16-868

No. _____

In The

Supreme Court of the United States

MYTON CITY, UTAH,

Petitioner,

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

AMY HUGIE
Myton City Attorney
33 S. Main St.
Suite 2A
Brigham City, UT 84302
(435) 734-0655
amyhugie@xmission.com

J. CRAIG SMITH
Counsel of Record
SMITH HARTVIGSEN, PLLC
175 S. Main St.
Suite 300
Salt Lake City, UT 84111
(801) 413-1600
jcsmith@SHutah.law

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTIONS PRESENTED

In *Hagen v. Utah*, 510 U.S. 399, 409 (1994), this Court granted certiorari "to resolve the direct conflict between" a Tenth Circuit ruling and a Utah Supreme Court ruling over whether Congress had diminished the Uintah Valley Reservation. This Court sided with the Utah Supreme Court and held that the Reservation had been diminished. In making this ruling, this Court also held that the town of Myton, Utah was not Indian Country and that Utah had jurisdiction to prosecute Indians who were accused of committing crimes in Myton.

Myton, however, was not a party to either the *Hagen* litigation or the conflicting Tenth Circuit decision that *Hagen* repudiated. Despite *Hagen*, in 2013 Myton was, for the first time, added as a party in the long running jurisdictional litigation between Utah and the Ute Tribe from which this appeal arises.

The district court dismissed the Tribe's claims against Myton pursuant to *Hagen*, quoting verbatim language that Myton is not in Indian country as well as prior instructions from the Tenth Circuit to follow *Hagen*. The Tenth Circuit reversed, holding that *Hagen* only applied to a specific lot within Myton rather than the entire town. The Tenth Circuit also reassigned the district court judge for adhering to *Hagen* in dismissing the Tribe's claims against Myton.

QUESTIONS PRESENTED – Continued

The Questions Presented are:

1. Did the court of appeals err in reassigning District Court Judge Bruce S. Jenkins for adhering to this Court's verbatim holding in *Hagen*?

2. Did the court of appeals err by holding that the town of Myton, Utah, is not removed from Indian country for the purposes of criminal jurisdiction under 18 U.S.C. § 1151?

LIST OF PARTIES

The parties in the court below were:

Ute Indian Tribe of the Uintah and Ouray Reservation, Plaintiff-Appellant.

Myton, a municipal corporation, Defendant-Appellee.

Duchesne County, a political subdivision of the State of Utah; Roosevelt City, a municipal corporation; Duchesne City, a municipal corporation; Uintah County, a political subdivision of the State of Utah; Wasatch County; Gary Herbert, in his capacity as Governor of Utah; Sean D. Reyes, in his capacity as Attorney General of Utah, Defendants.

United States of America; the State of Utah, Amici Curiae.

RULE 29.6 DISCLOSURE STATEMENT

No corporate entity is a petitioner.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The court of appeals' opinion is published at 835 F.3d 1255. The district court's order is unpublished.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1151, which defines "Indian country," as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c)

> all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The allotment legislation that diminished the Reservation, by opening it for non-Indian settlement and returning unallotted lands to the public domain: Act of May 27, 1902, 32 Stat. 245; Act of March 3, 1903, 32 Stat. 982; Act of April 21, 1904, 33 Stat. 189; Act of March 3, 1905, 33 Stat.1048.

STATEMENT OF THE CASE

The issue is whether the Tenth Circuit erred in refusing to abide by *Hagen* and reassigning a district court judge for relying on this Court's express language in *Hagen v. Utah* that "the town of Myton, where petitioner committed a crime, is not in Indian country" under 18 U.S.C. § 1151. 510 U.S. 399, 421-22 (1994). This creates a chilling effect on every Article III judge who implements this Court's mandates.

The Tenth Circuit's decision also ignores *Hagen*'s holding that all of Myton is not in Indian country, holding instead that this Court's phrase, "the town of Myton," was "no more than a shorthanded reference to . . . a parcel of land inside the town of Myton." *Ute Indian Tribe v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016) ("*Ute VII*").

I. The History of Myton

Myton is a small Utah municipality within the historic boundaries of the Uintah Valley Indian Reservation ("the Reservation"). Myton has a total population of 546, over 90% non-Indian.[1]

Congress diminished the Reservation through a series of allotment acts from 1902 to 1905 (the "1902 to 1905 Acts") that returned, to the public domain, lands that had not been allotted to the Tribe. *Hagen*, 510 U.S. at 402-08. Shortly thereafter, President Theodore Roosevelt reserved the Myton Townsite from the public domain by proclamation in 1905. The federal government then created townsite plats that the General Land Office and the United States Surveyor General accepted in 1905 and 1919, respectively. *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473, 1486 (D. Utah 1996) ("*Ute IV*"). Those plats reserved certain lands for public use, including Myton's streets, alleys, and school blocks. In 1912, Myton was incorporated as a municipality under Utah law. Brief of Appellee at 4, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080). From then on, the entire town has been subject, almost exclusively, to the State of Utah's criminal jurisdiction. *Hagen*, 510 U.S. at 421.

Since 1975, the Tribe has been involved in on and off litigation with the State of Utah and local governments over the extent of its criminal jurisdiction

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[1] Summary of Population and Housing Characteristics: Utah, 2010, Table 3, pg. 30, available at: http://www.census.gov/prod/cen2010/cph-1-46.pdf (last visited Dec. 2, 2016).

within the former boundaries of the Reservation. Myton was not a party to this litigation until 2013 when the Tribe added the town as a defendant along with the State of Utah, three counties, and two other municipalities. The Tribe claims generally that "defendants" had "taken actions inconsistent with the federal court decisions rendered in the 1975 suit," sent "law enforcement agents onto tribally owned reservation lands to take action which is inconsistent with the land's reservation status." Complaint at ¶ 22, No. 2:75-cv-00408-BSJ (D. Utah April 17, 2013).

The Tribe made no specific allegations against Myton, which did not have a police force. As the basis for its generic claims of wrongful prosecution by all "defendants," it focused on an order the Secretary of the Interior issued on August 25, 1945 (the "1945 Secretarial Order") that restored 217,000 unspecified acres "of undisposed-of open lands" to the Reservation, which the order said "need closer administrative control in the interest of better conservation practices." 10 Fed. Reg. 12409. The Secretarial Order does not mention Myton or any other townsite or municipality.

