1986

State of Utah v. Clinton Perank : Brief of Respondent

Utah Supreme Court

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	
Plaintiff-Respondent,	Case No. 860196
v.	Priority 2
CLINTON PERANK,	(Supreme Court No. 860243)
Defendant-Appellant.	

BRIEF OF RESPONDENT

ON APPEAL FROM AN ORDER OF
THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH,
THE HONORABLE RICHARD C. DAVIDSON, PRESIDING,
REVOKING THE PROBATION OF DEFENDANT-APPELLANT,
AND EXECUTING A SENTENCE OF 0-5 YEARS
IN THE UTAH STATE PRISON
FOR THE OFFENSE OF BURGLARY,
A THIRD DEGREE FELONY

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

A. Criminal Proceedings in Lower Court

Appellant Clinton Perank was charged with burglary, a third degree felony, in violation of Secton 76-6-202, Utah Code Annotated 1953, as amended (R. 1).

Pursuant to a plea of guilty, Perank was convicted as charged in the Seventh Judicial District Court in and for Duchesne County, State of Utah, the Honorable Richard C. Davidson presiding (R. 10). Perank was sentenced on October 27, 1983, to serve an indeterminate term of not more than five years in the Utah State Prison. However, execution of the prison sentence was suspended and he was placed on probation for eighteen (18) months, the terms of which included, inter alia, payment of a $750.00 fine and restitution, and a six-month jail sentence (execution of which was suspended) (R. 11).

On December 5, 1983, Perank's probation was modified based upon admitted violations of his probation agreement (R. 19).

On January 28, 1985, Perank's probation officer filed an affidavit alleging additional violations of probation (R. 42). Perank failed to appear for a scheduled March 18, 1985, hearing on probation revocation and a bench warrant was issued (R. 43). A hearing was finally held on May 28, 1985, and the court found Perank had violated the terms of his probation (R. 47). Sentencing was continued pending disposition of certain other criminal charges against him (R. 47, 50-51).

On January 31, 1986, yet another probation violation report was filed against Perank based upon a series of new violations including fresh burglary and theft charges (R. 51-53). The matter was heard on April 21, 1986. Perank, for the first time during any criminal proceedings in this case, asserted that the court lacked jurisdiction over him because he is an Indian, and the original burglary offense allegedly took place in Indian country (R. 82). The lower court rejected these claims, and thereafter revoked Perank's probation and executed the prison sentence (R. 63).

On or about October 21, 1986, the lower court, based upon stipulation of counsel, stayed its order revoking Perank's probation (see Supplemental Record on Appeal).

B. Course of Proceedings Involving Appellant's Indian Country and Indian Status Claims

As noted above, Perank's defense at his final probation revocation hearing was that the court lacked jurisdiction because: (1) the original burglary occurred in Indian country; and (2) he is an Indian.

Support for his claim that he is an Indian is essentially based on Affidavits from his father and mother he presented at the probation revocation hearing, and Article II of the Ute Indian Tribal Constitution. They allege that Perank's father is a full-blooded Indian and an enrolled member of the Ute Tribe, that his mother has some Indian blood, and that Perank was born in Roosevelt, Utah, while the family was residing on the Indian reservation (R. 69-72).

Perank also asserted that the court lacked jurisdiction because the original crime took place in Indian country. Indian country is defined at 18 U.S.C. 1151 to include:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, . . .

Perank rests his position on the en banc decision of the Tenth Circuit Court of Appeals in Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied, 107 S.Ct. 596 (Dec. 1, 1986) (App. Br. pp. 4-5). The en banc court, with two judges dissenting, held that the original Uintah reservation still exists as originally established, undiminished (except for two relatively small areas). The burglary that led to Perank's conviction occurred in Myton, Utah, which is located within the exterior boundaries of the original Uintah reservation as defined by the en banc majority.

However, the state district court concluded that the crime was not committed in Indian country. In reaching this result, that court necessarily agreed with the State's contention (R. 86-

87) that the reservation is limited to the trust lands.[1] The trust lands are those lands held in trust by the United States for the exclusive use and occupation of the Ute Indian Tribe, and no one disputes that the trust lands occupy reservation status and constitute Indian country within the purview of 18 U.S.C. 1151. Myton--where the burglary occurred--is situated on non-trust land.[2]

While this matter was before the lower court on Perank's probation violation, the Ute Indian case was pending before the United States Supreme Court on a petition for a writ of certiorari filed by the State of Utah, Duchesne and Uintah Counties, and Roosevelt and Duchesne Cities. Subsequent to Perank's appeal and the filing of his brief before the Utah Supreme Court, the parties stipulated that Respondent's brief could await the ruling

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1. The terms "Indian country" and "Indian reservation" are often used interchangeably, and refer to the area--regardless of land ownership--within the exterior boundaries of an Indian reservation. The term "trust lands" refers to lands held in trust by the United States for the exclusive use and occupation of Indians or Indian tribes. See generally F. Cohen, Handbook of Federal Indian Law, pp. 34-44 (1982 ed.). Thus, Indian country or an Indian reservation, with attendant jurisdictional ramifications, can, depending on the situation, include non-Indian land located within the exterior boundaries of a reservation.

2. See map, Ex. I-1B, which illustrates the boundary claims of the parties as well as general land ownership in the area. The foregoing citation is to the record in Ute Indian Tribe v. State of Utah, 521 F.Supp. 1072 (U.S.D.C. Utah 1981). When this matter was before the trial court for the probation revocation hearing, counsel for the parties stipulated that for purposes of determining whether the crime occurred on the reservation (within Indian country), the record before the federal court in the Ute Indian Tribe case could be considered. Consequently all record citations in our brief involving this issue will be to that record. In this regard, JX refers to Joint Exhibits; LD refers to the Joint Compendium of Legislative Documents; and the Trial Court Transcript is referred to as Tr.

of the United States Supreme Court in the Ute Indian case. The United States Supreme Court denied the writ on December 1, 1986 (107 S.Ct. 596). We concede that had the United States Supreme Court accepted the Ute Indian case and issued a decision on the merits, that would have been a dispositive judicial resolution of the boundary question. However, since the Supreme Court refused to grant certiorari, there has been no definitive judicial resolution of the boundary question by the highest federal court. A denial of certiorari is not a decision on the merits:

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again: again and again the admonition has to be repeated.

Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1949), and Stern, Gressman & Shapiro, Supreme Court Practice, Section 5.7, pp. 269-70 (6th ed. 1986).

This Court has a right to its own view on reservation status.3/ Certiorari was granted by the United States Supreme Court in both DeCoteau v. District County Court, 420 U.S. 425, 430-31 (1975), and Solem v. Bartlett, 465 U.S. 463, 466 (1984), because the Supreme Court of South Dakota reached a different result than did the Eighth Circuit Court of Appeals on whether or not a reservation had been disestablished. The Utah Supreme

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3. Other state courts have found themselves in a similar situation. See, e.g., State v. Janis, 317 N.W.2d 133 (S.D. 1982), and Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977).

Court has previously had occasion to address matters involving the Ute Indian reservation. Shortly after Congress opened the reservation to settlement by non-Indians in 1905, the Utah Supreme Court in both Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), and Whiterocks Irrigation Co. v. Mooseman, 45 Utah 79, 141 P. 459 (1914), recognized that the unallotted land had been restored to the public domain.

In the 1970's, the question of the status of the Ute reservation was specifically considered by the Utah Supreme Court. The Court concluded that the original Uintah reservation ceased to exist, but did so without detailed discussion. Brough v. Appawora, 553 P.2d 934 (Utah 1976), vacated, Mem. 431 U.S. 901 (1977). Pursuant to a petition for a writ of certiorari, the United States Supreme Court vacated the judgment and remanded for further consideration in light of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). However, when Brough was remanded to the trial court by the Utah Supreme Court, it was then removed to the federal district court (District Judge Willis W. Ritter had previously restrained the State from proceeding in reliance on Brough). The case was ultimately dismissed without any state court having considered the issue in light of Rosebud.

The United States, as amicus curiae before the United States Supreme Court opposed certiorari in Ute Indian Tribe, but conceded in its discussion of Brough that, despite the consideration of the boundary question by lower federal courts, the Utah courts may again be called upon to consider the boundary issue:

> The Utah Supreme Court did render a decision almost a decade ago that seemed to assume that these lands

were no longer part of the Reservation. Brough v. Appawora, 553 P.2d 934 (1976). But this Court, at the urging of the United States, vacated that decision and remanded for further consideration in light of Rosebud (431 U.S. 901 (1977)), and, as petitioners concede (Pet. 19 n.35), the diminishment issue was not resolved on remand. If the Utah Supreme Court nevertheless should adhere to its prior view in some future case, notwithstanding the intervening decision in Solem and the exhaustive consideration of the issue by the courts below, there will be time enough for this Court to grant review.[4]

C. Relevant Facts Concerning the Uintah Reservation

The original Uintah reservation, which had been created in the 1860's[5], consisted of more than two million acres, most of which is located in Duchesne County.[6] Pursuant to the Act of May 27, 1902 (32 Stat. 245, 263), as amended, a Presidential Proclamation of July 14, 1905 (34 Stat. 3119), provided that all the unallotted and unreserved lands of the original Uintah reservation were restored to the public domain and opened for public settlement under the homestead and townsite laws.[7] The

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4. Memorandum for the United States as Amicus Curiae at 14-15 in State of Utah v. Ute Indian Tribe, No. 85-1821 (November 1986).

