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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH Plaintiff, v. STATE OF UTAH, et al., Defendants.	**BRIEF ON SPLIT ESTATES** Case no. 2:75-cv-00408-RJS (Consolidated Action Civil Case Nos. 2:75-cv-00408, 2:13-cv-00276, 2:13-cv-01070, and 2:13-cv-01079) Judge Robert J. Shelby

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SOLE ISSUE PRESENTED

As used in this brief, the term "split-estate" lands refers to lands on the Uintah Valley Reservation[1] in which the surface lands were patented to non-Indians but the mineral estate is reserved to the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation (the Tribe).

The parties do not require or ask the Court to identify the "split-estate lands."[2] The Court need only issue a holding on whether split estate lands are Indian Country.

INTRODUCTION

> We're beginning to think we have an inkling of Sisyphus's fate. Courts of law exist to resolve disputes so that both sides might move on with their lives. Yet here we are, forty years in, issuing our seventh opinion in the Ute line and still addressing the same arguments we have addressed so many times before. Thirty years ago, this court decided all boundary disputes between the Ute Indian Tribe, the State of Utah, and its subdivisions. The only thing that remained was for the district court to memorialize that mandate in a permanent injunction. Twenty years ago, we modified our mandate in one respect, but stressed that in all others our decision of a decade earlier remained in place. Once more, we expected this boundary dispute to march expeditiously to its end. Yet just last year the State of Utah and several of its counties sought to relitigate those same boundaries. And now one of its cities tries to do the same thing today. Over the last forty years the questions haven't changed—and neither have our answers. We just keep rolling the rock.

Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton, et al., 835 F.3d 1255, 1257-58 (10th Cir. 2016) (Gorsuch, j.).

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[1] All of the lands on the Uncompahgre Reservation are Indian Country, and therefore the issue in this brief does not involve any of the Uncompahgre lands.

[2] There are approximately 146,000 acres of "split estate land." The parties and the United States have worked cooperatively to identify those lands, subject to a process for correction if errors or new and material land records were to be discovered.

The sole update to the above is that we are now 50 years in,[3] and that Utah and its subdivisions (hereinafter Utah) are now seeking to rehash issues again in this Court and likely an additional decision by the Tenth Circuit.

In 1975, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") initiated litigation to obtain a judicial determination of the "exterior boundaries of the Uintah and Ouray Reservation ...."

In *Ute I*, Judge Jenkins analyzed in detail the legal effect of the order restoring land to the Uintah Valley Reservation and he concluded that the United States had restored the whole of each parcel of split estate lands to the Tribe's Indian Country. He also discussed, and rejected, a theory that the Court should create a three-dimensional jurisdictional analysis for split estate lands, with the Tribe having jurisdiction of activities below ground but the state having jurisdiction of activities on the surface.

Utah appealed that decision. In that appeal, as in many appeals, one of a party's key strategic decisions is the scope of the argument it will present on appeal. Is it going to go for the big win, or a narrower partial win? If it goes for the big win, will it hedge its bets by making narrower arguments in the alternative? Utah solely went for the big win. It wanted control over all or nearly all of the 4,000,000 acres of the Tribe's Reservation, and it argued the Tribe's Reservations had been disestablished. The State was well aware that the appealed decision held

[3] The prior decisions are: *Ute Indian Tribe v. Utah* ("*Ute I*"), 521 F. Supp. 1072 (D. Utah 1981), aff'd in part, rev'd in part, *Ute Indian Tribe v. Utah* ("*Ute II*"), 716 F.2d 1298 (10th Cir. 1983); rev'd in part, aff'd in part, *Ute Indian Tribe v. State of Utah (Ute III)*, 773 F.2d 1087 (10th Cir. 1985) (en banc); *Ute Indian Tribe v. Utah* ("*Ute IV*"), 935 F. Supp. 1473 (D. Utah 1996); *Ute Indian Tribe of the Uintah & Ouray Reservation v. State of Utah* ("*Ute V*"), 114 F.3d 1513 (10th Cir. 1997); *Ute Indian Tribe v. Utah* ("*Ute VI*"), 790 F.3d 1000 (10th Cir. 2015); and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton* ("*Ute VII*"), 835 F.3d 1255 (10th Cir. 2016).

that the whole of each parcel of split estate land was Indian Country, but it chose not to present on appeal any argument in the alternative regarding those lands.

