17-44

No. _____



In The
# Supreme Court of the United States

RICHARD DOUGLAS HACKFORD,

*Petitioner,*

v.

STATE OF UTAH, GARY HERBERT, in his capacity as Governor of Utah; SEAN D. REYES, in his capacity as Attorney General of Utah; WASATCH COUNTY, SCOTT SWEAT, in his capacity as County Attorney for Wasatch County; and TYLER J. BERG, in his capacity as Assistant County Attorney for Wasatch County,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Acts of Congress, authorizing the President to set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, diminished the Uintah and Ouray Reservation.

2. Whether as used in 18 U.S.C. § 1151(a), the term "Indian Country" includes the National Forest land, and the right of way running through the National Forest lands where the alleged criminal conduct occurred, for purpose of federal criminal jurisdiction.

## PARTIES TO THE PROCEEDING

The petitioner in this case is Richard Douglas Hackford. The respondents are the State of Utah, Gary Herbert, in his capacity as Governor of Utah; Sean D. Reyes, in his capacity as Attorney General of Utah; Wasatch County, Scott Sweat, in his capacity as County Attorney for Wasatch County; and Tyler J. Berg, in his capacity as Assistant County Attorney for Wasatch County.

## CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Petitioner is not a corporate entity or publicly held company requiring any further disclosures.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Douglas Hackford respectfully petitions for a writ of certiorari to review the judgement of the Tenth Circuit United States Court of Appeals.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 845 F.3d 1325. Petitioner's Motion for Preliminary Injunction was denied, and his Complaint for Declaratory and Injunctive Relief was dismissed with prejudice in the District Court for the District of Utah and is not yet reported in the Federal Supplement, but is available at 2015 U.S. Dist. LEXIS 107301 (D. Utah Aug. 7, 2015).

## JURISDICTION

The Tenth Circuit entered judgment on January 19, 2017. Petition for rehearing *en banc* was denied on April 4, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioner filed a complaint for declaratory and injunctive relief on September 3, 2014. Petitioner argued his status as an Indian and the offense occurred on

Indian land therefore the state of Utah did not have jurisdiction. For reasons of judicial economy and efficiency, the case was immediately consolidated with Case No. 2:75-CV-00408, *Ute Indian Tribe v. State of Utah*. Thereafter, on September 15, 2014, *id.* at Dkt. 680, the District Court, *sua sponte*, entered an Order to Show Cause requiring Petitioner Hackford to appear at the hearing held on September 22, 2014 and show cause as to why the complaint should not be dismissed by virtue of 25 U.S.C. § 677v. The Court's motion was heard on September 22, 2014, and the Court dismissed Petitioner's complaint on the grounds that he was not a member of a federally recognized Indian Tribe, and pursuant to 25 U.S.C. § 677v, he was subject to jurisdiction of the State of Utah for criminal prosecution. *Supra* Dkt. 707. Petitioner immediately filed an appeal of the Court's order dismissing his complaint and filed an emergency Motion for Stay pending the appeal in Case No. 14-4116.

On December 4, 2014, prior to entering its final Rule 54(b) judgment, the District Court vacated its order dismissing Petitioner's complaint. Subsequently, Appeal Case No. 14-4116 was dismissed. The Court then set the matter for a preliminary injunction hearing on May 28, 2015, at which time Petitioner's complaint was again dismissed with prejudice. The Court noted at the time of its ruling that the matter would be final and certified for appeal. Petitioner timely filed a Notice of Appeal on June 29, 2015, as prescribed by Fed. R. App. P. 4(a)(1)(A) and Fed. R. App. P. 4(a)(2).

While the proposed order relating to the final judgment was circulating among the parties, the Tenth Circuit issued its ruling in the related case, *Ute Indian Tribe v. State of Utah*, Appeal Nos. 14-4028, 14-4031 and 14-4034; 790 F.3d 1000 (10th Cir. 2015) ("*Ute VI*"). Based on the Tenth Circuit Court's ruling in *Ute VI*, Petitioner filed a Motion for Reconsideration. The motion was heard and denied on August 4, 2015.