5. The creation of the Uintah reservation and its early history are reviewed in some detail in the United States District Court opinion in Ute Indian Tribe, 521 F.Supp. 1072, 1092-1100.

6. See Executive Order of Oct. 3, 1861 (I Kappler 900); Act of May 5, 1864 (13 Stat. 63); and [1879] Commissioner of Indian Aff. Rept., at 331 (JX 3). The western-most part of the original reservation is located in Wasatch County and the eastern-most part is located in Uintah County.

7. See, e.g., Uintah and White River Bands of Ute Indians v. United States, 139 Ct.Cl. 1, 22 (1957); Hanson v. United States, 153 F.2d 162, 162-63 (10th Cir. 1946); and Sowards v. Meagher, supra, at 1116.

following exceptions were made from this Proclamation: (1) the Secretary of the Interior set aside approximately 250,000 acres as a grazing reserve for the Ute Indians pursuant to the Joint Resolution of June 19, 1902 (32 Stat. 744)[8]; (2) more than one million acres were added to the Uinta National Forest (34 Stat. 3116); and (3) some 56,000 acres were reserved for reservoir sites for Indians and general agricultural development under the Presidential Proclamation of August 3, 1905 (34 Stat. 3141, as modified, 34 Stat. 3143).[9] Of the balance, approximately 99,000 acres were allotted to individual Indians and another 7,000 acres--the "Gilsonite Strip"--had already been restored to the public domain in 1888 (25 Stat. 157).

After 1905 and for the next forty years, the tribal reserves, together with the allotted lands in the original Uncompahgre[10]

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8. More than 20,000 acres were also set aside by the Department of the Interior as a tribal timber reserve for the Ute Indians. See, e.g., Memorandum of Chief Supervisor of Forests, dated March 20, 1922, at 1 (JX 401). See also 1932 Annual Report of the Uintah and Ouray Agency, at 1 (JX 427).

9. In the Act of April 4, 1910 (36 Stat. 269, 285), Congress provided compensation and thereby extinguished all of the Ute Indians' right, title and interest to these reclamation lands. The Utes were also ultimately compensated for the lands opened to settlement and the National Forest withdrawals. See e.g., Uintah and White River Bands of Ute Indians, supra, at 6-7, 11.

10. The allotted lands consisted only of approximately 12,500 acres. E.g., [1899] Commissioner of Indian Aff. Rept. at 543 (JX 117); and [1911] Commissioner of Indian Aff. Rept. at 92 (JX 353). The Uncompahgre reservation--which was created as a separate reservation from the Uintah reservation--was also the subject of the Ute Indian Tribe litigation (but is not involved here). The Ute Indian Tribe today refers to the entire reservation as the Uintah and Ouray reservation.

and Uintah reservations[11], were treated as the Ute Indians' existing reservation. On August 25, 1945, however, a 217,000 acre tract of opened and undisposed-of land located within what had been part of the original Uintah reservation was, by Proclamation of the Secretary of the Interior (10 Fed. Reg. 12409), restored to tribal ownership and "added to and made a part of the existing reservation" pursuant to Sections 3 and 7 of the 1934 Indian Reorganization Act (48 Stat. 984). Later, the Act of March 11, 1948 (62 Stat. 72), added an additional 500,000 acres--the so-called Hill Creek Extension--to the Ute Indians' reservation.

There is no dispute that the tribal reserves together with the remaining allotments--some 360,000 acres--are "Indian country" within the meaning of 18 U.S.C. 1151(a) and (c). Nor does anyone question that the surplus lands restored to tribal ownership and reservation status in 1945 and 1948 (the Hill Creek Extension)--which total more than 700,000 acres--are also Indian country. This entire area, comprising more than one million acres,[12] had been considered the extent of the Tribe's existing

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11. See e.g., Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting); and S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (letter of the Secretary of Interior).

12. Approximately half of the trust lands lie within the boundaries of the original Uintah reservation, while the other half lies within the original Uncompahgre reservation. The Ute Tribe contested that only these lands were originally treated as its reservation. As the dissent in Ute Indian Tribe concluded, however, the record establishes otherwise (see 773 F.2d 1105), a point the en banc majority did not dispute. See also S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (Letter of the Sec. of Interior); and 1957 Ute Tribe Ten-Year Development Program, at 66-68 (JX 465).

reservation until recent years (see, e.g., Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting)).[13]

As to the remaining portions of the original reservation, where Congress ended Indian ownership long ago, the area has historically been the primary concern of the State and local governments. The population and land use of the disputed area are more than 90 percent non-Indian, and nearly all the enrolled members of the Tribe live elsewhere. Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting). Within the disputed area (the non-trust lands) there are a substantial number of incorporated towns and cities (such as Roosevelt and Duchesne), and in recent years there has been significant natural resource, business and recreational development.

While this case presents a question of criminal jurisdiction, the implications of the decision transcend the narrow issue presented here. Approximately 18,000 non-Indian inhabitants[14] of the Uinta Basin area face the prospect of being suddenly thrust into the status of residents of an Indian reservation, where

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13. The tribal governmental unit is also located on the undisputed trust lands. The present governing body of the Ute Indian Tribe is a six member Tribal Business Committee. Two representatives of each of the three Ute Bands, the White River, the Uintah and the Uncompahgre, are elected to this Committee. In the 1985 tribal election, a total of 430 votes were cast for all candidates. Uintah Basin Standard, p. 20, April 17, 1985.

14. The combined population of Duchesne and Uintah Counties is currently estimated to be 39,000; approximately 18,000 non-Indians live within the historic reservation boundaries. On the other hand, the present number of enrolled members of the Tribe is estimated to be 1,500. Ute Indian Tribe, 773 F.2d at 1105; and Bureau of Econ. & Bus. Research Report, Univ. of Utah, Vol. 45, No. 1, p. 8, Table 5, July 1, 1984 (1985).

their officials would have only limited jurisdiction and where they would have no elective voice in the governance of their affairs and property by the Ute Tribe. For its part, the Tribe has already enacted a comprehensive Law and Order Code which, by its terms, is applicable to Indians and non-Indians alike throughout both historic reservation areas. Ute Indian Tribe, 773 F.2d at 1101. Although the Tribe would not have the criminal jurisdiction they claimed over non-Indians (see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the same cannot be said with respect to civil jurisdiction.[15/] The Tribe's Code also has a comprehensive Exclusion and Removal section, which purports to be applicable to both Indians and non-Indians throughout the two original reservations in certain situations.

D. Federal Court Litigation

Since Perank relies exclusively on the en banc decision in Ute Indian Tribe to support his argument that the burglary took place in Indian country, we summarize that litigation. Because

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15. National Farmers Union v. Crow Tribe, 105 S.Ct. 7 (1985). In 1981, the Supreme Court noted that Indian tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. . . ." Montana v. United States, 450 U.S. 544, 565 (1981) (emphasis added). The lower courts, construing tribal authority on reservation fee lands, have stated that such authority includes the power of taxation as well as some land use and related regulation. See, e.g., Snow v. Quinault Indian Tribe, 709 F.2d 1319 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982); Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 964 (9th Cir.), cert. denied, 459 U.S. 977 (1982); and Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir.), cert. denied, 454 U.S. 1092 (1981).

discussion of the legal principles in that litigation involved both the Uintah and Uncompahgre reservations, we note rulings as to both reservations--even though only the Uintah reservation is involved here. With respect to the boundaries of the Uintah reservation, each of the three federal court decisions reached a different result.

In 1975, after enacting its Law and Order Code, the Ute Indian Tribe sued Duchesne County and the Cities of Roosevelt and Duchesne, claiming that the original Uintah and Uncompahgre reservations--the combined area of which exceeds four million acres--presently exist to the full extent of their historic boundaries. The State of Utah subsequently intervened as a party defendant in 1976, and Uintah County was joined as a defendant in 1979. The district court held that the original Uncompahgre reservation had been disestablished by the Act of June 7, 1897 (30 Stat. 62, 87). Ute Indian Tribe, 521 F.Supp. 1110. The court further held that the original Uintah reservation had been diminished through: (1) the withdrawal of the so-called "Gilsonite Strip" pursuant to the Act of May 24, 1888 (25 Stat. 157); (2) the withdrawal of approximately one million acres for inclusion in the Uinta National Forest pursuant to the Act of March 3, 1905 (33 Stat. 1048, 1070); and (3) the withdrawal of approximately 56,000 acres of land for the Strawberry Reclamation Project by the Act of April 4, 1910 (36 Stat. 269, 285). Ute Indian Tribe, 521 F.Supp. at 1153-54. The court also recognized, as had the parties, that the Tribe's reservation had been enlarged to

include the 500,000 acre tract known as the "Hill Creek Extension" under the Act of March 11, 1948 (62 Stat. 72). Ute Indian Tribe, 521 F.Supp. at 1109.