In *Ute III*, the Court of Appeals rejected Utah's all-or-nothing argument for a big win. The Tenth Circuit conclusively determined the jurisdictional boundaries of the Uintah and Ouray Reservation. Utah lost. Now Utah wants to an raise argument in the alternative to the all or nothing argument it made in *Ute III*. It strategically chose not to raise in *Ute II* or *Ute III* and that it also chose not to raise in *Ute IV*, *Ute V*, *Ute VI*, or *Ute VII*, and it strategic decision has well known consequences.

In 2013, the Ute Tribe returned to this Court, seeking emergency injunctive relief against the flagrant and persistent efforts of the State of Utah and its political subdivisions to relitigate the Tribe's reservation boundaries in a friendlier forum—the Utah state courts. In its state courts, Utah brazenly asserted that even though it had been a party to the Ute line of cases, its court should hold that it was not bound by those decisions and that its courts should hold that the Ute line of cases were wrongly decided. Utah also asserted, inter alia, that if it could come up with any argument that it had not raised in the prior decades of this case, that new argument was not covered by the existing mandates in this case.

In *Ute VI* and *Ute VII*, the Tenth Circuit emphatically disagreed with Utah's assertion that it could continue to raise arguments that Utah had not raised before. The Tenth Circuit, Judge Gorsuch writing, agreed with the Tribe that the mandate in *Ute V* covered every acre of land in the Uintah and Ouray Reservation, and that the State was precluded from bringing forward any new arguments or from returning to any older arguments that it had not raised in the prior appeals.

Despite these rulings, the State of Utah now seeks to have additional land removed from the Tribe's land base based upon an argument that it raised in *Ute I*, that this Court rejected, and that the State chose not to present on appeal. It does not get to now say, 50 years into this case, "You did not agree with our argument for 4,000,000 acres, so now let us make a different argument to chip away another 156,000 acres from the Tribe." Its attempt to re-raise this issue must be rejected as a matter of law.

DISCUSSION OF LAW

The starting point for this Court's analysis is that in *Ute III*, the Tenth Circuit issued a mandate that all of the lands within the exterior boundaries of the Uintah and Ouray Reservation are Indian Country, and therefore within the primary jurisdiction of the Tribe and the United States.

The Tenth Circuit's mandate in *Ute III* applied to split estate lands.

In *Ute V*, the Tenth Circuit modified the mandate in *Ute III*, but it clearly and unequivocally stated that for any land not within the scope of that modification, the mandate from *Ute III* applied to the lands. That is, for any land outside the scope of the modification, the land remained Indian Country. That decision was based upon the mandate rule and issue and claims preclusion, not based upon review of the merits issue in *Ute III*—i.e. the Court in *Ute V* rejected Utah's argument that the federal courts should decide de novo whether parts of the Reservation had been diminished. This Court is required to scrupulously follow the appellate court mandate. *E.g.*, *Briggs v. Pa. R. Co.*, 334 U.S. 304 (1948)); *Ute V, Ute VI, Ute VII*.

In addition to the Mandate Rule, Utah is also barred from relitigating the status of the split estate lands by issue preclusion and claims reclusion. Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49) (2001)). Issue preclusion has two purposes: "[P]rotecting litigants from the burden of relitigating an identical issue with the same party or his privy" and "promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Claims preclusion bars relitigation of a claim that has previously been adjudicated.

I. THE SPLIT-ESTATE LANDS ARE UNEQUIVOCALLY INDIAN COUNTRY UNDER THE HOLDING IN *UTE I* AND THE EN BANC MANDATE OF *UTE III*, AND THAT PRECEDENT WAS NOT MODIFIED BY *UTE V*.

