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March 16, 2017

VIA U.S. Mail

Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

RE: Supreme Court Nomination of Judge Neil Gorsuch

Dear Judiciary Committee:

I am writing this letter to share my perspective of Judge Neil Gorsuch, based upon our firm's experience before him and my own long-term experience in Indian law. I have been an attorney practicing in Indian law since 1972, including positions as the Director of the Native American Rights Fund, the Associate Solicitor overseeing Indian Affairs in the Department of the Interior during President Carter's administration, and many years in private practice representing tribes and Indians.

My Firm has appeared in front of Judge Gorsuch in four appeals over the past two years. Two of those were in the long running *Ute v. Utah* case, and in both of those appeals Judge Gorsuch authored very strong decisions in favor of the Tribe, *Ute Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015), (*Ute VI), Ute Tribe v. Myton*, 835 F.3d 1255 (10th Cir. 2016). Our two other cases before him were just argued in January of this year, and we do not yet have a decision in either of those cases.

Given the list of people President Trump considered nominating, we were very pleased that Judge Gorsuch was the nominee for this important opening on the Supreme Court, and there are two primary points that I want to emphasize regarding his nomination.

First, our view, both from the cases we have had in front of Judge Gorsuch and from our background research on his prior decisions, was that Judge Gorsuch approached cases from a conservative judicial philosophy. While that is not ideal for tribes, it is much less concerning than if he approached cases from a conservative political agenda, which is the perspective of many of the others that President Trump was reportedly considering. In fact, and unfortunately for tribes, the justices who claim to be originalists do not abide by that philosophy when it comes to Indian tribes, and if they did, the Court's 30 year-long assault on tribal sovereign powers would cease.

Our other observation is that, unlike most justices for the past century, Judge Gorsuch has knowledge gained from living in and working in a circuit which has Indian Country and strong tribal governments. At the oral argument in *Ute VI* and in his subsequent opinion, we saw Judge Gorsuch use that knowledge of Indian Country. For example, when attorneys for the State of Utah were arguing that tribal authority got in the way of what the State wanted to do, Judge Gorsuch interrupted to note that the alleged harm was inherent in federal supremacy and tribal sovereignty; and when a Utah County attorney was asserting that tribal control over roadways was wrong, Judge Gorsuch cut the argument off, stating, "Yeah. It's the same thing if they [meaning the State of Colorado] close the road in Colorado. Utah has got no relief. It's another sovereign's property."

It is ironic that just at the time that tribal self-determination has strengthened tribal governments and led to increased respect from the two political branches of the United States' Government, the Supreme Court has gone the opposite direction, consistently making up new legal rules which take sovereign powers from tribes. And one of the things that stands out in the Supreme Court's decisions eroding tribal authority is its lack of understanding of the role that tribal governments play and the Justices' unfounded fear of tribes exercising sovereign powers over their lands, sovereign powers which they plainly had in 1789. At least with Judge Gorsuch, I believe that tribes will receive fair consideration and respect.

For all of the above reasons, I support and encourage the confirmation of Judge Gorsuch as the next member of the Supreme Court of the United States.

Sincerely,

Thomas W. Fredericks
Senior Partner

Enclosures

ATTACHMENT 1

790 F.3d 1000
United States Court of Appeals,
Tenth Circuit.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, Plaintiff–Counterclaim Defendant–Appellant/Cross–Appellee,
v.
State of UTAH; Duchesne County, a political subdivision of the State of Utah, Defendants–Counterclaimants–Appellees in No. 14–4028 and Defendants–Counterclaimants in No. 14–4031,
Uintah County, a political subdivision of the State of Utah,
Defendant–Counterclaimant–Third–Party Plaintiff–Appellee/Cross–Appellant,
Roosevelt City, a municipal corporation; Duchesne City, a municipal corporation; Myton, a municipal corporation, Defendants,
Bruce Ignacio, Chairman of the Ute Tribal Business Committee, in his official capacity, Defendant–Third–Party Defendant,
and
Business Committee for the Ute Tribe of the Uintah and Ouray Reservation; Gordon Howell, Chairman of the Business Committee; Ronald J. Wopsock, Vice Chairman of the Ute Tribal Business Committee, in his official capacity; Stewart Pike, member of the Ute Tribal Business Committee, in his official capacity; Tony Small, member of the Ute Tribal Business Committee, in his official capacity; Philip Chimburas, member of the Ute Tribal Business Committee, in his official capacity; Paul Tsosie, Chief Judge of the Ute Tribal Court, in his official capacity; William Reynolds, Judge of the Ute Tribal Court, in his official capacity, Third–Party Defendants.
Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, a federally recognized Indian Tribe, Plaintiff–Appellant,
v.
State of Utah; Wasatch County, a political subdivision of the State of Utah; Gary Herbert, in his capacity as Governor of Utah; Sean D. Reyes, in his capacity Attorney General of Utah; Scott Sweat, in his capacity as County Attorney for Wasatch County, Utah; Tyler J. Berg, in his capacity Assistant County Attorney for Wasatch County, Utah, Defendants–Appellees.
Uintah County, Amicus Curiae.

Nos. 14–4028, 14–4031, 14–4034.
|
June 16, 2015.

Synopsis

Background: Indian tribe brought action alleging that state and local governments were unlawfully trying to displace tribal authority on tribal lands. State and counties filed counterclaims alleging that tribe infringed their sovereignty. The United States District Court for the District of Utah denied tribe's motion for preliminary injunction to halt tribal member's prosecution for alleged traffic offenses on tribal land, tribe's claim of immunity from counterclaims, and county's claim of immunity from tribe's suit.

Holdings: The Court of Appeals, Gorsuch, Circuit Judge, held that:

[1] county's prosecution of tribal member constituted irreparable injury to tribal sovereignty;

[2] Anti–Injunction Act did not bar federal court from issuing preliminary injunction;

[3] *Younger* abstention was not warranted;

[4] mutual assistance agreement between state and tribe did not waive tribe's sovereign immunity from suit in state court;

[5] doctrine of equitable recoupment did not apply to permit state and county to assert counterclaims; and

[6] county attorneys were not entitled to sovereign immunity.

Affirmed in part, reversed in part, and remanded.

West Headnotes (14)

[1] **Injunction**

Indians and tribal matters

Invasion of tribal sovereignty can constitute irreparable injury warranting injunctive relief.

5 Cases that cite this headnote

[2] **Injunction**
Indians and tribal matters

County's prosecution of tribal member in state court for alleged traffic offenses on tribal land constituted irreparable injury to tribal sovereignty, thus warranting preliminary injunction barring prosecution, in light of state's failure to provide viable legal argument for its actions, and paramount federal policy of ensuring that Indians did not suffer interference with their efforts to develop strong self-government.

2 Cases that cite this headnote

[3] **Indians**
State court or authorities

State and its subdivisions generally lack authority to prosecute Indians for criminal offenses arising in Indian country.

Cases that cite this headnote

[4] **Indians**
State regulation
Indians
Jurisdiction and Power to Enforce Criminal Laws

States may exercise civil jurisdiction over non-Indians for activities on rights-of-way crossing Indian country, and may, in certain circumstances, enter Indian lands to investigate off-reservation crimes. 18 U.S.C.A. § 1151.

Cases that cite this headnote

[5] **Courts**
Injunction by United States Court Against Proceedings in State Court

Anti–Injunction Act's relitigation exception allows federal court to prevent state litigation of issue that previously was presented to and decided by federal court. 28 U.S.C.A. § 2283.

Cases that cite this headnote

[6] **Courts**
Criminal proceedings

Anti–Injunction Act did not bar federal court from issuing preliminary injunction barring county from prosecuting tribal member in state court for alleged traffic offenses on tribal land, where federal court had previously ruled that lands in question were Indian country. 28 U.S.C.A. § 2283.

3 Cases that cite this headnote

[7] **Federal Courts**
Younger abstention

For *Younger* abstention to apply, there must be ongoing state judicial proceeding, presence of important state interest, and adequate opportunity to raise federal claims in state proceedings.

Cases that cite this headnote

[8] **Federal Courts**
Injunctions

State and county lacked legitimate interest in relitigating boundary decisions by prosecuting Indians for crimes in Indian country, and thus *Younger* abstention was not warranted in tribe's action to enjoin county's prosecution of tribal member in state court for alleged traffic offenses on tribal land.

2 Cases that cite this headnote

[9] **Indians**
Sovereign Immunity

Indian tribe is subject to suit only where Congress has authorized suit or tribe has waived its immunity.