The final Order was entered on August 4, 2015. The District Court held that Petitioner's claims were essentially distinct from those of the other parties of the consolidated cases – concluding, "Mr. Hackford is not an Indian, and the site of the offense was not within Indian Country." (Order Re: Mot. For Preliminary Injunction, No. 2:75-cv-00408 Dkt. 897). The District Court confined its findings to the site of the offense, and thus, the court concluded "pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay in the entry of a final judgment with respect to Mr. Hackford's claims. . . ." (Order No. 2:75-cv-00408 Dkt. 897). In a separate document, the District Court entered judgment on August 12, 2015.

Petitioner's notice of appeal was filed approximately one month before entry of judgment, pursuant to Rule 4(a)(2) which permits a premature notice of appeal from a bench ruling, including non-final decisions, to relate forward to the final judgment and serve as an effective notice of appeal.

The Tenth Circuit has issued prior published decisions from appeals arising out of *Ute Indian Tribe v. State of Utah*, D. Utah Case No. 2:75:cv-00408. The decisions are *Ute Indian Tribe v. State of 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. State of Utah*, 114 F.3d 1513 (10th Cir. 1997) ("*Ute V*"); and *Ute Tribe v. State of Utah*, Appeal Nos. 14-4028, 14-4031 and 14-4034, 790 F.3d 1000 (10th Cir. 2015) ("*Ute VI*"); and *Ute Indian Tribe v. Myton*, 832 F.3d 1120 (10th Cir. 2016) ("*Ute VII*").

## SUMMARY OF THE ARGUMENT

Congress, by its legislative acts, did not clearly diminish the Uintah Indian Reservation and the Strawberry Reservoir lands remain part of the Reservation. Petitioner's arrest was on Indian land and he is not subject to state criminal prosecution.

## REASONS FOR GRANTING THE WRIT

### I. NO CLEAR INTENT TO DIMINISH THE RESERVATION EXISTS

A constitutionally valid treaty established the boundaries of the Uintah Indian Reservation for the Utah Indians.[1]

[1] Executive Order October 31, 1861, ratified by Congress May 5, 1864 (ch. 77, 13 Stat. 63).

This Court has held that "[o]nly Congress may diminish the boundaries of an Indian reservation, and its intent to do so must be clear." *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984). In *Hagen v. Utah*, 510 U.S. 399, 411, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994), this Court noted that its "framework for determining whether an Indian reservation has been diminished is well settled and starts with the statutory text." *Id.* See *Nebraska v. Parker*, 136 S. Ct. 1072, 1075 (2016). Further, in diminishment cases, this Court has examined "all the circumstances surrounding the opening of a reservation," *Hagen*, *supra*, at 412, including "the contemporaneous understanding of the Act's effect on the reservation." *Parker*, *supra*. The Strawberry Reservoir lands were exempt from the opening of the reservation. Such land was set aside from the opening for specific purpose; "Before the opening of the Uintah Indian Reservation, the President is hereby authorized to set apart and reserve any reservoir site or other lands necessary to conserve the water supply for the Indians or for general agricultural developments. . . . Warning is expressly given to all persons not to make settlement upon the lands reserved by this Proclamation." 33 Stat. at 1070. This language and purpose is not evidence of diminishment and not inconsistent with continued reservation status.

Utah is not one of the six states to which "jurisdiction over offenses committed by or against Indians in the areas of Indian country. . . ." was transferred by Pub. L. No. 83-280 ("P.L. 280"), Act of Aug. 15, 1953,

§ 2, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162(a)-(c)).

The U.S. District Court for the District of Utah (Jenkins, J.), interpreting the 1905 congressional acts setting aside lands before opening the reservation, reasoned that setting aside of forest lands and reservoirs was inconsistent with reservation status and as a result, the reservation was diminished. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072 (1981) ("*Ute I*"). However, *Ute I* was overturned by the Tenth Circuit *en banc* in rehearing, *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985) ("*Ute III*") holding that the reservation was not diminished and that land with different title or different purpose still retain reservation status. The Strawberry Reservoir lands were not challenged, however, the Court must adhere to *Ute III*, *Ute V* and *Hagen* for consistency.

