No. 15-___

IN THE

Supreme Court of the United States

WASATCH COUNTY, UTAH,
SCOTT H. SWEAT, & TYLER J. BERG,

Petitioners,

v.

UTE INDIAN TRIBE OF
THE UINTAH AND OURAY RESERVATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hagen v. Utah*, 510 U.S. 399, 409 (1994), this Court granted certiorari "to resolve the direct conflict between" the Tenth Circuit and the Utah Supreme Court over whether Congress has diminished the lands of the Uintah Valley and Uncompaghre Indian Reservation. This Court adopted the state court's holding that the lands have been diminished, such that those lands are not Indian Country.

The Tenth Circuit is not giving up, however. It has held that its prior precedent justifies expressly refusing to follow *Hagen*, except to the limited extent absolutely compelled with respect to the precise facts of this Court's ruling. In this case, the Tenth Circuit went substantially further still and held that its earlier (admittedly erroneous) holding that the reservation has not been diminished binds even petitioner Wasatch County, which was not a party to any of the prior litigation. Despite this Court's determination to resolve the conflict between the federal and state courts in *Hagen*, that conflict continues to persist.

The Question Presented is:

Did the court of appeals err in defying this Court's decision in *Hagen v. Utah* and enjoining a proper state court prosecution of a tribal member on lands that this Court has held have been diminished by Congress?

RULE 29.6 DISCLOSURE STATEMENT

No corporate entity is a petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

STATUTORY PROVISIONS INVOLVED

The Anti-Injunction Act provides in relevant part that "[a] court of the United States may not grant an injunction to stay proceedings in State court except as . . . necessary . . . to . . . effectuate its judgments." 28 U.S.C. § 2283.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A) is published at 790 F.3d 1000. The district court's order (Pet. App. B) is unpublished.

JURISDICTION

The court of appeals issued its judgment on June 15, 2015. On August 25, 2015, Justice Sotomayor granted a timely application to extend the time to file this Petition to and including November 13, 2015. App. No. 15A237. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In state court, petitioner Wasatch County (County) sought to prosecute a member of an Indian tribe for state law offenses she committed on a state road within the original boundaries of an Indian reservation. This Court and the state courts have found that *this precise reservation* has been

diminished, such that the County should have jurisdiction over the road.

The Tenth Circuit nonetheless enjoined the prosecution and found that only the tribe had jurisdiction. It invoked its own prior rulings, which expressly refuse to give full effect to this Court's decision about the reservation and which reject the view of the state courts.

The court of appeals thought that extraordinary result was authorized by an exception to the Anti-Injunction Act that permits enjoining a state court proceeding to enforce a prior federal court judgment. But the County was not a party to that prior case, which in any event did not produce an enforceable judgment at all and which is avowedly directly contrary to an on-point decision of this Court.

I. Background Of The Litigation Over The Boundaries Of The Ute Indian Reservation

A. History Of The Original Reservation Lands

Congress established the Uintah Valley Reservation and adjoining Uncompaghre Reservation (collectively, the Reservation) in Utah in the 1860s and 1880s. Respondent is the Ute Indian Tribe (Tribe), which has roughly 3000 members. They are "the descendants of the Indians who settled on the Uintah Reservation." *Hagen v. Utah*, 510 U.S. 399, 402 (1994).

The Reservation includes more than one million acres that the United States Government holds in trust for the Tribe and over which the Tribe indisputably has sovereignty. In addition, as originally established, the Reservation includes substantial non-trust lands.

In the late 1890s and very early 1900s, Congress transferred title to non-trust lands within the Reservation to non-Indians, in two particularly relevant respects. First, the Acts "allotted" lands to members of the Tribe, but "restored" other plots to the "public domain" for transfer to non-Indian settlers. The parties call the latter plots "unallotted lands."

Congress also "set apart and reserve[d]" substantial Reservation lands for a different "public" use: an addition to the public Uintah National Forest (Forest). Bureau of Indian Affairs, A Forest History of the Uintah and Ouray Indian Reservation 86-87, 89 (1992) (citing 33 Stat. 1070 (1905)). President Roosevelt withdrew roughly one million acres from the Reservation and transferred it to the Forest. As the Bureau of Indian Affairs has explained, the lands were thereby "severed" and "detached" from "the Indian reservation" and "tribal control." *Id.* at 52, 89. The Tribe requested compensation but did not "wish the lands returned"; the federal government paid the Tribe roughly $1.2 million. *Id.* at 55-56. These lands have since been administered by the U.S. Forest Service. The parties call them "Forest lands."

Ownership of other extensive non-trust lands has passed from the Tribe and its members to non-Indians. For example, members sold allotted lands to non-Indians.

The non-trust lands are now overwhelmingly either (a) populated by non-Indians, many of whom live in a number of towns and unincorporated areas; or (b) held and administered by agencies of the federal government (the Forest Service and Bureau of Land Management) for public use. The federal, state, and local governments—not the Tribe—regulate, provide governmental services, and tax those non-trust lands.

B. The Tenth Circuit Holds That The Reservation Has Not Been Diminished, But This Court Expressly Rejects That Ruling In *Hagen*

In 1975, the Tribe asserted for the first time since at least the turn of the century jurisdiction over not merely its trust lands and land owned by members of the Tribe but *all* of the land originally encompassed in the Reservation, including with respect to non-Indians living in and around several towns within the boundaries. Ute Indian Tribe of the Uintah and Ouray Reservation, Law & Order Code Ch. 2, § 1-2-1. That would make the non-Indian residents for the first time potentially subject to law enforcement and civil regulation by the Tribe.

The Tribe's position then (as now) was that the original Reservation remains intact, *i.e.*, not

diminished. "If the reservation has been diminished, then the [diminished land] is not in 'Indian Country,' *see* 18 U.S.C. § 1151, and the Utah state courts properly exercise[] criminal jurisdiction over" state law offenses. *Hagen*, 510 U.S. at 401-02. Otherwise, state courts lack jurisdiction because "Congress has not granted criminal jurisdiction to the State of Utah to try crimes committed by Indians in Indian Country." *Id*. at 408.