U.S. District Court Judge Bruce S. Jenkins has presided over almost all of the litigation since 1975 involving the Tribe's jurisdictional claims authoring two of the eight published opinions on this issue.

In *Ute Indian Tribe v. Utah*, ("*Ute I*"), Judge Jenkins ruled in the Tribe's favor, holding that the 1902-1905 Acts did not diminish the Reservation, except for lands removed for certain federal purposes. 521 F. Supp. 1072 (D. Utah 1981). Sitting *en banc*, the Tenth Circuit upheld Judge Jenkins' decision in a ruling now known as "*Ute III.*" *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1092-93 (10th Cir. 1985) (*en banc*), *cert. denied*, 479 U.S. 994 (1986) ("*Ute III*"). The effect of *Ute III* was that the Tribe retained full sovereignty over all original Reservation lands, which encompassed Myton.

II. This Court Reverses the Tenth Circuit Holding that the Reservation Was Not Diminished

A. *Perank* and *Hagen* – Utah Supreme Court.

On July 17, 1992, the Utah Supreme Court issued two decisions that conflicted with *Ute III* by holding that the Reservation had been diminished. The cases involved Utah felony prosecutions of two Native Americans – Clinton Perank and Robert Hagen – for criminal acts committed within Myton.[2]

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[2] Myton had nothing to do with these prosecutions. Under Utah law, a town like Myton does not prosecute felony crimes; the State does through the Duchesne County Attorney. Utah Code § 10-3-928(2); *id.* § 17-18a-401.

The longstanding understanding among non-Indians living within the former boundaries of the Reservation was that primarily non-Indian communities, including Myton, did include trust lands. Brief of Roosevelt City as Amicus Curiae Supporting Respondent at 8 n.8, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281).

As a result, Utah framed the issue as an all-or-nothing proposition, arguing that "Myton – where the burglary occurred – is situated on non-trust land." *See* Brief of Respondent at 4, *State v. Perank*, 858 P.2d 927 (Utah 1992) (No. 860243). Rather than address the status of the specific situs of Mr. Perank's crime, Utah focused on the "disputed area" of non-trust lands that had "historically been the primary concern" of the State and local governments. *Id.* at 10. This "disputed area" included "incorporated towns and cities." *Id.* at 10. In support, Utah relied on a map prepared by the Department of the Interior that depicted Myton as being outside of the Reservation (the "Map"). *Id.* at 4 n.2. Utah further argued that the demographics of the "disputed area" showed that the area had been disestablished because it was "predominantly populated by non-Indians, approximately 18,000 of them, with only about 1,500 tribal members, who are living mainly on trust lands." *Id.* at 43-44.

Mr. Perank also did not address the status of the specific site of his crime, arguing instead that all of Myton was part of the Reservation under *Ute III*. Brief of Appellant at 4-5, *State v. Perank*, 858 P.2d 927 (Utah 1992) (No. 860243).

Rather than refuting Utah's assertion that Myton was not Indian country, the Tribe submitted an amicus brief that ignored this issue entirely, arguing instead that Mr. Perank was not an Indian and was subject to State jurisdiction. *See* Brief for Ute Indian Tribe as Amicus Curiae, *State v. Perank*, 858 P.2d 927 (Utah 1992) (No. 860243). The United States, which declined to submit an amicus brief, provided a letter that only argued that the Reservation had not been diminished under *Ute III*. Letter from Blake Watson, Dep't of Justice, to Utah Supreme Court (Dec. 21, 1988).

The Utah Supreme Court agreed with Utah, holding that the "unallotted, unreserved lands . . . were restored to the public domain by the 1902 act . . . and that the Reservation boundaries were diminished by that restoration." *State v. Perank*, 858 P.2d 927, 953 (Utah 1992). *Perank* also did not identify or discuss the specific situs of the crime within Myton. Instead, after describing the effect of various federal actions on the Reservation boundary including the 1945 Secretarial Order, *Perank* held that: "[s]ince Myton, Utah, lies outside the boundaries of the Reservation *so described*, it is not within Indian Country." *Id.* (emphasis added). *Perank* also made it clear that it was referring to the entire town, stating: "The two towns where the bulk of the non-Indian population reside, Roosevelt and Duchesne, are in the disputed area that the State contends is not subject to tribal jurisdiction. *Myton is also in that area.*" *Id.* at 934 n.10 (emphasis added).

Like Mr. Perank, Mr. Hagen argued that Myton was entirely within Indian country under *Ute III*. Brief of Respondent at 6, *State v. Hagen*, 858 P.2d 925 (Utah 1992) (No. 910017). Utah took the opposite side of the same argument – that *Ute III* "was wrongly decided and that the original Uintah reservation was disestablished and today consists of only tribally owned 'trust lands,' *of which the town of Myton is not a part*." Brief of Petitioner at 9, *State v. Hagen*, 858 P.2d 925 (Utah 1992) (No. 910017) (emphasis added).

As a result, the Utah Supreme Court relied on *Perank* when it addressed Mr. Hagen's arguments, holding that "for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country." *State v. Hagen*, 858 P.2d 925, 926 (Utah 1992). Again, the court did not address or discuss the status of the specific lot on which Mr. Hagen was arrested. *Id.*

B. *Hagen v. Utah* – U.S. Supreme Court.

Mr. Hagen appealed to this Court. Rather than addressing the status of the situs of his crime in Myton, he argued: "[t]his case involves the issue of criminal jurisdiction in the *small town of Myton, Utah*. Brief of Petitioner at 3-4, *Hagen*, 510 U.S. 399 (1994) (No. 92-6181) (emphasis added).

Utah again argued that the "[t]own of Myton, Utah . . . is not located on Indian-owned 'trust lands,' but lies within the area which was restored to the public domain and opened to non-Indian settlement." Brief of Respondent in Support of Writ of Certiorari at 5, 510

U.S. 399 (1994) (No. 92-6281). Utah also made clear that it did not mean the specific lot where Mr. Hagen committed his crime, explaining that Mr. Perank was charged for his separate crime of "burglary in the Town of Myton (the same situs as [Mr. Hagen's] crime." *Id.* at 7.