A. IN *UTE I*, JUDGE JENKINS HELD THAT THE SPLIT-ESTATE LANDS ARE INDIAN COUNTRY.

In *Ute I*, this Court held that the whole of each parcel of split-estate lands are Indian Country. The District Court explained its reasons for that holding. First, the District Court noted that the Restoration Order of 1945 was issued "upon the recommendation of Commissioner of Indian Affairs John Collier," in a letter dated June 19, 1941. *Ute I*, 521 F. Supp. 1142. In footnote 193, the District Court stated:

> While Collier's letter recommends restoration of "all the undisposed-of opened lands lying within the former boundaries of the Uintah and Ouray Indian Reservation," he cites as authority Section 3 of the Indian Reorganization Act, which authorizes the Secretary to restore to tribal ownership "the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale or any other form of disposal ... See also S.Rep.No.1080, 73d Cong., 2d Sess. (1934). Later in the letter, Collier refers to the lands as the surplus opened lands of the Uintah and Ouray Indian Reservation not "ceded" "former" or some similar designation.

Ute I, 521 F. Supp. at 1142 n.193.

Parenthetically, there are two sections of the Indian Reorganization Act ("IRA") that come into play, Section 3, captioned "Restoration of Lands to Tribal Ownership" (now codified at 25 U.S.C. § 5103, and Section 7, captioned "New Indian Reservations" (now codified at 25 U.S.C. § 5110).

In *Ute I* (and then again in *Ute II* and *Ute III*), Utah went for the big win. As part of that attempt, Utah asserted that the Reservation was disestablished in 1905, and consequently, that the 1945 Restoration Order was based on Section 7 of the IRA, effectively creating a "new" reservation. The District Court rejected that argument. The Court noted that while the Restoration Order itself refers to *both* Sections 3 and 7 of the IRA, the preceding recommendation letter from Commissioner John Collier had relied exclusively on IRA Section 3. The District Court states:

> While the Order itself is somewhat ambiguous as to whether the lands restored were thought to be within the political boundaries of the reservation, related departmental documents indicate that Interior deliberately distinguished between the "opened" lands within the continuing boundaries of existing Indian reservations and "ceded" lands purchased by the United States and no longer within such boundaries; opened lands could be withdrawn from entry and restored to tribal ownership, while "ceded" lands could not. See Instructions, Restoration of Lands Formerly Indians to Tribal Ownership, 54 I.D. 559, 560 . . . (1934).

Ute I, 521 F. Supp. at 1143. The District Court then included a footnote with additional historical context, writing:

> This brings us up to the period of about 1890, at which time there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (*Ash Sheep Company v. United States*, 252 U.S. 159 (40 S.Ct. 241, 64 L.Ed. 507)). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the

> class of lands from which restorations of tribal ownership are to be made under the said Section 3, if in the public interest. It can safely be said that it would not be to the interest of the public to restore to the Indians all undisposed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation.

Ute I, 521 F. Supp. at 1143. The District Court returned to the body of the Court's *Ute I* decision and explained the Court's rationale for holding the split estate lands have been returned to Indian Country status:

> The conclusion that the lands restored to tribal ownership were within the existing boundaries of an Indian reservation is buttressed by a formal opinion by the Solicitor for the Department of the Interior construing the scope of the 1945 Secretarial Order. The Solicitor concluded that the order had restored to tribal ownership the mineral estate underlying fee-patented lands as well as the whole of the unallotted and unappropriated lands of the reservation:
>
> > The order restores "all lands which are now or may hereafter be classified as undisposed-of opened lands" of the reservation. The minerals in place are a part of the land. The fact that a lesser estate, the surface, has been carved out of the land and disposed of does not make that which is left, the mineral estate, any the less "lands." *British-American Oil Producing Co. v. Board of Equalization of Montana et al.*, 299 U.S. 159 (57 S.Ct. 132, 81 L.Ed. 95) (1936).
> >
> > One of the purposes of the order was to insure closer administrative control of the tribe's property in the interest of better conservation practices. As pointed out above, the beneficial title to the minerals has always been in the Indians. Certainly the Indians' mineral estate can be administered more effectively if the whole estate [sic] the minerals underlying the patented lands can be administered as a unit rather than by having the minerals underlying the patented lands administered under one set of laws and regulations and the minerals underlying the unpatented lands administered under another set of laws and regulations.
> >
> > The order should be construed in such a manner as will result in the accomplishment of its broad purpose. That was to restore to tribal