The Tribe filed suit in federal court seeking a declaratory judgment. The State was a defendant. But although the original Reservation lies in parts of seven counties, the Tribe named only two as defendants. Petitioner Wasatch County was not a party.

A Tenth Circuit panel ruled against the Tribe, holding that Congress had broadly diminished the Reservation. The panel held that the unallotted lands in the Uintah Valley Reservation were diminished and the Uncompaghre Reservation was disestablished. *Ute Indian Tribe v. Utah*, 716 F.2d 1298, 1315 (10th Cir. 1983). The same reasoning—*i.e.*, that lands had been transferred from the Reservation to public use—"convince[d] [the panel] that the forest reserve lands are not part of the reservation." *Id.* at 1314.

The en banc court reversed the panel, by a divided vote. This is the first of two prior Tenth Circuit decisions that are critical to this petition. The parties call it "*Ute III*." *Ute Indian Tribe v.*

Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986) (*Ute III*).

Ute III held that Acts "restoring" lands to the "public domain" do not diminish tribal reservations. *Id.* at 1092. Under that legal standard, the Tribe retained full sovereignty over all of the original Reservation lands, including the unallotted lands and the Forest lands. *Id.* at 1093.

Several years later, the Utah state courts expressly rejected that conclusion. Ruling in a dispute over unallotted lands in the Uintah Valley Reservation, the Utah Supreme Court held that Congress had diminished the Reservation. *State v. Hagen*, 858 P.2d 925 (Utah 1992); *State v. Perank*, 858 P.2d 927 (Utah 1992). That ruling effectively deemed the Reservation to encompass only the million-plus acres held in trust for the Tribe by the federal government. *See infra* at 21-22.

At the urging of the United States, this Court granted certiorari in *Hagen v. Utah* "to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen*, 510 U.S. at 409. This Court expressly agreed with the Utah Supreme Court and expressly rejected *Ute III*. *Id.* at 414-15. This Court reasoned that Congress had diminished the Reservation by transferring the unallotted lands out of the Reservation and into the public domain. *See*

infra at 32-36 (discussing *Hagen*'s reasoning in detail).

C. The Tenth Circuit Holds That Its Prior Precedent Remains Binding On The Parties To That Case

As the Tenth Circuit itself subsequently recognized, *Hagen* "held that the state had jurisdiction to prosecute Hagen because Congress had diminished the Uintah Reservation in the early 1900s. The *Hagen* decision effectively overruled the contrary conclusion reached in the [*Ute III*] case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *United States v. Cuch*, 79 F.3d 987, 989 (10th Cir. 1996) (internal citation omitted). That seemed to be the end of the matter, even to the Tenth Circuit.

It was not. Then as now, the Tribe avowedly defied this Court's decision in *Hagen*, even with respect to the precise unallotted lands at issue in that case. *See* Br. of Appellant Ute Indian Tribe, No. 14-4080, *Ute Indian Tribe v. Myton City* 19 (Aug. 19, 2015). The Tribe sought an injunction in federal court (where it had won *Ute III*) against the State and certain localities (again not including the County) to prevent them from taking any action to follow this Court's decision in *Hagen*.

The Tenth Circuit largely granted that request in the second prior decision that is critical to this petition. The parties call it "*Ute V*." *Ute Indian Tribe*

v. Utah, 114 F.3d 1513, 1515 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998) (*Ute V*). *Ute V* largely accepted the Tribe's argument that it could "continue[] to rely on *Ute Indian Tribe III* in exercising civil and non-felony jurisdiction on lands within the original reservation boundaries." *Id.* at 1524.

Ute V did not dispute that "*Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based—namely, that statutory restoration language is insufficient to infer diminishment." *Id.* at 1528. Moreover, the State was not collaterally estopped by the prior judgment in *Ute III*, because the State had also won a favorable judgment in *Hagen*. *Id.* at 1522-25. There was no basis to give preclusive effect to one but not the other. *Id.* at 1525.

But *Ute V* found another way to hold that the parties to *Ute III* were bound by that decision despite *Hagen*: *Ute III* was "law of the case," because the mandate had issued. *See id.* at 1521 ("Accordingly, we hold that the district court properly followed our mandate in *Ute* [*III*] by continuing to enjoin the state and local defendants from exercising jurisdiction pursuant to *Hagen*."); *id.* at 1519 (ruling resolves Reservation boundaries "as between the parties"). Yes, this Court had rejected *Ute III* by name with respect to this precise reservation, but that was "not sufficient to justify departing from [the Tenth Circuit's] earlier judgment." *Id.*; *see also id.* at 1523 (court of appeals had refused to apply *Hagen* beyond

the limited facts of that case, even if doing so might "achieve a more accurate judgment" or would avoid "injustice").

Ute V did, however, narrowly recall a small bit of the *Ute III* mandate—the bit that governed "precisely the category of fee lands at issue in *Hagen*": the unallotted lands located on the original Uintah Valley Reservation. *Id.* at 1530. *Ute V* held that those specific lands on that particular reservation were diminished.

But as to the parties to *Ute III*, the rest of that decision remained intact. Of particular note, the indistinguishable unallotted lands on the adjoining Uncompaghre Reservation remained undiminished. *Id.* at 1530-31. So did the Forest lands and lands that non-Indians had acquired in the last century when, for example, they were exchanged by the Tribe for other trust lands or sold by members of the Tribe. *Id.* at 1529-31. It made no difference that they had obviously been diminished under the legal standard adopted in *Hagen*. *Id.* at 1529

Ute V produced a hot mess. It was binding only on the parties to *Ute III* and even then only in federal court. The court also admitted its decision would produce "a checkerboard allocation of jurisdiction" with respect to land owned by non-Indians. *Id.* at 1530. Some would be outside the Tribe's jurisdiction (the unallotted lands on the Uintah Valley Reservation) while some (for example, lands sold over

one hundred years ago by members of the Tribe) would be Indian Country.

