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

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, -vs- STATE OF UTAH, et al., Defendants.	**ORDER** Case No. 2:75-cv-408-BSJ District Judge Stephen P. Friot

I. Introduction

On March 7, 2016, plaintiff filed a Motion to Recuse, doc. no. 1166, seeking an order disqualifying Judge Bruce S. Jenkins from presiding in this case. The motion rests on one statutory basis, *viz.*, 28 U.S.C. § 455(a), which provides, as relevant here, that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The motion rests on three main factual assertions: (1) Judge Jenkins is biased, (2) Judge Jenkins is senile, and (3) Judge Jenkins is a Mormon.

Presumably because "[b]ias is easy to attribute to others and difficult to discern in oneself," Williams v. Pennsylvania, __ U.S. __, 136 S.Ct. 1899, 1905 (2016), Judge Jenkins requested that another judge be assigned to rule on the motion. Doc. no. 1170. On March 11, 2016, Chief Judge Timothy M. Tymkovich designated the undersigned to hear the motion.[1] Doc. no. 1174, at 2. Accordingly, Chief Judge David Nuffer referred the motion to the undersigned. *Id.* On the same day, March

[1] The undersigned has, to the best of his recollection, neither met Judge Jenkins nor had any other form of contact with him.

11, the undersigned entered an order governing scheduling and other procedural aspects of the motion. Doc. no. 1175.

The State of Utah, the county defendants, and Duchesne City have responded to the motion. Doc. nos. 1181, 1184 and 1185. Plaintiff has replied to the responses filed by the state and the counties. Doc. nos. 1197 and 1198. Other papers, raising issues not going to the merits of the motion, have been filed. Doc. nos. 1203, 1215, 1218 and 1219. Those matters will be addressed as necessary in this order.

The motion is supported by an appendix consisting of 7,199 pages in 32 volumes.

The court has carefully considered all of the motion papers and has reviewed all of the relevant materials in the appendix. For the reasons stated in this order, the court concludes that the motion is without merit.

II. Scope of the issues presented for consideration

Plaintiff advances numerous contentions in support of disqualification under § 455(a). All of the contentions that are cognizable under § 455(a) will be addressed in this order. The matters that are, and are not, before the undersigned should be clearly understood at the outset:

a. The § 455(a) standard

The elegant and superficially simple language of § 455(a) – a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" – is encrusted with case law. But aside from the matters discussed in parts II(b) and (c), below, the present motion presents no consequential legal issues, so a simple recitation of some of the basic principles established by the case law will suffice.

Section 455(a), which has been described as a "catchall" recusal provision, Liteky v. United States, 510 U.S. 540, 548 (1994), establishes an objective standard

for disqualification. *Id.* "[W]hat matters is not the reality of bias or prejudice but its appearance." *Id.* The "inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993). Disqualification is appropriate "only where the reasonable person, were he to know all the circumstances, would harbor doubts about the judge's impartiality." In re McCarthey, 368 F.3d 1266, 1269 (10th Cir. 2004). Otherwise stated: "The test is whether a reasonable person, *knowing all the relevant facts*, would harbor doubts about the judge's impartiality." Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987) (emphasis added).

The statute is not intended to give litigants a veto power over sitting judges, Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 659 (10th Cir. 2002), but if the disqualification issue "is a close one, the judge must be recused." *Id.*

Although the issue of disqualification must be raised without delay, Willner v. University of Kansas, 848 F.2d 1023, 1028 (10th Cir. 1987), *cert. denied*, 488 U.S. 1031 (1988), the duty to recuse is a continuing duty – it does not taper off as the case proceeds. Cooley, 1 F.3d at 992. Indeed, disqualification is often sought, as in the case at bar, only after the presiding judge has had occasion to please or disappoint the litigants with rulings in the case, and only after some level of antagonism, trivial or severe, may have developed in the relations between counsel (or a displeased litigant) and the judge. But "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky, 510 U.S. at 555. When no extrajudicial source of bias is involved, the presiding judge's rulings will "only in the rarest circumstances evidence the degree of favoritism or antagonism required." *Id.* And opinions formed by the judge on the basis of events occurring within the confines of the case itself will not suffice to require recusal "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

Judicial remarks "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges sometimes display," do not establish bias or partiality. *Id.* at 555 - 56.

Finally, it must be borne in mind that "cases within § 455(a) are extremely fact-driven 'and must be judged on [their] unique facts and circumstances more than by comparison to situations considered in prior jurisprudence.' " Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995) (quoting from United States v. Jordan, 49 F.3d 152, 157 (5th Cir. 1995)).

b. The judge's mental competence to discharge his duties

Plaintiff's arguments in support of disqualification under § 455(a) include allegations to the effect that Judge Jenkins' mental competence is impaired.[2] By way of example, plaintiff asserts, in its opening brief, doc. no. 1166, and in its reply brief, doc. no. 1197, that:

- "[T]he Judge's memory and ability to analyze legal issues appears to be decreasing." Doc. no. 1166 at 2.

[2] The briefs in support of and in opposition to this motion were filed under seal, probably because of the nature of the allegations discussed in this section. However, the court notes that Judge Jenkins himself has not been squeamish about addressing, on the public record, allegations about his mental competence. *See*, Peterson v. United States, 2006 WL 2252862, *4 (D. Utah May 1, 2006) (denying motion to recuse). That fact undermines any considerations of confidentiality with respect to what the Supreme Court has described as "so delicate a subject" as the possible senility of a judge, Slayton v. Smith, 404 U.S. 53, 54 (1971), and strongly supports adherence to the clear public policy favoring public access to records of judicial decisions. For that reason, this order is not filed under seal.

- The judge's bias is "perhaps combined with decreasing memory of basic rules of law." *Id.* at 3.
- "The Court appeared unable to understand" an assertion made by plaintiff in support of a motion. *Id.* at 12.
- "[T]he Judge's inability to recall or understand [plaintiff's legal position] makes it impossible for the Tribe to overcome the Court's initial bias." *Id.* at 15.
- The judge "seems to have difficulty remembering important details from one court hearing to the next." He "was at a loss to remember what orders he had previously entered in the case." Doc. no. 1166-4, at 3. (Declaration of Tony Small).
- Plaintiff deserves "a Judge who is fair and impartial and who has the mental wherewithal to address the important legal issues that are presented by the Tribe's case." *Id.* at 6.
- Plaintiff has directed its attorneys to seek disqualification based, among other things, on "the Judge's intermittent mental incoherence." Doc. no. 1166-6, at 2. (Declaration of Bruce Ignacio).
- It is troubling that the judge "often does not remember critical facts from one court hearing to the next and that at times he becomes confused and loses his train of thought." *Id.* at 4.
- The judge's bias has become more determinative as his "memory and comprehension have decreased." Doc. no. 1197, at 6.
- The court has become "increasingly confused and unable to explicate its decisions." *Id.* at 9.

Disability, mental or physical, is not one of the grounds enumerated in § 455 for recusal, and is, for that reason, not an available basis for seeking recusal. United States v. State of Washington, 98 F.3d 1159, 1164 (9th Cir. 1996) (Kosinski, J., concurring), *cert. denied*, 522 U.S. 806 (1997). The Supreme Court made it clear in Liteky that partiality, as that concept is incorporated into § 455(a), is not a benign condition – it has "a pejorative connotation." Liteky, 510 U.S. at 552. Thus, perforce, the concept of partiality does not encompass disability, a matter which is cognizable

by the Judicial Council (and, in appropriate circumstances, by the Judicial Conference) under Chapter 16 of Title 28. Accordingly, the court disregards the allegations about Judge Jenkins' mental condition.

c. The judge's religious faith

Without so much as a passing reference to controlling authority that is fatal to its religion-based argument, plaintiff suggests that membership in The Church of Jesus Christ of Latter Day Saints – by Judge Jenkins or by any other judge – may be grounds for disqualification "in any case involving Indians or Indian tribes" because, as people with "dark skin," Indians purportedly come up on the short end of a passage (Alma 3:6) in Mormon scripture. Doc. no. 1198, at 15.

Assuming, for present purposes, that Judge Jenkins is, as asserted, a member of The Church of Jesus Christ of Latter Day Saints, plaintiff's argument is conclusively foreclosed by the Tenth Circuit's unequivocal holding that membership in and support of "the Mormon Church would never be enough to disqualify" a judge. In re McCarthey, 368 F.3d 1266, 1270 (10th Cir. 2004) (citing Bryce v. Episcopal Church, 289 F.3d 648, 660 (10th Cir. 2002): "[M]embership in a church does not create sufficient appearance of bias to require recusal."). *See also*, State of Idaho v. Freeman, 507 F.Supp. 706 (D. Idaho, 1981) (judge's status as a Mormon and officer of that church did not disqualify him, under § 455(a), from sitting in a case involving the proposed Equal Rights Amendment, on which the church had taken a position); and Menora v. Illinois High School Ass'n, 527 F.Supp. 632, 636 (N.D. Ill. 1981) (It was an "impermissible leap" to equate the judge's Jewish beliefs with disqualification in a case in which the plaintiffs' claims were based on their beliefs as Orthodox Jews).

Plaintiff's religion-based assertion is beyond the reach of § 455(a).

III. Plaintiff's contentions

Laying aside plaintiff's assertions with respect to Judge Jenkins' mental competence and his religious faith, plaintiff's core allegations of bias, within the meaning of § 455(a), are based on events which have occurred within the confines of the litigation in the district court. Cataloging plaintiff's assertions is not a simple task, but the following sampling will suffice as an overview of plaintiff's contentions:

- The judge's bias is demonstrated by the fact that he set a motion for summary judgment for a three-week evidentiary hearing. "There is simply no way, from an objective perspective, that an experienced and unbiased judge would set a motion for summary judgment for a three week evidentiary hearing." Doc. no. 1166, at 3.
- Bias is demonstrated by the fact that, in court proceedings, the judge treats defense counsel better than he treats plaintiff's counsel. The judge shows "open hostility" to plaintiff. *Id.* at 4. "When the Tribe gets up to speak, the Court continuously interrupts the Tribe, often with questions wholly unrelated to the issues which are before the court." *Id.*
- The judge has a "default position of denying the Tribe's requests, which contrasts with its default position granting any request by the State and aligned parties." *Id.* at 12.
- The judge denies plaintiff the relief to which it is entitled by continuously delaying ruling on the plaintiff's motions for summary judgment. *Id.* at 16, 19. He is "simply too biased to timely enter the relief which is required in this matter" and has "used subterfuges, reversals of [his] own orders, and other methods to put off again and again and again the entry of relief, including by now entering a truly unprecedented order that [he] would postpone ruling in the Tribe's motion for summary judgment until [he] held a three week evidentiary hearing on that motion." *Id.* at 22.

IV. Relevant history of this litigation

a. Events prior to the spring of 2013, when the litigation was revived

Before addressing plaintiff's arguments in support of disqualification, it will be helpful to review, for the sake of context, some aspects of the history of this

lengthy litigation. The appellate decisions that are relevant for present purposes are styled Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, and are found at 773 F.2d 1087 (10th Cir. 1985) (**Ute III**), 114 F.3d 1513 (10th Cir. 1997) (**Ute V**) and 790 F.3d 1000 (10th Cir. 2015) (**Ute VI**), as well as Hagen v. Utah, 510 U.S. 399 (1994).