If that wasn't enough, Utah explained that "[w]ithin the disputed area (the non-trust lands), there are several incorporated towns and cities (such as Myton, Roosevelt, and Duchesne)," and that until *Ute III*, "the state and local governments have asserted jurisdiction over the disputed area without challenge from the Indians, who have minimal, if any, interests in the disputed area." Brief of Respondent at 10, 11, *Hagen*, 510 U.S. 399 (No. 92-6281). Utah even cited the Map again to show that Myton was located outside of the trust lands. *Id.* at 6 n.3.

The Tribe and the United States both participated as amici, and neither made any effort to refute Utah's depiction of Myton as being entirely outside of Indian country. Moreover, neither the Tribe nor the United States discussed the status of the specific parcel where Mr. Hagen committed his crime or the 1945 Secretarial Order. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281); Brief for the Ute Indian Tribe as Amicus Curia, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281).

This Court granted Mr. Hagen's petition "to resolve the direct conflict between [*Ute III*] and the Utah Supreme Court['s]" *Perank* and *Hagen* decisions on the question of diminishment. *Hagen*, 510 U.S. at 409. To do this, it used the following test: "If the reservation has been diminished, then *the town of Myton, Utah*, which lies on opened lands within the historical boundaries of the reservation, is not in 'Indian country' . . . and the Utah state courts properly exercised criminal jurisdiction over petitioner, an Indian who committed a crime *in Myton*." *Id.* at 401-02 (emphasis added). *Hagen* then found that the Reservation had been diminished because "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Id.* at 414.

Hagen did not parse Myton. *See id.* at 401-22. Instead, this Court focused only on the "contemporaneous" evidence surrounding the opening of the Reservation, stating that the "subsequent history is less illuminating" and that "the confusion in the subsequent legislative record," which necessarily includes the 1945 Secretarial Order, "does nothing to alter our conclusion." *Id.* at 419-20.

Rather than study the subsequent legislative and regulatory history, *Hagen* focused instead on the "subsequent demographics of the Uintah Valley area," which, it held, did not controvert its finding of diminishment, noting that the area is approximately 85% non-Indian and that "when an area is predominately

populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country *seriously burdens the administration of state and local governments*." *Id.* at 420-21 (quoting *Solem v. Bartlett*, 461 U.S. 463, 471-72 n.12 (1984) (emphasis added).

This Court then considered the "jurisdictional history" of the Uintah Valley area to justify diminishment, finding that "Utah exercised jurisdiction over the opened lands from the time the reservation was opened until [*Ute III*]." *Id.* at 421. This fact coupled with the area's demographics "demonstrate[d] 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.* (emphasis added).

Having considered the impacts Indian country status would have on justifiable expectations and the burdens on local governments, this Court held that the Reservation had been diminished and that "the town of Myton, where petitioner committed a crime, is not in Indian Country." *Id.* at 421-22.

III. Post-*Hagen* Litigation – *Ute IV & V*

A. The District Court Identifies the Areas of Conflict Between *Hagen* and *Ute III*.

Following *Hagen*, the Tribe returned to the district court, seeking to enjoin Utah and other local defendants from relying on *Hagen* to exercise criminal

jurisdiction within the historic boundaries of the Reservation. The Tribe did not name Myton.

The Tribe's request brought the conflict between *Ute III* and *Hagen* to a head. Judge Jenkins issued an extensive decision known as "*Ute IV*," *Ute Indian Tribe v. Utah*, 935 F. Supp. 1473 (Utah D. Ct. 1996), which concluded by asking the Tenth Circuit for instruction on how to address the direct conflict.

In making this request, Judge Jenkins' opinion in *Ute IV* identified the areas of conflict between *Ute III* and *Hagen*. Although Myton was not a party to this proceeding, Judge Jenkins addressed the town's status, noting that the Tribe had identified various categories of non-trust lands, stipulating that the first category had been diminished under *Hagen*; namely, "lands that passed from trust to fee status under the 1905 Presidential Proclamation." *Id.* at 1486. Citing the presidential proclamation that created Myton and the federal government's acceptance of its townsite plat, Judge Jenkins concluded that: "Myton comes within the first category of *non-trust lands* listed by the Tribe, at least as to lands patented in fee, and *in its entirety as lands* 'opened to entry' under *Perank*." *Id.* (emphasis added).

B. The Tenth Circuit Interprets *Hagen* and Accepts Judge Jenkins' Delineation of Myton as Being Entirely Outside of Indian Country.

Subsequently, the Tenth Circuit modified its ruling in *Ute III* "to the extent that it directly conflicts with . . . *Hagen*." *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1516 (10th Cir. 1997) ("*Ute V*"). This holding should have put the issue of the status of Myton as not Indian country to rest. As to Myton, *Hagen* directly conflicted with *Ute III*.

Ute V goes even further to accept Judge Jenkins' conclusion that Hagen removed Myton "in its entirety" from Indian country, finding that he had "fully addressed the areas of genuine conflict" and holding that it "need look no further" than his summary. *Id.* at 1528. At no point, did the Tenth Circuit discuss Myton's status or modify Judge Jenkins' findings regarding Myton. It did not need to because it held that "[t]o the extent that the boundary determinations made in [*Ute III*] do not directly conflict with *Hagen*, they remain in effect." *Id.*

Outside of Myton, which was not specifically addressed in *Hagen*, the Tenth Circuit then modified *Ute III* so that the Reservation did not include "fee lands removed from the Reservation under the 1902-1904 allotment legislation." *Id.* at 1530. To identify these lands, *Ute V* set forth a three-part test to determine whether the land was: (1) unallotted, (2) opened to non-Indian settlement under the 1902-1905 legislation,

and (3) "not thereafter returned to tribal ownership." *Id.* at 1528.

C. The Case Settles Rather Than Producing a Judgment.

Ute V only remanded the case and Judge Jenkins entered a preliminary injunction requiring the parties to follow *Ute V*. The parties to *Ute V* (which did not include Myton) then settled and executed a stipulation. A related order was entered that approved maps depicting the jurisdictional and ownership status of land within the Reservation in light of *Ute V*. Stipulation, No. 2:75-cv-00408-BSJ (D. Utah Nov. 20, 1998); Order Approving Maps Depicting the Status of Land Within the Uintah Valley Indian Reservation, No. 2:75-cv-00408-BSJ (D. Utah Nov. 20, 1998). The "jurisdictional" map described all of Myton as "status under review." *See* Stipulation, No. 2:75-cv-00408-BSJ (D. Utah Nov. 20, 1998). Likewise, the "ownership" map described the entire town as "Presidential Townsite," rather than any Reservation land. The stipulation and the related order also said the maps created as "a rebuttable presumption [that] *accurately depict[ed] the status of the land*." Stipulated Order Vacating Preliminary Injunction and Dismissing the Suit with Prejudice, *Ute Indian Tribe v. Utah*, 2:75-cv-00408-BSJ (D. Utah Mar. 28, 2000) (emphasis added).