1 Cases that cite this headnote

[10] **Indians**
Sovereign Immunity

Doctrine of tribal sovereign immunity extends to counterclaims lodged against plaintiff tribe, even compulsory counterclaims.

2 Cases that cite this headnote

[11] **Indians**
Sovereign Immunity

Indiana tribe's waiver of immunity must be expressed clearly and unequivocally.

3 Cases that cite this headnote

[12] **Indians**
Sovereign Immunity

Mutual assistance agreement between state and Indian tribe did not waive tribe's sovereign immunity from suit, even though agreement provided that parties agreed to submit any disputes arising from agreement to federal district court, where agreement also stated that agreement did not waive any claims of sovereignty.

1 Cases that cite this headnote

[13] **Indians**
Sovereign Immunity

Doctrine of equitable recoupment did not apply to permit state and county to assert counterclaims for injunction and declaratory relief in Indian tribe's action to enjoin county from prosecuting tribal member in state court for alleged traffic offenses on tribal land, where county and state did not seek money damages, or assert equitable recoupment as defense.

Cases that cite this headnote

[14] **District and Prosecuting Attorneys**
Liabilities for official acts, negligence, or misconduct

Under Utah law, county attorneys were not arms of state, and thus were not entitled to sovereign immunity in Indian tribe's action to enjoin county from prosecuting tribal member in state court for alleged traffic offenses on tribal land; county attorneys were elected by county residents alone, and were paid not from state's coffers but out of county's general fund in amounts fixed by county legislative bodies. West's U.C.A. § 17–53–101.

1 Cases that cite this headnote

Attorneys and Law Firms

***1002** Frances C. Bassett and Jeffrey S. Rasmussen (Sandra L. Denton, Thomas W. Fredericks, Todd K. Gravelle, Matthew J. Kelly, and Jeremy J. Patterson with them on the briefs) of Fredericks Peebles & Morgan LLP, Louisville, CO, for the Ute Indian Tribe of the Uintah and Ouray Reservation.

Parker Douglas, Utah Federal Solicitor (Randy S. Hunter and Katharine H. Kinsman, Assistant Utah Attorneys General, and Bridget Romano, Utah Solicitor General, with him on the briefs), Salt Lake City, UT, for the State of Utah, Gary Herbert, and Sean D. Reyes.

Jesse C. Trentadue (Britton R. Butterfield, Carl F. Huefner, and Noah M. Hoagland, with him on the briefs) of Suitter Axland, PLLC, Salt Lake City, UT, for ***1003** Duchesne County, Wasatch County, Scott Sweat, and Tyler J. Berg.

E. Blaine Rawson of Ray Quinney & Nebeker P.C., Salt Lake City, UT (Greggory J. Savage, Matthew M. Cannon, and Calvin R. Winder of Ray Quinney & Nebeker, Salt Lake City, UT, and G. Mark Thomas, Uintah County Attorney, and Jonathan A. Stearmer, Chief Deputy Uintah County Attorney–Civil, Vernal, UT, with him on the briefs), for Uintah County.

Before HARTZ, GORSUCH, and MORITZ, Circuit Judges.

Opinion

GORSUCH, Circuit Judge.

In our layered system of trial and appellate courts everyone's assured at least two chances to air a grievance. Add to this the possibility that a lawsuit might bounce back to the trial court on remand or even rebound its way to appeal yet again—or the possibility that an issue might win interlocutory review—and the opportunities to press a complaint grow abundantly. No doubt our complex and consuming litigation wringer has assumed the shape it has so courts might squeeze as much truth as possible out of the parties' competing narratives. But sooner or later every case must come to an end. After all, that's why people bring their disputes to court in the first place: because the legal system promises to resolve their differences without resort to violence and supply "peace and repose" at the end of it all. *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 42 L.Ed. 355 (1897). For a legal system to meet this promise, of course, both sides must accept—or, if need be, they must be made to respect—the judgments it generates. Most people know and readily assent to all this. So it's pretty surprising when a State and several of its counties need a reminder. But that's what this appeal is all about.

*

Nearly forty years ago the Ute Tribe filed a lawsuit alleging that Utah and several local governments were unlawfully trying to displace tribal authority on tribal lands. After a decade of wrangling in the district court and on appeal, this court agreed to hear the case en banc. In the decision that followed, what the parties refer to as *Ute III*, the court ruled for the Tribe and rejected Utah's claim that congressional action had diminished three constituent parts of Ute tribal lands—the Uncompahgre Reservation, the Uintah Valley Reservation, and certain national forest areas. *See Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir.1985) (en banc). When the Supreme Court then denied certiorari, that "should have been the end of the matter." United States' Mem. in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief 3, Supplemental App. 8 (Nov. 23, 1992).

It wasn't. Instead, state officials chose "to disregard the binding effect of the Tenth Circuit decision in order to attempt to relitigate the boundary dispute in a friendlier forum." *Id.* As a vehicle for their effort, they decided to prosecute tribal members in state court for conduct occurring within the tribal boundaries recognized by *Ute III*. This, of course, the State had no business doing. *Ute III* held the land in question to be "Indian country." *See* 773 F.2d at 1093; 18 U.S.C. § 1151 (defining "Indian country"). And within Indian country, generally only the federal government or an Indian tribe may prosecute Indians for criminal offenses. *See DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 & n. 2, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Solem v. Bartlett*, 465 U.S. 463, 465 n. 2, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). True, states sometimes may prosecute "crimes by non-Indians against non-Indians and victimless crimes by non-Indians." ***1004** *Bartlett*, 465 U.S. at 465 n. 2, 104 S.Ct. 1161 (citation omitted). But unless Congress provides an exception to the rule—and it hasn't here—states possess "no authority" to prosecute Indians for offenses in Indian country. *Cheyenne–Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 668 (10th Cir.1980); 18 U.S.C. § 1162 (allowing certain states but not Utah to exercise jurisdiction over crimes committed by Indians in Indian country).

Disregarding all of this, state officials proceeded with their prosecutions anyway and soon one wended its way to the Utah Supreme Court. Declining to acknowledge or

abide "traditional ... principles of comity, ... *res judicata* and collateral estoppel," the State argued that the very same congressional actions *Ute III* said did *not* diminish tribal territory *did* diminish at least a part of the Uintah Valley Reservation. United States' Mem., *supra*, at 4, Supplemental App. 9. And with this much at least the Utah Supreme Court eventually agreed. *See* *State v. Perank*, 858 P.2d 927 (Utah 1992); *State v. Hagen*, 858 P.2d 925 (Utah 1992). Then the United States Supreme Court—despite having denied review in *Ute III* and despite the fact the mandate in that case had long since issued—granted certiorari and agreed too. *See* *Hagen v. Utah*, 510 U.S. 399, 421–22, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994).

This strange turn of events raised the question: what to do with the mandate of *Ute III?* Keeping it in place could leave the United States Supreme Court's decision in *Hagen* to control only cases arising from Utah state courts and not federal district courts, a pretty unsavory possibility by anyone's reckoning. So in a decision the parties call *Ute V*, this court elected to recall and modify *Ute III's* mandate. *See* *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1527–28 (10th Cir.1997). Because *Hagen* addressed the Uintah Valley Reservation, *Ute V* deemed that particular portion of Ute tribal lands diminished—and diminished according to the terms *Hagen* dictated. So much relief was warranted, this court found, to "reconcile two inconsistent boundary determinations and to provide a uniform allocation of jurisdiction among separate sovereigns." *Id.* at 1523.

Naturally, the State wanted more. It asked this court to extend *Hagen's* reasoning to the national forest and Uncompahgre lands and hold them diminished too. But *Ute V* rejected this request. Upsetting a final decision by recalling and modifying a mandate is and ought to be a rare and disfavored thing in a legal system that values finality. *Id.* at 1527. Though such extraordinary relief might have been warranted to give meaning to *Hagen's* holding, *Ute V* explained, it wasn't warranted to *extend Hagen's* reasoning to new terrain—even if doing so might happen to achieve a "more accurate" overall result. *Id.* at 1523. After all, by this point the parties' litigation was so old it had come of age and *Ute III* itself had been settled for years. "If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed." *Id.* (quoting 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4426, at 265 (1981)). Following this court's decision in *Ute V*, the Supreme Court again denied certiorari and, really, that should have been the end of it.