Much worse, the checkerboard had no lines or colored squares. It turned on a fact that was almost never known *ex ante*: how any given parcel came to be owned by Indians and non-Indians. So *Ute V* recognized that often only "a title search" could determine whether the Tribe or counties had jurisdiction over, for example, the location of a crime or over a business subject to taxation. *Id.*

D. The Case Settles Rather Than Producing A Judgment Adverse To The Governmental Parties

Ute V just remanded the case; it did not order the district court to enter an injunction or a judgment in favor of the Tribe. There was far too much left to do to try and put the decision in place. The district court entered a preliminary injunction requiring the parties to follow *Ute V*, whatever that meant.

The two counties that were parties to *Ute V* (as noted, the County was not) sought certiorari. No. 97-570, *Duchesne County v. Ute Indian Tribe*. They pointed to the court of appeals' refusal to give effect to *Hagen* and the utterly unworkable jurisdictional regime that resulted.

The State of Utah did not seek certiorari or otherwise encourage this Court to grant the counties' petition. Responding to an Order of this Court to set forth its position, the State explained that *Ute V* created "jurisdictional chaos." Response of the State

of Utah to Request for Statement of Position 3, No. 97-570, *Duchesne County v. Ute Indian Tribe* (Dec. 23, 1997). But Utah indicated that review was unnecessary at that time, because it had "determined to address the problem through negotiation, not litigation." *Id.* at 2. The State was "committed to serious negotiations," had made "important progress in negotiating difficult issues," and indeed had signed a "Letter of Intent" with the Tribe. *Id.* at 4. The State explained that it had not sought certiorari so as not to "jeopardize [those] ongoing negotiations." *Id.* With the state that won *Hagen* not supporting immediate review of *Ute V*, and with the settlement likely creating doubts about mootness, the Court denied certiorari. *Duchesne Cty. v. Ute Indian Tribe*, 522 U.S. 1107 (1998).

The parties to *Ute V* then settled. The settlement itself did not address any lands located within Wasatch County, which was not a party to either the *Ute* litigation or the settlement.

As stipulated by the parties, including the Tribe, the district court vacated its preliminary injunction and dismissed the Tribe's complaint with prejudice. Stipulated Order Vacating Preliminary Injunction and Dismissing the Suit with Prejudice, *Ute Indian Tribe v. Utah*, 2:75-CV-00408, Dkt. No. 145 (D. Utah Mar. 28, 2000) ("[Q]uestions of jurisdiction on the various categories of land within the original boundaries of the Uintah and Ouray Reservation have been determined by the decisions of the United States Supreme Court and the Tenth Circuit Court of

Appeals, *as modified by the agreements between the parties . . . .*" (emphasis added)). The court did not enter a judgment in favor of the Tribe or against any of the named governmental parties. *Id.*

The settlement departed significantly from *Ute V*. The Tribe agreed *not* to exercise its full sovereign authority over the non-trust lands that the Tenth Circuit had deemed to be Indian Country notwithstanding *Hagen*. *See* Disclaimer of Civil/Regulatory Authority at 1 (Exhibit to Dkt. No. 96). In consideration, the Tribe could exercise misdemeanor criminal jurisdiction over tribal members throughout the original Reservation, even in areas *Ute V* determined were not Indian country. *Id.*; *see also* Cooperative Agreement to Refer Tribal Members Charged with Misdemeanor Offenses to Tribal Court for Prosecution at 3 (Exhibit to Dkt. No. 96). Law enforcement officers representing all the parties would be "cross deputized." *See* Cooperative Agreement for Mutual Assistance in Law Enforcement at 3 (Exhibit to Dkt. No. 96). All other civil and criminal jurisdiction was assigned to the federal, state, and local governments that were parties to the settlement.

Major terms of the settlement expired in 2008, but the signatories continued to adhere, in some respects, to them voluntarily. In 2012, the Tribe stopped completely. The jurisdictional dispute—which *Hagen* supposedly resolved—then arose again. The Tribe filed suit to "reopen" the *Ute* litigation in 2013.

II. Factual And Procedural History

A. The County Maintains That The Reservation Has Been Diminished

Petitioner Wasatch County, Utah, is located southeast of Salt Lake City, more than one hundred miles from the tribal headquarters. The County was established in 1862. It has a total area of roughly 1200 square miles.

The County provides the usual array of traditional governmental services. For example, the Wasatch County School District manages elementary, middle, and high schools. The Emergency Medical Service provides urgent health care. The County Sheriff polices the region, including on state and county roads. The County Justice Court adjudicates civil and criminal matters.

There are 25,000 residents; roughly 125 are Native American. Most residents live in several communities, including Heber City, the County seat. Many work in the tourist recreational areas in nearby Park City and other locations near Salt Lake City.

Roughly half of the County lies within the Reservation's original boundaries. But that includes only one small area of trust land. For at least the last one hundred years, the Tribe made no jurisdictional claim to any of the rest. Much of it is Forest lands, which are patrolled by the County Sheriff under a contract with the Forest Service. There are also plots owned by non-Indians.

The County believes that the state courts are right and that *Ute III* and *V* are wrong, particularly given *Hagen*. The County believes that it *must* follow the precedent of this Court. So the County believes it is legally obligated to patrol the state and county roads within its borders, where it must enforce the validly enacted laws and regulations of the county, state, and federal governments. In turn, the County prosecutes state misdemeanor offenses that occur on those roads in Wasatch County Justice Court.

Before this litigation, the Tribe had never objected. There is no evidence that the Tribe has effectively policed (or can effectively police) those roads, including those in the Forest lands.

B. The Tribe Seeks A Federal Court Injunction

Lesa Jenkins was arrested on a state road in the County that traverses the Forest lands. The officer cited her for several state law offenses: speeding, driving with a suspended or revoked license, and driving without the device to detect intoxication required by her prior state drunk driving conviction.

The County sought to prosecute Ms. Jenkins. But she is an enrolled member of the Tribe. If she objected to the County's jurisdiction, the state court could decide that argument (as in *Hagen*). But there is no question that argument would be doomed in that court.

So the Tribe went back to the federal courts that had previously ruled in its favor, seeking declaratory and injunctive relief. It named petitioner and the State of Utah as defendants. The district court combined the suit with the original *Ute* litigation. That made the two county defendants in *Ute III* and *Ute V* parties here too. (They are contemporaneously filing their own follow-on petition.)