On appeal, a panel of the Tenth Circuit unanimously affirmed the lower court's decisions that: (1) the original Uncompahgre reservation had been disestablished; (2) the original Uintah reservation had been diminished by the withdrawal of the "Gilsonite Strip" and the land for the Strawberry River Irrigation Project; and (3) the Tribe's reservation was later expanded by the Hill Creek Extension. Ute Indian Tribe, 716 F.2d at 1304-15. By a divided vote, the panel also affirmed the district court's holding that the original Uintah reservation had been diminished by the National Forest withdrawal. Ute Indian Tribe, 716 F.2d at 1313-14. Reversing the lower court's decision, the panel held that reservation status had ended with respect to lands within the original Uintah reservation opened for settlement pursuant to the Act of May 27, 1902, as amended (32 Stat. 245, 263), and that the present-day reservation consisted of only the "trust lands". Ute Indian Tribe, 716 F.2d at 1313.

The Tribe petitioned for rehearing solely in regard to the status of the former Uintah reservation lands opened pursuant to the 1902 Act. After the Supreme Court's decision in Solem v. Bartlett, 465 U.S. 463 (1984), the court of appeals granted rehearing en banc. The Tribe then filed an amended petition to include the status of the original Uncompahgre reservation and the National Forest withdrawal from the original Uintah reservation.

The en banc court, with two judges dissenting, disagreed with the decision of the panel and, invoking Solem, held that both the original Uncompahgre and Uintah reservations still exist undiminished (except for the 1888 Gilsonite Strip and 1910 Strawberry Reclamation Project withdrawals). Ute Indian Tribe, 773 F.2d 1087. The State and local governmental entities then petitioned the United States Supreme Court for a writ of certiorari, which petition was denied on December 1, 1986 (107 S.Ct. 596).

SUMMARY OF ARGUMENT

Perank claims a lack of state district court jurisdiction in this matter because he is an Indian and because the crime was committed within the exterior boundaries of an Indian reservation (Indian country). To support his argument that the offense took place in Indian country, Perank simply relies on the decision of the Tenth Circuit Court of Appeals in Ute Indian Tribe v. State of Utah, et al., 773 F.2d 1087 (cert. denied, 107 S.Ct. 596). The en banc majority in Ute Indian Tribe held that the boundaries of the Uintah reservation, which comprise the entire drainage basin of the Duchesne River, remain intact. This area encompasses a number of non-Indian communities such as Duchesne, Roosevelt and Myton, Utah.

It is Respondent's position that reservation status ended with respect to lands within the original Uintah reservation opened for settlement pursuant to the Act of May 27, 1902 (32 Stat. 245, 263), as amended, and that the present-day reservation consists only of the "trust lands." Thus, there is no dispute

that the trust lands are Indian country. But the criminal offense involved here occurred off trust lands in Myton, Utah. Reduced to its essentials, this appeal involves whether the non-trust-lands portion of the historic Uintah reservation is within Indian country.

The en banc majority failed to apply the correct analytical test consistent with relevant United States Supreme Court precedents. In this regard, the en banc majority incorrectly concluded that the Supreme Court's decision in Solem established new standards for evaluating disestablishment cases, but (as is shown in Point I.A., infra) this is not so. By failing to apply the correct test, the en banc majority did not give proper consideration to language in the acts of Congress opening the reservation to settlement and restoring surplus lands to the public domain. Such language constitutes a clear expression of congressional intent to disestablish. This legislation, as well as the legislative history and circumstances surrounding the opening of the Uintah reservation from 1902 to 1905, clearly shows a congressional intent to restore the surplus lands of the reservation to the public domain, and thus to disestablish the reservation (Point I.B.2, infra).

The en banc majority also ignored other relevant factors that must be considered under the Supreme Court's decisions. The Supreme Court has acknowledged that a de facto, if not a de jure, disestablishment may have occurred. See, e.g., Rosebud, 430 U.S. at 604-05, and Solem, 465 U.S. at 471. By focusing all of its

attention on Solem and treating it as setting forth new principles, the en banc majority blinded itself to the teachings of the Supreme Court's earlier decisions. In addition to the statutory language, the surrounding circumstances and legislative history are to be examined in interpreting surplus land enactments. Subsequent administrative and congressional treatment are also relevant factors. Who actually moved onto the opened reservation land is likewise relevant to deciding whether a surplus land act diminished a reservation and whether the area has lost its Indian character. The record here demonstrates that the en banc majority did not consider these factors in a manner consistent with relevant principles (Point I.B.3, infra).

The administrative, congressional and judicial treatment of the disputed area subsequent to the 1905 opening confirms the fact that the Uintah reservation was disestablished. The subsequent treatment of the area clearly demonstrates that federal, State and local governments treated the disputed area as not being part of the Uintah reservation. In addition, the demographic history of the disputed area strongly supports disestablishment. The land ownership and population in the disputed area is overwhelmingly non-Indian, with the great majority of tribal members residing on Indian-owned trust lands. To place the disputed area in Indian country status would upset the long-held justifiable expectations of the non-Indian population who moved into this area and settled, and it would not significantly enhance tribal sovereignty. Further, it would greatly impair State and local governmental functions and authority in the Uinta

Basin. And finally, given the state of the record, it cannot be said that Perank's status as an Indian under 18 U.S.C. Sections 1152 and 1153 was not established below.

ARGUMENT

I. THE OFFENSE WAS NOT COMMITTED WITHIN INDIAN COUNTRY AND THE STATE DISTRICT COURT HAD JURISDICTION

Perank claims his crime was committed within Indian country as defined by 18 U.S.C. 1151, and that--coupled with the allegation that he is an Indian--deprived the state district court of jurisdiction. The following section of this brief will demonstrate that the crime did not take place within Indian country because the original Uintah reservation has been disestablished and today consists only of "trust lands," and Perank's offense was committed outside those trust lands. We first examine the principles established by the United States Supreme Court for determining whether a reservation has been disestablished. This is followed by an examination of the legislation and facts and circumstances surrounding the opening of the Uintah reservation which show that it has been disestablished.

A. General Principles Governing Disestablishment

Pursuant to the Act of May 27, 1902 (32 Stat. 245, 263), as amended, a Presidential Proclamation issued on July 14, 1905 (34 Stat. 3119), providing that all the unallotted and unreserved lands of the original Uintah reservation were restored to the public domain and opened for public settlement under the homestead and townsite laws. It is settled law that some surplus land acts diminished reservations, see, e.g., Rosebud Sioux Tribe

v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1975), and other surplus land acts did not, see, e.g., Mattz v. Arnett, 412 U.S. 481 (1973), and Seymour v. Superintendent, 368 U.S. 351 (1962). Solem, 465 U.S. at 468-69. As explained in Solem, the Supreme Court has established a "fairly clean analytical structure" for distinguishing those surplus land acts that of their own force effected an immediate diminishment of the reservation from those acts that simply permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries (id. at 470). Because Appellant does no more than submit the decision of the en banc majority to support his contention that the crime took place in Indian country, we must examine that decision in light of controlling Supreme Court precedents.

1. The en banc majority's decision in Ute Indian Tribe that the historic reservations were not disestablished ultimately rests on the proposition that restoration to public domain language is not the same as a congressional state of mind to disestablish and does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries. In so holding, the majority acknowledged that this had not been the law prior to Solem and, indeed, all of the judges who had considered this case before Solem agreed that such language was synonymous with disestablishment. See Ute Indian Tribe, 716 F.2d at 1303 (panel opinion); id. at 1316 (Doyle, J., dissenting); and 521 F.Supp. at 1122 (district court opinion). To the en banc majority, however, Solem altered this long-standing principle of

interpretation and marked a new direction in the Supreme Court's view of turn-of-the-century legislation concerning Indian reservations. Thus, the en banc majority concluded that "[u]nder the Solem standards neither the Uncompahgre Reservation nor the Uintah Reservation has been disestablished or diminished by any of the congressional enactments in question". Ute Indian Tribe, 773 F.2d at 1090-91.

The majority's reading of Solem is not correct. Solem did not establish new "standards" and it did not alter the principles announced in Seymour, Mattz, DeCoteau and Rosebud, which the Court in Solem described as having "established a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase lands within established reservation boundaries." 465 U.S. at 470. Although the Court has added several relevant factors to the traditional indicia of legislative intent, including how Congress and the Department of the Interior have treated the area in later years and whether the area has "lost its Indian character" because it is "predominately populated by non-Indians" (Solem, 465 U.S. at 471 & n.12), the Court has not departed from the governing principle "that congressional intent will control" (Rosebud, 430 U.S. at 586, and Solem, 465 U.S. at 470-71).