But as you might have guessed by now, the State and its counties are back at it. Just as they did in the 1990s, they are again prosecuting tribal members in state court for offenses occurring on tribal lands—indeed, on the very lands *Ute V* said remain Indian country even after *Hagen*. Seeking to avoid a replay of the "jurisdictional chaos" the State invited the ***1005** last time around, United States' Mem., *supra*, at 4, Supplemental App. 9, this time the Tribe filed suit in federal court. As clarified at oral argument, the Tribe seeks from this suit a permanent injunction prohibiting the State and its counties from pursuing criminal prosecutions of Indians in state court for offenses arising in areas declared by *Ute III* and *V* to be Indian country—and prohibiting the State and its subdivisions from otherwise relitigating matters settled by those decisions. Toward these ends and as an initial matter, the Tribe asked the district court for a preliminary injunction against the State, Wasatch County, and various officials to halt the prosecution of a tribal member, Lesa Jenkins, in Wasatch County Justice Court for alleged traffic offenses in the national forest area that *Ute III* and *V* recognized as Indian country. A sort of test case, if you will. In return, the State and Uintah and Duchesne Counties fired off counterclaims of their own alleging that the Tribe has somehow improperly infringed on *their* sovereignty.

Before us now are three interlocutory but immediately appealable collateral orders this latest litigation has spawned. The first addresses the Tribe's request for a preliminary injunction. The latter two address claims of immunity: the Tribe's claim of immunity from the counterclaims and Uintah County's claim of immunity from the Tribe's suit. In all three decisions the district court denied the requested relief. But, as it turns out, the Tribe's arguments on all three points are well taken: the district court should have issued a preliminary injunction and must do so now; the Tribe is shielded by sovereign immunity; and Uintah County is not.

*

We begin with the Tribe's motion for a preliminary injunction barring the State and Wasatch County from prosecuting Ms. Jenkins in state court. In one sentence and without elaboration, the district court held that the Tribe failed to demonstrate that it would suffer an irreparable harm without an injunction and denied relief on that basis alone.

[1] [2] We cannot agree. The Tenth Circuit has "repeatedly stated that ... an invasion of tribal sovereignty can

constitute irreparable injury." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir.2006). In *Wyandotte Nation* itself, this court upheld a preliminary injunction preventing Kansas from enforcing state gaming laws on a tract of tribal land because of the resulting infringement on tribal sovereignty. *Id.* at 1254–57; *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250–51 (10th Cir.2001). And we can divine no reason or authority that might justify a different result here, where the invasion of tribal sovereignty is so much greater.

Indeed, the 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. The State supplies just two conclusory paragraphs in defense of the district court's conclusory irreparable injury conclusion. And when it comes to the Tribe's charge that the State is reviving its efforts to undo tribal boundaries, the State simply brushes off the worry as "speculative." But there's nothing speculative about Utah's past disregard of this court's decisions and nothing speculative about the fact Ms. Jenkins's prosecution amounts to the same thing now. For its part, Wasatch County exhibits even less subtlety about its intentions, ***1006** going so far as to argue that the Tribe may not exercise authority over any lands in Utah because (in part) the State was once "a separate, independent nation, the State of Deseret" with "its own *Constitution* " that didn't recognize Indian lands or tribal authority. Wasatch Appellees' Br. 1011. Never mind *Ute III* and *V*. And never mind the United States Constitution and the authority *that* document provides the federal government to regulate Indian affairs. 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 sufficient to constitute "irreparable injury." *Prairie Band*, 253 F.3d at 1250–51 (second alteration in original) (internal quotation marks omitted). By any fair estimate, that appears to be the whole point and purpose of their actions.

What about the other considerations that traditionally inform preliminary injunction proceedings—the merits, the parties' claimed and competing harms, and the public interest? *See id.* at 1246. The State and County say these elements support them and provide alternative grounds on which we might affirm the district court and deny the Tribe's request for a preliminary injunction. But it turns out the district court didn't rest its decision on these other grounds for good reason.

[3] [4] Take the merits. At the risk of repetition, no one disputes that Ms. Jenkins is an enrolled member of the Tribe, that she is being prosecuted in Utah state court by local officials, or that her alleged offenses took place within the reservation boundaries established in *Ute III* and *V*. As we've seen too, it's long since settled that a state and its subdivisions generally lack authority to prosecute Indians for criminal offenses arising in Indian country. *See supra* at 1003–04. To be sure, and as the defendants point out, Ms. Jenkins was stopped and cited for committing a traffic offense on a right-of-way running through Indian lands. But both federal statutory law and *Ute V* expressly hold—and the defendants themselves don't dispute—that "rights-of-way running through [a] reservation" are themselves part of Indian country. 18 U.S.C. § 1151; *Ute V*, 114 F.3d at 1529. Of course, and as the State and County also observe, states may exercise civil jurisdiction over non-Indians for activities on rights-of-way crossing Indian country. *See Strate v. A–1 Contractors*, 520 U.S. 438, 442, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). And they may, in certain circumstances, enter Indian lands to investigate off-reservation crimes. *See Nevada v. Hicks*, 533 U.S. 353, 366, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). But these observations are beside the point as well, for the preliminary injunction request in this case concerns only the criminal prosecution of Indians in state court for crimes committed in Indian country. In the end, then, the defendants offer no legal authority for their position and face a considerable and uniform body of authority stacked against it. Any consideration of the merits would seem to favor the Tribe—and favor it strongly.

Lacking a viable legal argument the defendants reply with a policy concern. The Tribe's position, they say, would require state officers patrolling rights-of-way to engage in racial profiling because they would have to hazard a guess about whether a driver is or isn't an Indian before pulling her over. But even assuming the relevance of this concern, it is misplaced. After all, officers could just as easily (and lawfully) inquire into a motorist's tribal membership *after* she is stopped for a suspected offense. *See United States v. Patch*, 114 F.3d 131, 133–34 (9th Cir.1997). Indeed, it seems Utah's law enforcement agencies are *already* doing just that. *See* ***1007** *Jones v. Norton*, 3 F.Supp.3d 1170, 1192 (D.Utah 2014). And, in any event, the Tribe's preliminary injunction request doesn't complain about Ms. Jenkins's *stop*, but seeks only to halt her continued *prosecution* now that the State and County know she's a tribal member.[1]

That brings us to the last two elements of the preliminary injunction test: a comparison of the potential harms that would result with and without the injunction and a consideration of public policy interests. *Prairie Band*, 253 F.3d at 1250. Here again there's no question who has the better of it. On the Tribe's side of the ledger lies what this court has described as the "paramount federal policy" of ensuring that Indians do not suffer interference with their efforts to "develop ... strong self-government." *Seneca–Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir.1989); *see also Prairie Band*, 253 F.3d at 1253. Against this, the State and Wasatch County argue an injunction would impede their ability to ensure safety on public rights-of-way. But this concern "is not as portentous as [they] would have it." *Prairie Band*, 253 F.3d at 1253. It isn't because nothing in the requested temporary injunction would prevent the State and County from patrolling roads like the ones on which Ms. Jenkins was stopped, from stopping motorists suspected of traffic offenses to verify their tribal membership status, from ticketing and prosecuting non-Indians for offenses committed on those roads, from referring suspected offenses by Indians to tribal law enforcement, or from adjudicating disputes over the Indian status of accused traffic offenders when meaningful reasons exist to question that status. Instead, the temporary injunction would simply prohibit the State and County from prosecuting Ms. Jenkins and perhaps other tribal members for offenses in Indian country—something they have no legal entitlement to do in the first place. In this light, the defendants' claims to injury should an injunction issue shrink to all but "the vanishing point." *Seneca–Cayuga*, 874 F.2d at 716.

[5] [6] Though the traditional injunction considerations favor the Tribe, even this doesn't end the matter. Wasatch County (without support from the State) argues that—whatever those considerations might suggest—the Anti–Injunction Act forbids the issuance of any injunction in this case. The County notes, quite rightly, that out of respect for comity and federalism the AIA usually precludes federal courts from enjoining ongoing state court proceedings like Ms. Jenkins's Wasatch County prosecution. 28 U.S.C. § 2283. But this overlooks an important exception to the rule: the AIA also expressly authorizes federal courts to enjoin state proceedings when it's necessary "to protect or effectuate" a previous federal judgment. *Id.* This "relitigation exception," as it's called, allows "a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). And that, of course, is exactly what the Tribe asks us to do here. In *Ute III* and *V* this court held that certain national forest lands remain part of the Tribe's reservation—and thus Indian country. *See Ute V*, 114 F.3d at 1528–29; *Ute III*, 773 F.2d at 1089–90. The prosecution of Ms. Jenkins seeks to reopen that judgment ***1008** and contest whether the same national forest lands, in which her alleged traffic offenses occurred, are Indian country. So relief isn't just called for under traditional preliminary injunction principles, it's statutorily authorized by the AIA. Admittedly, the County tries to suggest that the current prosecution raises at least one "new" issue—whether it possesses the authority to try Indians for crimes on rights-of-way running through tribal lands. But this issue is no new issue at all for, as we've seen, *Ute V* expressly resolved it. *See supra* at 1006; *Ute V*, 114 F.3d at 1529; 18 U.S.C. § 1151.