> ownership all lands, or interest in lands, to which the superior rights of third parties had not attached.
>
> Therefore [the District Court order states], as previously indicated, it is my opinion that the minerals underlying the patented lands within the Uintah and Ouray Indian Reservation were restored to tribal ownership by the order of August 25, 1945. [citations omitted] The Solicitor reached a similar conclusion as to certain lands within the town of Myton, Utah [citations omitted] and applied a similar analysis to mineral rights underlying certain reclamation withdrawals within the reservation boundaries. [citations omitted] While the statutory references in the 1945 Order itself may be ambiguous [citation omitted], the contemporaneous construction of the Order by the Solicitor tends strongly to support this Court's inferences and conclusions. [citation omitted]

Ute I, 521 F. Supp. at 1144. The District Court then repeated the Court's rejection of the arguments advanced by Uintah and Duchesne Counties, writing in footnote 195 that the Counties' arguments were "properly disregarded":

> The [1945 Restoration] Order refers both to section 3 of the Indian Reorganization Act, which authorizes restoration of unsold, opened lands, and section 7, which authorizes the addition of new lands to existing reservations. 25 U.S.C. §§ 463, 467. Further the Commission of Indian Affairs recommended restoration of the lands citing section 3 as authority without reference to section 7.... Counsel for the defendant counties erroneously asserts that the restoration was made under section 7 without mention of section 3. [citation omitted] Counsel's related arguments are, therefore, properly disregarded.

Id. The foregoing ruling in *Ute I* was affirmed en banc in *Ute III*.

B. THE SPLIT-ESTATE LANDS ARE INDIAN COUNTRY UNDER THE *UTE III* MANDATE.

The State appealed from Judge Jenkins decision in *Ute I*. In that appeal, the State focused solely on arguments that would disestablish or which would substantially diminish the Reservation. *See Ute II*, *passim*, *Ute III*, *passim* (discussing state argument for disestablishment and argument for removal of about 1,000,000 acres of forest lands)*; Utah v. Ute Indian Tribe,* S.Ct. case 85-1821, State petition for writ of certiorari, 1986 WL 766674 (As related to the Uintah

Valley Reservation, the State's sole argument was that the Reservation had been disestablished). The State could have argued that if it lost on those larger issues, the Court of Appeals could have provided the State with a more modest win by rejecting Judge Jenkins' analysis that split estate lands remained "Indian Country," and Judge Jenkins related holding that if the minerals were Indian Country, the whole of the parcel was Indian Country.

But the State chose not to seek any narrower wins. It did not challenge Judge Jenkins' holdings that whole of the parcel of any split estate lands were restored to Reservation status by the Restoration order. That unchallenged holding became final.

Yet now the State seeks to go back 40 years and challenged Judge Jenkins' decisions that a three-dimensional analysis cannot be applied to a parcel, and his related holding that the split estate lands were restored to Reservation status by the Restoration order. That attempted relitigation is barred by the Mandate Rule and/or by issue preclusion.

In its en banc ruling in *Ute III*, the Tenth Circuit determined that all land within the exterior boundaries of the Uintah Valley Reservation, 773 F.3d at 1088-89 and the Uncompahgre Reservation, id at 90-93 are "reservation" as defined by federal case law that Congress codified into 18 U.S.C. § 1151. Because all of the lands are Indian Country under *Ute III*, the split estate lands are Indian Country under that decision. The Tenth Circuit's decision and mandate in *Ute III* became final after the United States Supreme Court denied a petition for a writ of certiorari in the case.

Under *Ute III*, split estates are Indian Country. Under *Ute III*, the Tribe and United States have criminal and civil jurisdiction over the surface and the subsurface, subject only to the same limitations which apply on all other Indian Reservations.

C. *UTE V* DID NOT MODIFY THE *UTE III* MANDATE

Ute V lifted the *Ute III* mandate in part. But for any land and any issues for which *Ute V* did not lift the *Ute III* mandate, the *Ute III* mandate remains binding. This was one of the two most important holdings from *Ute VI*. In *Ute VI*, the parties agreed that there were many categories of land which the Tenth Circuit had not discussed in *Ute V*. For example, the Court in Ute V did not provide a separate discussion of jurisdiction over split estate lands, roadway rights of way, mixed blood lands that had been acquired by the State, cancelled allotment lands, etc.

