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

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH Plaintiff, v. STATE OF UTAH, et al., Defendants.	**PLAINTIFF'S RULE 12(b) MOTION AND SUPPORTING MEMORANDUM TO DISMISS THE STATE OF UTAH'S COUNTERCLAIM** Consolidated Action Civil Case Nos. 2:13-cv-00276-BSJ & 2:75-cv-00408-BSJ Senior Judge Bruce S. Jenkins

The Ute Indian Tribe respectfully moves to dismiss the counterclaim filed by the State of Utah, Dkt. 219. The State of Utah's counterclaim must be dismissed based on (*i*) the absence of an Article III case or controversy; (*ii*) lack of standing; (*iii*) the Tribe's sovereign immunity from suit, (*iv*) the failure to join the United States as an indispensable party, or alternatively, (*v*) because the counterclaim fails to state a claim for relief.

A. STATEMENT OF RELEVANT FACTS

The Tribe Does Not Claim or Exercise Exclusive Criminal Jurisdiction

The counter-complaint filed by the State of Utah does not identify a single non-Indian individual who has been:

(*i*) stopped, detained, cited, or arrested by tribal police, or

(*ii*) incarcerated in a tribal jail, or

(*iii*) prosecuted and convicted by the Ute Tribe in its tribal court.

Facts such as these would exist if, as alleged by the State of Utah, the Ute Tribe was asserting and exercising "exclusive" criminal jurisdiction inside the Tribe's reservation boundaries. Further, in contrast to the Tribe's complaint, Dkt. 2 ¶¶ 21-23, the State's counter-complaint contains no allegation that the Ute tribal police:

(*i*) conduct routine police patrols on lands outside the reservation boundaries, or

(*ii*) conduct roadblock inspections of non-Indian motorists or regularly impound motor vehicles belonging to non-Indian individuals, or

(*iii*) racially profile, stop and detain, arrest, cite, and otherwise harass non-Indians when those non-Indians travel inside the Tribe's reservation boundaries.

The Tribe Has Not Exceeded its Civil Regulatory or Adjudicatory Jurisdiction

The State's counterclaim does not identify a single non-Indian individual who has been subjected to an illegal act of civil regulatory or adjudicatory jurisdiction exercised by the Ute Tribe over non-Indian individuals inside the Tribe's reservation boundaries.

What the State does allege is that the Tribe's effort to enforce the Tenth Circuit rulings in *Ute III* and *Ute V* is an act that impermissibly "challenges" the "judicial authority" and "law enforcement authority" of the State of Utah.[1] See Dkt. 219, p. 6, ¶¶¶ 5, 6 and 7. Of course the State does not—and cannot—articulate how, or why, the Tribe's enforcement of the holdings in *Ute III* and *Ute V* is tantamount to a usurpation of the State's sovereign authority. Beyond that bare, conclusory allegation, the State does not allege a single, specific act through which the Ute Tribe in fact has challenged the State of Utah's civil or criminal jurisdictional authority.

Paragraph 8 of the counterclaim alleges the Tribe is "attempting," by virtue of the complaint filed by the Tribe in this consolidated action (Dkt. 2, Case No. 2:13-cv-00276), to "assert civil, criminal and regulatory authority over lands owned by the State of Utah and by other private parties." See Dkt. 219, p. 6, ¶ 8. However, the State does not identify any specific tracts of land, nor detail any specific action of the Tribe—beyond the filing of the complaint in Case No. 2:13-cv-00276—that amounts to an improper "attempt" to assert "civil, criminal and regulatory authority" over non-tribal lands within the Uncompahgre Reservation.

[1] *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1093 (10th Cir. 1986) ("*Ute III*"), and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*").

Paragraph 11 of the counterclaim alleges that the Tribe "is requiring access permits for non tribal parties traveling or conducting business in the Uncompahgre Reservation without jurisdiction or authority to do so." Dkt. 219, p. 7, ¶ 11. However, it is black letter law that Indian tribes have the inherent sovereign right to control access onto their tribal territories. *See, e.g., Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) ("*Prairie Band*") (Indian tribes have the sovereign right to control access and the presence of non-members "to and on Reservation territory"). The fact that the Ute Tribe had the temerity to actually exercise its sovereign power provides no ground for the State's counterclaim against the Tribe.

Attached as **Exhibit A** are copies of Access Permits that have been issued by the Ute Tribe. It is obvious from these copies that the Tribe uses a single-page, standard-form document for its Access Permits. The Permits contain a single paragraph, highlighted in bold lettering, which specifies the terms and conditions under which a non-member is granted access onto tribal territory:

> **No Firearms, Weapons, and/or Bows and Arrows of any nature shall be transported on Indian Land. Hunting, Fishing, Firewood Gathering, Sightseeing or any other form of transportation for recreational purposes is strictly prohibited. No Artifacts, Rocks, Dirt or Plants are to be moved without specific written authorization from the Ute Indian Tribe.**

The imposition of these limited terms and conditions is fully within the Tribe's civil and regulatory authority under federal law. *E.g., Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250

Further, contrary to the State's implication, the Ute Tribe does not require Access Permits for the hundreds of motorists who travel daily across the reservation over

federal, state and/or county roadways—most notably U.S. 40, which is the main east-west arterial highway across northeastern Utah. See **Exhibit B**, Declaration to Todd K. Gravelle, Esq. The Tribe only requires Access Permits for non-members who plan to leave existing highway rights-of-way and enter onto lands under the Tribe's sovereign control. Id., **Exhibit B**, Declaration to Todd K. Gravelle, Esq.