The agreements underlying the settlement ultimately expired, reigniting the jurisdictional dispute that *Hagen* and *Ute V* had supposedly resolved. The

Tribe filed suit to "reopen" the *Ute* litigation in 2013, almost 20 years after *Hagen*, naming Myton for the first time, and seeking an injunction against all defendants from exercising criminal jurisdiction over the undefined and unspecified Reservation lands. Complaint, No. 2:75-cv-00408-BSJ (D. Utah April 17, 2013). Notwithstanding the fact that the Tribe had never challenged Utah's assertion in *Hagen* and *Hagen*'s holding that Myton was not Indian country, the Tribe now argued that the 1945 Secretarial Order restored certain unspecified lands within Myton to the Reservation.

IV. Procedural History

A. The District Court Dismisses the Tribe's Claims Against Myton Pursuant to *Hagen*.

Myton filed a motion to dismiss the Tribe's claims on May 9, 2013, relying on *Hagen*. Myton City's Motion to Dismiss and/or Motion for Judgment on the Pleadings, No. 2:75-cv-00408-BSJ (D. Utah May 9, 2013).

Following a pre-trial conference on September 22, 2014, which Judge Jenkins held to hear all pending motions he dismissed Myton. Brief of Appellee at 48-49, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080).

In his final written order, Judge Jenkins supported the dismissal by quoting verbatim *Hagen*'s analysis and its conclusion that "the town of Myton . . .

is not in Indian Country." Order Dismissing Claims against Defendant Town of Myton at 3, 6, No. 2:75-cv-00408-BSJ (D. Utah Jan. 28, 2015). He also concluded that he had no choice but to dismiss the Tribe's claims against Myton, with prejudice, because *Ute V* "makes clear that this court should follow the Supreme Court's decision in *Hagen*." *Id.* at 6. He also certified his decision for appeal. *Id.*

B. The Tribe Appeals Myton's Dismissal.

The Tribe appealed, arguing that adherence to *Hagen* somehow violated *stare decisis* and the Constitution. Brief of Appellant at 20-25, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080). In the alternative, the Tribe argued that Utah tricked this Court into issuing *Hagen* through fraud and that *Hagen*'s express ruling was only dicta. *Id.* at 25-36.

Myton responded that *Ute V* expressly modified the Tenth Circuit's prior mandate in *Ute III* to "the extent that it directly conflicts with . . . *Hagen*." Brief of Appellee at 11, 26, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080). Because the plain language of *Hagen* held that all of Myton was outside of Indian country, Myton argued that *Ute V* necessarily excluded it from Indian country through adherence to *Hagen*. *Id.* at 19-30. Myton also argued that a contrary conclusion would eviscerate *Hagen*'s consideration of the justifiable expectations of its citizens, pointing out the challenges of functioning as a jigsaw puzzle with missing

pieces exempt from municipal jurisdiction. *Id.* at 9-10, 40-46.

After sitting on the sidelines for two decades, the United States finally weighed in as an amicus, claiming that the 1945 Secretarial Order restored some undefined lands in Myton and that *Hagen*'s holding that Myton was not in Indian country was dicta. The United States never made any of these points in its amicus briefs in *Hagen* and *Perank* nor did it ever inform Myton, Judge Jenkins, or any other court of exactly which lands in Myton it believes are "trust lands." *See* Brief of United States as Amicus Curiae Supporting Appellant, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080).

C. The Tribe Seeks to Recuse and Reassign Judge Jenkins.

While its appeal regarding Myton's dismissal was pending, the Tribe moved to reassign Judge Jenkins in the proceedings that were still moving forward in the district court with the other parties. Motion to Recuse and Memorandum in Support, No. 2:75-cv-00408-BSJ (D. Utah Mar. 7, 2016). It also filed a Motion for Reassignment Upon Remand with the Tenth Circuit seeking the same relief. Motion for Reassignment of the Case to a Different District Court Judge, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080). In its motions, the Tribe alleged that Judge Jenkins was senile and

that he was biased against the Tribe, on a de facto basis, because he is a Mormon.[3] E.g., *id.*; Reply to the State of Utah's Response in Opposition to the Tribe's Motion to Recuse at 14-15, No. 2:75-cv-00408-BSJ (D. Utah Apr. 5, 2016).

The Tenth Circuit subsequently asked Judge Stephen Friot of the Western District of Oklahoma to act on the Tribe's motion to recuse. After reviewing the entire record, consisting of thousands of pages, Judge Friot issued a scathing 55-page decision that found that any "objective observer . . . would not harbor doubts about Judge Jenkins' impartiality." Order Denying Ute Motion to Recuse at 48, No. 2:75-cv-00408-BSJ (D. Utah July 25, 2016). Judge Friot also found the Tribe wholly responsible for any delay through its "persistent efforts . . . to avoid, or failing that, delay, the tedious but essential work incident to bringing this case to a conclusion." *Id.*

Myton submitted Judge Friot's decision to the Tenth Circuit as supplemental authority pursuant to Fed. R. App. P. 28(j) on July 28, 2016. *Ute VII*, however, followed two weeks later without a single mention of Judge Friot's order or his exhaustive analysis.

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[3] The Tribe's claim of bias is curious as Judge Jenkins' authored *Ute I*, which *Ute III* upheld, that the reservation had not been diminished.