The Tribe's position in federal court is that "*Hagen* does not prevent the Tribe—a non-party to *Hagen*—from enforcing the *Ute III*/*Ute V* mandate," because (in language that perfectly captures the Tribe's views) "the United States Supreme Court in *Hagen*" did not "have *the constitutional authority* to divest and diminish . . . the Tribe's Reservation lands." Br. of Appellant Ute Indian Tribe, No. 14-4080, *Ute Indian Tribe v. Myton City* 19, 21 (Aug. 19, 2015) (emphasis added). The Tribe requests a declaration that it has exclusive sovereignty throughout the original Reservation, including even the lands *Hagen* held were diminished. The Tribe also seeks 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 *Ute V* to be Indian Country—and prohibiting the State and its subdivisions from otherwise relitigating matters settled by those decisions. *See* Complaint, *Ute Indian Tribe v. Utah*, No. 2:13-CV-01070 at 8-10 (Dkt. No. 2) (D. Utah Dec. 3, 2013); Complaint, *Ute Indian Tribe*

v. Utah, No. 2:13-CV-00276 at 9-10 (Dkt. No. 2) (D. Utah Apr. 17, 2013)

As to the County in particular, the Tribe seeks to enjoin the prosecution of Ms. Jenkins. *See* Complaint, *Ute Indian Tribe v. Utah*, No. 2:13-CV-01070 at 9 (Dkt. No. 2) (D. Utah Dec. 3, 2013). It also seeks to enjoin the County from arguing in any state or federal court that the lands within the original Reservation are not Indian Country or from following a contrary ruling of any other court—including *Hagen*. *Id.* at 9-10.

C. The Tenth Circuit Enjoins The State Court Prosecution

With very narrow exceptions, the Anti-Injunction Act bars a federal court from enjoining a state court proceeding. 28 U.S.C. § 2283. The Act does not permit an injunction to enforce federal court precedent in state court. *Id.* So even if *Ute III* and *Ute V* were rightly decided, they could not be a proper basis to enjoin the prosecution of Ms. Jenkins. Instead, the state courts would decide the Reservation's boundaries themselves.

The district court refused to give the Tribe an injunction. But the court of appeals reversed in the decision that gives rise to this Petition.

The scorching ruling below excoriated the state and counties for challenging *Ute V*'s refusal to apply *Hagen* beyond its narrowest facts. Pet. App. 6a-7a. It chided this Court for even hearing *Hagen*, "despite

having denied review in *Ute III* and despite the fact the mandate in that case had long since issued." *Id.* 5a. And it admonished the defendants that if they continued to pursue the issue, "they may expect to meet with sanctions in the district court or in this one." *Id.* 26a.

The Tenth Circuit held that an injunction was required to enforce the judgment in *Ute V*. *Id.* at 8a-9a. It opined that the Anti-Injunction Act was no obstacle, because it permits a federal court to enjoin a state court proceeding when "necessary 'to protect or effectuate'" its judgments. *Id.* 14a.

Of course, the County was not a party to *Ute V*. Also, *Ute V* only bound the parties to *Ute III*, because *Ute V* relied only on the finality of the *Ute III* judgment. No matter. The Tenth Circuit held that every county was *ipso facto* in privity with the State, which had lost *Ute V*. Pet. App. 15a. The court identified no evidence that the State had litigated *Ute V* in the County's interests. To the contrary, the State had settled without any judgment being entered in favor of the Tribe. And the settlement gained the County nothing.

The Tenth Circuit nonetheless deemed all the defendants bound by *Ute V*, enjoined the County from prosecuting Ms. Jenkins, and remanded. Put otherwise, it enjoined a state court prosecution to "effectuate" a non-existent judgment (with respect to a non-party) that is in diametric opposition to an actual judgment of this Court. And, what is more, it

directly threatened sanctions if the governmental parties ever tried to exercise their sovereign authority over their own lands in their own courts again.

This petition followed.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has forever forbidden state and local governments—under the force of an injunction and a direct threat of sanctions—to apply this Court's on-point decision in *Hagen* in state or federal court to correctly identify their jurisdiction within the original Reservation. It disparages this Court's choice to decide *Hagen* at all. That ruling is a barely veiled attempt to strip this Court's ruling of its force and to reinstate the court of appeals' contrary decisions.

That ruling below moreover intrudes directly on the County's responsibility to conduct an ongoing criminal prosecution in state court for violations of state law on a state road. It puts the County to the choice of being sanctioned or abandoning its responsibilities to its citizens. It also upends the justifiable expectations of those citizens, specifically recognized in *Hagen*, that they are subject to the jurisdiction of ordinary civil authorities, not the Tribe.

The state courts would reach the opposite result in a case not brought by the government and also in this prosecution, were it not for the injunction. This

Court should resolve that conflict, just as it did in *Hagen*. But the basis for the Court's intervention is far stronger now. The ruling below conflicts directly with the decisions of this Court construing the Anti-Injunction Act and applying bedrock, long-accepted principles of collateral estoppel.

Certiorari accordingly should be granted.

I. This Court's Intervention Is Required Once Again To Establish The Correct Legal Test To Determine The Boundaries Of The Reservation.

The Reservation's boundaries are in chaos, which is precisely why this Court granted certiorari in *Hagen*. *Ute V* all but admitted that Tenth Circuit precedent produces an inadministrable "checkerboard" of jurisdictional responsibilities. *Ute V*, 114 F.3d at 1530. *Ute V* holds that the Reservation was diminished only with respect to the unallotted lands that were before this Court in *Hagen—i.e.*, those lands on the Uintah Valley Reservation that were opened to settlement under legislation in the early 1900s. *Id.* at 1529-30. All the other non-trust lands owned by non-Indians remained within the Reservation, including lands that Congress terminated from federal and tribal supervision, and lands that were previously allotted to members of the tribe but were long, long ago sold to non-Indians. *Id.* at 1529-31.