In *Ute VI* and *Ute VII*, the State and its subdivisions argued that in those instances in which *Ute V* had not discussed a specific category of land, the Tenth Circuit should hold the status of those lands was not determined by *Ute V*, and the status of those lands therefore remained to be determined in subsequent proceedings.

The State also argued that if the District Court or Tenth Circuit had issued a decision on a category of land prior to *Ute V*, but *Ute V* did not discuss that category of land, the status of those lands was undetermined by *Ute V*. Split estate lands fall within this argument.

Most significantly, after the Tribe reopened this matter in 2013, Utah asserted that it had come up with some new arguments for diminishment which its attorneys had failed to raise in the prior rounds of this case. Utah asserted that some of its new arguments were based upon alleged changes in substantive law which occurred after *Ute V*. The State and counties also asserted new arguments based upon factual distinctions that their prior attorneys had not raised. For example and of the greatest practical significance in *Ute V*, the State asserted a new argument that the State had criminal jurisdiction over tribal members on public roadways on the Reservation. *Ute VI* at 1006. It could have raised this (borderline frivolous) argument in the alternative in *Ute III* (and

perhaps also in *Ute V)*, but it chose not to do so at that time. In summary, the State and counties made all of the arguments that could be made in support of their position that *Ute III* and *Ute V* did not provide the controlling mandate.[4]

The Tenth Circuit emphatically rejected all of the State's arguments for seeking to relitigate issues that had been decided in the *Ute* line of cases.

> A system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out. Even—or perhaps especially—when those intransigent litigants turn out to be public officials, for surely those charged with enforcing the law should know this much already. Though we are mindful of the importance of comity and cooperative federalism and keenly sensitive to our duty to provide appropriate respect for and deference to state proceedings, we are equally aware of our obligation to defend the law's promise of finality. And the case for finality here is overwhelming. The defendants may fervently believe that *Ute V* drew the wrong boundaries, but that case was resolved nearly twenty years ago, the Supreme Court declined to disturb its judgment, and the time has long since come for the parties to accept it.

Ute VI at 1012.

It did not matter if the State had raised the arguments before, or could have raise the arguments before, or if it claimed there had been changes in the substantive law. The State had already had a full and fair opportunity to raise any of its narrower alternative arguments, the Tenth Circuit had issued its mandate, that mandate became final, and the State is bound by that mandate. In strong language, the Tenth Circuit told the State that enough is enough, that the State needs to stop its perpetual attempts to relitigate.

Yet, here we are again.

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[4] The State and counties argued, in the alternative, that if the Court in *Ute VI* agreed with the Tribe's argument that *Ute III* and *Ute V* collectively contain mandates for all land on the Reservation, the Court should modify the *Ute III/Ute V* mandate. The *Ute VI* Court rejected that argument by the State and counties.

II. APPLICABLE TENTH CIRCUIT PRECEDENT IS CONTROLLING

Even if the specific history of the Ute line of cases does not bar the State from relitigating under the mandate rule, issue preclusion or claims preclusion, this Court would be required to hold that the lands at issue are Indian Country under more general Tenth Circuit precedents defining Indian Country. Under Tenth Circuit case law, split estates are Indian Country if they meet the following two element test: 1) was the land set aside for a tribe, and 2) the land is under federal supervision. *HRI, Inc. v EPA*, 198 F.3d 1224 (10th Cir. 2000).

A. BACKGROUND ON THE LEGAL DEFINITION OF "INDIAN COUNTRY."

Before turning to detailed discussion of *HRI*, an understanding of the general definition of "Indian Country" and tribal jurisdiction is required. In 1948, Congress codified prior Supreme Court decisions into the standard definition of "Indian Country.[5] There are three categories of land that are "Indian Country:" 1) Reservation lands, notwithstanding whether non-Indians own any interest in the a parcel of land; 2) Dependent Indian Communities, and 3) lands owned by the United States in trust or restricted fee for the Tribe or tribal members In *Ute III*, the Tenth Circuit issued a straightforward application of the definition of "Reservation." All of the land within the exterior of the Uintah Valley Reservation and all of the lands within the exterior boundaries of the Uncompahgre Reservation remained Reservation lands.[6] This is the exact same rule that applies

[5] Section 1151 defines "Indian Country" for both criminal and civil matters. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987)("*"Indian country,' as defined at 18 U.S.C. § 1151 ... applies to questions of both criminal and civil jurisdiction."); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) ("While section 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.")