Eventually accepting as it must that it really does want to relitigate settled issues, the County replies that it's entitled to do so because it wasn't a party to *Ute III* or *V*. But here we encounter another sort of problem. It's not just parties who are bound by prior decisions: those in privity with them often are too, and counties are usually thought to be in privity with their states for preclusion purposes when the state has lost an earlier suit.[2] Of course "privity is but a label," but it is a useful label "convey[ing] the existence of a relationship sufficient to give courts confidence that the party in the former litigation was an effective representative of the current party's interests." *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1258 (10th Cir.2014). Many courts have already applied these preclusion principles in the AIA context.[3] And the County offers no reason to think it should be immune from their force and no reason to think Utah failed to serve as an effective representative of its interests in *Ute III* and *V*. In saying this much we don't mean to exclude the possibility that a county and state sometimes lack a sufficient identity of interests to warrant the application of preclusion principles; we mean to suggest only that nobody has given us any reason to think that possibility is realized here.

[7] [8] Where the County fails with the AIA the State suggests it might succeed with *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). As Utah observes, the AIA isn't the only legal authority that can induce a federal court to abstain from enjoining ongoing state court proceedings: freestanding federalism principles, like those embodied in *Younger*, often counsel the same course. But for *Younger* abstention to apply, there must be "an ongoing state judicial ... proceeding, the presence of an important state interest, and an adequate opportunity to raise federal claims in the state proceedings." *Seneca–Cayuga*, 874 F.2d at 711. And the second of these conditions is where Utah falters in this

case because, again, it hasn't identified any legitimate state interest advanced by its attempt to relitigate boundary decisions by prosecuting Indians for crimes in Indian country. Indeed, much like the AIA, *Younger* doctrine expressly authorizes federal courts to enjoin the relitigation of settled federal decisions in cases, like ours, of "proven harassment." *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971). And even absent a campaign of relitigation, this court in *Seneca–Cayuga* held that where, as here, states seek to enforce state law against Indians in Indian country "[t]he presumption and the reality ... are that federal law, federal policy, and federal ***1009** authority are paramount" and the state's interests are insufficient "to warrant *Younger* abstention." 874 F.2d at 713–14. Neither does Utah offer any means by which we might fairly distinguish or disregard the teachings of *Younger*, *Perez*, or *Seneca–Cayuga*.

With all the defendants' efforts to defend the district court's decision on alternative grounds now fully explained and explored they seem to us to have more nearly the opposite of their intended effect. We finish persuaded that all of the traditional preliminary injunction factors favor not the defendants but the Tribe, that the federalism concerns embodied in the AIA and *Younger* do not direct otherwise, and that a remand to the district court with instructions to enter a preliminary injunction is warranted.

*

[9] [10] Only the two questions of sovereign immunity remain for resolution and neither requires so much elaboration. We begin with the Tribe's motion to dismiss the counterclaims brought by Utah and Duchesne and Uintah Counties. It's long since settled that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This principle extends to counterclaims lodged against a plaintiff tribe—even compulsory counterclaims. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509–10, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). And it applies with just as much force to claims or counterclaims brought by states as by anyone else. *See Michigan v. Bay Mills Indian Cmty.*, —— U.S. ——, 134 S.Ct. 2024, 2031, 188 L.Ed.2d 1071 (2014). No one before us suggests that Congress has authorized the counterclaims here, so everything turns on whether the Tribe itself has waived its immunity.

[11] The State and Counties argue that the Tribe did just that in three agreements the parties signed in the aftermath of *Ute V*: the Disclaimer, Referral, and Mutual Assistance Agreements, to use the parties' shorthand. But we don't see how that's the case. A tribe's waiver of immunity must be expressed "clearly and unequivocally." *Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1152 (10th Cir.2011). Yet the Referral Agreement expired by its own terms in 2008 and the Tribe terminated the Disclaimer Agreement in 2011—well before the defendants brought their counterclaims. Neither do the State and Counties explain how these agreements, even assuming they might once have authorized suit, continue to do so much so long after they've expired. Instead, the defendants leave that possibility to the court's imagination—and that's never a substitute for a clear and unequivocal waiver of immunity.

[12] What about the Mutual Assistance Agreement? Far from waiving immunity, it contains a section entitled "No Waiver of Sovereignty or Jurisdiction Intended." According to that provision, "no acquiescence in or waiver of claims of rights, sovereignty, authority, boundaries, jurisdiction, or other beneficial interests is intended by this Agreement," and "no rights or jurisdiction shall be gained or lost at the expense of the other parties to this Agreement." Yes, the State and Counties point to another section of the agreement that says "[o]riginal jurisdiction to hear and decide any disputes or litigation arising pursuant to or as a result of this Agreement shall be in the United States District Court for the District of Utah." And, yes, this language is similar to language courts have sometimes held sufficient to waive tribal immunity. *See, e.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian* ***1010** *Tribe*, 532 U.S. 411, 415, 418–23, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30–31 (1st Cir.2000). But none of those cases confronted agreements with a separate section expressly asserting sovereign immunity like the one here. And trying to make sense of the whole document before us without rendering any portion of it a nullity—always our aspiration when interpreting contracts—we cannot say it clearly and unequivocally waives sovereign immunity. Instead, the language the defendants cite seems to us best understood as a forum selection clause. *Cf. Santana v. Muscogee (Creek) Nation ex rel. River Spirit Casino*, 508 Fed.Appx. 821, 823 (10th Cir.2013) (holding that a compact provision "waiv[ing] tribal immunity ... in a 'court of competent jurisdiction' " did not "alone confer jurisdiction on state courts because states are generally presumed to lack jurisdiction in Indian Country"). So the agreement both refuses to waive sovereign immunity and

proceeds to designate the District of Utah as the venue for any disputes should immunity ever be overcome. This arrangement may not seem the most intuitive but it's hardly incongruous: after all, the Tribe is always free to consent to a particular suit arising under the Mutual Assistance Agreement and allow it to proceed in the designated forum even as the Tribe chooses to stand on its claim of immunity in most cases. *See* Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 539–40 (10th Cir.1987) (holding that a tribe's potential waiver of immunity in one suit did not waive its immunity in a subsequent suit); *cf.* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) ("[A] State's sovereign immunity is 'a personal privilege which it may waive at pleasure.' " (quoting *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883))).

If the agreements don't help their cause, the State and Counties suggest their counterclaims can proceed anyway because they implicate the Tribe's UTERO (or Ute Tribal Employment Rights Office) ordinance. Under the terms of that ordinance, the Tribe has indeed "agree[d] to waive its sovereign immunity." But the ordinance explains that this "waiver is not, and should not be construed as a blanket waiver of the Tribe's sovereign immunity." Instead, the waiver exists "for the sole and limited purpose of enforcement of the terms of [the] Ordinance," which requires employers on the reservation, including the Tribe itself, to "extend a preference to qualified Indians ... in all aspects of employment." And even assuming without granting that the defendants' counterclaims could somehow be described as an effort to "enforce" the ordinance—itself a seriously questionable notion—the ordinance is enforceable only before tribal courts and the Tribe's UTERO Commission. Nowhere does the waiver permit other parties to hale the Tribe before a nontribal tribunal and this court enjoys no authority to rewrite for the defendants the waiver the Tribe has written for itself. *Seneca–Cayuga*, 874 F.2d at 715 ("[W]aivers of sovereign immunity are strictly construed.").