At a high level of generality, the story of this litigation is not complicated: A jurisdictional dispute between two sovereigns is being adjudicated in the court system of a third sovereign. But the litigation itself (which includes the challenges of implementing the legal outcome mandated by Ute V) is, and has been, hideously complex. As will be seen, the challenges that now confront Judge Jenkins are more factual than legal, and therein lies much of the explanation for the present posture of the case.

At an earlier stage, this litigation presented issues as to the allocation of civil and criminal jurisdiction as between plaintiff on one hand, and Utah state authorities on the other hand, with respect to the Uintah Valley Reservation, National Forest Lands within that reservation, and the Uncompahgre Reservation. Ute V, 114 F.3d at 1516 - 17. Judge Jenkins had held, in 1981, (i) that some 1902 and 1905 legislation dealing with unallotted lands "did not diminish" the Uintah Valley Reservation, (ii) except that the 1905 legislation, to the extent that it provided for the creation of forest reserves, did diminish the Uintah Valley Reservation, and (iii) that an 1894 Act "disestablish[ed]" the Uncompahgre Reservation. *Id.* at 1517 (summarizing Judge Jenkins' decision in Ute I, reported at 521 F.Supp. 1072 (D. Utah 1981)).

In an en banc decision (Ute III), the Court of Appeals held that all of the lands at issue retained their reservation status. Ute III, 773 F.2d at 1093. At that point, the status was that "all the lands retained their reservation status and remained Indian country, subject to the jurisdiction of the Tribe and the federal government."

Ute V, 114 F.3d at 1518. The Supreme Court denied certiorari. Utah v. Ute Indian Tribe, 479 U.S. 994 (1986). Eight years later, the Supreme Court reshuffled the deck. In a decision in an appeal, in a criminal prosecution, from a decision of the Utah Supreme Court, the U.S. Supreme Court (affirming the Utah court's decision that essentially disregarded the Tenth Circuit's holding in Ute III), "expressly reject[ed] [Ute III's] conclusion that the Uintah Valley Reservation had not been diminished." Ute V, 114 F.3d at 1519, summarizing Hagen v. Utah, 510 U.S. 399, 421 - 22 (1994). But the Hagen decision by the U.S. Supreme Court "was limited to the status of the unallotted Uintah Valley Reservation lands opened to settlement under the 1902 - 1905 allotment legislation." Ute V, *id.* The Supreme Court did not address the National Forest Lands or the Uncompahgre Reservation. *Id.* On May 2, 1994, shortly after the Supreme Court's decision in Hagen, Judge Jenkins modified the then-existing injunctive order to permit state and local prosecutions for felonies occurring on lands within the original boundaries of the Uintah Valley Reservation which were not statutory Indian country. But, importantly for present purposes, he noted that he was "not determining one way or another which lands may or may not constitute 'Indian Country.' " Order dated May 2, 1994, as quoted in Ute Indian Tribe v. State of Utah, 935 F.Supp. 1473, 1480 n. 1 (D. Utah 1996) (**Ute IV**). In Ute IV, which the Court of Appeals has described as "a comprehensive and detailed opinion," Ute V, 114 F.3d at 1519, Judge Jenkins, agreeing with plaintiff's arguments, concluded that, Hagen notwithstanding, he was bound under the "law of the case" doctrine to enforce the mandate in Ute III. Ute V, *id.* The appeal that inevitably followed produced the Tenth Circuit's decision in Ute V. In Ute V, the Court of Appeals framed the issues as follows:

> On appeal, the Tribe maintains that principles of finality require the district court to enjoin permanently the state and local defendants from exercising jurisdiction in a manner inconsistent with Ute Indian Tribe III.

> On the other hand, the state and local defendants argue that we should give effect to the contrary boundary determination in Hagen by recalling the mandate in Ute Indian Tribe III in its entirety and reinstating the original Tenth Circuit panel opinion.

Ute V, 114 F.3d 1513, 1520.

In Ute V, the Court of Appeals concluded that Judge Jenkins "properly followed our mandate in" Ute III, *id.* at 1521, but decided on its own to modify that mandate to the extent necessary to conform the state-tribal allocation of jurisdiction to the to the Supreme Court's "inconsistent [with Ute III] boundary determination in Hagen." *Id.* On that score, the Court of Appeals held that:

> [W]e agree with the district court that Hagen did not effectively overrule the entire judgment in Ute Indian Tribe III, including our holdings concerning the National Forest Lands and the Uncompahgre Reservation. Further, we agree that Hagen's only effect was to reduce (and not terminate) the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation were unallotted, opened for settlement under the 1902 -1905 legislation, and not thereafter returned to tribal ownership. Accordingly, we hold that our prior judgment in Ute Indian Tribe III should be, and is now, modified to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902 - 1905 legislation, and not thereafter returned to tribal ownership.

Ute V, at 1528.

After undertaking an extensive analysis, the Court of Appeals divided up jurisdiction as follows:

- *Indian country*: Non-trust lands passing in fee to non-Indians pursuant to the 1902 - 1905 allotment legislation. *Id*. at 1530.
- *Not Indian country*: (i) Trust lands, (ii) National Forest Lands, (iii) the Uncompahgre Reservation, (iv) lands apportioned to "Mixed Blood" Utes under the Ute Partition Act, (v) lands allotted to individual Indians that have passed into fee status after 1905, and (vi) "lands that were held in trust after the Reservation was opened in 1905 but that since have

> been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings pursuant to the Indian Reorganization Act."

Ute V, 114 F.3d at 1529 - 30.

The Court of Appeals noted that: "Although a *title search may be necessary* to determine which lands were opened under the 1902 - 1905 legislation, the parties' respective jurisdictions will never change *once the status of those lands is conclusively determined*." *Id.* at 1530 (emphasis added). The result was "a checkerboard allocation of jurisdiction." *Id.*

Odd though this may seem for purposes of a motion to recuse, it is important (as will be seen) to bear in mind that the plain language of the opinion Judge Tacha wrote for the panel in Ute V left no room for doubt that the task of "conclusively determin[ing]" the jurisdictional status of the squares on the checkerboard remained to be accomplished, and that that task fell to the district court in the pending proceedings. Nothing in the Ute V opinion intimates that the Court of Appeals contemplated that parcel-by-parcel jurisdictional determinations would be made, over the course of decades, by state courts in state prosecutions, by tribal courts, or by the Utah federal court in a series of ad hoc rulings made in contempt proceedings.

Although Ute V remanded the case to the district court for consideration of permanent injunctive relief, the parties instead entered into, as plaintiff puts it, "three agreements that have since expired, or were never implemented, or were terminated according to their terms." Doc. no. 1198, at 3. The matter was essentially dormant from 2000 until 2013, when the Complaint in Case No. 13-cv-00276 was filed and motions were filed in the 1975 case, seeking additional relief in that case. *See*, doc. nos. 153 - 161.

The litigation once again came to a head in June, 2015, with the Tenth Circuit's decision in Ute VI. Judge Jenkins had denied a motion for a preliminary

injunction to halt a prosecution pending in the Wasatch County Justice Court. The Court of Appeals turned aside all of the defendants' arguments in support of Judge Jenkins' decision and, more to the point here, directed the district court "to enter appropriate preliminary injunctive relief forthwith." Ute VI, 790 F.3d at 1012.

b. District court proceedings after the case was revived in the spring of 2013

Plaintiff's motion under § 455(a) is based on events that have occurred since the litigation was revived in April, 2013. Before the 1975 case was revived in 2013, the most recent substantive action had been taken by Judge Jenkins in early 2000. The case was then dormant until early 2013. In April, 2013, plaintiff filed a motion for supplemental proceedings. Doc. no. 153. Five days after that motion was filed, Judge Jenkins entered an order reopening the case and consolidating it with the newly filed case, Case No. 13-cv-0276. Doc. no. 161.

Preliminary note

Careful – and admittedly tedious – review of the proceedings, especially over the last year, is appropriate. There are several reasons for this. First, the present motion presents the question of whether "a reasonable person, *knowing all the relevant facts*, would harbor doubts about the judge's impartiality." Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987) (emphasis added). By their nature, plaintiff's arguments in support of recusal make thousands of pages of pleadings, briefs and transcripts relevant. Second, one of the main components of plaintiff's case for bias is delay in granting relief. An objective observer – especially one who has read the Tenth Circuit's decision in Ute VI – might well wonder why this case has not progressed further toward a final and definitive conclusion. One possibility is that a biased and recalcitrant judge is dragging the matter out with no justification, thus inflicting his bias on a disfavored litigant by evading the mandate of Ute V while

avoiding effective appellate review.[3] For that reason, it is appropriate to examine alternative explanations, in addition to looking for objective indicia of bias. That requires a detailed look at the proceedings in the district court. Third, there is the matter of Judge Jenkins' in-court treatment of plaintiff's counsel (mainly Mr. Rasmussen). There were some sharp elbows in the give and take between Judge Jenkins and Mr. Rasmussen. A superficial look at the proceedings in the district court would not suffice to convey the true flavor of what was said, in what context, for what reason, and with what import for purposes of the motion to recuse.

As might be expected after a thirteen-year period of dormancy, new counsel entered their appearance for plaintiff. The new counsel included Jeffrey S. Rasmussen and Frances C. Bassett. They entered their appearance on April 25, 2013.

In the case, as revived in April, 2013, the most pressing matter was a motion for temporary restraining order which was filed on April 17. Doc. no. 154. By way of a filing on April 29, 2013, that motion for a temporary restraining order became a motion for preliminary injunction. Doc. no. 176.

On April 30, 2013, Judge Jenkins set the case for a pretrial conference on the motion for preliminary injunction, to be held on June 24, 2013. The April 30

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[3] At a hearing on February 22, 2016, plaintiff's counsel purported to have that belief:

> The Court: I was trying to comply with the mandate.
>
> Mr. Rasmussen [co-lead counsel for plaintiff]: You think that, and we don't. *We think you're trying to violate the mandate*. That's for the Court of Appeals to decide, not for you to decide.

Doc. no. 1167, at 18 (emphasis added). (Throughout this order, transcripts are cited by their ECF pagination, rather than by the internal pagination of the transcript. The reason for that is that, in some instances, the internal pagination of a transcript matches the ECF pagination and in some instance it does not. Accordingly, for consistency, all citations to transcripts are as per the pagination set forth in the ECF headers.)

order also set other deadlines relating to the preliminary injunction proceedings. Doc. no. 231.

The pretrial conference was held as scheduled on June 24, 2013. Doc. no. 269. The pretrial conference consumed more than two hours. The time pressure, in terms of injunctive relief, was alleviated by the announcement, apparently by counsel for Duchesne County, that "pending state cases would be held in abeyance." Doc. no. 269.

Plaintiff's April 29 motion was labeled as a "Renewed Motion for Emergency Temporary Restraining Order." Doc. 176, at 1. However, it was clear from the motion that the relief sought was a preliminary injunction. *Id.* at 11. The motion sought injunctive relief to halt four criminal prosecutions which were pending in Uintah County. Specifically, the motion sought a preliminary injunction enjoining the defendants from:

1) Asserting in any court, administrative forum or other law-applying forum that the Uncompahgre Reservation has been disestablished or diminished.

2) Asserting in any court, administrative forum, or other law-applying forum that the Ute Tribe lacks any power of a sovereign Indian Tribe over any part of the Uncompahgre Reservation.