[6] The Tribe adds the caveat regarding the Gilsonite strip, which had been within the original exterior boundaries but which the courts have held was severed from the Reservation.

on nearly all of the Reservations in the United States. During the "Allotment era (1887-1934), non-Indians were permitted to acquire land within many reservations, but any land acquired by non-Indians remains part of the Reservation, and therefore subject to tribal regulation. Those non-Indians who chose to obtain land on a Reservation know or should know they were subject to tribal regulation.

If not for Utah's improper state court relitigation of issues it lost in *Ute III*, the jurisdictional boundaries on the Uintah Valley Reservation would be the same as they are on the Uncompahgre Reservation and on nearly all other Reservations. Determining jurisdiction would still be difficult (see below), but far, easier than it is now.

In *Ute V*, the Tenth Circuit synthesized its mandate from *Ute III* with the Supreme Court's decision in *Hagen*. The State sought a writ of certiorari on *Ute V*'s synthesis, but its petition was denied and *Ute V* became final. Hagen is therefore not relevant to this matter. Instead, this Court is bound by the Tenth Circuit's mandate in *Ute III*, as modified by *Ute V*.

The end result from this history is that the Uintah Valley portion of the Ute Reservation is already the most jurisdictionally complex Reservation in the United States.[7] *E.g.*, Dkt 103 ("Jenkins Map").

[7] The only other Reservation with an analogous, though more broadly grained, patchwork is the Yankton Sioux Reservation. That patchwork is also the result of a unique and complex litigation history. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998) (finding that land ceded to the United States at the end of the nineteenth century had diminished the Reservation); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999) (ruling that the Reservation had not been disestablished).

Determining which government or governments have jurisdiction is difficult, and because in general parties cannot consent to subject matter jurisdiction, the first several years of many matters are spent trying to figure out which regulator, adjudicator, or governing body has authority. Jurisdiction over criminal matters are comparatively easy to civil matters, but even in criminal matters it is difficult. One must locate the exact spot on which a crime occurred, then consult a map of the checkerboarded boundaries to determine if the crime occurred in Indian Country or outside. One must then know whether there is a victim, and if so, if the victim is an "Indian" as that term is defined in federal common law, [8] and one must know if the suspect is an Indian. At that point (and assuming the preliminary information acquired later proves to be accurate), police can determine who has authority to arrest, to transport, or to investigate. General Crimes Act, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153. Ex. 1 (available at https://www.justice.gov/d9/pages/attachments/2020/08/10/indian_country_criminal_jurisdictional_chart_-_october_2022_version.pdf (United States Department of Justice matrix summarizing the complex rules for determining criminal jurisdiction in Indian Country).

The parties to this case now generally do a good job of resolving which government should prosecute, but as the Tribe's recent motion for habeas corpus relief shows, even small changes in the location of the crime can move it from a parcel that is "Indian Country" to a parcel that is not.

Civil jurisdiction is yet more complicated, as one must also apply the "*Montana* test." *Montana v. United States*, 450 U.S. 544 (1981). Under the *Montana* test, a tribe has civil jurisdiction over a party who has entered into a consensual relationship with the Tribe or its

[8] There is no federal statutory definition of "Indian" for criminal or civil jurisdiction. The federal common law definition is not a bright line rule.

members. *Montana*, 450 U.S. at 565-66. A tribe also has jurisdiction over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. All of the factors governing criminal jurisdiction—political status of the parties as Indians or non-Indians, whether the land is Indian Country, etc. have to be considered to determine civil jurisdiction. But in addition, one must look at who owns the land and the nexus between the dispute and the tribe or tribal members, including the details of the matter at issue and whether there are any are any permits, licenses, contracts, family relationships contractual or family relationships between the Tribe/tribal members and those over whom tribal regulatory or adjudicatory is sought and other factors.