D. The Tenth Circuit Shrinks *Hagen* to a Single Lot in Myton.

Ute VII criticized Judge Jenkins' reliance on this Court's holding in *Hagen*. After concluding that *Ute V*, rather than *Hagen*, "decided all boundary disputes," it held that *Hagen* turned "on whether the particular parcel of land where the crime occurred (Mr. Hagen's home in Myton) was or was not Indian Country." *Id.* at 1261. Without quoting any language from *Hagen*, *Ute VII* then concluded that "[e]very bit of evidence suggests that the Supreme Court meant to remove from . . . Indian Country those lands (and only those) allotted to the nontribal members between 1905 and 1945." *Id.* at 1262. Consequently, *Ute VII* held that *Hagen*'s use of the term "the town of Myton" was "no more than a shorthanded reference to the situs of the crime, a parcel of land that had been allotted to a nontribal member between 1905 and 1945." *Id.*[4]

Of course, neither this Court nor any of the lower court decisions that gave rise to *Hagen* ever discussed whether or, in the alternative, how the 1945 Secretarial Order applied to Myton, let alone whether the parcel where Mr. Hagen committed his crime was subject to the Order. Neither did *Ute VII* recognize that the Tribe readily acknowledged that Utah had in fact "informed the Supreme Court that the entire town of

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[4] Notwithstanding *Hagen*, *Ute III* also held that this reasoning applies generally to similar lots transferred to non-Indians, but makes no specific findings regarding the jurisdictional status of any other lot other than Mr. Hagen's residence, which was never defined. *Ute VII*, 835 F.3d at 1264.

Myton was situated *outside* the Reservation, outside of Indian Country." Brief of Appellant at 26-27, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080) (emphasis in original). In a direct contradiction to this admitted fact, *Ute VII* nevertheless concluded that "[n]o one before the Court sought a ruling that *all* of Myton is outside of Indian Country. That question simply wasn't presented." 835 F.3d at 1262.

Without even mentioning Judge Friot's detailed explanation as to why the Tribe's counsel – and not Judge Jenkins – was to blame for extended litigation in this matter, *Ute VII* reached the opposite conclusion that "Utah and its subdivisions bear responsibility for much of this." *Id.* at 1264.

Ute VII didn't stop there, however. It also reassigned Judge Jenkins, not because of any bias, but because of what it called "extreme circumstances" in which he "twice failed to enforce this court's mandate in *Ute V*." *Ute VII*, 832 F.3d 1220, 1228 (10th Cir. 2016). These two instances consisted of a "one line order" that another judge issued, and Judge Jenkins' reliance on the verbatim language of *Hagen* when he dismissed the Tribe's claims against Myton. *Id.* at 1224. Thus, *Ute VII* remanded all matters to a new judge to "proceed to a final disposition" consistent with its mandate in *Ute V*. *Id.* at 1228.[5]

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[5] *Ute VII* also incorrectly found that Myton did not dispute that it was in privity with the State of Utah in *Ute V* and the prior litigation. In its briefing, Myton made clear that it disputed that

E. The Tenth Circuit Amends Its Decision to Remove a Glaring Error that Was One of Only Two Reasons to Reassign the Judge.

Following *Ute VII*, Judge Jenkins took the extraordinary step of writing the Chief Judges of both the district court and the Tenth Circuit to note that *Ute VII* incorrectly attributed the "one-line" order to him. Letter from Judge Jenkins to Chief Judge Nuffer at 3, No. 2:75-cv-00408-BSJ (D. Utah Aug. 19, 2016). This meant that his only "cited failure . . . was to write a 7 page opinion quoting extensively from the opinion of the Supreme Court." *Id.* Because of this, Judge Jenkins noted: "[i]f granting a motion and relying on a Supreme Court opinion violates a mandate which justifies reassignment, then every Article III trial judge is at risk." *Id.*

After receiving Judge Jenkins' letter, the Tenth Circuit removed the erroneous "twice failed" reference, leaving everything else in place. Order to Amend Decision, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No.

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it "was estopped from disagreeing with interpretations of the Secretarial Order *which the State of Utah made*" in the prior litigation. Response Brief of Appellee at 5 n.4, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080) (emphasis added). The Tribe did not argue that Myton was in privity with Utah. *See* Brief of Appellant, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080). In fact, the only time privity appears in the record is when the question was asked *sua sponte* during oral argument. Oral Argument at 18:15-18:35, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080). Even then, Myton made it perfectly clear that: "there is no privity." *Id.*

15-4080).[6] In other words, *Ute VII*'s sole reason for reassigning Judge Jenkins was his reliance on this Court's verbatim holding in *Hagen*.

This petition followed.

REASONS FOR GRANTING THE WRIT

Ute VII sets an impermissibly low bar for reassigning an Article III judge that directly threatens this Court's primacy and conflicts with the substantially higher bar that other circuit courts across the country require.

This Court should also reassert its primacy and reverse *Ute VII*, which reduces *Hagen*'s holding to a single lot and therefore conflicts directly with *Hagen*'s express holding that Myton is not in Indian Country.

Certiorari accordingly should be granted.

[6] The citation for the final, amended decision is 835 F.3d 1255 (10th Cir. 2016).

I. The Tenth Circuit's Reassignment of Judge Jenkins Allows Article III Judges to Be Reassigned at Whim.[7]

The Tenth Circuit's reassignment of Judge Jenkins is so fraught with errors that he took the exceptional step of writing the Circuit's Chief Judge to express concern that his reassignment for relying on this Court's express language puts "every Article 3 trial judge is at risk." Letter from Judge Jenkins to Utah District Court and Tenth Circuit at 3, No. 2:75-cv-00408-BSJ (D. Utah Aug. 19, 2016).

A. *Ute VII* Ignores the Factors Circuit Courts Must Consider When Reassigning a Judge.

Judge Jenkins' concerns are real and require this Court to act. The general rule in multiple circuits, including the Tenth Circuit (at least until *Ute VII*) is that, absent personal bias, a trial judge will only be reassigned "under extreme circumstances." *United States v. Kieffer*, 596 F. Appx 653, 666 (10th Cir. 2014) *cert. denied*, 135 S. Ct. 2825 (2015); *see also Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996) (citing *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986), *cert. denied*, 479 U.S. 988 (1986)); *United States v. Gupta*, 572 F.3d 878, 891 (11th Cir.

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[7] Myton acknowledges that this Court could address the merits of Judge Jenkins' reassignment through summary disposition pursuant to Rule 16(1) of the Rules of the Supreme Court of the United States.

2009). Under *Ute VII*, extreme circumstances now include adhering to this Court's rulings.

To determine whether extreme circumstances exist, courts of appeal across the country consider:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Kieffer, 596 F. App'x at 666; *see also Mitchell*, 80 F.3d at 1450 (citing *Sears, Roebuck & Co.*, 785 F.2d at 780); *Gupta*, 572 F.3d at 891.