3) Asserting in any court, administrative forum or other law-applying forum that the Uintah Valley Reservation has been disestablished.

4) For any land recognized as remaining part of the Uintah Valley Reservation in Ute Tribe of Indians of the Uintah and Ouray Reservation v. State of Utah, 773 F.2d 1298 (10th Cir. 1985) (Ute III) as modified by Ute Tribe of Indians of the Uintah and Ouray Reservation v. State of Utah, 114 F.3d 1513 (10th Cir. 1993) (Ute V), asserting in any court, administrative forum or other law-applying forum that such land is not part of the Uintah and Ouray Reservation or is not part of an Indian Reservation as that term is defined in 18 U.S.C. § 1151(a).

5) Asserting in any court, administrative forum, or other law-applying forum that the Ute Tribe lacks any power of a sovereign Indian Tribe over any part of the Uintah Valley Reservation.

6) Seeking, obeying, carrying out, issuing, enforcing, or otherwise treating as having any lawful force or effect any order of any court which is inconsistent with the mandate issued by the United States Court of Appeals for the Tenth Circuit in Ute III, as modified in Ute V or the orders of this Court after remand.

7) Taking any other action inconsistent with the mandate issued by the United States Court of Appeals for the Tenth Circuit in Ute III, as modified in Ute V or the judgment of this Court.

As can be seen, the injunctive relief sought by plaintiff in the motion for preliminary injunction articulated the matter at a conceptual level, leaving for later determination the issues as to the specific geographic areas as to which tribal sovereignty would prevail.

The complaint in the newly-filed case, Case No. 13-cv-0276, was filed on April 17, 2013. Two days later, on April 19, plaintiff filed an expedited motion for emergency temporary restraining order (doc. no. 9 in Case No. 13-cv-0276), and that motion was denied by the then-assigned judge, Judge Ted Stewart, on April 19, 2013. (Doc. no. 11 in Case No. 13-cv-0276.) The two cases were consolidated by order entered on April 22, 2013.

The revival of the litigation spawned numerous motions in addition to plaintiff's motion seeking preliminary injunctive relief. Many of those motions went to jurisdictional issues, which complicated the process of getting to the substantive issues presented by the motion for preliminary injunction. The motions that were filed under various subdivisions of Rule 12 included: Myton City's Motion to Dismiss and/or Motion for Judgment on the Pleadings (doc. no. 200), Roosevelt City's Motion to Dismiss and/or Motion for Judgment on the Pleadings (doc. no. 227), Plaintiff's Motion to Dismiss Defendant Uintah County's Counterclaim (doc. no. 222), Uintah

County's Rule 12(c) Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction (doc. no. 250), Plaintiff's Rule 12(b) Motion to Dismiss the State of Utah's Counterclaim (doc. no. 270), Plaintiff's Rule 12(b) Motion to Dismiss Duchesne County's Counterclaim (doc. no. 271), and Plaintiff's Rule 12(b) Motion to Dismiss Uintah County's Amended Counterclaim. Doc. no. 278.

By order entered on November 14, 2013, doc. no. 326, Judge Jenkins consolidated the motion for preliminary injunction with the trial on the merits pursuant to Rule 65(a)(2), Fed. R. Civ. P., set six of the Rule 12 motions for hearing on January 10, 2014, and established a schedule calling for completion of discovery and filing of post-discovery motions in early 2014, to be followed by a pretrial conference in early April, 2014. Doc. no. 362, at 7-8.

After the entry of the scheduling order, the matter proceeded to get ever more complex. After the entry of the scheduling order on November 14, 2013, scores of motions, substantive and non-substantive, were filed, including motions for sanctions and numerous discovery motions. All of that is aside from appeals and cross-appeals, as well as new or renewed motions for injunctive relief. The substantive motions included, on November 27, 2013 (doc. no. 335), The Ute Tribe's Motion for Partial Summary Judgment and a Permanent Injunction Barring Defendants From Relitigating Issues That Have Been Conclusively Adjudicated and From Exercising Criminal Jurisdiction Over Native Americans Inside the Uintah and Ouray Reservation. In many respects, this motion duplicated the previously-filed motion for preliminary injunction at doc. no. 176. On December 20, 2013, plaintiff filed The Ute Tribe's Second Renewed Motion For Preliminary Injunctive Relief. Doc. no. 361. At least in terms of the relief sought, this motion again substantially duplicated the requests for relief that had been previously advanced. From a jurisdictional and procedural standpoint, the matter was complicated further, on

January 21, 2014, with the filing of The Ute Tribe and Third-Party Defendants' Motion and Supporting Memorandum to Dismiss Duchesne County's Counterclaim and Third-Party Complaint Under Rule 12(b), Or Alternatively for a Summary Judgment of Dismissal. Doc. no. 417.

On February 14, 2014, the state of Utah filed a Motion for Partial Summary Judgment (doc. no. 458), and Duchesne County filed a Motion for Partial Summary Judgment on the same day. Doc. no. 459. These substantive motions were followed by Duchesne City's Motion for Summary Judgment and Memorandum in Support. Doc. no. 465. On February 24, 2014, Judge Jenkins entered an order substantially granting plaintiff's motion to dismiss the counterclaims filed by Duchesne County. Count 1 of Duchesne County's counterclaim was dismissed with leave to file an amended pleading. The County's racketeering claims under Count 2 were dismissed "for being facially deficient and failing to state a cause of action," and the court denied the motion to dismiss the remaining claims under Counts 2 through 5. Doc. no. 481. This order drew a notice of appeal by plaintiff, doc. no. 488, appealing the order denying the tribe's motion to dismiss the counterclaims. Jurisdiction was asserted under the collateral order doctrine. Doc. no. 488. In turn, Uintah County filed a notice of cross-appeal on March 13, 2014 (doc. no. 516), appealing that portion of the January 10, 2014 ruling denying Uintah County's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction, to the extent that that order reflected a holding that Uintah County lacked sovereign immunity from suit by the tribe.

Given the scheduling complexities resulting from the pendency of the multitude of motions, many of which were themselves exceptionally complex, Judge Jenkins held a status conference on March 17, 2014. The conference ran for nearly three hours. The result of that conference was that plaintiff's deadline for responding to motions for summary judgment was extended to March 31, discovery was reopened

to April 22, the stipulated final pretrial order was due on April 30, a final pretrial conference was set for May 5 and 6, 2014, as well as May 7, if necessary. The order also stated that all other pending motions "will be continued and considered within the context of Pretrial." Doc. no. 520, filed on March 17, 2014.

On April 24, 2014, Judge Jenkins entered an order clarifying, in part, rulings previously made on motions to dismiss, including particularly the rulings memorialized in the order at doc. no. 481 which had been filed on February 24, 2014. In the April 24 order, expanding on his ruling with respect to motions to dismiss Uintah County's amended counterclaim and Uintah County's third party complaint, Judge Jenkins stated that he had dismissed Uintah County's allegations concerning tribal participation in the filing of purportedly frivolous tribal court lawsuits against Uintah County officials for lack of sufficient facts to state a plausible claim for relief, granting twenty days' leave to amend. He also stated that he had denied plaintiff's motion to dismiss as to core jurisdictional issues raised by Uintah County's amended counterclaim. Doc. no. 582, at 3. Judge Jenkins also concluded that:

> The legal question of the respective scope of State, local and tribal jurisdiction within the existing Ute reservation boundaries rests at the core of this case, and will be fully addressed in the context of the plenary hearing to be conducted later this year. That question demands full and definitive resolution.
>
> The State of Utah's Counterclaim joins issue on the jurisdictional question, as do the plaintiff's own pleadings. Each is entitled to a thoughtful and reasoned determination on the merits.

Doc. no. 582, at 5.

Accordingly, Judge Jenkins ordered that the plaintiff's Rule 12(b) motion to dismiss Uintah County's amended counterclaim "is GRANTED IN PART as to

alleged participation in frivolous lawsuits and DENIED IN PART as to core jurisdictional issues." *Id.* He also granted the third-party defendants' Rule 12(b) motion to dismiss Uintah County's third-party complaint, gave Uintah County leave to amend its pleadings, denied plaintiff's Rule 12(b) motion to dismiss the State of Utah's counterclaim, denied as moot (in light of the filing of Uintah County's amended pleadings) plaintiff's motion to dismiss Uintah County's counterclaim, and denied Uintah County's Rule 12(c) motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction. *Id.* at 5-6.

On April 30, 2014, Judge Jenkins entered an order, doc. no 602, memorializing his previous statement in open court that "all pending motions will be heard by the court within the context of pretrial beginning May 5, 2014 at 9:30 a.m." That docket entry made clear that "all pending motions will be heard, including but not limited to:" Uintah County's Motion to Compel (doc. no. 526), Plaintiff's Motion for Protective Order (doc. no. 540)(, Plaintiff's Motion to Stay (doc. no. 541), Plaintiff's Motion for Protective Order at doc. no. 542, Plaintiff's Motion for Stay at doc. no. 543, Plaintiff's Motion for Protective Order at doc. no. 544, Uintah County's Motion in Limine (at doc. no. 550), Plaintiff's Motion for Protective Order Against Uintah County at doc. no. 554, Duchesne County's Motion for Sanctions (doc. no. 581), Duchesne County's Second Motion for Sanctions (doc. no. 588), Plaintiff's Emergency Motion to Stay (doc. no. 589), Uintah County's Motion to Compel at doc. no. 590, Uintah County's Motion to Compel (doc. no. 591), Uintah County's Motion to Strike (doc. no. 593), and Uintah County's Motion to Continue. Doc. no. 595.

As the May 5 motion hearing approached, the jurisdictional conflicts continued, as indicated by Ute Tribe's Emergency Motion to Enjoin the State of Utah's Latest Illegal State Prosecution (doc. no. 619), filed on May 2, 2014. In that motion, plaintiff sought relief by way of an injunction halting the prosecution of a

member of the Navajo Nation in Uintah County State Court for an offense allegedly occurring "within the boundaries of the Uintah and Ouray Indian Reservation." The location of the alleged offense was asserted to be "Indian country as evidenced by a Land Status Verification from the Bureau of Indian Affairs." Doc. no. 619, at 2.

The May 5 and 6 proceedings were memorialized by way of a docket entry entered on May 6, which noted that: "There are fact questions to be resolved." Counsel were directed to prepare and submit a proposed pretrial order within ten days, and an evidentiary hearing was set for July 28, 2014 at 9:30 a.m.

On July 18, Judge Jenkins ordered that an amended pretrial order, approved by all counsel, should be submitted by August 22, with a final pretrial conference to be held on September 22, 2014. The docket entry for this action noted that: "All parties agreed to the dates set."