In determining whether an Indian reservation exists, one must therefore first examine the face of the relevant legislation. Rosebud, 430 U.S. at 587. In each of the disestablishment cases

decided before Solem, the Court expressly acknowledged that restoration to public domain constitutes firm and unequivocal language of disestablishment. See Rosebud, 430 U.S. at 589 & n.5; DeCoteau, 420 U.S. at 426-27, 446; Mattz, 412 U.S. at 504, n.22; Seymour, 368 U.S. at 354-55; and United States v. Pelican, 232 U.S. 442, 445-46 (1914). In the clearest possible terms, the Court stated that restoration to the public domain meant "stripped of reservation status." DeCoteau, 420 U.S. at 446.

The decisions in Rosebud and Decoteau fairly reflect the view of the Court on this point. Although in both cases the Court was divided on the question whether the particular area involved had retained reservation status, the Court was unanimous that such restoration language amounted to a unequivocal expression of an intent to disestablish. See Rosebud, 430 U.S. at 589, n.5; id. at 618 (Marshall, J., dissenting); DeCoteau, 420 U.S. at 426-27, 446; id. at 463 (Douglas, J., dissenting). Indeed, Justice Marshall--who wrote the Court's opinion in Solem--observed in his dissenting opinion in Rosebud that an 1889 surplus land act expressly restoring lands to the public domain (25 Stat. 896, sec. 21) was "yet another example" of "'clear language of express termination. . .'." Id., 430 U.S. at 618.

Solem did not reject or alter this firmly-established rule of interpretation. The crucial provision interpreted in Solem did not provide for the restoration of the surplus lands to the public domain, nor was any such language contained in the operative portions of the Solem legislation. Instead, a reference to "public domain" appeared in a subsequent section providing that

tribal members could harvest timber on certain portions of the opened lands, "only as long as the land remained part of the public domain." Sec. 9, 35 Stat. 464. The Court acknowledged that even this oblique reference was evidence of disestablishment; it found, however, that because the phrase was "isolated," it could not be dispositive. Solem, 465 U.S. at 475.

In justifying its expansive interpretation of Solem, the en banc majority also relied upon a footnote in Solem stating that there was "considerable doubt as to what Congress meant in using..." public domain terminology in the Solem legislation since the affected lands "could be conceived of as being in the 'public domain' inasmuch as they were available for settlement" (id., 465 U.S. at 475, n.17). It is evident, however, that the Court did not intend this statement in Solem to overrule its prior decisions and to discount the significance of public domain language in every other instance. The Court had already indicated that such language supported the disestablishment claim and, in any event, the Court would hardly have confined its comments to one sentence in a footnote had it intended such a drastic departure from the views, expressed by both the majority and dissenting Justices in prior cases, regarding the significance of such restoration language.

The en banc majority's decision to the contrary also overlooks the Solem Court's later observation, in the context of subsequent jurisdictional history, that:

> Unentered lands were considered a part of the reservation. They were available for allotment to tribal members, they were leased for the benefit of

> the tribe, and they were specifically defined as different from land in public domain.

Id. at 480, n.25 (emphasis added), quoting F. Hoxie, Jurisdiction on the Cheyenne River Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 87 (undated). The reference to public domain in the quoted passage can only be understood on the basis that public domain and reservation status are mutually exclusive.[16] In short, Solem does not signal the Supreme Court's abandonment of its previous interpretations of restoration to public domain language. Such language continues to be the clearest expression of disestablishment.

2. Although Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 105 S.Ct. 3420 (1985),[17] required that the various acts involved here--which contain identical operative language--should be interpreted to have the same effect, the en banc majority did not do so and thereby compounded its error. In this regard, there was no dispute that the so-called "Gilsonite

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16. This is how the author of the quoted study understood it, as he considered public domain status to be crucial in interpreting the subsequent jurisdictional treatment of the area involved. See Hoxie, supra, at 87, 88. Thus, he stated that it was necessary to determine whether the area in question was "administered as part of the public domain. . . ." Id., at 87.

17. In that case, the issue was whether that Tribe retained treaty hunting and fishing rights in an area ceded under a 1901 cession agreement. See 105 S.Ct. at 3422. In interpreting this agreement, the Court initially looked to the construction given a prior treaty with the same Tribe containing similar cession language. See 105 S.Ct. at 3422, 3428. As the Court there explained, "[p]resumptively, the similar language used in the 1901 Cession Agreement should have the same effect." 105 S.Ct. at 3428.

Strip"--a 7,000-acre tract located on the edge of the original Uintah reservation--was disestablished by the Act of May 24, 1888 (25 Stat. 157). See, e.g., Ute Indian Tribe, 773 F.2d at 1098 (Seymour, J., concurring). Compare with district court opinion, id., 521 F.Supp. at 1099. See also panel opinion, id., 716 F.2d at 1318 (Doyle, J., dissenting). As Judge Seymour stated, "Congress was completely clear when it terminated Uintah rights in the Gilsonite Strip. . . ." Id., 773 F.2d at 1098. Yet the operative provisions concerning the Gilsonite Strip used the same language as the 1902 (Uintah) Surplus Land Act and expressly restored the area "to the public domain" (Section 1, 25 Stat. 157). The en banc majority offered no reason why the restoration language contained in the 1902 Uintah Act should be interpreted differently, and there is none.[18]

3. The decision of the en banc majority is also at odds with the decisions of other courts of appeals in disestablishment cases. The Eighth and Ninth Circuits, in a long line of decisions, have consistently recognized that restoration to public domain language is an explicit expression of congressional intent to disestablish.[19] Also, decisions of the Tenth Circuit prior

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18. The dissent, on the other hand, relied upon the understanding of the parties regarding the effect of the 1888 Act in interpreting the 1902 Surplus Land Act, as amended. See Ute Indian Tribe, 773 F.2d at 1112.

19. See, e.g., Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977); United States ex rel. Feather v. Erickson, 489 F.2d 99, 100 (8th Cir. 1973), rev'd on other grounds sub nom. DeCoteau v. District County Court, 420 U.S. 425 (1975); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687-88 (8th Cir. 1973); Beardslee v. United States, 387

to Solem had also assumed that such language was synonymous with disestablishment.20/ The significance these decisions accorded to restoration to public domain language has a sound historical foundation and follows well-established principles regarding public lands. See Ute Indian Tribe, 773 F.2d at 1106 (Seth, J., dissenting). Long before the acts in question here, it was settled law that when the federal government appropriates or reserves a tract for any purpose, such as an Indian reservation, the tract is thereby severed from the public domain--that is, it loses its status as public land.21/ In 1889, for instance, the

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19. (Cont'd.) F.2d 280, 285 (8th Cir. 1967); DeMarrias v. South Dakota, 319 F.2d 845, 846 (8th Cir. 1963); Russ v. Wilkins, 624 F.2d 914, 915, 924 & 927-29 (9th Cir. 1980) (Hoffman, J., dissenting), cert. denied, 451 U.S. 908 (1981); United States v. Southern Pacific Transportation Co., 543 F.2d 676, 696 (9th Cir. 1976). See also Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 817 n.8 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); United States ex rel. Cook v. Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); and Putnam v. United States, 248 F.2d 292, 295 (8th Cir. 1957).

District court and state court decisions in the disestablishment context have been to the same effect. See, e.g., Russ v. Wilkins, 410 F.Supp. 579, 581-82 (N.D. Cal. 1976), rev'd on other grounds, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel. Condon v. Erickson, 344 F.Supp. 777, 778 (D.S.D. 1972), aff'd, 478 F.2d 684 (8th Cir. 1973); Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001, 1005 (D. Minn. 1971); Stankey v. Waddell, 256 N.W.2d 117, 119 (S.D. 1977); Wood v. Jameson, 130 N.W.2d 95, 99 (S.D. 1964); and Lafferty v. State, 125 N.W.2d 171, 174 (S.D. 1963).

20. See Ellis v. Page, 351 F.2d 250, 251-52 (10th Cir. 1965); Tooisgah v. United States, 186 F.2d 93, 98, 104 (10th Cir. 1950) (Phillips, J., dissenting).

21. See, e.g., Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839); Leavenworth, Lawrence, and Galveston Railroad Co. v. United States, 92 U.S. 733, 745 (1875); Hastings and Dakota Railroad Co. v. Whitney, 132 U.S. 357, 360-61 (1889); Bardon v. Northern Pacific Railroad Co., 145 U.S. 535, 539 (1892); Spalding v. Chandler, 160 U.S. 394, 404-05 (1896); Gibson v. Anderson, 131

Supreme Court remarked that:

> The doctrine first announced in Wilcox and Jackson, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands . . . has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

Hastings and Dakota Railroad Co., 132 U.S. at 360-61. Contrary to the en banc majority's view, because the reservation of a tract removed it from the public domain,[22] later restoration of the tract to the public domain firmly signified the end of reservation status.[23]

In sum, the en banc majority's interpretation not only is inconsistent with the decisions of the Supreme Court and the lower federal courts in Indian reservation boundary cases, but also

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21. (Cont'd.) F. 39, 41-42 (9th Cir. 1904); United States v. Techenor, 12 F. 415, 421 (D. Ore. 1882); Kansas Pacific Ry. Co. v. Atchison, Topeka & Santa Fe R. Co., 13 F. 106, 107 (D. Kan. 1881); and United States v. Payne, 8 F. 883, 893-94 (W.D. Ark. 1881). "Public domain" and "public lands" traditionally have been regarded as "equivalent" concepts. Barker v. Harvey, 181 U.S. 481, 490 (1901).