Having failed to identify any language in a statute, agreement, or other document in which the Tribe has waived its immunity, the State and Counties take us even further afield and in some curious directions. For example, the State and Duchesne County argue we shouldn't dismiss the counterclaims before us because of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *Young*, of course, held that claims for prospective injunctive relief against state officials may proceed even though states themselves are generally immune from identical claims. And the Supreme Court has extended *Young's* application ***1011** to the tribal context, allowing claims against tribal officials that wouldn't be allowable against the tribe itself. *See* *Bay Mills*, 134 S.Ct. at 2035. But that principle has no application to this appeal: the counterclaims before us seek relief not from tribal officials but from the Tribe itself, sued in its own name.

[13] The defendants' invocation of the doctrine of equitable recoupment is no more helpful to their cause. Traditionally, this court has treated recoupment as "an equitable defense that applies only to suits for money damages." *Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n*, 888 F.2d 1303, 1305 (10th Cir.1989), *rev'd in part on other grounds*, 498 U.S. 505, 111 S.Ct. 905.[4] Meanwhile, the defendants' counterclaims in this case seek just injunctive and declaratory relief. And even assuming the doctrine might operate in cases like this, "recoupment is in the nature of a defense" to defeat a plaintiff's claims, not a vehicle for pursuing an affirmative judgment. *Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935); *see also* *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir.1982). Yet an affirmative judgment is exactly what the defendants desire. As clarified at oral argument, the Tribe's suit seeks to bar relitigation of issues settled in *Ute III* and *V* and to enjoin the prosecution of Indians for offenses committed on tribal lands. In reply, the counterclaims ask us to do much more than deny that relief—they demand, among other things, the affirmative relief of an injunction barring the Tribe from bringing lawsuits against county officials in federal or tribal courts.

Along different but no more persuasive lines, Uintah County argues that the Tribe waived its immunity by bringing the original *Ute* litigation some forty years ago. But Supreme Court precedent couldn't be clearer on this point: a tribe's decision to go to court doesn't automatically open it up to counterclaims—even compulsory ones. *See* *Citizen Band*, 498 U.S. at 509–10, 111 S.Ct. 905. The County contends that an out-of-circuit decision, *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir.1995), somehow undermines this principle. But it does no such thing. The tribe in *Rupp* explicitly invited the defendants' counterclaims, "affirmatively ... asking the defendants to assert any right, title, interest or estate they may have [had] in the disputed lands." *Id.* at 1245. And even Uintah County doesn't suggest it's ever received an invitation like that from the Ute Tribe.

By now the point is plain. The State and Counties haven't identified a clear and unequivocal waiver of sovereign immunity and none of their—often inventive—arguments can substitute for one. The Tribe is entitled to dismissal of the counterclaims.

*

That leaves Uintah County's claim that it's entitled to immunity too. Neither the State nor any of Uintah's sister counties join this argument, and it faces a seriously uphill battle from the start. That's because the Supreme Court "has repeatedly refused to extend sovereign immunity to counties." *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006).

[14] Uintah County tries to avoid that conclusion in this case by insisting its county attorneys are the main focus of the Tribe's suit and those officials are entitled ***1012** to immunity because they are "arms of the state." *See, e.g.*, *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574 (10th Cir.1996). But even assuming that county attorneys are the proper focus of our attention (the Tribe's suit is against Uintah County, not its attorneys), a problem still persists. For a county official to qualify as an "arm of the state," it's not enough that he "exercise a slice of state power" by carrying out prosecutorial functions. *N. Ins. Co.*, 547 U.S. at 193–94, 126 S.Ct. 1689 (quoting *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979)) (internal quotation marks omitted). Instead, our case law directs us to examine both the "degree of autonomy" that the county official enjoys under state law and the extent to which the finances of his office are "independent of the state treasury." *Watson*, 75 F.3d at 574–75 (quoting *Haldeman v. Wyo. Farm Loan Bd.*, 32 F.3d 469, 473 (10th Cir.1994)). And both considerations suggest an insufficient connection between Uintah County attorneys and the State of Utah to call them arms of the state. In Utah, county attorneys are elected by county residents alone and the state code refers to them as "elected officers of a county." Utah Code Ann. § 17–53–101; *see also id.* § 17–18a–202. When it comes to finances, county attorneys are paid not from the State's coffers but out of the county's general fund in amounts fixed by county legislative bodies. *Id.* § 17–16–14, –18. Neither has Uintah County pointed to any countervailing features of state law or practice that might favor it and suggest a different result here.

To be clear, we hardly mean to suggest that county attorneys can never qualify as arms of the state. The inquiry turns on an analysis of state law and financial arrangements so the answer may well differ from state to state and agency to agency and epoch to epoch. We can surely imagine a different structure to state law, one in which a county prosecutor's office is a good deal more intimately associated with the state. Indeed, that currently may be the case elsewhere. *See, e.g.*, *Slinger v. New Jersey*, No. 07–CV–5561, 2008 WL 4126181, at *9–10 (D.N.J. Sept. 4, 2008), *rev'd in part on other grounds*, 366 Fed.Appx. 357 (3d Cir.2010). But there's just no evidence before us suggesting that's currently the case in Utah.

*

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.

The district court's decision denying the preliminary injunction request is reversed and that court is directed to enter appropriate preliminary injunctive relief forthwith. Its decision denying tribal immunity is also reversed and it is instructed to dismiss the counterclaims against the Tribe. The district court's decision denying immunity to Uintah County is affirmed. Before oral argument, we provisionally ***1013** granted Uintah County's motions for leave to file an amicus brief and supplemental appendix, a decision we do not disturb. All other motions are denied. Though we see some merit in the Tribe's motion for sanctions against Uintah County given the highly doubtful grounds of some of its arguments to this court, we hope this opinion will send the same message: that the time has come to respect the peace and repose promised by settled decisions. In the event our hope proves misplaced and the defendants persist in failing to respect the rulings of *Ute V*, they may expect to meet with sanctions in the district court or in this one. *See Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir.1990).

All Citations

790 F.3d 1000

Footnotes

1 Similarly, the State and County raise the possibility that Ms. Jenkins's alleged offenses (driving without an ignition interlock, for example) are "continuing" offenses that might have occurred both on and off tribal lands. But whatever other problems this argument might confront, it fails on its facts. It's undisputed that Ms. Jenkins stands charged in state court for conduct that occurred within tribal lands and no one has pointed to any evidence in the record indicating that any part of the offense continued off-reservation.

2 *See, e.g.,* *County of Boyd v. U.S. Ecology, Inc.,* 48 F.3d 359, 361–62 (8th Cir.1995); *Nash County Bd. of Ed. v. Biltmore Co.,* 640 F.2d 484, 493–97 (4th Cir.1981); 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4458, at 558–59 n. 9 (2d ed.2002) (collecting cases).

3 *See, e.g.,* *Vasquez v. Bridgestone/Firestone, Inc.,* 325 F.3d 665, 675–77 (5th Cir.2003); *First Ala. Bank of Montgomery, N.A. v. Parsons Steel, Inc.,* 825 F.2d 1475, 1486 (11th Cir.1987); *Kerr–McGee Chem. Corp. v. Hartigan,* 816 F.2d 1177, 1180 (7th Cir.1987).

4 *See also* *Bolduc v. Beal Bank, SSB,* 167 F.3d 667, 672 n. 4 (1st Cir.1999); *Black's Law Dictionary* 618 (9th ed.2009) ("[Equitable recoupment] is ordinarily a defensive remedy going only to mitigation of damages."). *See generally* Thomas W. Waterman, *A Treatise on the Law of Set–Off, Recoupment, and Counter–Claim* ch. 10 (1869).

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ATTACHMENT 2

835 F.3d 1255
United States Court of Appeals,
Tenth Circuit.

Ute Indian Tribe of the Uintah and Ouray Reservation, Plaintiff–Appellant
v.
Myton, a municipal corporation, Defendant–Appellee,
and
Duchesne County, a political subdivision of the State of Utah; Roosevelt City, a municipal corporation; Duchesne City, a municipal corporation; Uintah County, a political subdivision of the State of Utah; Wasatch County; Gary Herbert, in his capacity as Governor of Utah; Sean D. Reyes, in his capacity as Attorney General of Utah, Defendants.
United States of America; The State of Utah, Amici Curiae.

No. 15-4080
|
Filed August 29, 2016

Synopsis

Background: Ute Indian Tribe filed suit against cities, counties, and state officials, seeking injunctive relief halting criminal prosecution of tribal member for alleged traffic offenses on land judicially recognized as Indian country. The United States District Court for the District of Utah, Bruce S. Jenkins, Senior Judge, granted city's motion to dismiss, and tribe appealed.