This Court stated that it has "not hesitated" to overturn decisions when they are "unworkable or are badly reasoned," *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); when "the theoretical underpinnings of those decisions are called into serious question," *State Oil Co. v. Khan*, 522 U.S. 3, 21, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); when the decisions have become "irreconcilable" with intervening developments in "competing legal doctrines or policies," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989); or when they are otherwise "a positive detriment to coherence and consistency in the law. . . ." *Id.* This Court has found that even "one of these circumstances can

justify our correction of bad precedent." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2425 (2014).

In 1905, Congress authorized the President to set aside part of the surplus land, before it was opened for settlement, "as an addition to the Uintah Forest Reserve" or as "a reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development." 33 Stat. at 1070. In 1910, Congress appropriated funds for the transfer of title, management and control of the reservoir lands. Act of April 14, 1910, ch. 140, 36 Stat. 284. Thereafter Pub. L. No. 100-563, 102 Stat. 2826 (October 31, 1988) placed the same Strawberry Valley Project lands, including the Strawberry Reservoir into the Uinta National Forest. Congress was fully aware of the National Forest status, being reservation lands when it enacted the 1988 law. Thus, Congress acknowledged that the reservoir lands were never removed from the Uintah Indian Reservation, or alternatively, intended to place the lands within reservation boundaries.

This Court has stated that to assess whether an Act of Congress diminished a reservation, the inquiry must start with the statutory text, for "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen*, at 411. Under its precedents, the Court also is to "examine all the circumstances surrounding the opening of a reservation." *Id.* at 412. *Solem* stated that because of "the turn-of-the-century assumption that Indian reservations were a thing of the past," many surplus land

Acts did not clearly convey "whether opened lands retained reservation status or were divested of all Indian interests." *Id.* at 468.

The Tenth Circuit held it was "clear [that Congress] did not intend to extinguish the forest lands of the Uintah Reservation" *Ute III*, 773 F.2d 10087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). Later, that Court reaffirmed its ruling that the National Forest Lands remain within the boundary of the Uintah Valley Reservation in *Ute V*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 552 U.S. 1034 (1998) and *Ute VI*, 790 F.3d 1000 (10th Cir. 2015).

The district court recognized that it was bound under "law of the case" rules to enforce the mandate in *Ute III*, 935 F. Supp. at 1516. *Ute V*, 114 F.3d at 1520. However, later, the District Court refused to uphold the mandate regarding reservation boundaries, and the State of Utah refused to abide by the mandate in continuing to prosecute Indians on Indian lands, see *Ute VI* and *Ute VII*.

This Court's decision in *Hagan* held that the reservation was not diminished (with one inapplicable exception). Neither the Act of May 27, 1902, ch. 888, 32 Stat. 263 nor the Act of March 3, 1905, 33 Stat. L. 1070 specifically mention diminishment of the Uintah Reservation. The Tenth Circuit addressed whether congressional enactments from 1902 through 1905 had the effect of diminishing the Uintah Valley Reservation. *Ute III*, 773 F.2d at 1093. Sitting *en banc* in 1985,

"we held that the Reservation had *not* been diminished." *Ute V*, 114 F.3d 1513, 1516 (10th Cir. 1997) (emphasis added).

Further, this Court and others have interpreted statutes such as these as not diminishing the boundaries of reservations. See *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) ("The 1882 Act bore none of these hallmarks of diminishment."); *State v. Perank*, 858 P.2d 927, 949 (Utah 1992) (The Utah Supreme Court held that "[t]he law is clear that if mere legal title to opened surplus lands passed to non-Indians, such lands remained part of the reservation, and restoring the opened lands to tribal ownership would have no effect on their status as reservation lands, since by definition they never left the reservation."). This Court noted that this type of surplus land act "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit." *Id.*, citing *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 448, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). "Such schemes, the *Parker* Court held, allow "non-Indian settlers to own land on the reservation." *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962). But in doing so, they do not diminish the reservation's boundaries." *Parker*, *supra.*

## II. EXTINGUISHMENT DOES NOT EQUAL DIMINISHMENT

The Tenth Circuit in its decision for Respondents stated that "when Congress passed the 1910 statute providing that the Ute Indians would be paid a fixed sum of $1.25 per acre and that '[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished,' it 'clearly evince[d] an intent' to diminish the Uintah and Ouray Indian Reservation." *Hackford v. Utah*, 845 F.3d 1325, 1329 (10th Cir. 2017). However, extinguishment has not been held by the courts to equate to diminishment. See *Hagen v. Utah*, 510 U.S. 399, 401, 127 L. Ed. 2d 252, 114 S. Ct. 958 (1994) (holding that by diminishing a reservation and opening the diminished lands to settlement by non-Indians, Congress had *extinguished* Indian country on the *diminished* lands) (emphasis added); *Solem*, at 474 ("it is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation.").

