United States District Court
United States Courthouse
Salt Lake City, Utah 84101

Bruce S. Jenkins
U.S. Senior District Judge

Telephone
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August 15, 2016

Chief Judge David Nuffer
U.S. District Court, District of Utah
351 South West Temple, Suite 10.100
Salt Lake City, UT 84101

Re: 2:75-cv-408 - Ute Indian Tribe v. UT, et al.

Dear Chief,

I write to you as Chief Judge because of your oversight and supervisory responsibility for case assignment. I call to your attention to a recent opinion and order from the Court of Appeals because it impacts upon your responsibilities.

The Circuit opinion was filed on August 9, 2016, bears their number 15-4080 and is a subpart of the '75 Ute Indian case. I call your attention also to an exhaustive 54 page opinion filed on July 25, 2016 by Senior Judge Friot of Oklahoma in the '75 case denying Plaintiff's Motion to Recuse. Plaintiff's Motion to Recuse was filed on March 7, 2016. While the Motion to Recuse was pending before Judge Friot, Plaintiff's counsel filed a motion before the Circuit Panel asking that Ute '75 be reassigned. The allegations made in that motion were similar to matters pending before Judge Friot. At that point recusal or reassignment could produce similar results or conflicting results. While counsel for Plaintiff informed the Panel as to the pending motion before Judge Friot, nothing in the record indicates that Judge Friot was informed of the Motion to Reassign. The results of the two motions are indeed in conflict.

The last four lines of the Panel's case refer to your responsibilities. They say:

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

I write to alert you to the fact that the factual premise as to part of the case history as recited by the Circuit Panel is incorrect. Someone needs to call that to the Panel's attention. Let me illustrate why I say what I say.

While the Court of Appeals attributes actions to the "district court" it fails to identify which judge it is talking about. By implication it attributes the action to the assigned Judge in the '75 case by citing the action as one of the two bases for reassignment.

On page 17 of the opinion it notes that the district court ". . . has twice failed to enforce this court's mandate in *Ute V* . . .." It suggests the '75 judge entered a "one-line order." (See page 8 of the opinion.) While I am an advocate of brevity, never in my life have I signed a one-line order. The order referred to in *Ute VI*, the "one-line order," was entered by a colleague and not by me. The case was Lesa Jenkins and the county involved was Wasatch County, Civil No. 2:13-cv-1070. The order speaks for itself. The order is noted in the docket of that case as CM/ECF No. 71. After that matter was on appeal (it was appealed from a docket entry), that case was consolidated with the '75 Ute case. *The Ute VI* Panel consolidated before it, an early pleading matter on appeal from me with the order entered in my fellow judge's case. While I have always taken responsibility for my own sins, a perceived sin of a colleague ought not to be attributed to me as part of the justification for reassignment. His views are not necessarily my views. After my colleague's case came back I entered a preliminary injunction as was required by the Mandate in the Wasatch County case which was then before me in Civil No. 2:75-cv-408, CM/ECF No. 944. Compliance is not defiance. Copy annexed.

This correct history does away with one of the only two reasons cited by the Panel as justification for the order of reassignment.

The only other cited failure on my part as to the Mandate of the Circuit was to write a 7 page opinion quoting extensively from the opinion of the Supreme Court. It says what it says. A copy is annexed. If granting a motion and relying on a Supreme Court opinion violates a mandate which justifies reassignment, then every Article 3 trial judge is at risk. Let me be clear. I care not who finishes Ute '75. As you know, I have a calendar of complex and challenging matters. I do care that an alleged factual basis for an order of reassignment be accurate as well as adequate. The question as to reassignment was orally put to an amicus. Plaintiff 's counsel answered the question in its filing April 19, 2016 while the Motion to Recuse was pending before Judge Friot. The Court of Appeals had the benefit of amicus who at no time ever appeared before the assigned Judge and never presented either factual or written material in the pending matter before the assigned Judge.

One of the curiosities in the Panel's opinion is the reliance on "facts" by the Circuit purporting to reveal what Justice Sandra Day O'Connor really said using material disputed by Myton.

I have no trouble being reversed in *Myton,* indeed in any case. That is part of the process. I don't have power or the inclination to second guess what the Supreme Court plainly says. The fact that I wrote an opinion and granted a motion does not violate a mandate. My opinion may be wrong in the eyes of some, but it violates no mandate. It respects the finding of the Supreme Court. It provides to the Circuit and, if appropriate, the Supreme Court, an opportunity to clarify what the Supreme Court was talking about.

As noted above, after my colleague's case came back in the Lesa Jenkins matter I entered a preliminary injunction as required. That complied with the *Ute VI* Mandate.