Holdings: The Court of Appeals, Gorsuch, Circuit Judge, held that:

[1] issue preclusion barred relitigation of whether parcel of land within city was Indian country;

[2] equitable principles did not warrant eliminating checkerboard jurisdiction; and

[3] doctrine of laches did not apply.

Reversed.

West Headnotes (8)

[1] **Federal Civil Procedure**
Insufficiency in general
Federal Civil Procedure
Construction of pleadings
Federal Courts
Dismissal for failure to state a claim

At motion to dismiss stage, Court of Appeals and district court must construe all well-pleaded factual allegations in light most favorable to non-movant and ask only if they state plausible claim for relief. Fed. R. Civ. P. 12(b)(6).

1 Cases that cite this headnote

[2] **Judgment**
Government, state, or municipality, and officers, citizens, or taxpayers

Under doctrine of issue preclusion, prior proceeding in which Court of Appeals determined that tribe's original reservation lands that passed from tribal trust to fee status pursuant to non-Indian settlement did not qualify as "Indian country," but lands that could have been but were not allotted to non-tribal members and were instead restored to tribal status under Indian Reorganization Act remained Indian country subject to federal and tribal, not state and local, criminal jurisdiction, precluded city from relitigating issue of whether land restored to tribal jurisdiction and on which tribal member allegedly committed offenses over which local officials sought to exercise criminal jurisdiction to prosecute him was Indian country, since city was in privity with parties to prior proceeding. 18 U.S.C.A. § 1151.

1 Cases that cite this headnote

[3] **Indians**
What is Indian country in general
Indians
Jurisdiction and Power to Enforce Criminal Laws

City's request to eliminate checkerboard jurisdiction, in which state and local officials had criminal jurisdiction on some parcels of land within city while federal and tribal officials had criminal enforcement power on other parcels of land within city, would not be granted under equitable principles; checkerboard jurisdiction was natural consequence of Congress's decisions to open and then close original Indian reservation lands to non-Indian settlement, elimination of city's checkerboard jurisdiction would only alter shape of board in one relatively small and peculiar way that would defy shape dictated by judicial mandates, and many other localities had lived with checkerboard jurisdiction successfully. 18 U.S.C.A. § 1151.

1 Cases that cite this headnote

[4] **Equity**
Application of doctrine in general

Doctrine of laches may be used as matter of judicial discretion to vindicate justifiable expectations threatened by untimely assertion of long dormant claims.

Cases that cite this headnote

[5] **Indians**
Limitations and laches

Indian tribe's claim that city was impermissibly prosecuting tribal member for alleged crimes committed on land that qualified as Indian country, subject to federal and tribal, not state and local, criminal jurisdiction, was not barred, under doctrine of laches, since laches defense generally could not be asserted against United States, which owned land qualifying as Indian country and held in trust for benefit of tribe, and city had no justifiable expectation that no land within city was Indian country after years of litigation determining that lands restored to tribal jurisdiction qualified as Indian country. 18 U.S.C.A. § 1151.

1 Cases that cite this headnote

[6] **United States**
Time to sue, limitations, and laches

Laches is line of defense that usually may not be asserted against United States.

Cases that cite this headnote

[7] **Federal Courts**
Reassignment to new judge on remand

Absent proof of bias, reassignment of district judge on remand is step Court of Appeals takes only in extreme circumstances.

Cases that cite this headnote

[8] **Federal Courts**
Reassignment to new judge on remand

Although there was no sign that district judge was biased in granting city's motion to dismiss Indian tribe's claim that local officials were impermissibly prosecuting tribal member for alleged crimes committed on land qualifying as Indian country, reassignment to different district judge was warranted for entire case and all related matters in order to ensure their just and timely resolution on remand for enforcement of appellate mandate issued nearly 20 years ago, since judge had twice failed to enforce appellate mandate that had finally resolved all boundary disputes.

Cases that cite this headnote

***1257 Appeal from the United States District Court for the District of Utah (D.C. Nos. 2:75-CV-00408-BSJ and 2:13-CV-00276-BSJ)**

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Before GORSUCH, PHILLIPS, and MORITZ, Circuit Judges.

ORDER

This matter is before the court, *sua sponte*, to amend one sentence on page 17 of the court's August 9, 2016 decision. A copy of the amended Opinion with the change to page 17 is attached to this order. The clerk is directed to reissue the Opinion forthwith and *nunc pro tunc* to the original filing date.

GORSUCH, Circuit Judge.

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. ***1258** 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.

*

To understand how this very old fight arrives back before us today, a brief dip into Western history helps. Beginning in the 1860s and under pressure to make way for incoming settlers, the federal government forced members of the Ute Indian Tribe in Utah onto a new reservation. Like most reservations established around that time, the land the Utes received represented but a portion of their historic lands and pretty undesirable land at that. *See* Floyd A. O'Neil, *The Reluctant Suzerainty: The Uintah and Ouray Reservation*, 39 Utah Hist. Q. 129, 130-31 (1971). But, as these things often went, as the decades wore on and settlement pressures continued to increase the Tribe's land began to look a good deal more alluring. *See id.* at 137-38. By 1905, Congress authorized the Secretary of the Interior to break up the Ute reservation by assigning individual plots to individual tribal members and allotting any land left over (and a very great deal was sure to be left over) to interested homesteaders. In exactly this way, massive swaths of former Ute reservation lands passed back into the public domain. *See generally* *Ute Indian Tribe v. Utah* (*Ute I*), 521 F.Supp. 1072, 1092–1127 (D. Utah 1981).

That is, until 1945. Instead of disassembling reservations, Congress by now wished to reassemble them. While by this point the former Ute reservation had been opened to nontribal settlement for forty years, large portions still remained unclaimed and sitting in the hands of the Secretary of the Interior. With Congress's permission, the Secretary in 1945 issued an order returning these unallotted lands, about some 217,000 acres, to tribal jurisdiction. *See* Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984; Order of Restoration, 10 Fed. Reg. 12,409 (Oct. 2, 1945); *Ute Indian Tribe v. Utah* (*Ute II*), 716 F.2d 1298, 1312–13 (10th Cir. 1983).

The litigation surrounding these events and their upshot began in earnest in 1975. That year the Ute Tribe filed a lawsuit in federal court, alleging that the State of Utah and several local governments were busy prosecuting tribal members for crimes committed on tribal lands, even though (constitutionally supreme) federal law generally assigns criminal enforcement responsibilities in "Indian country" to federal and tribal officials, not state or local ones. *See* 18 U.S.C. §§ 1151-1152, 1162; *Cheyenne–Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980). For their part, the State and its subdivisions responded that the lands in question didn't qualify as Indian country because the 1905 legislation that opened reservation lands to outside settlement had the effect of diminishing or disestablishing the Utes' reservation. *See Ute I*, 521 F.Supp. at 1075–79.

It took a decade and an exhaustive adversarial process, but in 1985 this court finally resolved the issue *en banc* in a case the parties call *Ute III*. This court sided with the Tribe and, in a nutshell, held that *all* lands encompassed within the original Ute reservation boundaries established beginning in the 1860s—including all those lands that passed to non-Indian settlers between 1905 and 1945—remained Indian country subject to federal and tribal (not state and local) criminal jurisdiction. *See Ute Indian Tribe v. Utah* (*Ute III*), 773 F.2d 1087, 1088–89, 1093 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). After the Supreme Court denied certiorari, that ***1259** might have seemed the end of it. After all, *Ute III* "disposed of all boundary questions at issue on the merits" and "left nothing for the district court to address [on remand] beyond the ministerial dictates of the mandate." *Ute Indian Tribe v. Utah* (*Ute V*), 114 F.3d 1513, 1521 (10th Cir. 1997) (internal quotation marks omitted).

But that was not the end of it. That was not even the beginning of the end of it. Dissatisfied with the result of *Ute III*, state and local officials went shopping for a "friendlier forum" in which to "relitigate the boundary dispute." United States' Mem. in Support of Ute Indian Tribe's Mot. for Injunctive Relief 3, Supp. App. 8 (Nov. 23, 1992). And no doubt correctly sensing it would represent their best chance for victory, they chose "[a]s a vehicle for their effort" state court prosecutions of tribal members whose unlawful conduct occurred on former reservation lands that had passed to nontribal settlers between 1905 and 1945. *Ute Indian Tribe v. Utah* (*Ute VI*), 790 F.3d 1000, 1003 (10th Cir. 2015); *see also State v. Perank*, 858 P.2d 927, 934 (Utah 1992). Never mind that *Ute III* held that these very lands qualified as Indian country, where Utah and its subdivisions lacked criminal law enforcement authority over tribal members. 773 F.2d at 1088–89, 1093. Never mind, too, the normal operation of issue or claim preclusion principles. State officials argued to Utah state courts that their prosecutions could proceed because the 1905 legislation carved out from Indian country at least those lands that had passed to nontribal members between that year and 1945. *See Perank*, 858 P.2d at 934. Ultimately, the Utah Supreme Court agreed with this much. *See id.* at 953; *State v. Hagen*, 858 P.2d 925, 925–26 (Utah 1992). And so did the U.S. Supreme Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). *See id.* at 421–22, 114 S.Ct. 958.