Extinguishment affects title, where diminishment concerns tribal jurisdiction and reservation boundaries. See *Bates v. Clark*, 95 U.S. 204, 208, 24 L. Ed. 471 (1877); *Idaho v. Hodel*, 814 F.2d 1288, 1291 (9th Cir. 1987) ("Congress may diminish Indian land without extinguishing title to the land."); *Idaho v. Andrus*, 720 F.2d 1461, 1464 (9th Cir. 1983) ("The question of whether title to Indian land has been extinguished is separate from the question of disestablishment. While Congress has the authority to disestablish (diminish)

a reservation and extinguish title, it may do either without the other.") (citation omitted).

The Tenth Circuit held in *Hackford* that the 1910 Act provided that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished." Act of April 4, 1910, ch. 140, 36 Stat. 284. The Act, however, does not mention diminishment, and this Court has held that diminishment will not be found absent evidence of clear action or intent of Congress. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, at 470. This Court in *Solem* held that diminishment "will not be lightly inferred" because Congress must "clearly evince an intent to change boundaries before diminishment will be found." *Id.* Without clear congressional intent to disestablish a reservation, the reservation remains because "'[o]nce a block of land is set aside for an Indian Reservation . . . [it] retains its reservation status until Congress explicitly indicates otherwise.'" *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 991 (8th Cir. 2010) (quoting *Solem*, 465 U.S. at 470, 104 S. Ct. 1161). The Tenth Circuit has held that there is "a presumption in favor of the continued existence of a reservation." *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010).

Intent to diminish or disestablish a reservation must be "clear and plain." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977), quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). See *United States v. Dion*, 476 U.S. 734, 739 (1986). Such intent must be "expressed on the face of the Act or be clear from the

surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). This Court has advised that in examining statutory language for evidence of diminishment, "a court should focus on terms and language contained in the operative portion of the act at issue because it 'is the relevant point of reference for the diminishment inquiry.'" *Hagen*, 510 U.S. at 413.

Further, this Court has found that "there is a presumption in favor of the continued existence of a reservation." *Solem*, 465 U.S. at 472. Respondent cannot point to any evidence of clear action or intent of Congress to diminish the land in question. Separately interpreting different Acts runs against this Court's express method of assessing diminishment. Without clear intent to diminish a reservation, the land is not diminished. Petitioner was in Indian country at the time of the alleged offense.

A reservation is diminished when a contiguous piece is carved from the boundaries; however, despite the fact that non-Indians may acquire title to land in the remainder, its reservation status does not change. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 606 F.3d 895, 899 fn. 4 (8th Cir. 2010). This Court has held that once a reservation is established, it remains intact until Congress explicitly diminishes its boundaries or disestablishes it entirely. *Solem*, 465 U.S. at 470. In that same light, the *Solem* Court stated that "[b]ecause courts must construe Indian treaties sympathetically to Indian interests, an intent to alter a reservation's boundaries will not be lightly inferred."

*Id.* The Court further explained that the most probative evidence of intent is "the operative language of the act that purportedly shrinks a reservation." *Id.* The Court went on to state that a reservation can encompass land that is not owned by Indians. . . ." *Id.* at 468. Based on this Court's precedent, it should find that the land upon which Petitioner's alleged offense occurred was Indian country and a part of the Uintah Reservation.

Court precedents also look to any "unequivocal evidence" of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998).