On September 10, 2014, prior to the September 22 final pretrial conference, plaintiff filed a motion to bifurcate. Doc. no. 671. For purposes of this motion to recuse, it is of more than passing significance that, by that motion, plaintiff asked the court "to hold a separate trial on the fact-intensive issue of identifying the jurisdictional status of particular land parcels within the Uintah Valley Indian Reservation, thereby allowing the Court to proceed on an expedited basis on the Tribe's pressing and long-pending claims for injunctive relief." Doc. no. 671, at 2. In support of the motion to bifurcate, plaintiff noted that in the Ute V decision in 1997, the Court of Appeals had said that a title search may be necessary to determine which lands were opened under the 1902-1905 legislation. *Id.* Accordingly, plaintiff asserted that: "Apart from the immediate and pressing need to rule on the Tribe's pending motions for injunctive relief, the Court is also faced with the separate, but no less important task, of determining what lands within the Uintah Valley Reservation remain within the Reservation pursuant to the three-part test set forth by the Tenth

Circuit in *Ute V*." *Id.* at 4. Plaintiff quite understandably noted that "it is critical to comprehensively determine the jurisdiction status of all lands within the original Uintah Valley Reservation. Only then will the parties have certainty and finality about the jurisdictional status of lands within the Reservation." *Id.* at 5. On the issue of the determination of the jurisdictional status of lands within the Reservation, the plaintiff noted that: "In contrast to the issues presented by the Tribe's pending motions for injunctive relief, the question of land status will be factually intensive and will entail an analysis of land title and historical records for multiple tracts of land." *Id.* Consequently, plaintiff requested that the court "bifurcate the hearings on the Tribe's pending motions for injunctive relief from the remainder of the case." *Id.*

On September 10, 2014, the day the motion to bifurcate was filed, plaintiff also filed a motion for appointment of a special master to determine the title issues. Doc. no. 672. That motion is, for present purposes, not significant so much for its filing or its disposition as it is for the factual statements (which the court credits) made in support of the motion. Those factual statements leave little doubt that the task of determining which square on the checkerboard was which color (*see*, p. 11, above) was a major task and was essential to putting the mandate of the Court of Appeals into practical effect. In the motion, plaintiff said that:

> [T]he determination of Indian Country status will require research and an analysis of title documents and other records pertaining to numerous parcels of land. Each individual parcel of land at issue must be identified, based on historical ownership and the time and circumstances under which that individual parcel passed from trust to fee status, either as Indian country of not Indian country."

Doc. no. 672, at 3. Elaborating on this point, plaintiff said that the "land status issue in the present case will require similar 'piecing together' [referring to Brock v. ING, 827 F.2d 1426, 1427 (10th Cir 1987)] of records by an individual knowledgeable in

a particular area to perform exhaustive title research and to identify and interpret land records dating back to the early 1900." *Id.*

In light of the filing of yet more motions, on September 12, 2014, the court entered an order for hearing with respect to Uintah County's Motion to Stay Pending Appeals (doc. no. 668), plaintiff's Motion for Ruling that the District Court has Continuing Jurisdiction Over Uintah County in the Original Action (at doc. no. 670), plaintiff's Motion to Bifurcate (doc. no. 671), plaintiff's Motion for Appointment of Special Master (at doc. no. 672) and Richard Douglas Hackford's Motion for Preliminary Injunction. Doc. no. 675. These motions were set for hearing at the previously set pretrial and motion hearing, scheduled for September 22, 2014. Doc. no. 677.

The pretrial and motion hearing began, as scheduled, on September 22, 2014. The court took action on some of the pending motions, then recessed for the day, requesting counsel to meet and determine what issues remained to be adjudicated. The hearing resumed on September 23, 2014, at 1:30 p.m. Doc. no. 707. On September 23, at the continued pretrial conference, the court stayed the matter as to all remaining parties except Duchesne City. The court directed counsel to meet and submit a suggested form of a pretrial order within 20 days. Doc. no. 708. The stay was the result of the pendency of appellate proceedings and was entered at the suggestion of counsel for plaintiff. At the September 23 hearing, counsel for plaintiff told the court that "it would make sense to stay the whole case" (doc. no. 709, at 30), but deferred to Duchesne City as to whether the stay should include proceedings relating to Duchesne City. *Id.* *See also*, doc. no. 709, at 31 ("Mr. Rasmussen: OK. Our view is that the court should at this point stay the whole case.")

On December 3, 2014, a hearing was had, predominantly focused on issues relating to the form of an order memorializing action previously taken in the case by

Judge Jenkins. Those proceedings, for which the transcript is at doc. no. 747, shed light on several aspects of the matter before the undersigned.

First, the December 3, 2014 proceedings probably present the prime example of pointed exchanges between Judge Jenkins and counsel for plaintiff, specifically Mr. Rasmussen. The discussion evolved into some give and take as to the status of lots in the City of Myton townsite. The discussion between Judge Jenkins and Mr. Rasmussen proceeded on a fairly even keel (albeit not without some tension here and there) until Mr. Rasmussen, referring to "most of the land within that presidential townsite" (doc. no. 747, at 19), told Judge Jenkins that he was "trying to give it to the City of Myton." *Id.* Judge Jenkins responded: "I'm not trying to give it to anybody." *Id.* To which Mr. Rasmussen replied: "We respectfully disagree." *Id.* To which Judge Jenkins responded: "Quit putting words in the Court's mouth. That's one of your bad habits." *Id.* This is decidedly not the first or only instance of Mr. Rasmussen's provocative choice of words. Mr. Rasmussen provided the bait; Judge Jenkins rose to the bait in that instance, although there have been many other instances, as disclosed by the transcripts in this case, in which Judge Jenkins did not rise to the bait. This exchange, viewed either in isolation or within the total context of the case, is not indicative of bias cognizable under § 455(a). Judge Jenkins succeeded in clearing the air, to facilitate a reasoned discussion of the issues then before the court, by observing that:

> The Court has diminished nothing, it has taken nothing, and, quite frankly, counsel, has stolen nothing. And the use of inflammatory words on the part of counsel is inappropriate. I don't want any more of it. You can talk factually and you can talk legal propositions. But I've tried to be tolerant and I've tried to be appropriate in considering matters that are in conflict. But after a while, the Court even gets tired of inflammatory matters. And be suitably warned, I've been sitting here for over three decades and I

> have on one occasion found counsel in contempt in almost 36 years, but don't make me break that record.
>
> You speak up and you state your position and you do it with non-inflammatory language and you attribute nothing inappropriate to the Court or its motivations, and we'll get along. And if we don't, fellow counsel will finish the case and you won't be here. So just be fully warned.

Doc. no. 747, at 21.[4]

The December 3, 2014 proceedings also shed light on the nature of the residual issues then pending before Judge Jenkins. Although the specific purpose of that hearing was not to sort out which square on the checkerboard had which color, the transcript does illustrate the nature of those challenges – challenges confronting the court as well as counsel. Although, as plaintiff asserts, the overarching legal issues in the case had been laid to rest by late 2014, the application of those principles in determining the jurisdictional status of various plots of land remained as a very substantial task to be completed. Thus, counsel for plaintiff understood that, as to some plots, there would need to be: "a factual hearing on the disputed areas." *Id.* at 23. The exacting nature of the task before the court is further illustrated by the fact that one of the remaining challenges was the determination of "the Tribe's jurisdiction over the crimes committed by Indians on those streets and alleyways." *Id.* at 69 (Mr. Rasmussen).

Granting that there was a sharp exchange between Judge Jenkins and Mr. Rasmussen early in the hearing, the overall approach taken by Judge Jenkins (to the proceedings in general and to that hearing in particular) is aptly illustrated by his

[4] The tone of Judge Jenkins' exchanges with Mr. Rasmussen differed noticeably from the tone of his exchanges with plaintiff's other lead counsel, Ms. Bassett, as indicated by the placid discussion at pages 77-79 of the December 3, 2014 transcript. Doc. no. 747.

candid acknowledgment, toward the end of the hearing that (referring to an order addressing the jurisdictional status of a mixed-blood):

> And it seems to me that I may have issued a premature order dealing with his mixed blood nature and the consequence to him of a particular statute that Congress passed without first looking at the question of location. Because if he's in Salt Lake City, for example, his status as a mixed blood is of no moment. If he's at a different location, where it may or may not have some significance, then at that point in time his status as a mixed blood is meaningful. I may have jumped the gun.

Id. at 82-83.

By order entered on January 28, 2015 (doc. no. 786), Judge Jenkins dismissed plaintiff's claims against the City of Myton, consistent with the Supreme Court's decision in Hagan, 510 U.S. 399, at 421-22 (the Town of Myton "is not in Indian country"), and his understanding of the mandate of the Court of Appeals in Ute V. Doc. no. 786, at 6.

On September 11, 2015, in the wake of the Tenth Circuit's Ute VI decision in June Judge Jenkins entered a preliminary injunction enjoining a criminal prosecution then pending in Wasatch County Justice Court. Doc. no. 944. In that order, Judge Jenkins specifically noted the mandate of the Court of Appeals "to enter appropriate preliminary injunctive relief forthwith." *Id.* That September 11 order obviously did not resolve all of the remaining issues in the case. Far from it. But that order, focusing on a particular prosecution, illustrated the need for comprehensive and definitive resolution of the jurisdictional status of tracts of land as to which jurisdictional uncertainty remained.

On October 12, 2015, again in the wake of the Tenth Circuit's decision in Ute VI, plaintiff filed a motion for summary judgment, seeking the following relief:

WHEREFORE the Ute Tribe respectfully requests entry of partial summary judgment and an order that permanently enjoins the Defendants, their agents, employees, successors, attorneys, and all those in active concert or participation with them to refrain from:

1) Prosecuting Indians for alleged violations of Utah state law committed within the exterior boundaries of the U&O Indian Reservation;

2) Asserting in any court, administrative forum, or other law-applying forum that the Ute Tribe lacks any power of a sovereign Indian Tribe over any part of the Uncompahgre Reservation.

3) Asserting in any court, administrative forum or other law-applying forum that the Uintah Valley Reservation has been disestablished.

4) For any land recognized as remaining part of the Uintah Valley Reservation in Ute Tribe of Indians of the Uintah and Ouray Reservation v. State of Utah, 773 F.2d 1298 (10th Cir. 1985) (Ute III) as modified by Ute Tribe of Indians of the Uintah and Ouray Reservation v. State of Utah, 114 F.3d 1513 (10th Cir. 1993) (Ute V), asserting in any court, administrative forum or other law applying forum that such land is not part of the Uintah and Ouray Reservation or is not part of an Indian Reservation as that term is defined in 18 U.S.C. § 1151(a).

5) Asserting in any court, administrative forum, or other law-applying forum that the Ute Tribe lacks any power of a sovereign Indian Tribe over any part of the Uintah Valley Reservation.

6) Seeking, obeying, carrying out, issuing, enforcing, or otherwise treating as having any lawful force or effect any order of any court which is inconsistent

with the mandate issued by the United States Court of Appeals for the Tenth Circuit in Ute III, as modified in Ute V or the orders of this Court after remand.

7) Taking any other action inconsistent with the mandate issued by the United States Court of Appeals for the Tenth Circuit in Ute III, as modified in Ute V or the judgment of this Court.

8) Require Defendants to dismiss for lack of jurisdiction all pending state prosecutions of Indians for on-reservation conduct, including a dismissal of State v. Lesa Ann Jenkins, Wasatch County Justice Court, Case No. 135402644; State of Utah v. Melanie Santio, Case No. 131800059, Eighth Judicial District Court, Uintah County, Utah; State of Utah v. Cyrus Aaron Cuch, Case No. 135900541, Uintah County Justice Court, Uintah County, Utah; State of Utah v. Debra Penningjack, Case No. 145900695, Uintah County Justice Court, Uintah County, Utah.

9) Asserting in any court, administrative forum or other law-applying forum that the Uncompahgre Reservation has been disestablished or diminished.

Doc. no. 982, at 19-20.