That twist of events required this court to reconsider *Ute III*'s mandate in light of *Hagen*. On the one hand, "[u]psetting a final decision by recalling and modifying a mandate is and ought to be a rare and disfavored thing in a legal system that values finality." *Ute VI*, 790 F.3d at 1004. On the other hand, if left untouched, *Ute III*'s mandate invited a pretty unsavory result: the possibility that the Supreme Court's decision in *Hagen* would be left to "control only cases arising from Utah state courts and not federal district courts." *Id.* To avoid that outcome, this court took the extraordinary step of recalling and modifying *Ute III*'s mandate a decade after its issuance "to reconcile [the] two inconsistent boundary determinations and to provide a uniform allocation of jurisdiction among [the] separate sovereigns." *Ute V*, 114 F.3d at 1523.

This was no easy task. After carefully reviewing the possibilities, Judge Tacha, writing for the court in a decision the parties call *Ute V*, held that a full and proper respect for *Hagen* meant that this court now had to recognize that "lands that passed from [tribal] trust to fee status pursuant to non-Indian settlement" between 1905 and 1945 do *not* qualify as Indian country. *Id.* at 1529; *see also id.* at 1530. At the same time, Judge Tacha declined to read *Hagen* as affecting *Ute III*'s mandate in any other respect. So, for example, she explained that lands that could've been but were not allotted to nontribal members

between 1905 and 1945, and that were instead restored to tribal status in 1945, remained Indian country. *Id.* at 1528–31; *see also Ute VI*, 790 F.3d at 1004. With that much decided, *Ute V* (once again) resolved all outstanding boundary issues, leaving to the district court nothing but the ministerial task of entering a permanent ***1260** injunction memorializing its terms. *See Ute V*, 114 F.3d at 1530–31. Once more, too, the Supreme Court denied certiorari. 522 U.S. 1107, 118 S.Ct. 1034, 140 L.Ed.2d 101 (1998). And with that, you could be forgiven for thinking that surely, now, the saga was about to draw to a close as the century neared its end.

Not even close. After this court issued *Ute V* and its light, the parties entered into a series of agreements under the district court's superintendence that seemed to keep the peace—even for some years after major portions of them expired in 2008. But then, much as they did in the build-up to *Hagen*, Utah and several of its counties began what appeared to the Tribe to be a campaign to undermine this court's boundary determinations by prosecuting tribal members for crimes committed "on the very lands *Ute V* said remain Indian country even after *Hagen*." *Ute VI*, 790 F.3d at 1004. Unsurprisingly, the Tribe responded to this effort by filing suit once more in 2013 and by requesting a permanent injunction to enforce the terms of *Ute III* and *V*. As a first step toward that end, the Tribe sought a preliminary injunction halting the prosecution of one tribal member for alleged traffic offenses on land that "*Ute III* and *V* recognized as Indian country." *Id.* at 1005. Yet in a one-line order that contained no explanation, the district court denied the request.

So it is that just last year the rock returned for this court to push up the hill one more time. In *Ute VI*, we found that the land at issue in the prosecution in question unquestionably qualified as Indian country under the terms of *Ute V* and that Utah and the localities were indeed attempting to "undo the tribal boundaries settled by *Ute III* and *V*." *Id.* Accordingly, this court ordered the district court to issue the preliminary injunction forthwith. *Id.* ("[T]he district court should have issued a preliminary injunction and *must do so now*...." (emphasis added)). "[T]he time has come," we said, for the parties "to respect the peace and repose promised by settled decisions." *Id.* at 1013. Again the Supreme Court denied review. —— U.S. ——, 136 S.Ct. 1451, 194 L.Ed.2d 575 (2016).

Yet even that wasn't the end of it. While *Ute VI* was before this court, one of the defendants, the town of Myton, filed a motion to dismiss the Tribe's suit. Even though the Tribe's complaint alleged that Myton lies on original Ute reservation lands and includes tracts that were opened in 1905 but never settled and so restored to tribal jurisdiction in 1945. And even though the Tribe's complaint alleged that the town and its agents sought to prosecute tribal members for crimes on those restored tribal lands. Despite all this, Myton sought dismissal and the district court granted it, certifying its disposition for appeal under Fed. R. Civ. P. 54(b). And so with that we face the rock and the hill yet again, with the Tribe and the federal government asking us to give effect to *Ute V*'s mandate by overturning the district court's ruling.

*

We are of course obliged to do exactly that. The Tribe's suit against Myton alleges that local officials seek to exercise criminal jurisdiction over tribal members on lands that were restored to tribal jurisdiction in 1945. Lands that, accordingly, remain Indian country under the express terms of *Ute V* and so qualify as lands where tribal members are generally subject only to federal and tribal criminal authorities.

[1] [2]To be sure, Myton disputes the facts alleged in the complaint. It contends that not a single bit of land within its boundaries was subject to the 1945 restoration ***1261** order. But if Myton really wishes to dispute the facts alleged in a complaint, a motion to dismiss surely isn't the proper way to go about it. At the motion to dismiss stage we and the district court must construe all well-pleaded factual allegations in the light most favorable to the non-movant and ask only if they state a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). And the Tribe's factual allegation that Myton includes land that qualifies as Indian country under the terms of *Ute V* is a good deal more than plausible. Indeed, it is undisputed that Myton lies on land that was part of the Tribe's original reservation. *See* Aple. Br. at 4 ("Myton City ... is encompassed by the historic boundaries of the Uintah Valley Indian Reservation...."). The town's own plan and plat acknowledge that even today "approximately 48%" of the town's geographic space remains tribal "trust lands." Myton City General Plan FY 2006, at 12; *see also id.* at fig.2. And when in 1947 the town sought to purchase certain parcels of land within the townsite's boundaries so that it might build an airport, the U.S. Department of the Interior refused the sale, citing its judgment that the tracts in question had been "irrevocab[ly]" restored to tribal jurisdiction in 1945. App. vol. XIV at 2087-88. So it seems Myton's response to this appeal is really no response at all.

Of course, that's not Myton's only reply. The town also

argues that the Supreme Court's decision in *Hagen* requires the dismissal of this suit. In particular, it points to a sentence in which the Court stated that "the town of Myton, where petitioner committed a crime, is not in Indian country." 510 U.S. at 421, 114 S.Ct. 958. But though perhaps appealing on first encounter, on closer inspection this argument proves no more persuasive than the last.

After all and as we've seen, any dispute over the meaning and effect of *Hagen* was itself finally decided by this court a very long time ago. As *Ute V* recognized, *Hagen* addressed the question whether state officials had the power under federal law to prosecute a particular crime by a particular defendant—a question whose answer turned on whether the particular parcel of land where the crime occurred (Mr. Hagen's home in Myton) was or was not Indian country. *See* *Ute V*, 114 F.3d at 1518–19; *see also* 18 U.S.C. § 1151; *United States v. Arrieta*, 436 F.3d 1246, 1247 (10th Cir. 2006); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971). The Supreme Court *held* that particular parcel was not Indian country, so state officials could lawfully prosecute Mr. Hagen. *See* *Hagen*, 510 U.S. at 421–22, 114 S.Ct. 958. Of course, *Hagen*'s *reasoning* or *ratio decidendi* extended further, for the Court made plain that its holding rested on the judgment that all parcels of land transferred to nontribal members between 1905 and 1945 are not Indian country—and that Mr. Hagen's home sat on such a parcel. *See* *id.* at 414, 114 S.Ct. 958. And in *Ute V*, this court sought to give full effect not just to *Hagen*'s holding but to its reasoning too, revising *Ute III*'s mandate to reflect that *all* former reservation lands transferred to nontribal members between 1905 and 1945 no longer qualified as Indian country. *See* *Ute V*, 114 F.3d at 1528, 1530. But, as interpreted by *Ute V*, *Hagen* didn't hold that each and every tract of land inside Myton is outside Indian country and didn't purport to supply reasoning that might support such a rule. *See* *id.* at 1530. Myton might disagree with *Ute V*'s assessment on this score and believe "that *Ute V* drew the wrong boundaries." *Ute VI*, 790 F.3d at 1012. But Judge Tacha's careful interpretation of *Hagen* in *Ute V* dates back nearly twenty years, the Supreme ***1262** Court has twice declined to disturb its judgment, and we are not free to tinker with that controlling precedent now. *See* *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993); *Tokoph v. United States*, 774 F.3d 1300, 1303-04 (10th Cir. 2014). Neither, for that matter, does Myton dispute that it is in privity with the parties to *Ute V* or identify any other reason that might prevent that decision from binding it not just as a matter of precedent but as a matter of issue preclusion too.