But no one even knows ahead of time where the squares of the checkerboard lie and who has

jurisdiction. No current, official map or database resolves the dispositive fact under *Ute V*: *how* non-Indians acquired the lands. So "a title search" may be required for each plot each time a question arises. *Id.* at 1530. For example, people obviously commit crimes on non-tribal land. So it can take a survey and title search each time to figure out what law applies and who has jurisdiction to prosecute.

Don't believe just us. The Tribe told this Court in *Hagen* that this exact system would produce "jurisdictional chaos" that would be "virtually impossible" to administer, as "the State may have jurisdiction over one lot, but the Tribe and the United States may have jurisdiction over the lot next door." *See* Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g, No. 92-6281, *Hagen v. Utah* at 4-5. A single store could be situated on two lots with conflicting jurisdictions, with the "absurd situation of a tribal member being subject to or exempt from paying State sales taxes depending on the location within the store of the item purchased." *Id.*

Actually, it is much worse than a "checkerboard" without squares; it is an impossible-to-play game of three dimensional chess because the court systems apply conflicting jurisdictional rules and Tenth Circuit precedent applies to some parties but not others. So County residents have no way to know *ex ante* whether they are bound to the Tribe's laws or instead Utah law. Such "inequalities in the administration" of the law are "a fertile basis for

litigious confusion" rendering estoppel inappropriate. *Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948).

As parties to the *Ute* litigation, the State and the other named local governments are bound by Tenth Circuit precedent. Everyone else—for example, a business contesting the Tribe's right to tax—is bound by *Hagen* and state court precedent, which very often will reach a different result.

That is true in *both* federal and state court. In federal court, the collateral estoppel effect of the Tenth Circuit's decision binds the State and the named local governments. But everyone else is subject to *Hagen*.

In state court, the Tenth Circuit has made clear it will enforce its precedent against the State and local governments through injunctions of prosecutions (as well as sanctions). But everyone else is bound by *Hagen*'s finding of diminishment and state court precedent.

The differences are radical. The Tenth Circuit essentially admitted that *Hagen* overrules *Ute III*. State court precedent also deems the Reservation much smaller. The Tribe told this Court that state court precedent amounts to "finding that the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians." *See* Mot. of Ute Indian Tribe to Intervene as a Matter of Right, No. 92-6281, *Hagen v. Utah* at 4-5, 7. It told the district court that state court precedent "holds that the Uintah Valley Reservation

was disestablished, except for those lands which are held in trust by the United States for the benefit of the Tribe." *See* Mem. in Supp. of Renewed Mot. for Injunctive Relief, *Ute Indian Tribe v. Utah*, No. 2:75-CV-00408, at 8-10 (D. Utah July 31, 1992). The United States agrees that under state court precedent "the exterior boundaries of the Uintah [Reservation] have been disestablished." United States' Memorandum as *Amicus Curiae* in Support of Ute Indian Tribe's Motion for Injunctive Relief, *Ute Indian Tribe v. Utah*, No. 2:75-CV-00408 at 2 (Dkt. No. 10) (Nov. 23, 1992).

This is a real practical problem, right now, every day. The Tribe has barred some non-members from traveling on county roads. It has interfered with county efforts to fix the roads. It has banished non-member business owners, as well as their non-member employees and lawyers, from public lands and state roads.

In sum, this petition presents the conflict between state and federal courts that led the Court—at the urging of the United States—to grant certiorari in *Hagen*, but in a far more intractable and consequential form. This Court's intervention is obviously required once again.

II. The Ruling Below Violates The Anti-Injunction Act, Impermissibly Preventing The State Courts From Adhering To This Court's Precedent.

The Anti-Injunction Act prohibited the Tenth Circuit from enjoining the County's prosecution of Ms. Jenkins based on *Ute V*. The court of appeals had two choices. It could give full effect to this Court's ruling in *Hagen* and reject the request for an injunction. Or it could let the state courts make the collateral estoppel determination for themselves.

The relevant part of the Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in State court except as . . . necessary . . . to . . . effectuate its judgments." 28 U.S.C. § 2283. "[T]he Act's core message is one of respect for state courts." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011).

The Tenth Circuit's concern that it must put an end to state court litigation over the boundaries of the Reservation was just wrong. Even if the state courts had erroneously failed to apply collateral estoppel, "an injunction is not the only way to correct a state trial court's erroneous refusal to give preclusive effect to a federal judgment. As we have noted before, 'the state appellate courts and ultimately this Court' can review and reverse such a ruling." *Id.* at 2376 n.5 (quoting *Atl. Coast Line R. Co. v. Locomotive Eng'rs*, 398 U.S. 281, 287 (1970)).

The Tenth Circuit invoked the Act's "relitigation exception." But it never acknowledged that the exception is "strict and narrow" and "not [to] be enlarged by loose statutory construction," *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-48 (1988), so that "*[a]ny doubts* as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed," *Atlantic Coast Line*, 398 U.S. at 297 (emphasis added). "[E]very benefit of the doubt goes toward the state court; an injunction can issue only if preclusion is clear beyond peradventure." *Bayer Corp.*, 131 S. Ct. at 2376 (internal citations omitted). "Under this approach, close cases have easy answers: The federal court should not issue an injunction, and the state court should decide the preclusion question." *Id.* at 2382.

That means that the Tribe was entitled to an injunction only if it can show beyond doubt that the ordinary requirements of collateral estoppel exist here: (i) *Ute V* decided the same issue that is presented by the state court prosecution; and (ii) *Ute V* produced a final judgment embodying the court of appeals' ruling on that issue. Then, because the County was not a party to *Ute V*, the Tribe must also show beyond question that two additional conditions are satisfied: (i) the County was in privity with the State in the sense that (at a minimum) the State sought to protect the County's interests while it litigated *Ute V*; and (ii) the State adequately

represented the County's interests by fully and fairly litigating *Ute V*.

In fact, none of those requirements was satisfied here at all, much less satisfied "beyond peradventure." *Bayer Corp.*, 131 S. Ct. at 2376.