Ute VII's failure to analyze, or even mention, these factors is a stark departure from the precedent of the Circuits. Tellingly, the only factor that can be seen as receiving any analysis is the first one regarding a judge's ability to put aside previously expressed views. *Ute VII*, 835 F.3d at 1263-64. However, to find that a judge is incapable of putting aside his or her views, there must be some type of evidence of "adamance" on the judge's part in sticking to their previously held beliefs. *Sears, Roebuck & Co.*, 785 F.2d at 780 ("A district court judge's adamance in making erroneous rulings may justify remand to a different judge.").

Here, *Ute VII* cites its the mistaken belief that Judge Jenkins "twice failed" to respect its mandate. 832 F.3d at 1228. Of course, after Judge Jenkins pointed out that he had nothing to do with one of these so-called "failures," the Tenth Circuit corrected its opinion to focus on one singular "failure" – Judge Jenkins' dismissal of Myton, relying on this Court's verbatim language in *Hagen*. *Ute VII*, 835 F.3d at 1264. A singular instance does not show that Judge Jenkins is incapable of changing his previously expressed views, especially when the Tenth Circuit had already approved of his findings in *Ute IV* that Myton was entirely out of Indian country under *Hagen*. Moreover, Judge Jenkins has shown that he can change his viewpoints. After all, his first ruling in this case was to side with the Tribe in *Ute I* to find that the Reservation had not been diminished.

More troubling, *Ute VII* finds that Judge Jenkins is incapable of following the Tenth Circuit's mandates and resolving this "long lingering dispute" without even mentioning Judge Friot's conclusion that Judge Jenkins is doing exactly that and the Tribe, rather than Judge Jenkins, or any other party, has been responsible for the delay. Order at 48, No. 2:75-cv-00408-BSJ (D. Utah July 25, 2016). As a practical matter, Judge Jenkins has presided over this case for almost the entirety of its tortured and convoluted forty-year history and reassignment will require a significant amount of time for another judge to get up to speed.

The end result is that *Ute VII* with little or no analysis reassigned Judge Jenkins for relying on this

Court's precise language, ignoring the factors that its own precedent and the precedent of other circuit courts. *Ute V* sets a dangerously low bar for reassignment.

B. *Ute VII*'s Finding That Judge Jenkins Ignored Its Mandate Is Without Merit.

The Tenth Circuit's conclusion that Judge Jenkins should be removed for failing to fulfil its mandate is just as problematic. As this Court holds, "a mandate is controlling as to matters within its compass, [but] on the remand a lower court is free as to other issues" left open by the mandate. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 168 (1939); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895); *see also Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (holding that a district court has authority to address "any issue not expressly or impliedly disposed of on appeal."). Additionally, if a remand is general, the district court is free to address "anything not foreclosed by the mandate." *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1125 (10th Cir. 2003). (internal quotation marks omitted).

Ute V did not disturb *Hagen*'s ruling on Myton's status. Instead, it issued a general mandate that left the determination of jurisdictional status within the historical boundaries of the Reservation, outside of Myton, up to Judge Jenkins to determine. While *Ute V* ordered Judge Jenkins to follow *Hagen*, it provided no guidance regarding Myton. Specifically, it mentions

Myton only once as the location of the crimes that gave rise to the Utah Supreme Court's ruling that the Reservation had been diminished. *Ute V*, 114 F.3d at 1518. It never discusses the meaning of the phrase "the town of Myton" as used in *Hagen*. *Id.* at 1515.

Ute V also accepted and even endorsed Judge Jenkins' conclusion, in *Ute IV*, that *Myton* was removed from the Reservation under *Hagen* "at least as to lands patented in fee, and *in its entirety* as lands 'opened to entry'" as a result of *Hagen*. *Ute IV*, 935 F. Supp. at 1486, 1528 (emphasis added). Thus, Judge Jenkins properly dismissed the Tribe's claims against Myton pursuant to *Hagen* and *Ute V*.

If that were not enough, the actions of the parties following *Ute V* also show that the decision did not disturb *Hagen*'s determination of Myton's jurisdictional status; otherwise the stipulated maps would not have identified Myton as "status under review." Stipulation, No. 99 2:75-cv-00408-BSJ (D. Utah Nov. 20, 1998). Of course, Myton was not a party to the Stipulation. Even the Tenth Circuit's own contemporaneous decisions read *Hagen* as excluding all of Myton from Indian country. *See Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 976 n.8 (10th Cir. 1995) ("In *Hagen*, the Court concluded that the Uintah reservation had been 'diminished' . . . and that therefore *a town* originally within the reservation was now outside the reservation." (emphasis added)).

Judge Friot's ruling provides further evidence still of Judge Jenkins' adherence to the mandates. For instance, while *Ute VII* claims that Judge Jenkins ignored its mandates, Judge Friot found that Judge Jenkins "want[ed], at long last, to get this case to a final and definitive conclusion, *effectuating the mandates of the Court of Appeals*." Order Denying Ute Motion to Recuse at 48, No. 2:75-cv-00408-BSJ (D. Utah July 25, 2016) (internal quotation marks omitted) (emphasis added). Moreover, in contrast to *Ute VII*'s conclusion that Judge Jenkins and "Utah and its subdivisions bear much of the responsibility" for the fact that no permanent injunction had yet been entered, Judge Friot held that the Tribe was solely to blame for any delay for its "persistent efforts . . . in seeking to avoid, or, failing that, delay the tedious but essential work incident to bringing this case to a conclusion." *Id.* at 48.

If the reassignment of Judge Jenkins is allowed to stand, this precedent subjects every Article III judge, at least in the Tenth Circuit, to removal at whim. More importantly, because *Ute V* required Judge Jenkins to apply the Tenth Circuit's mandate in a way that is consistent with *Hagen*, *Ute VII*'s reassignment of Judge Jenkins for relying on the verbatim language of this Court will make other Article III judges think twice before they apply Supreme Court precedent that apparently has become disfavored by a subsequent inferior circuit court.