Though it's long since water over the dam, both as a matter of precedent and preclusion, we might add our view that *Ute V*'s interpretation of *Hagen*'s rule and reasoning was entirely correct. Every bit of evidence suggests that the Supreme Court meant to remove from *Ute III*'s determination about the scope of Indian country those lands (and only those lands) allotted to nontribal members between 1905 and 1945. Indeed, the Utah Supreme Court decisions under review in *Hagen* didn't purport to hold differently. As *Hagen*'s companion case, *Perank*, made clear, the "only issue" the Utah Supreme Court sought to resolve was "whether the unallotted and unreserved lands that were opened to entry in 1905 *and not later restored to tribal ownership and jurisdiction* [in] 1945" qualified as Indian country. 858 P.2d at 934 (emphasis added). Neither did the State of Utah seek a different rule before the U.S. Supreme Court. In its briefing, Utah expressly acknowledged that "[t]here is no dispute that ... the surplus lands restored to tribal ownership and reservation status in 1945 ... are also Indian country." Br. for the Resp't, *Hagen*, 510 U.S. 399, 114 S.Ct. 958 (No. 92–6281), 1993 WL 384805, at *9. An acknowledgment the State repeats even today in the amicus brief it tenders otherwise in support of Myton. Br. of Utah as Amicus Curiae at 3 ("After explaining the effect of the 1945 and 1948 restorations, the State [in *Hagen*] reiterated there was no dispute that the tribal reserves, remaining allotments and restored lands were all Indian country."). In this light, it is evident that the Supreme Court's mention of the town of Myton in *Hagen* was no more than a shorthanded reference to the situs of the crime, a parcel of land inside the town of Myton that had been allotted to a nontribal member between 1905 and 1945, and thus a parcel of land that failed to qualify as Indian country under the Court's reasoning. No one before the Court sought a ruling that *all* of Myton is outside Indian country. That question simply wasn't presented. And nothing in the parties' arguments to the Court or the reasoning of the Court's opinion would support such an idiosyncratic rule. So it is *Ute V*'s interpretation of *Hagen* is not only plainly controlling: it seems to us plainly correct.

[3]As a final measure, Myton appeals to equity. It laments the consequences for the town's administration that follow from having to contend with some parcels in town where it cannot exercise criminal jurisdiction over some persons. But this sort of "checkerboard" jurisdiction—where state and local officials bear criminal enforcement power on some lands and federal and tribal officials oversee others—is the natural consequence of Congress's decision to open and then close reservation lands to outside settlement. Neither would a victory for Myton eliminate the checkerboard that already exists in former Ute reservation lands: it would only alter the shape

of the board in one relatively small and peculiar way, a way that would defy the shape dictated by *Ute III* and *V* more than a generation ago, and we see no equity in that. For that matter, checkerboard jurisdiction is a fact of daily life throughout the West, the result of many different congressional commands like those at issue here, and something many ***1263** localities have lived with successfully. Myton offers no reason to think it has not done or cannot do the same. Surely, too, it is not for this court to override Congress's commands on the basis of claims of equity from either side. *See Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1158 (10th Cir. 2010) (en banc) ("[A]s this court has previously explained, Congress has authorized checkerboard jurisdiction under its definition of Indian country in 18 U.S.C. § 1151." (internal quotation marks omitted)).

[4]By way of equity Myton finishes with an appeal to the doctrine of laches. That doctrine may be used as a matter of judicial discretion to vindicate "justifiable expectations" threatened by the untimely assertion of long dormant claims. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005) (internal quotation marks omitted). Because the Tribe waited so long to assert claims against it, Myton submits, the town has long since and fairly come to expect that it contains no tribal lands qualifying as Indian country.

[5] [6]We don't see how. For one thing, the lands that reverted to the Tribe in 1945 are owned by the United States and held in trust for the benefit of the Tribe. Br. of United States as Amicus Curiae at 4. And given this, it is far from clear whether the doctrine of laches could be used to determine the fate of this territory, for laches is a line of defense that usually may not be asserted against the United States. *See Guar. Trust Co. v. United States*, 304 U.S. 126, 132, 58 S.Ct. 785, 82 L.Ed. 1224 (1938). For another thing, we don't see how the town might have ever justifiably thought that it contained *no* lands qualifying as Indian country. As we've seen, the Department of the Interior long ago explained its view that the 1945 restoration order had the effect of returning to the Tribe's jurisdiction lands within the town's limits. As we've seen, too, when local governments started to assert jurisdiction over tribal members on tribal lands about thirty years ago, the Tribe brought a suit to challenge their actions—and no one disputes that the Tribe did so in a timely manner. Since then, the Tribe has consistently defended its jurisdiction over lands throughout the original Ute reservation territories—lands that include Myton. Indeed, the Tribe has won two separate judgments (*Ute III* and *V*) holding (first) that *all* and (then) that *some* of Myton is inside Indian country. What's more, in previous iterations of this dispute, in *Hagen* itself, and again in this case, both the State of Utah and Myton's county (Duchesne) have accepted that the 1945 order restored tribal jurisdiction over unallotted former reservation lands like those in Myton. *See Perank*, 858 P.2d at 949; *Ute II*, 716 F.2d at 1312–13; Br. for the Resp't, *Hagen*, 510 U.S. 399, 114 S.Ct. 958 (No. 92–6281), 1993 WL 384805, at *9; Br. of Utah as Amicus Curiae at 3. On this record, Myton's claim to have long and justifiably expected that its town contains no Indian country simply cannot withstand scrutiny. *Cf. City of Sherrill*, 544 U.S. at 214, 221, 125 S.Ct. 1478 (approving laches on a very different record where the land was sold to nontribal members and neither the tribe nor the federal government did anything to assert their rights "[f]rom the early 1800's into the 1970's").

[7] [8]Before we finish rolling the rock up the hill, one more issue remains to confront. The Tribe has filed a motion seeking the reassignment of this and related cases to a different district judge on remand. Absent proof of bias, reassignment is, of course, a step this court takes only in "extreme circumstances." *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 744 (10th Cir. 2005) (internal quotation marks omitted). But we think those exist ***1264** here. The unavoidable fact is that nearly twenty years ago in *Ute V* this court explained that, between *Ute III* and its own disposition, "all boundary questions at issue" had been finally resolved. *Ute V*, 114 F.3d at 1521. Even so, the years since seem to have brought nothing but relitigation of those boundaries. *See, e.g.*, *Ute VI*, 790 F.3d at 1005. Utah and its subdivisions bear responsibility for much of this. We have even had to take the extraordinary step of reminding them, parties who should (and do) know better, of the possibility of sanctions if they continue to defy settled judicial mandates. *Id.* at 1013. But the fact remains that the district court has failed to give effect to this court's mandate in *Ute V* and has given us little reason to hope that things might change on remand or that this long lingering dispute will soon find the finality it requires. Accordingly, while we see no sign of bias in this case, we conclude reassignment of this and all related disputes is required to ensure their just and timely resolution. *See, e.g.*, *Leoff v. S & J Land Co.*, 630 Fed.Appx. 862, 864, 866 (10th Cir. 2015) (reassigning for failure to "comply strictly with the mandate" issued by this court); *United States v. Gupta*, 572 F.3d 878, 892 (11th Cir. 2009) (same).

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The district court's order granting Myton's motion to

dismiss is reversed. This case and all related matters shall be reassigned to a different district judge. The court and parties are directed to proceed to a final disposition both promptly and consistently with this court's mandates in *Ute V*, *Ute VI*, and this case.

All Citations

835 F.3d 1255

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