); *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996) (reassignment was necessary because of the "unmistakable appearance" of bias or partiality); *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (reassignment was warranted because the "judge from the bench questioned the wisdom of the substantive law he had to apply and challenged the government's decision to prosecute."); *United States v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981) (ordering reassignment because district judge's remarks "reflect a personal prejudice against" the appellant "for successfully appealing his conviction on the basis of the judge's actions during the prior trial.").

"There are occasions when a matter is appropriately remanded to a different district judge not only in recognition of the 'difficulty' that a judge might have 'putting aside his previously expressed views,'" but also to preserve the appearance of justice. *Cullen v. United States*, 194 F.3d 401, 408 (2d Cir. 1999). Such is the case here.

Furthermore, the "recusal of a judge is required 'when a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits.'" *In re United States*, 614 F.3d 661, 666 (7th Cir. 2010) (citations omitted).

The Tenth Circuit has approved a three-part approach that is used by other federal circuits in determining whether circumstances warrant reassignment to a different judge on remand. *Mitchell v. Maynard*, 80 F.3d at 1450. The Federal Judicial Center has described that three-part test as follows:

> (1) "whether on remand the district judge can be expected to follow [the appellate] court's dictates"; (2) "whether reassignment is advisable to maintain the appearance of justice"; and (3) "whether reassignment risks undue waste and duplication." In weighing these factors, "[t]he first two factors are considered to be of equal importance and a finding of either one will support a remand to a different judge." (citations omitted) (underscore added)

Federal Judicial Center, *Judicial Disqualification: An Analysis of Federal Law*, p. 110 (2d ed. 2010). That three-part test is readily met here.[84]

B. The Standard for Reassignment is Readily Met Here

Objectively, there is the appearance of a deep-seated bias against the Tribe based on the district judge's failure to grant meaningful injunctive relief—

[84] Parenthetically, the Tribe has filed a motion to recuse the District Court Judge. The motion and response and reply memoranda were filed under seal, however, copies of the sealed pleadings have been submitted under seal in the Tribe's Supplemental Appendix, Supp. App. V15, 3081, 3145, 3166.

meaningful enforcement of the *Ute III*, *V* and *VI* mandates—after 27 separate court hearings over three years of litigation. As noted repeatedly throughout this brief, a litigant like the Ute Tribe who has obtained an appellate court mandate "after a lengthy process of litigation, involving several layers of courts, should not be required to go through the entire process again" simply to obtain execution of the mandate. *General Atomic Co. v. Felter*, 436 U.S. at 497. After the four days of hearing on January 19-22, 2016—which left the Tribe with *neither* a preliminary nor a permanent injunction, nor even a *partial* preliminary or permanent injunction—the Tribe's Utah counsel, J. Preston Stieff, made a pithy observation: if the tables had been turned, if it was not the State of Utah, but the Ute Indian Tribe that had been violating federal law and federal court mandates repeatedly for four years running, if it was the Tribe that had been sending tribal police on patrols *outside* the U&O Reservation boundaries, arresting non-Indians and impounding their automobiles, imprisoning non-Indians in tribal jails and then prosecuting the non-Indians through the Ute Indian Tribal Court for violations of tribal law—if those had been the operative facts, instead of the other way around, Attorney Stieff is sure the district court would have issued effective injunctive relief "forthwith"—years ago.

In fact, the district court has made comments that appear to reflect a personal bias against the Tribe, referring to the Tribe as "an alleged sovereign," and saying,

"*even an alleged sovereign has the duty of being put to its proof*."[85] That statement is racially and ethnically offensive, and it is on a par with similar ethnically-charged statements that warranted recusal in *United States v. Franco-Guillen*, 196 Fed. Appx. 716, 717-18 (10th Cir. 2006) (In that case the trial judge said, "I will not put up with this from these Hispanics or anybody else, any other defendants"). More to the point, the Court's demeaning reference to the Tribe as an "alleged sovereign," suggests that the District Judge has improperly "infused his personal animosity" into the case. *Offutt v. United States*, 348 U.S. at 16.