22. As the Solicitor of the Department of the Interior explained years later in regard to the original Uintah reservation, "[a]lthough the . . . reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. . . ." Solicitor Opinion M-36051, at 5 (December 7, 1950).

23. See Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942). The issue in that case was whether the Sioux Tribe was entitled to compensation for certain lands reserved for it by executive orders but later "'restored to the public domain' . . ." by the President. Id. at 325. In holding that no compensation was due, the Supreme Court expressly found that the two Executive Orders restoring the lands to the public domain (I Kappler 884-85, 899) "terminated the reservation. . . ." Id. at 330.

is untenable from an historical perspective. At the turn of the century, reservation status and public domain status were uniformly understood to be mutually exclusive. In construing restoration language as it has, the Tenth Circuit has thus attempted to "remake history," which the Supreme Court admonished "cannot" be done in order to resurrect a reservation that long ago ceased to exist. DeCoteau, 420 U.S. at 449; accord Rosebud, 430 U.S. at 615.

B. The Original Uintah Reservation was Disestablished Pursuant to the Act of May 27, 1902, as amended, and Today is Comprised Only of the Trust Lands

1. Governing Principles Support Disestablishment

As discussed above, the en banc majority misread Solem as changing the Supreme Court's analytical test for determining reservation disestablishment, and failed to apply the proper test when considering the legislation which opened the Uintah reservation and restored the unallotted lands to the public domain. Restoration to public domain language constitutes firm and unequivocal language for disestablishment (DeCoteau, 420 U.S. at 445-46), and demonstrates "an unmistakable baseline purpose of disestablishment" (Rosebud Sioux Tribe, 430 U.S. at 592).

The analysis of the "public domain" language in the 1902 Act as amended by subsequent acts is a key part of the analysis to determine whether or not the reservation was disestablished. The en banc majority did not consider this legislation in a manner consistent with relevant precedents, while the en banc dissent followed the correct analytical test and reached the correct result. Subsection 2 below is an analysis of the legislation

opening the reservation. It clearly shows a congressional intent to restore the surplus lands to the public domain and disestablish the reservation.

After disregarding clear language of disestablishment on the basis of its misreading of Solem, the en banc majority proceeded to ignore other factors that must be considered not only under Solem but also under the Supreme Court's prior decisions. Summarizing these decisions, the Court in Solem stated that when the area involved "has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred. . . ." 465 U.S. at 471. Thus, "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation. . . ." Id.

By focusing all its attention on Solem and treating it as setting forth new principles, the en banc majority blinded itself to the teachings of the Supreme Court's earlier decisions. In addition to the statutory language, "the 'surrounding circumstances,' and the 'legislative history' are to be examined" in interpreting surplus land enactments. Rosebud, 430 U.S. at 587. Accord, e.g., Solem, 465 U.S. at 469-70. The record here demonstrates that the en banc majority did not consider these factors in a manner consistent with the relevant precedents. Subsection 3 below reviews these other relevant factors. They vividly demonstrate that the decision below will not materially advance the interests of tribal sovereignty, and will severely hamper the functioning of State and local governments.

We now turn to a specific discussion of the legislation, legislative history, demographics and other circumstances surrounding the opening of the Uintah reservation.

2. The Uintah Reservation was Disestablished Pursuant to the Act of May 27, 1902, as amended

a. Creation of the Uintah Reservation

The Uintah reservation was created by President Abraham Lincoln by Executive Order in 1861 and included the entire area within the drainage basin of the Duchesne River, comprising approximately 2,039,040 acres (about 3,186 square miles). This was later confirmed by Congress in 1864 (13 Stat. 63). The various bands of the Ute Tribe were encouraged to move to the Uintah reservation so they would finally be settled in a designated area. See Ute Indian Tribe, 521 F.Supp. at 1092-1100, for a discussion of the creation and early history of the Uintah reservation.

b. Early Efforts to Restore Surplus Reservation Lands to the Public Domain--The 1902 Act

The period around the turn of the century witnessed an active effort by Congress and the President to disestablish large Indian reservations by making individual allotments to the Indians and then restoring the remaining lands to the public domain for settlement. This, Congress hoped, would facilitate the assimilation of Indians into the general society. The Uintah reservation was not the only reservation where the allotment and surplus program was instigated; it was happening in several other reservations in the West at about the same time

period. See General Allotment Act of 1887 (24 Stat. 388); DeCoteau at 432-33; and Solem at 466-67.

The Uintah reservation contained vast areas of land in excess of the lands needed to satisfy the allotments to the Indians. Therefore, Congress enacted the Act of May 27, 1902 (32 Stat. 245), which was the Indian Appropriations Act for that year, and included a provision restoring any lands not allotted to the Indians to the public domain. The relevant portion of the Act states:

> That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: . . . (Emphasis added).

Thus, the original 1902 Act authorizing the opening of the reservation contained "public domain" language which is language "precisely suited" to disestablishment. DeCoteau, supra, at 445-446. Again, in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Supreme Court held that language restoring surplus reservation land to the public domain (even though the original act was amended to provide for a different method of opening) demonstrated "an unmistakable baseline purpose of disestablishment." Id. at 592. See also Seymour v. Superintendent, 368 U.S. 351 (1962).

An important observation is that, in 1902, Congress believed the consent of the Indians had to be obtained before their lands

could be allotted and the surplus restored to the public domain and thus opened to private settlement and entry under the public land laws. Efforts to obtain the consent of the Indians to allotment were unsuccessful within the time limits set forth in the 1902 Act and Congress was forced to take further action with regard to opening the Uintah reservation. However, this task was made easier by the Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), which held that Congress had exclusive and plenary power to deal with reservation lands, without the necessity of obtaining the approval or consent of the Indians.

c. Action After the 1902 Act

Reacting to the latitude confirmed by the Supreme Court in Lone Wolf, supra, Congress promptly enacted the Act of March 3, 1903 (32 Stat. 982), which directed that the Uintah reservation should be allotted and the surplus lands opened for settlement and entry under the public land laws.24/ In 1904 Congress again extended the time for the opening to March 10, 1905, so that surveying could be completed and allotments made (33 Stat. 207).

In the meantime, on April 27, 1903, the Commissioner of Indian Affairs prepared instructions for United States Indian Inspector James McLaughlin regarding the opening of the Uintah

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24. It is worthy of note that it took Congress fewer than sixty days following the decision of the Supreme Court in Lone Wolf in which to mandate the opening of the Uintah reservation without the consent of the Indians.

reservation. The Department of Interior viewed the administrative task under the 1903 Act to be one of making allotments to the Indians and restoration of the surplus lands to the public domain as set forth in the 1902 Act. In May of 1903, Inspector McLaughlin met with the Utes in the Uinta Basin to explain to them that the reservation was to be terminated without their consent and that allotments would be made. The following extract from the transcript of that meeting clearly shows McLaughlin's understanding that the reservation boundaries were to be extinguished (JX 162, pg. 42):

> Inspector McLaughlin:
>
> A number of your speakers have said that you do not want your land stolen from you. My friends, these hills, these streams, these valleys will all remain just as they are. There will be no change in the nature of the country but the improvements that will come when white people come in among you. My friends, Red Cap said my talk was cloudy, and you do not understand it. You are the people who are in the dark in regard to the force of this act of congress, and I am trying to bring you into the light. You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. (Emphasis added).[25]

d. The Act of March 3, 1905

The time set by the 1904 Act for opening the reservation (March 10, 1905) was running out. Early in 1905, the

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25. For a more detailed version of McLaughlin's negotiations with the Indians, see JX 162, pp. 42-45. A subsequent report of McLaughlin, summarizing his meetings with the Utes, can be found at LD 101, pp. 9-12.

Department of Interior had not been able to complete surveys of reservation land in order to make the allotments, so that the excess lands could in turn be ascertained and restored to the public domain. This delay prompted the Senate, on February 4, 1905, to demand an explanation from the Secretary of the Interior as to why he apparently was not going to meet the March 10 deadline (see LD 101 at p. 1). The Secretary reported promptly, under date of February 15, 1905, setting forth the progress that had been made, and explaining, inter alia, that the Department had experienced difficulty in completing land surveys so that allotments could be made and this had prevented a timely completion of the allotment program. He thus made clear the need for an extension of time in which to complete the allotment program.