To this already complicated jurisdictional morass, the State now wants to add a three dimensional element: the Tribe can regulate activities which have a sufficient nexus to the dominant mineral estate, but the Tribe cannot regulate activities on the surface that lack that nexus.

No authority supports that attempt to add a three dimensional analysis, and in fact Judge Jenkins rejected it in *Ute I* in part because it would make an already nearly unworkable jurisdictional scheme yet more unworkable.

As discussed above, Judge Jenkins decision on split estate lands is now final and binding. But even it that decision were not final and binding, the State's proposed three dimensional analysis is unsupported by any case law and has also already been rejected by the Tenth Circuit for the same reason Judge Jenkins rejected the argument.

In *HRI*, the United States owned the surface of the relevant land[9] for the Navajo Tribe, and the subsurface estate was owned by a non-Indian. The United States EPA asserted jurisdiction over the land. Under the federal regulations at issue in *HRI*, EPA only asserted jurisdiction if the land was Indian Country as defined in 18 U.S.C. § 1151. The federal courts had previously concluded that the land at issue was not Reservation under 18 U.S.C. § 1151(a). Therefore, to determine whether the land was Indian Country, the Tenth Circuit had to determine whether the land was held in trust for the Tribe, 18 U.S.C. § 1151(c).

In *HRI*, the Tenth Circuit analyzed how to determine (separate from the unique Ute line of cases) whether split estate land is Indian Country. It held that the rule of law for split estates is the *same two element test which applies to estates that are not split*. It based its decision on *United States v. McGowan*, 302 U.S. 535 (1938), *United States v. Pelican*, 232 U.S. 442 (1914) and *United States v. Sandoval*, 231 U.S. 28 (1913), which were the holdings that Congress later codified into 18 U.S.C. § 1151.

Under the two-element test from *HRI*, the split estate lands on the Ute Reservation are plainly Indian Country. The Ute lands were set aside for the Ute Tribe: they were part of the Uintah Valley Reservation created by President Lincoln and subsequently ratified by Congress. 13 Stat. 63. This is *undisputed*. The remaining question is whether the land is under "federal supervision" as that term is defined in *HRI* and in the case law which was codified into 18 U.S.C.

[9] There were two areas of land at issue in *HRI*. For current purposes, the relevant parcel was the parcel for which the United States owned the surface in trust. There was another parcel that was arguably a "dependent Indian community," which would have been Reservation under 18 U.S.C. § 1151(b). That part of the *HRI* case, which then was litigated for another decade, is, fortunately, immaterial to the issue in this memo. As related to the split estate land the Tenth Circuit's 2000 decision became final, and it remains good law.

§ 1151. Judge Jenkins held they were, and that decision is final under the mandate rule and under issue preclusion.

In *HRI*, the Tenth Circuit held that land is under "federal supervision" if the United States exercises "active control" over the land. *Id.* at 1253. The Court contrasted "active control" from the minimal federal activities at issue in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1988). Active control establishes the element of federal supervision. Based upon the facts that the United States discussed in its brief in *HRI*, the Tenth Circuit ruled that federal regulation of drilling on tribal land and the federal requirement that operators obtain a federal permit established federal supervision over the land. Those same federal controls apply to the spilt estates at issue on the Uintah and Ouray Reservation. In fact, where (as here) the United States owns the minerals in trust, it exercises even more control than where (as in *HRI*) the United States only owned the subservient surface estate. *See, e.g., HRI*, 198 F.3d at 1254 (in holding that there is "federal supervision" over lands in which a tribe owns either the surface or subsurface estate, the Court cited a federal regulation in which EPA stated that tribal ownership of either estate met the requirement of federal supervision).

In *HRI*, the Court also held that the burden is on the party who was asserting that the split estate was not Indian Country, and it concludes that where the land is under federal supervision the party asserting that the land is not Indian Country cannot meet its burden of proof. HRI, 198 F.3d at 1253-54.