In addition, after issuance of the *Ute VI* mandate, the district court has made repeated statements that not only are dismissive of the Tribe's request for a permanent injunction, but that also minimize the State's defendants' persistent violations of federal law and federal court mandates. For instance, the District Judge has said that he believes the State defendants have "learned their lesson,"[86] that "people repent;"[87] and that the Judge also believes the State defendants "have given up"[88] challenging the U&O Reservation boundaries—a statement the Court made even as the Court was fully aware that defendants were at that moment "rapping on"

[85] Supp. App. V1, 104 (10/22/2015 Hearing Transcript, p. 81:16-20 (immediately following the Court's observation that the State defendants had learned their lesson).
[86] Supp. App. V1, 103 (10/22/15 Hearing Transcript, p. 81:11).
[87] Supp. App. V11, 2524 (1/21/2016 Hearing Transcript, p. 470:4-7).
[88] Supp. App. V9, 2120 (1/19/2016 Hearing Transcript, p. 106:9-25).

the door of the U. S. Supreme Court with petitions for certiorari that did attempt to relitigate the Tribe's reservation boundaries.[89] Here, as in *Mitchell v. Maynard* and *United States v. Franco-Guillen*, reassignment is necessary in order to maintain the appearance of justice.

In view of the District Judge's comments described above, any reasonable person would perceive a significant risk that the district judge will not resolve this case on its merits and in obedience to the *Ute V* and *VI* mandates. The District Judge's comments suggest the Judge has developed a personal bias against the Ute Tribe that prevents the Judge from presiding over this complex case impartially. Equally troubling is the fact that there has been "an alarming lack of timely progress," in deciding the Tribe's 2013 and 2014 motions for summary judgment and entry of a permanent injunction, *see John B. v. Goetz*, 626 F.3d 356, 364 (6th Cir. 2010)—a delay that strongly suggests the District Judge is unable, unwilling, and philosophically resistant to implementing the Tenth Circuit's *Ute V* and *VI* mandates.

Finally, the Tribe believes there will be no negative impact on judicial resources if the case is reassigned to a different judge. In light of the three appellate mandates that already have been rendered in this case—*Ute III*, *V* and *VI*—virtually all the legal issues have been conclusively litigated and all that remains to be done

[89] Supp. App. V10, 2318-24 (1/20/2016 Hearing Transcript, p. 300:2 -306:7).

is for those legal rulings to be applied to undisputed facts. The Tribe is convinced that a different judge could read, hear, and decide the Tribe's summary judgment motions in less time than the "three-week minimum" evidentiary hearing that Judge Jenkins agreed to conduct on the Tribe's summary judgment at the recommendation of Uintah County's counsel. Conversely, if the case is not reassigned, the Tribe can only foresee an ever more alarming waste of judicial resources going forward.

CONCLUSION

Based on the facts and authorities cited herein, the Ute Indian Tribe respectfully asks the Tenth Circuit to hold that the district court has abused its discretion by effectively denying the Ute Tribe's multiple requests for injunctive relief. The Tribe further asks the Court to find that the Tribe has been denied due process and equal treatment under the law by the district court's continued delay, deferment, and effective denial of meaningful injunctive relief to the Ute Tribe. Finally, the Tribe asks the Court to review the Tribe's summary judgment motions *de novo* and to determine the Tribe's entitlement to a permanent injunction as a matter of law and undisputed fact.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the obvious significance of this case to the Ute Indian Tribe. In addition, in light of the case's complex procedural history,

and the complexity of the legal issues before the Court, the Tribe believes that the parties and the Court will both benefit from oral argument.

Dated this 23rd day of May, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Section 1. Word count

As required by Fed. R. J.A. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 12,497 words.

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By: /s/ *Frances C. Bassett*
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sunbelt Vipre Enterprise version 6.2.5.1, dated 8/19/2015, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Debra A. Foulk*
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2016, a copy of this **APPELLANT'S OPENING BRIEF AND SUPPLEMENTAL APPENDIX VOLUMES 1 - 15** were served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

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I also hereby certify that on the 25th day of May, 2016, the original and seven (7) copies of the foregoing **APPELLANT'S OPENING BRIEF** and the original of the **SUPPLEMENTAL APPENDIX VOLUMES 1 - 15** were delivered via courier to the Clerk of the Court, United States Tenth Circuit Court of Appeals.

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