Accordingly, by the Act of March 3, 1905 (33 Stat. 1048), Congress extended the effective date for terminating the reservation from March 10, 1905, to September 1, 1905. The Act provided in relevant part:

> That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; . . .
>
> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and

> two, such portions of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: Provided, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation. (Emphasis in original.)

e. The Relationship Between the 1902 and 1905 Acts

The en banc majority thought the 1905 Act (33 Stat. 1069), extending the time for opening, supplanted the 1902 Act (32 Stat. 263), restoring the lands to the public domain. Compare Ute Indian Tribe, 773 F.2d at 1089 with id. at 1111-12 (Seth, J., dissenting). That reasoning is flawed and is not supported by the Acts, the legislative history or surrounding circumstances.

It is true that the 1905 Act does not specifically repeat the "public domain" language of the 1902 Act. Rather, the 1905 Act contained a provision that the unallotted lands were to be disposed of under "the general provisions of the homestead and townsite laws, . . . and shall be opened to settlement and entry by proclamation of the President." But the 1905 Act did not purport to change whether there should be a disestablishment. That had already been clearly stated in the 1902 Act. The 1905 Act merely addressed the manner and procedures for accomplishing disestablishment. There is no conflict or inconsistency between the two.

The provision in the 1905 Act that the surplus lands were to be disposed of under the homestead and townsite provisions of the public land laws certainly does not constitute a restriction to the declaration in the 1902 Act that the lands were to be restored to the public domain. The intent of the 1902 Act was carried over into the 1905 Act.

The circumstances surrounding the Uintah reservation opening are similar in many respects to those in Rosebud, supra, where the Supreme Court found there to be a diminishment of reservation boundaries. In Rosebud, the Court held that the operative language of the original act demonstrated "an unmistakable baseline purpose of disestablishment" (430 U.S. at 592) even though the opening of the reservation was actually implemented by subsequent legislation. The same is true for the Uintah reservation legislation in that each later act merely builds on the original act and deals primarily with extending the time for opening.26/

The legislative history of the 1905 Act, however, demonstrates that Congress was implementing, not abandoning, the 1902 Act's baseline purpose to end the Uintah reservation. Compare S. Rep. No. 4240, 58th Cong., 3d Sess., at 14-16 (1905) (letters of the Commissioners of Indian Affairs and the General Land Office) with Ute Indian Tribe, 773 F.2d at 1112 (Seth, J., dissenting) ("[n]othing in the Congressional debates suggests an attempt to

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26. On this point, the Tenth Circuit's en banc decision is contrary to its views as expressed in Hanson v. U.S., 153 F.2d 162 (10th Cir. 1946), where it was concluded that the 1905 Act merely extended the date of opening and did not alter or affect the operative terms of the 1902 Act.

change the 1902 intent. . ."). See also, debates at 39 Cong. Rec. 1181-1185, 3522 (Jan. 21, 1905, LD 103).

What Congress was actually concerned about in 1905 (other than a speedy conclusion of the allotment process) was that land speculators might deprive bona-fide homesteaders of the land. See "Indian Appropriations Bill, 1906," Hearings, Subcomm. of the Senate Comm. of Indian Affairs, 39th Cong., 3d Sess. (1905, LD 100 at 30). Nowhere in the cited subcommittee debates is there any statement that the purpose of the limitations on entry was to keep the reservation intact. To the contrary, the pertinent discussion reveals that even with such limitations the land would still be restored to the public domain. Senator Teller, one of the advocates of the limitation on entry stated at the hearings: "I am not going to consent to any speculators getting public land if I can help it" (Senate Subcommittee Hearings, supra, LD 100 at 30) (emphasis added). Further, there is nothing in the congressional debates or reports to indicate that Congress ever intended or desired to preserve the original exterior boundary of the Uintah reservation.

The real purpose and intent of the 1905 Act was not only to implement the restoration of the surplus lands to the public domain as provided in the 1902 Act, but also to allow entry and settlement of such lands only under the homestead and townsite laws in order to prevent speculation. Limitations on entry such as those contained in the 1905 Act are not inconsistent with the previously expressed intent of Congress to restore surplus lands to the public domain and disestablish the reservation. Again,

the cumulative series of acts in this case can be compared to those in Rosebud where the Supreme Court held there to be a disestablishment. Rosebud at 592.

That the 1905 Act carried the 1902 Act into effect is further clearly demonstrated by the Presidential Proclamation opening the original Uintah reservation for entry and settlement. The Presidential Proclamation of July 14, 1905 (34 Stat. 3119), employing much the same format as that used in the 1904 Rosebud Proclamation, provided:

> Whereas it was provided by the Act of Congress, approved May 27, . . . 1902 (32 Stat., 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, "shall be restored to the public domain: . . . ."
>
> And, whereas, the time for the opening of said unallotted lands was extended to October 1, 1904, by the Act of Congress approved March 3, 1903 (32 Stat., 998), and was extended to March 10, 1905, by the Act of Congress approved April 21, 1904 (33 Stat., 207), and was again extended to not later than September 1, 1905, by the Act of Congress, approved March 3, 1905 (33 Stat., 1069), which last named act provided, among other things:
>
> [The Act is here quoted]
>
> Now, therefore, I . . . do hereby declare . . . that all the unallotted lands in said reservation, excepting such as have at that time been reserved . . ., and such mineral lands as may have been disposed of . . ., will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not otherwise, be opened to entry, settlement, and disposition under the general provisions of the homestead and townsite laws of the United States. . . .

34 Stat. at 3119-20 (emphasis added).

The President thus clearly understood that the 1905 Act was implementing--not deviating from--the purpose of disestablishment

underlying the 1902 Act. The 1905 Proclamation is similar to the one involved in Rosebud and constitutes an "unambiguous, contemporaneous, statement, by the Nation's Chief Executive of a perceived disestablishment. . ." (id., 430 U.S. at 602-03), and unmistakably reflects the intent of Congress. See id. at 603. On this subject the en banc majority opinion is again silent.

3. Additional Considerations Support Disestablishment

In addition to examining the legislation opening a reservation, the Supreme Court has stated that another component of its "fairly clean analytical structure" is to examine the subsequent history of the area:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred. See Rosebud Sioux Tribe v. Kneip, supra, at 588, n 3, and 604-605, 51 L Ed 2d 660, 97 S Ct 1361; Decoteau v. District County Court, 429 US at 428, 43 L Ed 2d 300, 95 S Ct 1082. In addition to the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471.

The Court further noted that:

> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian Country seriously burdens the administration of State and local governments.

Solem at 471, n.12.

In Rosebud, the Court stated:

> The fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority, is a factor entitled to weight as a part of the "jurisdictional history." The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts. . .

Rosebud, 430 U.S. at 604-05. We will now briefly examine several additional factors which strongly support disestablishment.

a. Subsequent Administrative and Congressional Recognition of Termination

The 1905 Presidential Proclamation, discussed supra, which opened the reservation, does not stand alone in its reference that the surplus lands were restored to the public domain. The understanding of other responsible government officials has, until recent years, consistently mirrored President Roosevelt's construction.27/ Many of the documents cited in the

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27. See, e.g., Letter of the Acting Commissioner of Indian Affairs to the Secretary of Interior, dated May 11, 1905, at 3 (JX 463); Letter of the Acting Secretary of Interior, dated September 3, 1909; Letter of the Commissioner of the General Land Office to Senator Reed Smoot, dated December 20, 1909; Letter of the Secretary of Interior to Senator Reed Smoot, dated January 12, 1911; H.R. Doc. No. 892, 62d Cong., 2d Sess., at 1-2 (1912) (Joint Report of Inspector James McLaughlin and the Chief Supervisor); H.R. Doc. No. 1250, 63d Cong., 3d Sess., at 1-2 (1914) (Letter of the Secretary); Letter of the Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated September 28, 1922, at 1 (JX 403); Letter of the Commissioner of Indian Affairs, dated December 1, 1927, at 2; 54 I.D. 559, 561-62 (1934) (JX 431); Solicitor Opinion M-33626, at 2 (August 3, 1944); Secretarial Order, 10 Fed. Reg. 12409 (1945) (LD 183); 59 I.D. 393 (1947); Solicitor Opinion M-36051, at 1-2, 5 (December 7, 1950); Appeal of Edward M. Brown, A-26523, at 1-2 (December

margin expressly recognize that, with respect to the original Uintah reservation, the unallotted and unreserved lands were restored to the public domain under the provisions of the 1902 Act. The record shows as well that officials of the Interior Department treated the original Uintah reservation as having been disestablished. Thus, with the opening of the reservation in 1905, Department officials immediately began referring to the original area as the "former" reservation. For decades after the opening, Interior officials consistently administered only the trust lands (the tribal grazing reserve, the allotments, and the lands later restored to tribal ownership and reservation status) as the Tribe's existing reservation,[28] a practice that continued until recently.[29]

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27. (Cont'd.) 11, 1952); Appeal of Charles B. Gonsales, at 1 (January 23, 1953); and Secretarial Order, 36 Fed. Reg. 19920 (1971) (LD 210).