This motion once again illustrates the continuing need to define just what land qualifies as "land recognized as remaining part of the Uintah Valley Reservation." (*See,* ¶ 4, quoted above.)

On October 22, 2015, Judge Jenkins held a hearing on a series of motions, most prominently including a motion for protective order filed by plaintiff, challenging the propriety of a deposition notice issued by Duchesne City, as reflected by the transcript of that hearing. Doc. no. 1010, at 4. Although that hearing involved

a relatively narrow set of issues, the proceedings before Judge Jenkins on October 22, 2015 once again illustrate the problems which continue to bedevil this case, this time in the context of a discussion in which Judge Jenkins was clearly attempting to define the issues, at least for purposes of the matters before the court that day. The following exchange occurred:

> THE COURT: Okay. Now you say it's the Tribe's land. Okay. Other than that, are there any problems with Duchesne City?
>
> MR. RASMUSSEN: Other than them trying to take our land?
>
> THE COURT: Other than the fact that you've got a dispute as to land.
>
> MR. RASMUSSEN: We don't have a dispute, Your Honor. We already have Ute III, Ute V and Ute VI. We have them trying not to abide by it.
>
> THE COURT: Okay. Well, that's a question that I guess is yet to be determined as to Duchesne City.
>
> MR. RASMUSSEN: And that's going to be determined by the Court of Appeals. That issue is on appeal and not before this Court anymore.
>
> THE COURT: Well, that depends.
>
> MR. RASMUSSEN: No, that does not.
>
> THE COURT: I'm sorry. When you address the Court, you address the Court courteously. I'll address counsel courteously. But if I make a statement, you're welcome to respond to it. But I'm trying to figure out what you're talking about, particularly in reference to Duchesne City.

Doc. no. 1010, at 7-8.

When Judge Jenkins said "Well, that depends," he was clearly making reference to the fact that even though appellate proceedings were then pending, it was by no means a foregone conclusion that – given the nature of the appeal and of the

proceedings underway in the district court – the mere filing of a notice of appeal froze the litigation in the district court. Mr. Rasmussen's curt – and demonstrably incorrect – response ("No, that does not)" invited, and got, a tart response from the presiding judge. More importantly for present purposes, Judge Jenkins concluded his response to Mr. Rasmussen's unjustifiably confrontational statement by attempting to get the matter back on track: "But I'm trying to figure out what you're talking about, particularly in reference to Duchesne City." *Id.* at 8. Once again, the tone by which Mr. Rasmussen addressed the court bears comparison to Ms. Bassett's demeanor in the courtroom. *See, e.g.,* the October 28, 2015 transcript, doc. no. 1010, at 47-51, 55-56 and 66-70. The passage at pages 66-70 is especially telling. Ms. Bassett directly and respectfully answered Judge Jenkins' questions, without quibbling about the relevance of the question to the proceedings at hand and without verbally poking a sharp stick in the eye of the presiding judge.

The October 28 proceedings also shed light on Judge Jenkins' continuing desire to bring the case to a conclusion consonant with the rights of the parties as adjudicated by the Court of Appeals. The following passages from Judge Jenkins' comments at the conclusion of the hearing are illustrative:

> The primary reason, of course, is that we have yet to comply about mandate in the '75 case. First, that mandate is many years old. It found first life in Ute III. It was discussed extensively by this Court in Ute IV including the meaning of the mandate and the requirements under mandate. It was modified by the Court of Appeals at in Ute V. The form and content of a mandated permanent injunction has yet to be decided in this case. It was postponed for years because of the agreement of the parties, the agreement of the parties purportedly to get along, and found new life only after the agreement of the parties expired or was ignored, and the '75 case was reopened.

> The form and content of a permanent injunction depends in part on factual matters yet to be presented to the Court. That mandate, and here I'm talking about the mandate in Ute V, has never been withdrawn. A final order pursuant to the mandate has yet to be entered.

Doc. no. 1010, at 74.

> Since no final order has been entered in the '75 case by this Court as mandated by Ute III and Ute V, it would be wise for all parties to assist the Court to heed the mandate of the Court of Appeals to have such a final order entered. And that is exactly what this Court had in mind when it fixed a new scheduling order by agreement of counsel, by the way, those who are here, in this case in chief and provided a new discovery cutoff date and fixed related procedural matters so that we can get a permanent order entered.

Id. at 75-76.

> *The title matters and the checkerboard matters referred to in Ute V need identification and resolution. That was specifically recognized by plaintiff when it asked for additional discovery time*. Included therein are plaintiff's assertions, at least in argument, as to title to roads within certain cities, for example, Duchesne City, and perhaps other towns and counties which plaintiff may assert to, may or may not come within the title and checkerboard problem. I don't know until we examine and have proof in reference to the title and checkerboard problem.
>
> The location of specific alleged violations after checkerboard and title questions have been resolved pursuant to the mandate may be of consequence or it may not be of consequence. Hopefully that can even be cleared up in pretrial or trial if need be. To me, it seems perfectly obvious that people can adequately prepare in that area, and there may be no conflict as to the identified checkerboard locations or title locations.

> Now, finality, finality is obviously needed. A final pretrial discussion is obviously needed to pin down the events or items to be used or proffered as proof to justify the relief sought, which is very broad relief on some motions.

Id. at 77-78 (emphasis added).

Judge Jenkins concluded this portion of his comments by summarizing: "We all have our marching orders on Ute V and will proceed." *Id.* at 83.[5]

On January 15, 2016, plaintiff submitted a proposed form of pretrial order. Doc. no. 1094-2. The proposed pretrial order, 179 pages in length, contains the various parties' asserted uncontroverted facts, but the most relevant part of the proposed pretrial order, for present purposes, is the section in which the parties lay out their views as to the contested issues of fact. Plaintiff articulated the contested issues of fact as follows:

> The Tribe contends there are no genuine issues of disputed material fact. The Tribe contends that all the Defendants' Statement of Contested Issues of Fact are either immaterial to the Tribe's request for injunctive relief, or alternatively, relate to issues that are barred by the mandate rule and the Ute III, V and VI mandates, the doctrines of res judicata (and/or collateral estoppel), law of the case, and stare

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[5] Lest there be any doubt as to whether, during the post-Ute VI proceedings in the district court, Judge Jenkins considered the defendants to be under effective restraint *pendente lite*, the following exchange (in the context of a discussion of a stay of a Uintah County prosecution) from the October 22, 2015 motion hearing) is worthy of note:

> THE COURT: But you've agreed that they could prosecute him for state lands. Why should we stay that if you've agreed to it?
>
> MS. BASSETT: Because the order does not prevent them from going back to their state court and prosecuting him for the on reservation.
>
> THE COURT: Actually it does, and I think they understand that very well. And they recognize that if they play around with nonsense like that they would be here and I'd put them in jail.

Doc. no. 1010, at 55 - 56.

> decisis, or other legal defenses, including without limitation, the Tribe's sovereign immunity and the statute of limitations.

Doc. no. 1094-2, at 37.

In contrast, the State of Utah articulated its view of the contested issues of fact, as relevant here, as follows: "Whether each individual parcel of land in Duchesne and Uintah Counties is, or is not reservation land." *Id.* In the same vein, Duchesne County proffered, as one of the contested issues of fact, the question of: "What land within Duchesne County is 'Indian Country,' as that term is defined by 18 U.S.C. § 1151, so as to divest the State of Utah and Duchesne County of criminal jurisdiction over members of a federally recognized tribe?" *Id.* at 88. Wasatch County posed the same question. *Id.* at 90. Likewise, Uintah County's statement of contested issues of law articulated numerous issues, at least as seen by Uintah County, to be resolved to determine the jurisdictional status of lands within that county. *Id.* at 96-97.

The case came on for pretrial conference as scheduled on January 19, 2016. It is fair to say that the predominant focus, at least from the presiding judge's perspective, was the need to get the case to finality. In that vein, in response to a question from Judge Jenkins, Ms. Bassett, co-counsel for plaintiff, articulated plaintiff's request for relief as being, in part, as follows: "We are requesting that the state parties be permanently enjoined [from] prosecuting Indians, applying Utah state law to Indians for conduct that occurs on any of the land and land categories identified in Ute V as still being Reservation." Doc. no. 1106, at 12. This statement by counsel prompted inquiry by Judge Jenkins as to identification of "lands that are in dispute" for jurisdictional purposes. *Id.* at 13. In the context of that discussion, Ms. Bassett stated that plaintiff does not believe that, in Ute V, "the Tenth Circuit sent it back to you with instructions to have an adjudicatory process." *Id.* at 13. That statement

amounted to an assertion, repeated later at the pretrial conference, that the case could and should be closed in the district court without identification of the geographic areas that are off limits for purposes of prosecution by Utah state authorities. Continuing that discussion, Judge Jenkins, commenting on the effect of Ute V, observed that:

> THE COURT: To the extent that [Ute V] modified Ute III, it pointed out in Uintah the possibility that some of the lands within the original boundaries may have changed in character. And the question then becomes well, okay, if it's changed in character, what portion of those lands are still Indian Country, if any? What portion of those lands are no longer Indian lands, Indian Country, if any? You know, that is a factual question and that's a question, that's a legitimate question.

Doc. no. 1106, at 16.

That comment by Judge Jenkins plainly indicates an understanding that, under Ute V, the task which falls to the district court (in giving effect to the overarching legal principles that had by then been clearly established by the Supreme Court and the Tenth Circuit) was the task of determining what lands fell within state criminal jurisdiction and what lands did not.

This continuing discussion at the pretrial conference brought into high relief the necessity of resolving geographic jurisdiction within the context of the *federal* litigation. Shortly after Judge Jenkins made his comment about the need to sort out geographic jurisdiction (doc. no. 1106, at 16, quoted above), Ms. Bassett observed that:

> And I think that it is incumbent upon the state parties that if there is a prosecution of someone who claims to be an Indian, and it is in the boundary areas, checkerbordered [sic] areas of the Uintah Valley Reservation, it is incumbent upon them to verify state jurisdiction before they proceed with that prosecution. And we believe that a permanent

> injunction can be entered as to all of the lands identified as Indian Country in Ute V. That is our position.

Id. at 17.

The problem, quite clearly, is that, as to numerous geographic locations – places where people live, drive and get arrested – the legal conclusions that were expounded in Ute V are not self-executing. Thus, when plaintiff states that "[w]e want an injunction against the state parties[']enforcement of state law on all lands that are within the Uintah and Ouray Reservation," *id.* at 18, that request, amply supported by appellate determinations, leaves before the district court the task of determining, in numerous debatable and marginal situations, just what lands fall within the ambit of "all lands" that are within the reservation, an imperative which caused Judge Jenkins to return to the task at hand, as he saw it:

> THE COURT: No, I'm talking about the fact that it's confusing. And unless we clarify, unless we clarify, and it is laid out with clarity so that anybody including judges and lawyers can understand, then we're doing nobody a service.

Doc. no. 1106, at 18.

Responding to plaintiff's assertions and the court's resultant concerns, counsel for Uintah County reminded the court that Ute V *does* contemplate a determination of specific jurisdictional boundaries:

> And it says, although a title search may be necessary to determine which lands were opened under the 1902-1905 legislation, the party's respective jurisdictions will never change, and here is the key language, once the status of those lands is conclusively determined.
>
> It doesn't say Ute V has conclusively determined it and now hereby implement it. It says once that it is, certainly implying that that had to be done at a future time.