II. This Court Should Intervene to Prevent *Ute VII* From Overruling *Hagen*.

In *Hagen*, this Court held in plain and simple terms that, "the town of Myton, where petitioner committed a crime, is not in Indian Country." 510 U.S. at 421. This straightforward holding should have forever resolved Myton's jurisdictional status. In disobedience to this Court and its ruling in *Hagen*, however, the Tenth Circuit rationalizes that *Hagen*'s plain language does not mean what it actually says but is instead merely a "shorthanded reference" for something else entirely – the specific lot where Mr. Hagen committed his crime, rather than the entire town. *Ute VII*, 835 F.3d at 1261-62. This ignores the undisputed fact that *Hagen* and its related lower court rulings never identify or even discuss a specific lot, referring exclusively instead to "Myton, Utah" and "the town of Myton." Nevertheless, the Tenth Circuit now believes that *Hagen* only removed certain parcels from Indian country, creating an unworkable checkerboard pattern of jurisdiction that does exactly what *Hagen* purposefully avoided, disrupting the "justifiable expectations" of Myton's citizens. *Hagen*, 510 U.S. at 421.

A. The Hierarchy of the Federal Court System Places This Court, Not the Tenth Circuit, As the Supreme Court in the Land.

Stare decisis is a bedrock principle of American law "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters

reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

The reason for these principles is simple: "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

Ignoring this seminal constitutional principle, *Ute VII* revises and overrules *Hagen*. *Hutto* is instructive here. In *Hutto*, this Court remanded a case with instructions to apply its *Rummel v. Estelle*, 445 U.S. 263 (1980) decision. *Hutto*, 454 U.S. at 372. On remand, however, the district court ignored *Rummel* and relied on a contrary Fourth Circuit opinion. *Id.* at 373. The Fourth Circuit affirmed. *Id.* This Court reversed and reprimanded the Fourth Circuit, finding: "the Court of Appeals . . . ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress." *Id.* at 374-75.

As in *Hutto*, this Court already issued an opinion that decided the issues before the Tenth Circuit in *Ute VII*. Notwithstanding *Hagen*'s straightforward holding that the entire "town of Myton . . . is not in Indian

country," *Hagen*, 510 U.S. at 421, the Tenth Circuit has now imposed a different and conflicting holding because it didn't like *Hagen*'s holding. The Tenth Circuit has done so by ignoring plain language and replacing it with what it posits this Court actually "meant to say."

The Tenth Circuit may, respectfully, disagree with *Hagen* but as an "inferior court," U.S. Const. Art. I, § 1, it is bound by *Hagen*'s holding that all of Myton is not in Indian country. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (explaining that "[t]he Court of Appeals was correct in applying [stare decisis] despite [its] disagreement . . . for it is this Court's prerogative alone to overrule one of its precedents."). "Needless to say, only this Court may overrule [*Hagen*]," *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983), "no matter how misguided the judges of [the Tenth Circuit] may think it to be." *Hutto*, 454 U.S. at 375.

B. The Tenth Circuit's *Ute VII* Decision Is in Diametric Opposition to *Hagen*.

The Tenth Circuit's material revision of this Court's *Hagen* decision is disconcerting because there is no language in *Hagen* to indicate that the use of the phrase "town of Myton" meant anything else. *See Hagen*, 510 U.S. at 401-22. If *Hagen* were as "plain" as the Tenth Circuit believes, this Court would have said as much. It did not. To the contrary, *Hagen* provides no

indication where Mr. Hagen was arrested within Myton. The only description it provides for the location of the crime are the phrases "Myton" or "the town of Myton." *Hagen*, 510 U.S. at 400-02, 408-09, 420. These phrases are not and cannot be transformed into a "shorthanded reference" to a single, never identified, lot as *Hagen* provided no other context to show that it meant anything other than, what it said: the town of Myton.

The Tenth Circuit is equally wrong in its conclusion that "every bit of evidence" in *Hagen* shows that this Court's diminishment is limited to "only those lands" allotted to nontribal members between 1905 and 1945, referring to the 1945 Secretarial Order. *Ute VII*, 835 F.3d at 1262. Contrary to any arguments that this Court was unaware of this order, Mr. Hagen, Utah, and the United States discussed the order at length in their briefs. Brief for Petitioner at 43-44, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281); Brief for Respondent at 9, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281); Brief for United States as Amicus Curiae Supporting Petitioner at 42 n.40, *Hagen*, 510 U.S. 399 (No. 92-6281). *Hagen*, finding no need to address the Order, focused on whether "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Hagen*, 510 U.S. at 414. It did not discuss whether the opened lands were subsequently returned to trust status; and it made clear that the "subsequent history is less illuminating"

and "does nothing" to alter the finding of diminishment. *Id.* at 420.

Hagen went even further to make plain that, when it said "the town of Myton," it meant what it said by considering the primarily non-Indian demographics of the area and Utah's exercise of "jurisdiction over the opened lands [including all of Myton] from the time the reservation was opened until [*Ute III*]." *Id.* at 421. This fact, as this Court noted, "stands in sharp contrast" to the holding in *Solem v. Bartlett*, 465 U.S. 463, 480 (1984), where the Bureau of Indian Affairs policed the opened lands within the Cheyenne River Sioux Reservation following their opening. *Id.*

Relying on these considerations, *Hagen* concluded "that the Reservation was diminished; *a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.*" *Id.* at 421 (emphasis added). *Hagen* had no need to address demographics and the justifiable expectations of thousands of people spread out over the original boundaries of the Reservation if all it was deciding was a single lot within Myton. If *Hagen* really addressed a single lot, the entire discussion of demographics and settled expectations in support of the holding in *Hagen* was misplaced, meaningless, and nonsensical.

Hagen further recognized that what the Tenth Circuit is so adamant about promoting – a jurisdictional checkerboard of chaos – is unworkable, stating: "[w]e have recognized that 'when an area is predominately populated by non-Indians with only a few surviving

pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.'" *Id.* at 420-21 (quoting *Solem*, 465 U.S. at 471-72). Why consider burdens to local governments if *Hagen*'s intent was to create a checkerboard pattern of jurisdiction at a micro-level within a small town?

Indeed, this Court has consistently rejected the exercise of tribal jurisdiction over non-Indian areas and where a state or local government has exercised exclusive jurisdiction over the area for a long period of time. *E.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998) (internal quotation marks omitted); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977).