28. See, e.g., H.R. Rep. No. 5010, 59th Cong., 1st Sess., at 1-2 (1906) (Letters of Secretary of Interior and Commissioner of Indian Affairs); Presidential Proclamation dated September 1, 1906, 34 Stat. 3228; Letter of the Acting Commissioner of Indian Affairs, dated September 26, 1907, at 1 (JX 336); Letter of the First Assistant Secretary of the Interior to the Commissioner of Indian Affairs, dated November 8, 1907, at 1 (JX 338); H.R. Doc. No. 1279, 60th Cong., 2d Sess., at 2-3 (1909) (1908 Letters of Secretary and Commissioner of Indian Affairs); Letter of the Secretary of Interior, dated December 19, 1908, at 1, 2, 4 & 6 (JX 341); and 39 I.D. 79 (1910) (Acting Secretary of Interior). See also 34 I.D. 549, 549-50 (1906) (Ass't. Attorney General).

29. See, e.g., 773 F.2d at 1105 (Seth J., dissenting); S. Doc. No. 78, 66th Cong., 1st Sess., at 1 (1919) (Letter of the Secretary of the Interior); 1929 Annual Report of the Uintah & Ouray Agency, at 1 (JX 420); 1931 Agency Grazing Report, at 1, 3 (JX 424); 1931 Annual Agency Report, at 4 (JX 425); 1932 Annual Agency Report, at 1 (JX 427); H.R. Rep. No. 370, 77th Cong., 1st Sess., at 3 (1941) (Report submitted by Secretary of Interior); Phoenix Area Office, Information Profiles of Indian Reservations in Arizona, Nevada & Utah, at 155 (1976) (JX 480).

Subsequent legislation and other congressional materials are to the same effect.[30] Numerous congressional documents subsequent to the 1905 opening contain references to the "former" reservation. See for example, Senate Report No. 219, 61st Cong. 2d Sess., Feb. 14, 1910 (LD 138) entitled "Making Available Lands On Former Uintah Indian Reservation," (emphasis added).[31]

It should be noted that these numerous and repeated references in congressional documents were consistent with the policy of the day of disestablishing Indian reservations and assimilating the Indians into society.

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30. See, e.g., Act of July 20, 1912, 37 Stat. 196; S. Rep. No. 139, 59th Cong., 1st Sess., at 1 (1906); H.R. Rep. No. 291, 59th Cong., 1st Sess., at 1 (1906); S. Rep. No. 893, 62d Cong., 2d Sess., at 1-2 (1912); H.R. Rep. No. 943, 62d Cong., 2d Sess., at 1-2 (1912); S. Rep. No. 979, 69th Cong., 1st Sess., at 1-2 (1926); H.R. Rep. No. 2047, 69th Cong., 2d Sess., at 2 (1927); and 74 Cong. Rec. 3408 (1931). Characteristic of Congress' treatment is the Act of July 20, 1912, which provided that:

> any person who has heretofore made a homestead entry for land which was formerly a part of the Uintah Indian Reservation in the State of Utah, authorized by the Act approved May twenty-seventh, nineteen hundred and two, and Acts amendatory thereto. . . .

37 Stat. 196 (emphasis added). See also Rosebud, 430 U.S. at 603, n.25.

31. For other past tense references to the "former" reservation, see: Congressional Floor Debates, Jan. 15, 1906, p. 1064 (LD 116); Senate Bill 321, Jan. 27, 1906 (LD 120); H.R. Rep. No. 823, Feb. 9, 1906 (LD 122); S. Rep. No. 2561--Indian Appropriations Bill, p. 131, April 13, 1906 (LD 124); S. Rep. No. 4263, June 12, 1906 (LD 126); Public Law 258 (H.R. 15331, pp. 375-76) June 21, 1906 (LD 127); H.R. Rep. No. 5010, June 25, 1906 (LD 128); Senate Bill 6375 (P.L. 345) June 29, 1906 (LD 129); P.L. 104--Indian Appropriations Bill, p. 95, April 30, 1908 (LD 135); P.L. 144--Indian Appropriations Act, p. 285, April 4, 1910 (LD 139); P.L. 434--Indian Appropriations Act, p. 1074, March 31, 1911 (LD 141); P.L. 717, 70 Stat. 546, 548, July 14, 1956 (LD 203).

Judicial pronouncements also follow suit. In decisions rendered prior to Ute Indian Tribe, the courts interpreted the 1905 Act as merely amending, not superseding, the 1902 Act.[32] Indeed, in 1946, the Tenth Circuit expressly held in Hanson v. United States--a decision unaccountably ignored by the en banc majority--that the unalloted and unreserved lands of the original Uintah reservation were "restored to the public domain by the Act of May 27, 1902. . . ." Id. at 163. The Utah Supreme Court likewise recognized the restoration of the unallotted lands to the public domain under these Acts. Sowards, 108 P. at 1114. Finally, in a different context, the United States Supreme Court recognized that the Tribe's reservation was considered to be only those lands held in trust by the federal government. Affiliated Ute Citizens v. United States, 406 U.S. 128, 141 (1972).

Moreover, by holding that the original Uintah reservation remains intact, the en banc majority has created what must be one of the few--if not the only--Indian reservations engulfing a national forest. The district court and the panel of the court of appeals agreed that such an anomaly was not intended and that the forest provisions of the Act of March 3, 1905, 33 Stat. 1048, 1069-70, which set aside more than 1 million acres "as an addition to the Uintah Forest reserve, subject to the laws, rules and regulations governing forest reserves," thereby diminished the

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32. See Hanson v. United States, 153 F.2d at 162-63; Uintah and White River Bands of Ute Indians, 139 Ct.Cl. at 5-6 & 21-22; United States v. Boss, 160 F. 132, 132-33 (D. Utah 1906); and Sowards v. Meagher, 108 P. 1112, 1114 (Utah 1910).

original Uintah reservation. Ute Indian Tribe, 716 F.2d at 1313-14. The en banc majority thought, incorrectly, that under Solem the transfer of the administration of these one million acres from the Interior Department to the Department of Agriculture and the fact that Congress later compensated the Tribe for its interest in the forest lands were not inconsistent with continued reservation status. Despite the fact, as the federal district court stated, that the "status and purpose of national forest lands are distinct from the status and purpose of Indian reservations" (Ute Indian Tribe, 521 F.Supp at 1138), the en banc majority apparently believed that under Solem this could be ignored and that the Tribe therefore had jurisdiction within the national forest (Ute Indian Tribe, 773 F.2d at 1090). There is, however, nothing in the Court's Solem opinion that justifies such an extraordinary result. Congress clearly ended the original Uintah reservation on the land withdrawn for a national forest, which further demonstrates its intent to disestablish the reservation itself.

The United States supported the Ute Tribe as amicus curiae in the recent federal litigation with respect to the Uintah reservation. In so doing, the United States failed to acknowledge the inconsistency of that position with its position in other litigation involving this reservation. In Uintah and White River Bands of Ute Indians v. United States, 139 Ct.Cl. 1 (1957), it entered into a stipulation with which the Court of Claims agreed (139 Ct.Cl. at 5-6, 22) which quoted the 1902 Act and then succinctly stated the critical point: "Pursuant to this [1902] Act and

amendments thereto, . . . allotments in severalty . . . . were made to the Uintah and White River Indians, and surplus lands . . . . were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians" (emphasis added). What is more, the United States (and the Utes) consistently and repeatedly maintained that the original Uintah reservation was a former reservation; and throughout its opinion and findings, the Court of Claims also treated the original Uintah reservation as having ended. E.g., 139 Ct.Cl. at 2, 25, 28, 56, 64, 69 and 70. It is also worthy of note that when the Ute Indian plaintiffs appeared in the Court of Claims, they summed it up well: "Now, the Act of May 27, 1902, comes as a matter of particular importance in this suit because that is the Act as amended under which the Uintah Reservation was ultimately broken up."33/

b. Subsequent Demographic History Supports Disestablishment

Here, the demographic history of the area demonstrates that the en banc majority's decision will not materially advance the interests of tribal sovereignty (which has for the past 60 years been exercised primarily on the trust lands), but will seriously hamper the functioning of State and local governments in a myriad of areas. The disputed area "lost its Indian character" long ago. It is "predominantly populated by non-

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33. Opening statement in testimony for plaintiff, Uintah and White River Band of Utes v. U.S., No. 47569, U.S. Court of Claims at p. 195 (Jan. 11, 1954).

Indians," approximately 18,000 of them,[34] with only about 1,500 tribal members, who are living mainly on trust lands. Ute Indian Tribe, 773 F.2d at 1105 (Seth, J., dissenting). The non-Indians are the ones "who actually moved onto the opened reservation lands" and have been there ever since. Thus, there has indeed been a de facto or de jure disestablishment. It is their "justifiable expectations," built up over a 60-year period, that would be upset if it were to be held that the original boundaries are still intact and it is their interests the en banc majority ignored, despite the United States Supreme Court's command that such factors must be taken into account. E.g., Rosebud, 430 U.S. at 605; and Solem, 465 U.S. at 471.