As you know, Plaintiff filed a motion on March 7, 2016, to recuse the assigned judge in this matter – the eve of long-set hearing dates to consider the form and content of the district court's order implementing *Ute V*, namely March 11, 2016. The relief asked for in the 2013 Complaint and a variety of motions for summary judgment were set for hearing and trial on March 21, 2016. Those dates, long set, were vacated by the need to have the Motion to Recuse heard. An Oklahoma Judge, Senior Judge Friot was assigned. Judge Friot wrote an exhaustive 54 page opinion filed on July 25, 2016 (CM/ECF No. 1223). After examining many volumes of material Judge Friot denied the motion. The materials examined in detail in Judge Friot's opinion seems to conflict in many respects with some of the recent Panel's opinion. No reference is made to that opinion in the Panel's opinion and it is unknown whether Judge Friot's opinion was ever called to the Panel's attention by counsel or otherwise. If not, Judge Friot's opinion should have been called to the Panel's attention so that matters discussed and decided by Judge Friot common to questions alleged by Plaintiff's attorneys before the Panel could be examined by the Panel with care. For example, Judge Friot's discussion of Judge Tacha's opinion and the need for evidence so that *Ute V* could be implemented.

I read with interest the two cited cases used to justify reassignment. One is an accounting case. One is a criminal case. They are: *Leoff v. S & J Land Co.*, 630 F. App'x 862, 864, 866 (10th Cir. 2015) and *United States v. Gupta*, 572 F.3d 878, 892 (11th Cir. 2009). Each recites three factors sometimes used when a panel ponders whether the reassignment of a case is appropriate. They are: "(1) Whether the original judge would have difficulty putting his previous views and findings aside; (2) whether assignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment."

The facts in each case and the actions of each judge are far different than the facts in this case. The three suggested factors have some pertinence. The history of this case required great effort on the part of the district court – not just the Court of Appeals. This case began in 1975. I inherited the case in 1978 when I was appointed. Time involved by this judge over the years has not been weeks but months as demonstrated by *Ute I*, and particularly *Ute IV* when this court asked the Court of Appeals for instructions because of the conflict between *Ute III* and the

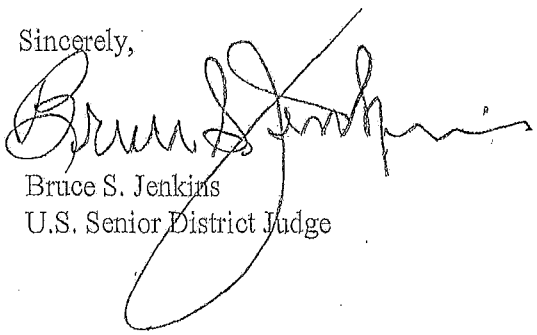
Hagen decision of the United States Supreme Court. The parties did not ask for instructions. This Court asked for instructions. That request and extended opinion resulted in *Ute V* by the Circuit. The parties then sought to get along by agreement, which after a number of years fell apart. Since then the players have all changed – the attorneys, changed tribal leaders, and changed county, state and city leaders. Even most of the Court of Appeals has changed. As demonstrated by this resurrected case, attitudes of litigants in this case have changed as well. This is well documented by Judge Friot's exhaustive opinion and the effort of this judge to bring the matter to conclusion. This case, as noted was reopened. The laws of mortality being what they are, when reopened, the case was, alas, still assigned to me.

The Panel's opinion acknowledges that no judicial bias is involved. The denial by Judge Friot of the Motion to Recuse fortifies that. There are no fixed or recurring or repetitive actions of defiance of the Mandate by the assigned judge. They don't exist. I asked and received competing suggested Mandate orders as to *Ute V* from the parties. I asked the Plaintiff if they had abandoned any of the identical claims for relief in their motions and complaint, and walked through each. They abandoned none of them. They needed to be put to their proof.

The Panel's opinion talks about "just and timely resolution." One of the ironies of this case is a final hearing on the *Ute V* Mandate was set for March 11, 2016 (which Plaintiff argued was stayed because of an ancillary matter on appeal – although the assigned judge kept insisting that the Mandate had never been withdrawn and would go forward on that date unless otherwise ordered by the Circuit). A final hearing and trial on the identical motions and complaint asking identical relief, were set for March 21, 2016. Both were vacated – not stayed – vacated by the court because of Plaintiff's filing of the Motion to Recuse on March 7, 2016, four days before the March 11, 2016 hearing date. It was a mighty struggle to get that far.

While this letter is directed to you because of your assignment responsibilities, I have not filed it in the pending case. At this point I have not sent it to the attorneys. It is unfair to you to be asked to enter an order with a flawed factual base. Since this letter is to you, I ask your permission to furnish a copy to the Panel members. I ask also your permission to file a copy with the Chief Judge of the Circuit because of a matter initiated by the attorneys for Plaintiff dealing with matters exclusively before him and inappropriately duplicated by counsel for Plaintiff before others.

Sincerely,



Bruce S. Jenkins
U.S. Senior District Judge