A. Collateral Estoppel Does Not Attach To The Judgment In *Ute V*, Which Does Not Preclude Later Litigation By Any Entity

The essential requirements of collateral estoppel are not satisfied in this case. *Ute V* was an *opinion*, not a *judgment*.[1] That opinion was not implemented: the parties settled. *See Arizona v. California*, 530 U.S. 392, 414 (2000) ("But settlements ordinarily occasion no issue preclusion (sometimes called

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[1] *See, e.g.*, *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 1580 (Fed. Cir. 1994) (holding that there was no preclusive effect when an appellate decision "resulted in a remand for further proceedings," because a "final judgment is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'" (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945))); *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1341 (Fed. Cir. 2013) (holding that there was no preclusive effect when an appellate court vacated and remanded, because "where the scope of relief remains to be determined, there is no final judgment"); *see also* 18A Wright & Miller, *Federal Practice and Procedure* § 4432 (2d ed. West 2015) ("There is no preclusion as to the matters vacated or reversed, unless further proceedings on remand lead to a new judgment that expands the scope of preclusion. . . . Reversal and remand for further proceedings on the entire case defeats preclusion entirely until a new final judgment is entered by the trial court or the initial judgment is restored by further appellate proceedings." (internal footnotes omitted)).

collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect." (citing Restatement (Second) of Judgments § 27 (1982) (issue preclusion applies only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment")).[2] Further, the settlement was temporary and contained very different terms than *Ute V* would have imposed.[3] That is a particularly significant concern under the Anti-Injunction Act.[4]

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[2] *See, e.g.*, *Cell Therapeutics Inc. v. Lash Grp. Inc.*, 586 F.3d 1204, 1212 (9th Cir. 2009), *as amended on denial of reh'g and reh'g en banc* (Jan. 6, 2010) (ruling ending in settlement lacks collateral estoppel effect, especially with respect to nonparty, including because doing so "would upend the settlement process . . . [and] inevitably chill the settlement spirit"); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 284-85 (5th Cir. 2006) (holding that collateral estoppel did not apply when the parties had settled after a denial of a motion to dismiss, because the denial was "*not* a final judgment on the merits because the action continues after the denial," and "[s]ettlement agreements, like consent judgments, are *not* given preclusive effect unless the parties manifest their intent to give them such effect"); *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906 (7th Cir. 1990) ("[C]onsent judgments, while settling the issue definitively between the parties, normally do not support an invocation of collateral estoppel."); *Hughes v. Santa Fe Int'l Corp.*, 847 F.2d 239, 241 (5th Cir. 1988) ("A consent judgment ordinarily does not give rise to issue preclusion because the issues underlying the judgment are neither actually litigated nor necessary and essential to the judgment. However, consent judgments will be given preclusive effect if the parties manifest such an intention." (internal citations omitted)).

[3] *See, e.g.*, *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 913-14 (4th Cir. 2013) (holding that there was no claim

The district court did eventually enter a "judgment" after the parties settled. But if anything it was adverse to the Tribe: it dismissed the Tribe's complaint *with prejudice*. So *Ute V* did not result in a preclusive judgment in favor of the Tribe.

Independently, an important "issue" that the County is being prevented from litigating in the state court prosecution of Ms. Jenkins was not an "issue" in *Ute V*. The County argues that even if *Ute III* and *V* are correctly decided, the County has jurisdiction over the offense because an element of the crime occurred outside Indian Country. *Ute III* and *Ute V* do not decide that question; they only address the antecedent question of the Reservation's boundaries. Because the issues are different, collateral estoppel does not apply, and an injunction is forbidden: "[A]n *essential prerequisite* for applying the relitigation exception is that the claims or issues which the

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preclusion when the previous action had been dismissed in accordance with a settlement, because "the preclusive effect of a judgment based on such an agreement can be no greater than the preclusive effect of the agreement itself" and the settlement terms did not bar lawsuits by non-signatories).

[4] *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (holding that relitigation exception did not apply because the "contention that [an appellate opinion] is a 'judgment' that has res judicata or collateral estoppel effect is flawed"); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 179-80 (5th Cir. 1996) (holding that AIA relitigation exception did not apply because the federal court order (denying class certification) was not a final judgment on the merits).

federal injunction insulates from litigation in state proceedings actually have been decided by the federal court. Moreover, . . . this prerequisite is strict and narrow." *Chick Kam Choo*, 486 U.S. at 148 (emphasis added).

The Tenth Circuit's ruling is thus contrary to the Anti-Injunction Act because collateral estoppel does not attach to *Ute V*, much less attach beyond any doubt.

B. At The Very Least, *Ute V* Does Not Bind The County, Which Was Not A Party To That (Non)Judgment

The County was not a party to *Ute V*. As the district court has recognized, the Tribe "seems to lump all the Defendants together. But it is obvious, under the *Ute V* Mandate, that they are not the same." Order Fixing Hearing Date on Pending Motion and Related Matters, *Ute Indian Tribe v. Utah*, No. 2:75-CV-00408 at 9 (Dkt. No. 956) (D. Utah Sep. 18, 2015).

That means the requirements of collateral estoppel are even more rigorous. "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329

(1971). Indeed, this Court's "decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008).

The Tenth Circuit's desire to end the litigation over the Reservation's boundaries—which is doomed to failure in any event, because it does not bind other parties—is not a basis to bind the County. "[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment." *Bayer Corp.*, 131 S. Ct. at 2381.

The strict prerequisites for applying non-party estoppel are not satisfied here. The State of Utah was not in privity with the County. The Tenth Circuit had the presumptive rule exactly backwards: "[c]ourts have . . . generally found that *no privity exists* . . . between state and local governments." 47 Am. Jur. 2d Judgments § 625 (emphasis added); *see also, e.g.*, *Bank of Kentucky v. Commonwealth of Kentucky*, 207 U.S. 258, 265-66 (1907) (county was not bound by res judicata to the result of previous litigation by the state and other counties).

That presumption is not overcome here. Merely describing the Tenth Circuit's preclusion ruling shows it is wildly wrong. The County—*a non-party*,

with no ability to participate in the case—was bound by *Ute V*. But the *actual parties* to *Ute V* were not bound; they entered into a settlement under which they agreed not to follow it in some important ways. That cannot be right.