In the pending federal consolidated court cases of the *Ute Indian Tribe v. State of Utah*, No. 2:75-cv-00408, reservation boundaries remain in dispute. Despite the fact that the Ute Tribe intervened in Petitioner's District Court case to assert that the Strawberry Reservoir area was *not* Indian country, the Ute Tribe and the BIA now take the contrary position that the Strawberry Reservoir land *is* Indian country. The District Court directed the Tribe and the Defendants to work toward an agreement on a proposed map identifying the "carve out" of non-reservation land within the Uintah Basin. The Ute Tribe presented a BIA preliminary map dated February 2016 that designated the Strawberry Reservoir as Indian country. Further, legal counsel for the Ute Tribe indicated that they were

bound by and would follow the BIA designations. Defendants Joint Status Report, *id.* Dkt. 1163. The Tribe acknowledged it was bound to follow the BIA's designation because the BIA is charged with providing land status information. *Id.* This also contradicts the BIA's prior position "that the site of Mr. Hackford's offenses 'IS NOT WITHIN THE AREA DESIGNATED AS INDIAN COUNTRY'." *Hackford* at 7 fn. 4.

Also, in the pending cases, the Tribe designated as an expert witness, Gavin Noyes with the Native Planning Institute. Mr. Noyes was hired to look at and assist in identifying tribal lands (Noyes Dep. 18:7-19, September 15, 2016), 2:75-cv-00408 Dkt. 1015-1 within the Uintah Valley Reservation.[2] Mr. Noyes stated that no source documents attributing title to the rights-of-way exist. (Noyes at 81:7-12). This is "unequivocal evidence" of the contemporaneous and subsequent understanding of the status of the reservation considered in examining the question of land status. *South Dakota v. Yankton Sioux Tribe*, *supra.*

This Court noted that "[c]ommon textual indications of Congress' intent to diminish reservation boundaries include '[e]xplicit reference to *cession* or other language evidencing the present and *total surrender* of all tribal interests or an unconditional commitment

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[2] Mr. Noyes' deposition related specifically to the city of Myton and Duchesne County, however he acknowledged, "We are carrying out work for the larger reservation area for this Court case." (Noyes at 18:15-19).

from Congress to compensate the Indian tribe for its opened land'." *Solem*, *supra*, at 470.

The 1910 Act was appropriations legislation for the transfer of title, management, and control. This language is not substantial and compelling evidence of a congressional intention to diminish Indian land and cannot alter the original language in the treaty of 1861 and subsequent congressional language in 1905, which explicitly set aside land for reservoir site and recognized the land for the benefit of the Indians.

The 1988 Strawberry Valley Land Compensation and Exchange legislation by Congress was enacted, *inter alia*, to transfer certain lands, and to compensate the Association for the loss of *certain contractual surface rights and interests*. Pub. L. No. 100-563, 102 Stat. 2826 (October 31, 1988). This again is evidence of title only and not diminished reservation status.

In *United States v. Rickert*, 188 U.S. 432 (1903), this Court held that the United States holds *legal title* to land in trust for an Indian or a tribe. In that case, the United States held legal title to certain lands in trust for a band of Sioux Indians which was in actual possession of the lands. This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes. *Id.* at 443. It was emphasized that the fee title remained in the United States in obvious execution of its protective policy toward its wards, the Sioux Indians. See *West v. Oklahoma Tax Com'n*, 334 U.S. 717, 723 (1948);

*Strawberry Water Users Ass'n v. United States*, 576 F.3d 1133, 1137 (10th Cir. 2009) (" . . . legal title to both plants has always remained in the United States. . . .").

See *Nebraska v. Parker*, 136 S. Ct. 1072, 1080 (2016) ("The mixed historical evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation."). In light of this, the land is not diminished, and the Petitioner was in Indian country at the time of the alleged offense.

"[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, at 470. The Supreme Court in *Solem* held that diminishment "will not be lightly inferred" because Congress must "clearly evince an intent to change boundaries before diminishment will be found." *Id.* Without clear congressional intent to disestablish a reservation, the reservation remains because " [o]nce a block of land is set aside for an Indian Reservation . . . [it] retains its reservation status until Congress explicitly indicates otherwise." *Solem*, at 470. There is a presumption in favor of the continued existence of a reservation. See *Solem*, at 481; *Mattz v. Arnett*, 412 U.S. 481 (1973).

Intent to diminish or disestablish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. at 738. Such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz*, 412 U.S. at 505.