Id. at 32.

Counsel for Uintah summarized his client's position as follows:

> I think as a result of that language, that in whatever permanent injunctive relief is measured, that first there has to be a determination, a conclusive determination, of what is and is not Indian Country applying the principles in Ute V. That would be the mandate from Ute V that I see.

Id. at 33.

The discussion of these relief-related issues at the pretrial conference inevitably led to references to situations involving state criminal prosecutions in which serious practical difficulties arose from jurisdictional uncertainty. Counsel for Uintah county, in that context, made reference to what was referred to as the "Blake Nez" case, among others:

> The Blake Nez case was always within county jurisdiction. The Tribe sought an injunction in this court on that matter and then later we voluntarily agreed to stay it at the request of the court and avoid further argument. They have since withdrawn their claims because factually there is no dispute whatsoever that it occurred within county and state jurisdiction. But when the Tribe talks about all of the interference with tribal sovereignty, and I understand their point and concern, I mean in no way to belittle it, it's a valid concern, it's just as valid with the state and counties. When a county officer makes a citation or arrest, and it takes three years for the charges to be brought to trial or longer because of stays and all of the other things, there is an interference with the county's sovereignty, with the state's sovereignty.

Id. at 38.

The position of counsel for Uintah County as to the nature of the task remaining for the district court was substantially echoed by counsel for Duchesne County and Wasatch County:

> I won't rehash what's been said by the state or Uintah County. I was going to say I agree and think the mandate is clear. The court has to do a parcel by parcel determination. All we're hearing from the Tribe is they want an injunction that says thou shalt not prosecute a member of a federal recognized Tribe for an offense committed within Indian Country. Well the question is what is Indian Country?

Id. at 56.

Counsel for plaintiff was unmoved by defendants' assertions or the court's expressions of concern:

> [By Mr. Rasmussen]: And as Ms. Bassett explained, our view is that under the mandate that was given to this court, this court does not need to do a tract by tract final map and that it would not be a very productive use of this court's time. So it's not required by the mandate and initially the Tribe certainly thought it would be great to have that. But what we have found is that it is a lot more work. There are a lot of parcels there.

Id. at 66.

Elaborating on plaintiff's desire not to resolve specific geographic jurisdiction issues in the district court, Mr. Rasmussen suggested that: "One of the things that the court could much more easily do is simply retain jurisdiction for the parties to come back if they had a dispute." *Id.* at 69. This prompted Judge Jenkins to summarize his concerns as follows:

> THE COURT: What happens to the poor guy in custody of somebody when all of this takes place? Is he sitting in the county jail or is he sitting in a tribal lock-up, um, while people are going through this process? Um, is he arrested? Is he provided due process? Is there a constitutional violation?

Id. at 70.

The pretrial conference continued on January 20, 2016. The pretrial conference lasted an exceptionally long time, but that was in part a result of the complexity of the case and in part a result of the fact that the pretrial conference proceedings included a fair amount of discussion of merits-related issues, much of which included discussion of then-pending motions (not the least of which were the plaintiff's several pending motions for summary judgment, each of which, as described by plaintiff's counsel, "are seeking the same relief." Doc. no. 1167, at 6.).

The several hundred pages of transcript from the pretrial conference also reflect quite clearly that Judge Jenkins was intent on accomplishing the usual procedural objectives of a pretrial conference. Specifically, hours of court time were devoted to identification of uncontested facts, identification of contested fact issues, identification of witnesses who would definitely be called, elimination of unnecessary witnesses as to authentication or other essentially uncontested issues, authentication of exhibits, determination of the scope of the issues to be tried, determination of the scope of relief to be granted, the prospects for agreed resolution of geographic jurisdiction issues (at least as to some parcels), and the possibilities for the use of alternative dispute resolution techniques to resolve jurisdictional issues as to contested parcels. The transcript clearly reflects that Judge Jenkins persistently sought to narrow the issues and streamline the final hearing. There was much discussion, also, of the status of preparation of jurisdictional maps and as to the accuracy of maps then existing. As has been noted, in numerous – hundreds – of instances, the discussion of the relatively routine matters listed above digressed into brief discussions of issues on the merits which, in many instances, helped to narrow the issues or otherwise streamline the case for trial purposes.

Throughout the pretrial conference proceedings, Judge Jenkins returned to the issue of the relief to be granted. As will be seen below, it was a foregone conclusion

that the mandates of Ute V and Ute VI would be implemented by a grant of substantial judicial relief. Much of the pretrial conference was devoted to discussion of the extent to which relief could be granted without further delay, versus the extent to which either the broader relief sought by plaintiff in its motions for summary judgment or the resolution of specific geographic jurisdiction issues as to specific parcels would entail further delay, including the delay inherent in holding an evidentiary hearing. But, as will be seen, one thing was certain about Judge Jenkins' approach to the matter. He was interested in bringing the case to a conclusion. As he said on January 20, 2016: "And I'm as interested in finality before I'm dead as anybody in the courtroom." Doc. no. 1188, at 140.

In the pretrial conference on January 21, 2016, the discussion returned to the checkerboard jurisdiction issue, commonly referred to by Judge Jenkins and counsel as "the carveout." Judge Jenkins made it very clear that, as far as he was concerned, deferring resolution of the geographic jurisdiction issues as to the carveout parcels was "an open invitation to trouble again." Doc. no. 1120, at 23. Shortly after that he elaborated:

> Well, we've got to get those competing maps down to one so that they accurately and commonly define what's there. We've got to do our work as mandated in Ute V as to the carveout and not leave it to new generations to do what we are supposed to do ourselves.

Doc. no. 1120, at 24.

Judge Jenkins was also interested in exploring the possibility of granting any relief that could appropriately be granted without the delay that would inhere in further proceedings: "Well, are we in a position at this point to talk about the entry of at least some measure of the mandate in Ute V?" *Id.* at 25. On that score, Judge Jenkins mentioned the possibility that "a carveout can wait until the next hearing so people can do their work on both sides, even though we sat together months and

months and months ago where the Tribe asked for making sure they had plenty of time to do their work in reference to the checkerboard area, and we extended that time." *Id.*

Later in the January 21 proceedings, the subject of adjudication of the jurisdictional status of the carveout parcels – the checkerboard tracts – arose once again, resulting in this significant exchange:

> [Ms. Bassett:] So what we ask for is for this Court to go ahead and enter a permanent injunction as to the lands that are already delineated. In the interim, we would, and without we are -- without waiving our position, because our position is, is that no further adjudicatory process is required as to the carveout areas. So without waiving that –
>
> THE COURT: That's a changed position. It was an earlier position otherwise.
>
> MS. BASSETT: *Yes. And I think maybe that was before we recognized the massiveness of the job that would be entailed*.

Doc. no. 1120, at 45 (emphasis added).

This turnabout, taken together with Mr. Rasmussen's proposal that the parties could just "come back if they had a dispute," doc. no. 1106, at 69, vividly illustrates what the predominant problem is in this case. Ute V, common sense, and the obvious need for jurisdictional certainty, all require a definitive determination, by contested adjudication if necessary, of the jurisdictional status of all parcels whose jurisdictional status might be open to question. Judge Tacha unmistakably recognized that need in Ute V. State and tribal law enforcement officers simply cannot function effectively without that degree of clarity, and Judge Jenkins repeatedly recognized the need for clarity as to the jurisdictional status of all parcels whose status might be in question. In September, 2014, as is discussed in more detail on p. 20, above, plaintiff's counsel spoke of "the separate, but no less important task, of determining what lands within

the Uintah Valley Reservation remain within the Reservation pursuant to the three-part test set forth by the Tenth Circuit in Ute V." Doc. no. 671, at 4. Plaintiff said – correctly – that it was "critical to comprehensively determine the jurisdiction status of all lands within the original Uintah Valley Reservation. Only then will the parties have certainty and finality about the jurisdictional status of lands within the Reservation." *Id.* But, at least as early as the pretrial conference in January, 2016, plaintiff's counsel struggled to avoid tackling that tedious and unglamourous task. As will be seen, their strategy for avoiding that task became, when all other options were unavailing, a strategy of delay. That strategy went hand in hand with the adoption of an even more strident tone in Mr. Rasmussen's treatment of the presiding judge. Then, when ordinary methods of getting some delay were unavailing, plaintiff's counsel filed the present motion.

If anything is clear from the record in this case, it is clear that there are numerous parcels whose jurisdictional status has not been determined. It is equally clear that once the parties actually sit down and work through the operative documents, the status of numerous parcels can be determined without the necessity of a contested adjudication. But the record also plainly demonstrates that, ultimately, there will be some parcels as to which there will be no meeting of the minds, resulting in the need for a contested adjudication of jurisdictional status. The fact that plaintiff's counsel changed their minds about the need for an "adjudicatory process" when they "recognized the massiveness of the job" explains much but changes nothing.

The pretrial conference continued on January 22, 2016. With the benefit of his discussions with counsel, on the preceding days, of the legal and practical issues presented by the case, Judge Jenkins made it clear that he thought a stepwise approach to granting final relief might well be appropriate. In the context of a discussion of the

confusion resulting from conflicting jurisdictional maps, Judge Jenkins observed that "the diminished items referred to in Ute V have yet to be itemized and specifically defined." Doc. no. 1114, at 164. But he observed that, even so: "we could end up with a reasonable mandated final order, at least in part, awaiting the completion of the work to which we've all been assigned." *Id.* at 164-65. To that end, Judge Jenkins indicated his desire for the preparation of "a common and agreed to map that tracks Ute III and Ute V with a recognition of the carveout section that is still a work in process. And I would like to have that done in three weeks." *Id.* at 165. He recognized that "one map attached to an order implementing Ute V" would be "the beginning point." *Id.* Consequently, he said that he "would like the Indian Tribe to prepare a suggested form of order having to do with the determination in Ute V, and to do so within ten days." *Id.* He invited the defendants to do likewise, within ten days after presentation of plaintiff's proposed order. *Id.* Thus, Judge Jenkins was clearly intent on granting relief effectuating the principles expounded in Ute V without having to await the completion of the process necessary to adjudicate the jurisdictional status of carveout parcels.

That brought the discussion to a point, on January 22, which has drawn much pointed comment and argument in plaintiff's papers in support of the present motion. Judge Jenkins announced his intent to hold "an evidentiary hearing on the motion for summary judgment." Doc. no. 1114, at 168. He solicited the estimates of counsel as to the time required for that hearing. Mr. Rasmussen, co-counsel for plaintiff, commented that he had "never been in a situation where there's been any substantial amount of testimony at a summary judgment motion." *Id.* Judge Jenkins explained (somewhat confusingly): "We're going to trial. But we're having a hearing on the motions for summary judgment because there are evidentiary questions that are in conflict." *Id.* at 169. At that point, counsel for one of the defendants inquired as to

whether the hearing contemplated by Judge Jenkins would deal with the carveout areas, to which Judge Jenkins responded as follows:

> THE COURT: No. Heavens no. That's absolutely post. We're going to enter at least a partial. That's why I've asked them to prepare and suggest a form of order implementing Ute V. That's separate and a different evidentiary position to begin with.

Id.

In responding to a comment by plaintiff's counsel, Judge Jenkins elaborated on his intentions:

> THE COURT: There are disputed issues of fact, primarily because of the large relief[6] that you're asking for. There are some facts that are not in dispute. There are other facts that are very much in dispute. So we've got to have an evidentiary hearing.