Most tellingly, *Ute VII* makes no effort to reconcile its holding with these considerations. In fact, it even criticizes and chides Myton for even raising the same governance difficulties that *Hagen* resolved as a mere "fact of daily life throughout the West." *Ute VII*, 835 F.3d at 1262.[8]

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[8] *Ute VII* also notes that laches "usually may not be asserted against the United States." 835 F.3d at 1263. Myton's discussion of laches focused on the concepts of justifiable expectations and burdens on the administration of local government, both of which this Court discussed in *Hagen* and later expounded upon in *City of Sherrill v. Oneida Indian Nation*, which cites *Hagen*'s ruling regarding Myton as the basis for its application of these concepts. 544 U.S. 197, 215 (2005).

C. The Structure of Arguments and Evidence Presented in *Perank* and *Hagen* Do Not Support *Ute VII*.

Unable to quote any language in *Hagen* to support its diminishment of *Hagen* to a single lot diminishment, *Ute VII* mistakenly relies on the Utah Supreme Court's *Perank* and *Hagen* decisions.

As with this Court's decision, neither of these decisions discussed the lots on which Mr. Perank and Mr. Hagen committed their crimes. *See Perank*, 858 P.2d 927; *Hagen*, 858 P.2d 925. Instead, Mr. Perank and Mr. Hagen made the same all-or-nothing argument: because *Ute III* determined that the Reservation was not disestablished, and because all of Myton was located within the boundaries of the Reservation, they claimed that Utah had no jurisdiction over them. *E.g.*, Mem. of Points and Auth. in Supp. of Def. Mot. to Dismiss at 2, *State of Utah v. Perank*, No. 1121 (8th Dist. Utah, Aug. 15, 1986); Petition for Writ of Certiorari, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added). They never discussed or presented evidence as to where the Reservation ended and non-Indian country began. *See, e.g.*, Petition for Writ of Certiorari, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281).

Contrary to the *Ute VII*'s misstatement that "[n]o one . . . sought a ruling that *all* of Myton is outside Indian country," Utah made precisely this argument, as discussed above. The Tribe admitted this fact in its brief to the Tenth Circuit, going so far as to accuse

Utah of committing fraud upon this Court. Brief of Appellant at 25-29, *Ute VII*, 835 F.3d 1255 (10th Cir. 2016) (No. 15-4080).

More importantly, none of the Utah Supreme Court decisions ever discuss the specific locations of Mr. Perank's and Mr. Hagen's crimes, i.e., whether the specific lots were restored to the Reservation in 1945. If that had been the intent, these decisions would have said so. They do not. Instead they address the status of "Myton, Utah" as a whole and that the entire town was within the disputed area that Utah argued was outside of Indian country. *Perank*, 858 P.2d at 934 n.10.[9]

The sole language *Ute VII* quotes to support its revision of *Hagen* is the following from *Perank*: "'The only issue' . . . is 'whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction [in] 1945' qualified as Indian country." *Ute VII*, 835 F.3d at 1262 (quoting *Perank*, 858 P.2d at 934). *Perank*, however, never discussed whether, or how, the 1945 Secretarial Order applied to Myton, citing it only as evidence that Congress had diminished the Reservation. *Perank*, 858 P.2d at 934.

More importantly, Utah argued that Myton did not include trust lands, and the Tribe and the United

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[9] The Utah Supreme Court even cited this very footnote in *State v. Coando*, which it issued the same day as *Perank* and *Hagen*, as the sole reason that a Native American who committed a crime in nearby Roosevelt was subject to State jurisdiction. 858 P.2d 926, 927 (Utah 1993).

States did nothing to refute this position. As a result, when *Perank* describes the Reservation boundaries as "*enlarged by the Secretarial Order*" it states that "Myton, Utah, lies outside the boundaries of the Reservation *so described*." *Id.* at 953 (emphasis added). Otherwise, it would not have used "Myton, Utah" to refer to something as specific as a single lot.

The Utah Supreme Court's decision in *Hagen* is no different. Although the court notes that Mr. Hagen was arrested at his residence, it never discusses whether or not that specific lot was subject to the 1945 Secretarial Order. *See State v. Hagen*, 858 P.2d 925. Consequently, when the Utah Supreme Court applied *Perank* and held that "Myton, Utah is not in Indian Country" (the same phrase this Court used), it could not have meant anything other than the entire town.

Even Mr. Hagen himself understood this when he presented his petition for certiorari to this Court. He never argued that his residence, the situs of the crime, was Indian country. Instead, he took issue with the Utah Supreme Court's holding that: "*Myton, Utah* was part of the unallotted lands . . . and not within Indian country." Petition for Writ of Certiorari at 6, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added).

More importantly, as with *Perank*, Utah and another municipality argued that Myton did not include trust lands. Brief of Respondent at 6, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) ("[t]he town of Myton – where Petitioner Hagen's crime occurred – is situated on non-trust land."); Amicus Brief of Roosevelt City at

8-9, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (listing Myton as one of the "area communities located on the non-Trust lands."). These claims either were based on the Map, which the federal government has prepared to depict its position. Brief of Respondent at 6, *Hagen*, 510 U.S. at 399 (1994) (No. 92-6281). Neither the Tribe nor the federal government refuted this assertion: they, like Mr. Hagen and Mr. Perank, made the same "all-or-nothing" argument about Myton's jurisdictional status. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281); Brief for the Ute Indian Tribe as Amicus Curiae, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281).

Consequently, *Hagen*'s repeated use of the phrase the "town of Myton" can only be interpreted as applying to all of Myton. The fact that the Tribe and the United States now, twenty years later, have belatedly raised questions about the trust status of lands within Myton does not empower the Tenth Circuit to reverse this Court's express holding. While the Tenth Circuit may disagree, only this Court can change its holding that Myton is not Indian country. *Hutto*, 454 U.S. at 375.[10]

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[10] The Tribe also cites a map and general plan that appeared on Myton's website that depicted certain lots within the town as being trust lands. This map has no force of law, and was not prepared by Myton, which, as a small town with a population of 569, lacks the resources to create maps and relies on maps made by others.

CONCLUSION

Certiorari is needed to protect the independence of the Article III judiciary and the primacy of this Court.

Respectfully submitted,

AMY HUGIE
Myton City Attorney
33 S. Main St.
Suite 2A
Brigham City, UT 84302
(435) 734-0655
amyhugie@xmission.com

J. CRAIG SMITH
Counsel of Record
SMITH HARTVIGSEN, PLLC
175 S. Main St.
Suite 300
Salt Lake City, UT 84111
(801) 413-1600
jcsmith@SHutah.law