Under the en banc majority's result, the Ute Tribe would preside over an area owned and predominantly populated by non-Indians and, hence, in which the Tribe has little presence and no real interest as a sovereign. At the same time, State and local authority would be significantly limited despite the fact that this area has principally been the concern and responsibility of these governments, not the Tribe. This would include increased tribal court jurisdiction over all residents of the area, and diminished state court jurisdiction.

The testimony and exhibits introduced in the federal district court clearly establish that the State and its local governmental divisions had exercised primary jurisdiction within the historic

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34. U.S. Dept. of Commerce, Bureau of Census, General Population Characteristics Utah, Table 15, p. 46-12 (1980).

reservation area subsequent to the opening, except on the trust lands. The early jurisdictional history of the disputed area shows that the Indians of the Uintah and Ouray Agency (the White River, Uintah and Uncompahgre Utes) were, after the historic reservation was opened to settlement, generally subject to the laws of the State of Utah within those areas so opened (excluding trust lands).35/ For example, in the Annual Report of the Superintendent of the Uintah and Ouray Agency for 1916 (JX 380), it was stated as follows:

> The Indians of this Jurisdiction are citizens of the State of Utah, and voters, and the present Superintendent has not assumed any jurisdiction over their persons. Where offences have been committed against the laws of the State, the matter has been reported to the County authorities and the agency officials have endeavored to co-operate with the County authorities in the maintenance of law and order.

Id. at 2-3. Other documentary evidence also demonstrates that the State exercised jurisdiction within the historic reservation area beginning in the early 1900's.36/

The primary evidence regarding the more recent jurisdictional history of the disputed area was the testimony of various State and local officials introduced at the federal district court trial. This testimony shows that until recently the State continued

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35. See, e.g., JX 344; JX 354 at 2-3; JX 368 at 2-3; JX 380 at 2; JX 386 at 4-5; JX 393 at 3-4; JX 396; JX 397 at 2; JX 399 at 2; JX 412 at 1; JX 415 at 1-3; JX 417 at 1-2; and JX 420.

36. See also letter from District Superintendent, Indian Field Service, August 5, 1926 (JX 412); Annual Report of the Superintendent of the Uintah and Ouray Agency, 1917 and 1918; JX 386 at 4-5; JX 393 at 3-4. See also Trial Tr. at 269 and 277-78 (testimony of George Marett, Sheriff of Duchesne County).

to exercise primary jurisdiction within the historic reservation area, except on the trust lands.[37]

The evidence introduced in this case regarding the exercise of jurisdictional authority by the Tribe also confirms that the State and local governmental subdivisions have, until recently, exercised primary jurisdiction within the historic reservation area, except on the trust lands.[38]

Finally, until recently the Ute Tribe itself treated only the trust lands as the Tribe's post-1905 reservation.[39] As the dissent in Ute Indian Tribe observed:

> Statements made by the Utes themselves also tend to detract from their position. For example, the 1957 Ute Ten Year Development Program provides a description of the total acreage of the Uintah and Ouray reservation as currently containing 1,010,000 acres. . . .

773 F.2d at 1114.

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37. See Trial Tr. at 106 (testimony of Clair Huff, Utah Division of Wildlife Resources); 121 (testimony of Norman Hancock, Division of Wildlife Resources); 158-59 (testimony of David Thomas, Division of Wildlife Resources); 186-87 (testimony of Edward Tuttle, Utah Division of Parks and Recreation); 220 (testimony of Donald Smith, Utah Division of Wildlife Resources); 251 (testimony of C. Blake Feight, Utah Division of Oil, Gas & Mining); 267, 270-74, 277-79 and 281-89 (testimony of George Marett, Duchesne County Sheriff); and 298-99 (testimony of Ray Wardle, member and Chief of Tribal Police, cross-deputized by Uintah County).

38. See, e.g., Trial Tr. at 121 and 135 (testimony of Norman Hancock); 159 (testimony of David Thomas); 174 (testimony of Gordon Harmston, Utah Department of Natural Resources); 187 (testimony of Edward Tuttle); 228 (testimony of Charles East); 251 (testimony of C. Blake Feight); 262-63 (testimony of Alfred Parriette, Tribe's Division of Wildlife Management and Law Enforcement); and 294-300 (testimony of Ray Wardle).

39. See, e.g., 1957 Ute Ten-Year Development Program, at 66-68 (JX 465); 1966 Review and Revision of the Uintah & Ouray Indian Reservation-Wide Program, at 7, 8; and 1969 Annual Report of the Uintah Indian Tribe, at 1 (JX 473).

Further, for many decades the Ute Tribe has maintained signs at the boundaries of the trust lands, advising the public that they were entering the "Uintah and Ouray Indian Reservation." These signs were clearly intended to designate what the Tribe thought were the reservation boundaries. The signs have been replaced from time to time over the years (with the signs in more recent times being more elaborate), but they have always indicated that the boundaries of the trust lands were the reservation boundaries.40/

In short, the record is clear that until recent years the Tribe never attempted to exert any significant jurisdictional authority off the trust lands. The history of the area in dispute shows that it has long been the responsibility of State and local governments, is overwhelmingly populated by non-Indians, and has lost its Indian character virtually from the opening of the reservation in 1905.

Applying the analytical test developed by the United States Supreme Court to the legislation, facts and circumstances surrounding the opening of the original Uintah reservation, the conclusion must be that the reservation was disestablished and the surplus lands which were restored to the public domain are not part of the reservation--nor do they constitute Indian country as

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40. See, for example, the testimonies of Dave Thomas (Tr. 155-57) and Gordon Harmston (Tr. 176-77). A series of photographs of such signs located at trust land boundaries, as such signs appeared on March 22, 1977, were introduced at trial as Ex. I-4B, coordinated with Ex. I-4A, indicating the precise locations where the various photographs were taken.

defined by 18 U.S.C. 1151. Therefore, the state district court had jurisdiction in this matter.

II. PERANK'S INDIAN STATUS

18 U.S.C. Sections 1152 and 1153 preclude state criminal jurisdiction over "Indians" who commit crimes within Indian country.[41] However, these statutes do not provide a specific definition of who is an Indian. Perank asserts that he is an Indian, and contends that Article II of the Ute Tribal Constitution[42] recognizes membership in the Tribe as including all children born to any resident member of the Tribe.[43]

Perank submitted two affidavits below from his father and mother (R. 69-72), which alleged that Perank's father is a full-blooded Indian enrolled as a member of the Ute Tribe, that his mother has some Indian blood, and that Perank was born in Roosevelt while the family was residing on the reservation. The record also contains a copy of Perank's birth certificate (R. 76), and those of other Perank family members (R. 73-75).

As the moving party challenging the court's jurisdiction, Perank carries the initial burden of producing sufficient evidence, beyond mere suppositions or allegations, to establish a

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41. As already shown above, the crime here was not committed in Indian country so Perank's Indian status is irrelevant.

42. It appears this Court can take judicial notice of the Tribal Constitution. See Rule 201(b) Utah Rules of Evidence.

43. The Ute tribal courts have also adopted this interpretation of the tribal constitution. See Chapoose v. Ute Tribal Business Committee, Ute Tribal Appellate Court, Civil No. 133-77 (1981).

jurisdictional question. Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541, 546 (1965), and United States v. Hester, 719 F.2d 1041 (9th Cir. 1983). Moreover, since the basis of his jurisdictional challenge is that he is an Indian, he carries the initial burden of producing prima facie evidence to establish such. United States v. Hester, supra. Given the evidence Perank presented, albeit limited, we cannot say that he failed to meet his threshold burden of establishing his status as an Indian and creating a jurisdictional question on that issue.

Once that threshold showing was made, the burden shifted, and the State was required to carry the ultimate burden of persuasion on jurisdiction. State v. Allen, 607 P.2d 426, 428 (Idaho 1980); Frankel v. Wyllie and Thornhill, Inc., 537 F.Supp. 730, 735 (N.D. Va. 1982). Utah Code Annotated, Section 76-1-501(3) provides that "The existence of jurisdiction . . . shall be established by a preponderance of the evidence." While the State argued that Perank was not an Indian because he was not an enrolled member of the Tribe[44/] and had not participated in tribal activities (R. 87-88), unfortunately, no evidence was presented below by the State regarding Perank's Indian status.

Given the state of the record, it cannot be said that Perank's status as an Indian under 18 U.S.C. Sections 1152 and 1153 was not established below.

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44. Article II of the Ute Tribal Constitution does not on its face seem to require formal enrollment as a requisite for Tribal membership. We note that since his probation revocation Perank has evidently been enrolled as a tribal member.

CONCLUSION

The lower court should be affirmed.

Respectfully submitted this 4th day of March, 1987.

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