Doc. no. 1114, at 170.

Mr. Rawson, counsel for Uintah County, estimated that the length of the hearing contemplated by Judge Jenkins would be "at least three weeks, given all the witnesses." *Id.* at 172. As this discussion drew to a close, Judge Jenkins set the hearing to begin "on Monday the 21st of March, ten o'clock in the morning, hearing on motions for summary judgment, including the last one." *Id.* at 174.

After reiterating his desire for an order generally implementing the Ute V mandate, *id.* at 175, Judge Jenkins inquired of Mr. Rasmussen as to how soon he could be prepared to address the issues as to the carveout parcels. *Id.* at 176. Mr. Rasmussen suggested that each county's parcels be dealt with separately. *Id.* He also suggested that Duchesne City could be dealt with much sooner because "it looks like

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[6] This is a reference to the expansive forms of injunctive relief, as sought in plaintiff's motions for summary judgment (*see,* p. 14, above), which, if granted, would augment the relief clearly called for by Ute V but would (by enjoining, as Judge Jenkins put it, "ten very broad areas of behavior," doc. no. 1101, at 2) potentially invite unnecessary inter-jurisdictional strife.

there's only about 20 lots within Duchesne City where there's really an issue." *Id.* And Judge Jenkins summarized his thoughts as to the process relating to the carveouts as follows: "Those things that you can agree upon 99 percent, that's fine. If there is a one-percent problem, the Court will try to resolve it for you." *Id.* at 177.

As the pretrial conference neared completion, Judge Jenkins returned once again to the task of maintaining the status quo pending the entry of final relief:

> Now, in the interim, so we maintain the status quo and try to get along, I have previously stayed things, sometimes formally, sometimes informally. We're interested in good faith on both sides. I will indicate that if it is obvious within the meaning of Ute V, that basically incorporates Ute III, at least in most part, where a state trooper, or someone similarly situated, is faced with a problem and information is accurately available, he act in good faith. And the tribal representatives, when they are asked for information, supply that information promptly and act in good faith.
>
> And I will indicate that from the bench here right now as an order until this matter is finally settled. I recognize, as has counsel for the Tribe, that it depends on the facts and circumstances, but one should not knowingly violate Ute III or Ute V as modified.

Id. at 179-180.

As the hearing drew to a conclusion, Judge Jenkins made his intent clear:

> THE COURT: Yes. It's Ute V. Ute V. Ute V. Yes. That's what we've got to -- you see, that's why we have to segment it. We've got to get that implementing order, that final order taken care of. We all recognize that we haven't done the work that needs to be done to deal with the carveout section. So at least we can get most of it done. We've gone even a little further on the carve out, as you know.

Id. at 184.

In summary as to the pretrial conference, and those aspects of it that are prominently discussed in plaintiff's motion papers, it is reasonably clear that, as far as Judge Jenkins was concerned, three types of relief were in play:

1. A prompt – summary – grant of the relief clearly contemplated by Ute V. As to this form of relief, it is evident that Judge Jenkins thought that no fact issues should stand in the way of prompt action.

2. The noticeably broader forms of relief sought in plaintiffs' motions for summary judgment. Those motions sought broader forms of relief, as indicated on p. 14, above. As to the propriety of granting those broader forms of equitable relief, it was Judge Jenkins' conclusion (as is often the case on a motion for summary judgment) that there were fact issues to be resolved at trial.

3. Adjudication of residual issues as to the jurisdictional status of specific parcels remaining in controversy (carveouts).

Another thing is clear. Mr. Rasmussen may be forgiven for expressing his perplexity with the notion that there would have to be an evidentiary hearing on a motion for summary judgment. The fact of the matter is that Judge Jenkins would have done well to have provided an overall explanation of his approach at the outset of the January 22 proceedings. That would have eliminated most or all of the potential for confusion and perplexity. But by the end of the hearing, the judge's approach was evident. Plaintiff raises the "three week evidentiary hearing on summary judgment" argument in various contexts and for various purposes throughout its papers in support of the present motion. None of that has merit, under § 455 or otherwise.

On January 27, 2016, following the pretrial and motion hearing, Judge Jenkins entered an order recapping, in part, the proceedings at the four-day hearing. Doc. no. 1101. That January 27 order confirms, consistent with the discussion at the pretrial and motion hearings, that the judicial relief contemplated by Judge Jenkins fell into the three categories summarized above: (1) "the proper form of order implementing the Tenth Circuit's Ute III Mandate, as modified by Ute V", (2) a determination as to the "expansive injunctive relief" requested by the Tribe in its complaint and in several summary judgment motions, and (3) identification of the carveout parcels. *Id.* at 1.

In the January 27 order, Judge Jenkins elaborated as follows with respect to the second category of relief (the "expansive relief"):

> The second matter – a court determination on the expansive relief requested by the Tribe in its complaint, as consolidated, and several summary judgment motions – requires an evidentiary hearing. In the Tribe's most recent summary judgment motion (CM/ECF No. 1088), the Tribe seeks a permanent injunction enjoining Defendants to refrain from ten very broad areas of behavior. This requested relief parallels the relief sought in the Tribe's prior summary judgment motions. The expansive nature of such relief goes beyond and is in contrast to the fairly limited task of implementing the Mandate. When parties seek permanent injunctive relief – particularly of the expansive nature sought by the Tribe in its complaint, as consolidated, and summary judgment motions – and when conflicts and evidentiary questions arise, parties are entitled to a hearing to resolve those questions.

Id. at 2.

Consistent with his oft-repeated desire to enter an order implementing the Ute III and Ute V mandate, Judge Jenkins directed the plaintiff to submit a proposed form of order within ten days, and granted defendants ten days thereafter within which to respond with their proposed forms of order. *Id.* Judge Jenkins' January 27 order also called for submission of proposed maps implementing Ute III and Ute V as to the exterior boundaries of the reservation and, importantly, directed the parties to meet on four days in the latter part of February to "resolve the carveout issues remaining from *Ute V*." *Id.* Finally, as relevant here, the January 27 order reaffirmed the setting for the evidentiary hearing as follows: "A three week allotted evidentiary hearing on the permanent injunctive relief sought in the Tribe's summary judgment motions shall commence at 10:00 a.m. on March 21, 2016." *Id.* at 3.

On February 8, plaintiff filed a notice of appeal (doc. no. 1127) with respect to Judge Jenkins' January 27 order. That appeal was assigned No. 16-4021 in the Court

of Appeals. The Tribe wasted no time asserting that the filing of the notice of appeal "divested the District Court of jurisdiction." Doc. no. 1135, at 2, filed on February 11, 2016. Accordingly, the Tribe also moved for an order vacating the order directing the parties to meet in late February to address carveout issues. Doc. no. 1143, filed on February 19, 2016.

Also on February 19, 2016, the Court of Appeals entered an order denying the Tribe's emergency motion for a stay of the district court proceedings. The Court of Appeals briefly recounted the four factors ordinarily relevant to the issue of whether a stay should be entered and concluded that: "Upon consideration of [the Tribe's] motion, appellees' responses, and appellant's replies, we conclude appellant has failed to justify the grant of a stay under the governing factors." Doc. no. 1145 (dated February 19, 2016, in Tenth Circuit Nos. 15-4154 and 16-4021).

It is fair to say that, following the pretrial conference and motion hearing, and with the January 27 order in hand, the parties had their marching orders and were left with no reason to doubt Judge Jenkins' resolve to push the case to a conclusion. By the time the January hearings ended, and, in any event, by the time they read Judge Jenkins' January 27 order, there should have been no question in the minds of plaintiff's counsel that the "three week trial on summary judgment" mystery was no longer a mystery at all. As is discussed above, Judge Jenkins plainly intended to summarily (*e.g.,* under Rule 56) grant the overarching relief that could be granted with no further ado (to implement, at the district court level, the legal principles expounded in Ute V) and to hold a trial on the residual fact issues relevant to the other relief sought by plaintiff. Yet, as late as February 22, 2016, three days after the Tenth Circuit had denied a stay of proceedings before Judge Jenkins, and in the context of a discussion of plans for proceedings consistent with Judge Jenkins' January 27 order, Mr. Rasmussen reiterated that "you cannot set a motion for summary judgment for an

evidentiary hearing." Doc. no. 1167, at 8. He continued: "We are allowed to make that argument. You can say that that's the norm. You are simply wrong. And you've been on this bench far too long to be making that type of an error in favor of the other side." *Id.*

The transcript of the February 22 hearing also clearly demonstrates the continuing desire of plaintiff's counsel *not* to do the work necessary to bring the case to a conclusion in the district court. Mr. Rasmussen repeatedly maintained – even though the Court of Appeals had just denied a stay – that the pendency of the appeal tied Judge Jenkins' hands. *E.g.*, doc. no. 1167, at 6, 9, 10, 12 - 13, 16. By way of sharp contrast, at the February 22 hearing, Judge Jenkins concisely summarized his approach as follows: "Has the mandate in Ute V ever been withdrawn? It has not. Is it a mandate that's directed to the parties and to the Court? It sure is, requiring everybody's cooperation." *Id.* at 53. A few minutes later: "[By Judge Jenkins] Other than the carved out portion requiring further definition, the parties otherwise agree that Ute III and Ute V define the periphery of the reservation and that the Tenth Circuit's mandate at least can be partially implemented with an order and a common map identifying such agreed upon peripheral reservation boundaries." *Id.* at 55.

On February 22, Judge Jenkins denied another motion to stay, reaffirming that counsel were to meet on February 24, to "identify the boundaries of the reservation," a matter that had been discussed at the January hearings and remained unresolved. Doc. nos. 1155, 1209.

The motion now before the undersigned, the motion to recuse, was filed by plaintiff on March 7, 2016. On the day before that motion was filed, plaintiff filed yet another motion to stay (doc. no. 1165), reciting that the motion to recuse had been mailed for filing and requesting that, as a result of the filing of the motion to recuse, a stay should be entered "until the latter of this Court granting [the Motion to Recuse]

or resolution of a promptly filed petition for writ of mandamus to the Tenth Circuit, through which the Tribe would seek appellate review of any order by this Court refusing to recuse itself." Doc. no. 1165, at 2. On March 9, 2016, on his own motion, Judge Jenkins vacated the hearings that had been set for March 11 and March 21.

V. Discussion and analysis under § 455(a)

The controlling legal standards are stated beginning at p. 2, above. Suffice it to say for present purposes that the test under § 455(a) is objective. Disqualification is appropriate only where a reasonable person, were he to know all the circumstances, would harbor doubts about the judge's impartiality.