The State also did not litigate *Ute V* in the County's interest. None of the State's filings suggest that it was representing the distinct interests of absent local governments such as the County. Two other counties represented themselves and the district court said others could intervene. If the State acted for them all, that would have been unnecessary.

The State also did not protect the County in settling. The County would not have given up its own jurisdictional claim in exchange for the settlement, which gave it nothing. So the County cannot be bound. *See Taylor*, 553 U.S. at 896 (preclusion violates due process when the party to the first action neither "'took care to protect the interests' of absent parties" nor "'understood their suit to be on behalf of absent" parties) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 802 (1996)) (alterations omitted); *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999).

This case is accordingly much closer to other circuits' rulings that a county is not in privity with a

state. The decision below is irreconcilable with those decisions.[5]

The State did not protect the County's interests for a second reason: it did not fully litigate *Ute V*. *Ute V*'s refusal to give effect to *Hagen* was novel and controversial, to say the least. But the State did not seek certiorari; instead, it told this Court that review was unnecessary because it preferred to settle. And it then did settle, rather than continuing to litigate the case on remand. The County cannot be bound to the State's decision. *See Blonder-Tongue Labs.*, 402

[5] For example, in *Baraga County v. State Tax Commission*, 645 N.W.2d 13 (Mich. 2002), the Michigan Supreme Court held that consent judgments by local governments regarding the taxation of Indian land did not bind the state, because the governmental entities were not in an agency relationship. That was particularly so because the state relied for its position on intervening precedent of this Court. *See also United States v. Dominguez*, 359 F.3d 839, 843-44 (6th Cir. 2004) (discussing *Baraga*). *See, e.g.*, *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 764 (9th Cir. 2003) (city and state agency were not in privity in a lawsuit over oil spill damage, because the city had property interests (a private easement) at stake that the state did not); *Froebel v. Meyer*, 217 F.3d 928, 934 (7th Cir. 2000) (county and state agency were not in privity in lawsuit over state's removal of a dam on county land, because the county was uninvolved in the events giving rise to the previous lawsuit and was represented by different counsel than the state); *Harris Cty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 316-19 (5th Cir. 1999) (county was not in privity with either state attorney general or another county because "the attorney general does not represent all district and county attorneys in the state when he makes decisions regarding the conduct of litigation," and the county "neither knew of nor participated in the [previous] suit").

U.S. at 329 ("Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.").

C. The Tenth Circuit's Ruling Cannot Be Reconciled With This Court's On-Point Decision In *Hagen*.

Whatever the rule in ordinary collateral estoppel cases, here the basis for allegedly preclusive judgment was *expressly rejected by this Court*. It cannot be "clear beyond peradventure," *Bayer Corp.*, 131 S. Ct. at 2376, that a state court should be enjoined from following this Court's precedent. *See Montana v. United States*, 440 U.S. 147, 161 (1979) ("major changes in the law" would be an appropriate basis not to hold a non-party bound by collateral estoppel (citing *Comm'r v. Sunnen*, 333 U.S. 591 (1948)).[6]

Ute III and *Ute V* are irreconcilable with *Hagen*. *Ute V* held that Tenth Circuit precedent "precludes

[6] *See, e.g.*, *Ginters v. Frazier*, 614 F.3d 822, 827 (8th Cir. 2010) (holding that collateral estoppel did not apply because of a relevant intervening Supreme Court decision, which "constitutes a significant change in controlling legal principles under the 'change in law' exception to the doctrine of collateral estoppel"); *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 399 (5th Cir. 2004) (holding that collateral estoppel did not apply because of relevant intervening Supreme Court and circuit court decisions).

the defendants from enforcing the contrary holding in *Hagen*," "even where [*Ute III*] is erroneous in light of a later change in law." *Ute V*, 114 F.3d at 1522. It made no difference that applying *Hagen* would "achieve a more accurate judgment or . . . avoid the injustice that might result," because the fact "that *Ute Indian Tribe III* may have been wrongly decided or operates unfairly against the state and local defendants is not a concern." *Id.* at 1523.

The Tenth Circuit's jurisdictional rulings conflict with *Hagen* regarding several different types of non-Indian lands. Take the unallotted lands, for example. This Court held that the unallotted lands of the Uintah Reservation were diminished. Nothing about the allotment statutes of the adjoining Uncompaghre Reservation changes that result, yet the Tenth Circuit holds they remain in the Reservation.

Next take the Forest lands. *Hagen* did not expressly decide their status. But they are obviously diminished under the legal standard adopted by this Court. *Ute III* held the opposite on the theory that statutes restoring reservation land to the "public domain" do not diminish the reservation. *Ute III*, 773 F.2d at 1092. It ruled that diminishment would arise only from a "clear expression of congressional intent to change the status of the reservation." *Id.* at 1088. That test would be satisfied if Congress withdrew reservation lands and provided "an unconditional commitment to compensate Indians for their opened lands." *Id.* Alternatively, the historical record could "unequivocally reveal a widely-held,

contemporaneous understanding that the affected reservation would shrink." *Id.*

Hagen rejected the court of appeals' plain statement rule and moreover held that "the payment of a sum certain to the Indians" is not a prerequisite to diminishment. *Hagen*, 510 U.S. at 412. Instead, the determination whether Congress diminished a reservation turns on three factors:

> (1) "the statutory language used to open the Indian lands";
>
> (2) the historical context surrounding the passage of the surplus land Acts"; and
>
> (3) "who actually moved onto opened reservation lands."

Id. at 411.

Those three factors, the Court concluded, established that Congress had diminished the Reservation with respect to the unallotted lands at a minimum:

First, the 1902 Act stated that unallotted lands "shall be *restored to the public domain*," so that "their previous public use was extinguished" and they no longer were Indian Country. *Hagen*, 510 U.S. at 412. Indeed, this Court noted, the Tenth Circuit *itself* had since rejected *Ute III*'s conclusion that statutory language providing for restoration of lands to the public domain does not diminish a reservation. *Id.* at 414 (citing *Pittsburgh & Midway Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990)).