The Tenth Circuit's decision in a latter round of *HRI* further demonstrates this law. *Hydro Resources, Inc. v. U.S. EPA*, 6089 F.3d 1131, 1162 (10th Cir., *en banc*, 2010). In that later round, the tribe and United States asserted that a different parcel of land was Indian Country under 18

U.S.C. § 1151(b) (dependent Indian community), and the tribe and the United States argued for a three dimensional analysis of whether the land is Indian Country--that the land could be Indian Country for some purposes, but not for others. Writing for the Court, then Circuit Judge Gorsuch rejected that argument. Judge Gorsuch wrote that the argument "invites not just a checkerboard, but a virtually three-dimensional checkerboard, a sort of ever-shifting jurisdictional Rubik's cube, jettisoning relative predictability for the open-ended rough-and-tumble of factors" that assures "complex argument[s] in [the] trial court and virtually inevitable appeals." *Id.* at 1163 (internal quotation omitted).

If the holdings in the *Ute* line of cases were not binding and dispositive, *HRI* would provide the legal framework. We only have to ask whether the land had been set aside for the Tribe and whether there is sufficient federal responsibility for the land such that the land is under "active control" by the United States. We do not have to consider whether the specific activity at issue has a nexus sufficient to qualify the land as "Indian Country" for that purpose. Applying that standard from *HRI* here, the standard that the United States advocated for, the split estates are Indian Country.

B. THERE IS NO BASIS FOR THIS COURT TO REJECT JUDGE JENKINS DECISION THAT THE SPLIT-ESTATE MINERAL LANDS ARE INDIAN COUNTRY.

The law applicable to the Ute Reservation is unique and controlling. Therefore, in deciding the issue presented here, the Court should clearly and expressly limit its decision to the unique law and history of the split estates at issue on the Uintah Valley Reservation. As discussed above, the *Ute* line of cases have already resolved all of the issues, and all that remains to be done is to issue a final order. Here, we have a Tenth Circuit holding and mandate that the land is Indian County,

and further holdings that the land can only be removed from that mandate if it meets the specific test stated in *Ute V*. This Court's holding would be limited to this sui generis history.

C. ALL SPLIT ESTATE LANDS ON ALL RESERVATIONS ARE INDIAN COUNTRY.

Although the status of split estate lands on the Uintah Valley portion of the Tribe's Reservation can be determined on the narrow grounds unique to those lands, if the Court were to hold otherwise, the Court would have to resolve the Tribe's alternative, and broader argument. The law supporting that broader argument shows that all split estate lands on the Uintah Valley portion of the Reservation, and lands for which the United States owns the subsurface in trust for all other tribes nationwide are "Indian Country" under the two element test in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1988) and the Tenth Circuit's decision in *HRI*, 198 F.3d 122. Under this broader argument, split estate lands nationwide are Indian country because: 1) the land was set aside for a tribe, and 2) the land is under federal supervision. *HRI, Inc. v EPA*, 198 F.3d 1224 (10th Cir. 2000).

There is, in fact, no good faith argument that split estate lands are not under federal supervision. The United States heavily regulates mineral production from mineral estates that it owns in trust for tribes. *E.g.*, Indian Leasing Act of 1891, ch. 38326 Stat. 794 (Feb. 28, 1891); Indian Mineral Leasing Act of 1938, 52 stat. 347; Indian Mineral Development Act of 1982, 96 Stat. 1938. These and other federal statutes providing for federal supervision of tribal mineral lands are codified at 25 U.S.C. § 25 use 396-401. *See also* 25 C.F.R. § Parts 200-227 (providing regulations for leasing of tribal minerals, including oil, gas, and hard minerals); *Wyoming v. Zinke*, D. Wyo. Case 15-CV-41/43 (United States asserts regulatory authority over all aspects of mineral

production on trust land on the Ute Reservation, and asserts that it does not even have to defer to tribal regulations governing mineral production of tribal trust minerals).

CONCLUSION

The *Ute* line of cases holds that the land at issue is Indian Country. This Court should issue a decision unique to the *Ute* line of cases. But if the Court does not decide in favor of the Tribe based upon the *Ute* line of cases, the same result applies under the Tenth Circuit's two-part test. The admitted fact that he subsurface is under federal superintendence means that he whole of the parcel is under federal supervision, and is therefore Indian Country.

DATED this 14th day of November 2025.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November 2025, a copy of the foregoing Brief on Split Estates was filed electronically. Notice of this filing will be sent to the parties of record through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen, *Pro Hac Vice*