After thorough consideration of the Motion to Recuse, the responses, the replies, and the voluminous record, the undersigned is persuaded that the motion is without merit. An objective observer, were he to know all of the circumstances, would not harbor doubts about Judge Jenkins' impartiality. To the contrary, the record shows, time and again, a judge who wants, at long last, to get this case to a final and definitive conclusion, effectuating the mandates of the Court of Appeals. In the latest chapter of this long-running litigation, Judge Jenkins has had to deal not only with the challenges presented by an extraordinarily complex case but with the persistent efforts of plaintiff's counsel in seeking to avoid, or, failing that, delay, the tedious but essential work incident to bringing this case to a conclusion.

a. The judge's interactions with plaintiff's counsel – tone and disparate treatment

As for the tone of Judge Jenkins' dealings with plaintiff's counsel, plaintiff correctly points out that, in some instances the tone of the judge's interactions with one of plaintiff's counsel differed noticeably from the tone of his interactions with defendants' counsel. For that matter, as has been noted, the tone of the judge's interactions with one of plaintiff's lead counsel – Ms. Bassett – also differed from the tone of his interactions with plaintiff's other lead counsel, Mr. Rasmussen. But it is

plain from the record that these differences do not give rise to an appearance of bias. These differences in tone (and, on the whole, notable examples are isolated) are readily explainable by the gratuitously antagonistic and provocative way in which Mr. Rasmussen addressed the judge. Even a cold transcript demonstrates that, on more than a few occasions, Mr. Rasmussen chose to be confrontational, stopping just short – if short at all – of impudence, in responding to unexceptionable questions or comments from the bench. Mr. Rasmussen's treatment of Judge Jenkins called for remarkable forbearance on the part of Judge Jenkins. As it became increasingly obvious that Mr. Rasmussen would not succeed in persuading Judge Jenkins to forego adjudication of the jurisdictional status of the carveout parcels (a task plainly required by Ute V), Mr. Rasmussen's tone grew yet more strident. Behavior like that would test the patience of any judge and would, without doubt, elicit at least some indication of irritation from all but the most patient. That is what happened here. Judge Jenkins' occasional sharp responses to gratuitous provocation prove only that he is human. The fact that Mr. Rasmussen stood alone as the recipient of those responses proves only that Judge Jenkins was not inclined to accord similar treatment to dissimilar behavior.

Some elaboration on this point is appropriate. It is commonplace, in district court proceedings (or, for that matter, at oral argument in Denver), that there will be easily perceptible differences in the repartee as between the court and counsel for the two opposing parties. This can be traced, variously, to the merits of the case, to procedural frustrations, to the behavior of counsel, or to judicial bias. Moreover, there will be times that the degree of forbearance that might be desirable is not forthcoming. For instance, in a hearing on December 18, 2015, Judge Jenkins referred to Mr. Rasmussen's local counsel as "your [Mr. Rasmussen's] fountainhead of information" (as to a matter which seemingly should have been within Mr. Rasmussen's

knowledge). Doc. no. 1222, at 12 - 13. If that was sarcasm or a gibe (difficult to determine one way or the other from a transcript), the undersigned does not applaud it. But, viewed in isolation or in context, that sort of a comment is indicative of exasperation, not bias within the meaning of § 455(a).

An objective observer, with knowledge of the circumstances, would not conclude that Judge Jenkins' treatment of plaintiffs' counsel is indicative of partiality. To the contrary, it would not be lost on an objective observer that most of the sharp exchanges between Judge Jenkins and plaintiff's counsel occurred in the context of discussions that clearly reflected the judge's resolve to push this case to a final and definitive conclusion, with entry of a final judgment granting substantial injunctive relief to plaintiff, thus effectuating the mandates of Ute V and Ute VI.

b. Delay in granting relief

As is discussed above (pp. 44-45), Judge Jenkins concluded that bringing the case to a conclusion would involve three steps: (1) a grant of the relief specifically contemplated by Ute V, (2) consideration of the broader relief sought by plaintiff to augment the relief specifically contemplated by Ute V, and (3) adjudication of the jurisdictional status of the carveout parcels.

At first blush, it would seem that the first species of relief could have been granted summarily – maybe within days after the Tenth Circuit's emphatic decision in Ute VI. Theoretically, Judge Jenkins could have summarily entered an injunction barring "any criminal prosecution by the defendants on the basis of acts allegedly occurring on lands having the status of Indian country under Ute III and Ute V." But even this sort of injunctive relief would be virtually meaningless without a definitive determination of the location of the outer boundaries of the reservations, let alone an adjudication of the jurisdictional status of those tracts asserted to be carveout parcels. As to those broad areas that were, and are, clearly Indian country, it does not appear

that the defendants, at least after Ute VI, have any remaining inclination to test the jurisdictional rules that had been established by the Tenth Circuit and the Supreme Court. But the problem is at the margins, as is so often the case. Consequently, even on the first species of relief, the entry of an injunction having any more meaning than a wave of the judicial hand is a demanding task. As is shown at length above, Judge Jenkins unquestionably sought to get the case in a posture for a prompt grant of relief of the first type. In that effort, he was thwarted in no small measure by plaintiff's counsel.

As for the third[7] type of relief – the adjudication of the carveout parcels – sorting out those issues (*e.g.*, identifying those parcels that actually should be treated, for purposes of criminal jurisdiction, as carveout parcels) was, and remains, a prerequisite to giving practical effect to the Tenth Circuit's mandates. That task is decidedly not the fun part of this case. It is quite clear from their explicit statements that plaintiff's counsel are not enthusiastic about tackling the tedious, technical and unglamourous work which will be necessary to fill in the colors on the checkerboard.[8] The parcels as to which there is remaining jurisdictional uncertainty represent, in terms of areal extent, a relatively small portion of the total acreage, but those tracts clearly have been a disproportionately abundant source of disputed prosecutions. For that reason, the legal outcomes that can now be regarded as final as a conceptual matter cannot actually be put into practical effect – literally, on the ground – without the resolution of residual issues as to the status of the carveout parcels.

A quick look at the parties' jurisdictional maps[9] shows beyond doubt that, regardless of how geographic jurisdiction is ultimately sorted out by the court, a

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[7] Delay in granting the second type of relief is discussed in section (c), below.

[8] *See, e.g.*, doc. 1221, at 17 (transcript of December 1, 2015 proceedings).

[9] *See*, doc. nos. 1140, 1141, 1163 and 1164.

resolution of this litigation which fails to determine the jurisdictional status of the carveout parcels would, as a practical matter, be no resolution at all. This is so as a legal matter, *see,* Ute V, 114 F.3d at 1529 - 31, and, of at least equal importance, as a matter of day to day (and night to night) practicality, from the standpoint of tribal, BIA and state law enforcement officers (to say nothing of those who depend on them for their safety and security). On this point, it is telling that plaintiff's counsels' approach (which is the main underpinning of their delay strategy, the failure of which, in turn, goes far to explain the filing of the present motion) would expose individual members of the plaintiff tribe to sitting in jail while jurisdictional disputes are sorted out at length by state courts in state prosecutions, by tribal courts, or by the federal court in contempt proceedings. Getting a new judge will not diminish the complexities with which plaintiff must, like it or not, deal as a prerequisite to actually getting the benefit of the legal relief to which it is entitled. Under the best of circumstances – which presupposes a genuine commitment of counsel on all sides to completing the task – the adjudication of the carveout parcels will take time. The delay in getting there, in the face of plaintiff's counsels' disinclination (demonstrated by their actions and by their express statements) to move the process along, can hardly be laid at the feet of the judge. Even less is that delay a sign of a biased judge. The plaintiff tribe, not to be confused with its counsel, may genuinely feel itself dissatisfied with Judge Jenkins. But that dissatisfaction is not rooted in any cause cognizable under § 455(a).

c. Three-week trial on motions for summary judgment

Plaintiff's oft-repeated complaint that the judge's bias is demonstrated by his unheard of action in scheduling a three-week trial on the motions for summary judgment is equally without merit. The record clearly shows that the judge recognized that the case is ripe for a summary grant of some forms of relief, but that he had

concluded that there were factual issues to be resolved as to the broader forms of equitable relief sought by plaintiff.[10] There is nothing remarkable – or indicative of bias – about that. The short of the matter is that, if there is to be a Ute VII, any trial judge would not want the Tenth Circuit, in Ute VII, to send the case back for some non-substantive reason such as overlooking a fact issue.

To be sure, in the opinion of the undersigned, any potential for confusion would have been reduced if Judge Jenkins had made clear, at an earlier point in the January pretrial conference, just what he meant when he referred to an evidentiary hearing on the motions for summary judgment. But what is important for present purposes is the fact that, by the time the late January proceedings were over, there could have been no real doubt about the fact that Judge Jenkins' intent was to conduct an evidentiary hearing to resolve disputed fact issues. Plaintiff may take issue with Judge Jenkins' conclusion that fact issues were afoot with respect to the broader forms of equitable relief sought by plaintiff, but the fact that a litigant is required to try a case that it thought should be adjudicated in all respects under Rule 56 is hardly an indicator of bias.

VI. Ancillary matters

Plaintiff has requested oral argument on its motion to recuse. The undersigned is convinced that oral argument is not necessary. The motion has been thoroughly briefed on both sides. The undersigned has thoroughly reviewed the massive record. Oral argument would, without doubt, afford an opportunity for rhetoric. But oral argument would not shed meaningful light on the question of whether plaintiff has demonstrated, on this record, that an objective observer, with knowledge of the circumstances, would reasonably question the presiding judge's impartiality. Accordingly, the motion at doc. no. 1206 is **DENIED**.

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[10] This is discussed in detail on pp. 30, 44-45, above.

Uintah County's Evidentiary Objections to Ute Tribe's Replies to the State of Utah's and County Defendants' Responses in Opposition to the Tribe's Motion to Recuse (doc. no. 1203) are **OVERRULED**. Accordingly, plaintiff's motions to strike the evidentiary objections, contending that the evidentiary objections, which have now been overruled, amount to an improper sur-reply (doc. nos. 1208 and 1215), are **STRICKEN AS MOOT**.

VII. Conclusion

Plaintiff correctly states that it has "already established most of its case as a matter of law." Doc. no. 1197, at 8. The remaining challenge is to put those legal principles to work for the benefit of the entire population of the vast areas of the State of Utah that are affected by this litigation. The arguments advanced in support of the motion to recuse the judge whose duty it is to complete that task are without merit. The undersigned has also considered, and rejected, the possibility that Judge Jenkins' insistence on reaching a disposition which is procedurally final, comprehensive in its effectuation of the appellate mandates, and definitive in its adjudication of geographic jurisdiction, is really just a sly way of avoiding the grant of any meaningful relief at all. Any such notion is thoroughly undermined by the record.

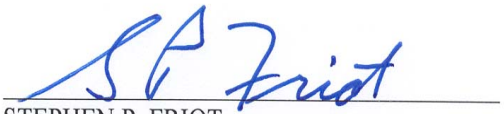
One final matter deserves comment. The filing of a motion to recuse cannot, even with the hostility implicit or explicit in such a motion, itself require recusal. *See, generally,* Charles Gardner Geyh, Judicial Disqualification: An Analysis of Federal Law, at 46 *et seq.*, Federal Judicial Center, 2010, and cases there cited. Even so, the undersigned, having personally reviewed more than a thousand pages of transcripts of proceedings in this case (to say nothing of hundreds of pleadings, briefs and orders), is also satisfied that plaintiff's unmeritorious motion to recuse will not affect Judge Jenkins' approach to the discharge of his official duties in this case. On that score, the transcripts are replete with instances in which Judge Jenkins, confronted

with conduct which was, at a minimum, exasperating, chose to stay focused on the merits and on the challenges of bringing this case to a conclusion consonant with the mandates of the Court of Appeals. The undersigned is confident that will not change.

For the reasons set forth in this order, plaintiff's Motion to Recuse, doc. no. 1166, is, in all things, **DENIED**.

Dated this 25th day of July, 2016.

BY THE COURT:



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

75-0408p005.wpd