Second, the Indian Inspector had recognized that as a result of the congressional Acts, "there will be no outside boundary line to this reservation." *Id.* at 417.

Finally, the members of the Tribe overwhelmingly reside on Indian Trust lands and "[t]he seat of Ute tribal government is in Fort Duchesne, which is situated on Indian trust lands." *Id.* at 421. By contrast, "[t]he State of Utah exercised jurisdiction over the opened lands from the time the reservation was opened until the Tenth Circuit's *Ute Indian Tribe* [*III*] decision." *Id.* These facts "demonstrate[] a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Id.*

Even *Ute V* did not dispute that "*Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based—namely, that statutory restoration language is insufficient to infer diminishment." *Ute V*, 114 F.3d at 1528. Specifically, as the original Tenth Circuit panel correctly anticipated, under *Hagen*, Congress diminished the Reservation by removing not just the unallotted lands but the Forest lands too. 716 F.2d at 1314. *Ute III itself* essentially acknowledged that conclusion, recognizing that "the case against disestablishment" is stronger with respect to the unallotted lands of "the Uintah Indian Reservation than the other areas," including the subject Forest lands. *Ute III*, 773 F.2d at 1088. Just as the unallotted lands were restored to public use,

the Forest lands—which are federally managed—were converted to "*public land* bearing forests . . . as *public reservations*." *Id.* at 1100. The federal government moreover paid the Tribe $1.2 million for the Forest lands. The Tribe lost control over those lands, just as it did the unallotted lands. The U.S. Forest Service—not the Tribe or the Bureau of Indian Affairs—manages the Forest lands, and the Bureau of Indian Affairs itself has explained that they were "severed" and "detached" "from the reservation" and "from tribal control." A Forest History of the Uintah and Ouray Indian Reservation, *supra*, at 52, 55-56, 86-87, 89.

Hagen's other diminishment factors indeed support finding that Congress disestablished the Uncompahgre Reservation altogether. The Court recognized that "[o]ur cases considering operative language of restoration have uniformly equated it with a congressional purpose to terminate reservation status." *Hagen*, 510 U.S. at 413 (emphasis added). Further, *Hagen* indicates that nothing in the historical records required a contrary conclusion. *Id*. at 420. The same conclusion follows from the facts that the Tribe's members do not occupy the other non-trust lands and that non-Indians have been governed by the federal, state, and local governments rather than the Tribe. *Id*. at 420-21.

When they function as intended, the doctrines of "res judicata and collateral estoppel . . . promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."

Allen v. McCurry, 449 U.S. 90, 95-96 (1980). But here, the Tenth Circuit is applying those doctrines to do the opposite. The County is pursuing a solemn responsibility assigned to it under both the federal and state constitutions: it is enforcing the criminal law. It is doing so in furtherance of a decision and judgment of this Court. As the Tenth Circuit itself recognized, the state court litigation does not seek to apply *Hagen* retroactively or to undo any individual judgment from the past, but instead seeks "to apply *Hagen* prospectively to the continuing conduct of separate sovereigns and the individuals living in and around the Uintah Valley Reservation." *Ute V*, 114 F.3d at 1526. The defendant (Ms. Jenkins) was not a party to the prior federal court litigation, so she has no fair claim to repose from litigating the Reservation's boundaries. This must be the context in which the federal courts are least likely to find preclusion and most hesitant to interfere with proceedings in state court.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Tenth Circuit.

Nos. 14-4028, 14-4031

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.

No. 14-4034

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.

Appeal from the United States District Court
for the District of Utah
(D.C. Nos. 2:75-cv-00408-BSJ and
2:13-cv-0170-DB-DBP)

Before HARTZ, GORSUCH,
and MORITZ, Circuit Judges

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 (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 (1975); *Solem v. Bartlett,* 465 U.S. 463, 465 n.2, (1984). True, states sometimes may prosecute "crimes by non-Indians against non-Indians and victimless crimes by non-Indians." *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 (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 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.

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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.

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, 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.

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 (1997). And they may, in certain circumstances, enter Indian lands to investigate off-reservation crimes. *See Nevada v. Hicks,* 533 U.S. 353, 366 (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 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,*

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[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.

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.

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 (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 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

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[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).

suggest only that nobody has given us any reason to think that possibility is realized here.

Where the County fails with the AIA the State suggests it might succeed with *Younger v. Harris,* 401 U.S. 37 (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 (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 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.

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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 (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 (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.,* 134 S.Ct. 2024, 2031 (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.

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.

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 Tribe,* 532 U.S. 411, 415, 418-23 (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 (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 (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 (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 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.

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.[4] Meanwhile, the

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[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.

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 (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. The County contends that an out-of-circuit decision, *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), somehow

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Waterman, *A Treatise on the Law of Set-Off, Recoupment, and Counter-Claim* ch. 10 (1869).

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.

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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, (2006).

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 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 (quoting *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 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.

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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 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).

APPENDIX B

UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH,

Plaintiff,

v.

THE STATE OFUTAH and WASATCH COUNTY, a political subdivision of the State of Utah,

Defendants.

ORDER

Case No. 2:13-CV-1070

Judge Dee Benson

This matter is before the court on Plaintiffs Motion for Preliminary Injunction (Dkt. No. 3), and Defendants' Motion to Dismiss (Dkt. No. 31). Having heard oral argument on March 17, 2014, and having reviewed the motions and supporting memoranda, the court hereby rules as follows:

Plaintiff's Motion for Preliminary Injunction is DENIED. Plaintiff has failed to demonstrate the

irreparable injury necessary for the court's issuance of a preliminary injunction at this time.

Defendants' Motion to Dismiss is DENIED. Under the unique circumstances and facts of this case, and in recognition of the significant federal issues involved in the case, the court finds the Anti-Injunction Act (28 U.S.C. § 2283) inapplicable and abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) is not appropriate.

For reasons of judicial economy and efficiency, this case is hereby transferred in its entirety to the Honorable Bruce S. Jenkins for consolidation with case no. 2:13-CV-276.

It is so ORDERED.

DATED this 19th day of March, 2014.

Dee Benson
United States District Judge