The Supreme Court has clearly stated that when both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, it is "bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place" and that the old reservation boundaries survive. *Mattz*, 412 U.S. at 481. Congressional determination to terminate an Indian reservation must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.*

Likewise, this Court has decided several cases concerning the interpretation of Congressional intent as to diminishment and termination of Indian lands. "Congress's intent to terminate must be clearly expressed." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998). See *Nebraska v. Parker*, 136 S. Ct. 1072, 1075 (2016) ("Dueling remarks by legislators about the 1882 Act are far from the unequivocal evidence required in diminishment cases."); *United States v. Dion*, 476 U.S. 734 (1986) ("Congress' intention to abrogate Indian treaty rights must be clear and plain.").

This Court has held that courts may not "ignore plain language that, viewed in historical context and given a fair appraisal clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985). See *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1393 (10th Cir.

1990) (the Tenth Circuit stated that even though a portion of the Navajo Reservation was disestablished, the tribe nonetheless retained jurisdiction over allotted lands in the former reservation area that remained Indian country under 18 U.S.C. § 1151(b) and (c)).

The United States Supreme Court interpreting the 1902 and 1905 homestead surplus land acts in *Hagen* held only that specific land within the town of Myton located within the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century. The Supreme Court left undisturbed the Tenth Circuit's decision in *Ute III* – that the remaining reservation was not diminished, including the National Forest lands. The Court in *Ute V* modified its mandate in *Ute III* only to the extent it directly conflicted with *Hagen*, 510 U.S. at 399.

The Court should grant certiorari and hold for Petitioner.

## III. INDIAN COUNTRY INCLUDES RIGHTS-OF-WAY WITHIN THE BOUNDARIES OF AN INDIAN RESERVATION.

The definition of "Indian Country" contemplates land under the jurisdiction of the United States Government, notwithstanding title and includes rights-of-way within the boundaries of an Indian reservation. 18 U.S.C. § 1151(a) explicitly separates the concept of jurisdiction from the concept of ownership.

Historically, this Court, in *Clairmont v. United States*, 225 U.S. 551, 32 S. Ct. 787, 56 L. Ed. 1201 (1912), held that land "was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country. . . ." *Id.* at 558 (quoting *Bates v. Clark*, 95 U.S. 204, 208, 24 L. Ed. 471 (1877)). However, Congress "abrogated this understanding of Indian country and, with respect to reservation lands, preserves federal and tribal jurisdiction even if such lands pass out of Indian ownership." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007 (8th Cir. 2010). See *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357-58, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962) (concluding that under § 1151(a) reservation status applies even when land is purchased by a non-Indian); see also *Solem*, 465 U.S. at 468 ("Only in 1948 did Congress uncouple reservation status from Indian ownership. . . .").

Rights-of-way through an Indian reservation are Indian country even if land running through the reservation is not. "[R]ights-of-way running through [a] reservation" are themselves part of Indian country. 18 U.S.C. § 1151(a) defines Indian country as:

> all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

"Indian Country" based on Congress' interpretation of the term, includes "land under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Oklahoma Tax Com'n v. Sac and Fox*, 508 U.S. 114, 123, 113 S. Ct. 1985, 1991, 124 L. Ed. 2d 30 (1993). See *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995). In the instant case, the infraction was undoubtedly committed on National Forest land under the jurisdiction of the U.S. and on a right-of-way within Indian country.

Congress authorized grants of rights-of-way over Indian lands in 1948 legislation. Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-328; *Strate v. A-1 Contrs.*, 520 U.S. 438, 454 (1997). See *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 (1975) ("It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities."). See *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."). *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).

"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" (18 U.S.C. § 1151(a)) are designated Indian country. In *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975), the Ninth Circuit Court of Appeals, upholding the federal conviction occurring on Indian lands, found the tribal officer had jurisdiction, "As a final word on the subject of Officer Antone's authority, we note that the fact that the events of interest here may have occurred within the right-of-way for a state highway avails the defendant nothing. Rights-of-way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police." See *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973); 18 U.S.C. § 1151 (1970).

Plaintiff cannot point to any evidence of clear action or intent of Congress to diminish the rights-of-way in question.

## CONCLUSION

Statutes are to be "construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); *Winters v. United States*, 207 U.S. 564, 576-577, 52 L. Ed. 340, 28 S. Ct. 207 (1908).

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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