Paragraph 12 of the counterclaim alleges the Tribe "is imposing the tribal UTERO ordinance on non-tribal members traveling or conducting business in the Uncompahgre Reservation without jurisdiction or authority to do so." This allegation is premised on the Tribe's enactment of the Ute Tribal Employment Rights Office Ordinance ("UTERO Ordinance"), Ordinance 13-016, on March 27, 2013.[2]

However, it is well-established that Indian tribes have the right to enact tribal employment rights ordinances (TEROs). *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-1315 (9th Cir. 1990). Moreover, under the Ute Tribe's Constitution, tribal ordinances do not take effect until approved by the Secretary of the Department of Interior ("DOI"). See Ute Tribe Const., Art. VI, Sec. 2 (attached to the Tribe's earlier motion to dismiss Uintah County's countercomplaint, Dkt.). The Superintendent of the Bureau of Indian Affairs ("BIA"), DOI, Uintah and Ouray Agency, has approved Ordinance No. 13-016, subject to additional technical and legal review by the DOI's regional office. See Dkt. 221-pp. 34-35**.** In approving the Ordinance, the BIA Superintendent necessarily determined that the UTERO Ordinance (*i*) does not violate federal law, and (*ii*) is otherwise an appropriate exercise of the Tribe's civil and

[2] A copy of the Ordinance was attached as Exhibit C to the Uintah County's original counter-complaint, Dkt. 162-3.

regulatory authority. See Section 18 of Secretarial Order No. 2508, 14 FR 258, 259 (Jan 18, 1949); see e.g., 34 FR 637 (Jan. 16, 1969; 40 FR 17046 (Apr. 16, 1975).[3]

As explained below, the facts alleged by the State of Utah do not establish (*i*) an actual Article III case or controversy, or (*ii*) constitutional or prudential standing, or (*iii*) a claim on which relief can be granted. Alternatively, the complaint must be dismissed because the State (*iv*) has failed to join the United States as a necessary and indispensable party, and/or (v) the Ute Tribe has sovereign immunity against all of the State's claims.

B. LEGAL ARGUMENT

"Federal courts are courts of limited jurisdiction . . . empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress." *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994) (citations omitted). A plaintiff generally bears the burden of demonstrating the court's jurisdiction to hear his or her claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). In the Tenth Circuit, motions to dismiss for lack of jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject-matter jurisdiction; or (2) a challenge to the actual facts upon which subject-matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

[3] The authority formerly delegated to Indian Commissioners was delegated to the Assistant Secretary of Indian Affairs in 1977, when that position was established. See Secretarial Order No. 3010, 42 FR 53682 (Oct. 3, 1977).

The Tribe's motion to dismiss the State's counterclaim is based on both a facial challenge to the sufficiency of the pleading itself, and a challenge to the facts on which subject-matter jurisdiction is based.

I. THERE IS NO ARTICLE III CASE OR CONTROVERSY

Article III of the Constitution limits the jurisdiction of federal courts to "cases and controversies," meaning that cases must be "ripe" for adjudication. The ripeness requirement is a constitutional limitation on the power of federal courts, not just a statutory limitation as found under 28 U.S.C. §§ 1331 and 1332. *See New Mexicans for Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995) (stating that the ripeness inquiry "bears on the court's subject matter jurisdiction under the case or controversy clause of Article III of the Constitution).

Ripeness is a justiciability doctrine that both implements Article III's case-or-controversy requirement and reflects additional prudential considerations that require federal courts to refrain from premature intervention in nascent legal disputes. *Nat'l Park Hospitability Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (citing *Abbott Labs v. Gardner,* 387 U.S. 136, 148-49 (1967)). The ripeness requirement is designed to avoid "premature adjudication." *Id*. Even in its prudential form, ripeness is a doctrine that a Court may invoke on its own initiative, regardless of whether it is raised by the parties. *Id.*

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568,

580-81 (1985) (the purpose of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.")) Where the likelihood of harm is speculative, the Supreme Court has found cases unripe. *See, e.g., Nat'l Park Hospitability Ass'n,* 538 U.S. at 811; *Reno v. Catholic Social Servs., Inc.,* 509 US. 43, 59 n. 20 (1993); *Poe v. Ullman,* 367 U.S. 497, 508 (1961). It cautions courts against adjudicating "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 580-81 (1974). And if "no irremediable adverse consequences flow from requiring a later challenge," judicial intervention may be premature. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

Here, the State of Utah has not alleged a viable Article III case or controversy for the following reasons: first, the Ute Tribe is neither claiming, nor exercising, "exclusive" criminal jurisdiction authority over lands within its reservation boundaries; secondly, the State has failed to allege facts showing an illegal assertion of civil and regulatory authority within the Tribe's reservation boundaries; and thirdly, the enactment of UTERO Ordinance does not violate federal law and does not exceed the Tribe's civil regulatory authority.

II. ALTERNATIVELY, THE STATE OF UTAH LACKS STANDING

A federal court may hear only those cases where a plaintiff has standing to sue. Standing has two components. First, standing has a constitutional component arising from Article III's requirement that federal courts hear only genuine cases or controversies. Second, standing has a prudential component. *See Habecker v. Town*

of Estes Park, Colo., 518 F.3d 1217, 1224 n.7 (10th Cir. 2008)(noting that in addition to constitutional standing requirements, "the Supreme Court recognizes a set of 'prudential' standing concerns that may prevent judicial resolution of a case even where constitutional standing exists"). The burden of establishing standing rests on the plaintiff. *See*, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). The plaintiff must "allege . . . facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990)(internal citations and quotations omitted). Moreover, where the defendant challenges standing, a court must presume lack of jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312. 316 (1991)(Quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) (internal quotation omitted). "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)(quoting *FW/PBS v. City of Dallas*, 493 U.S. at 231)(internal citations and quotations omitted).

A. The State of Utah Lacks Constitutional Standing

"Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007). *See* U.S. Const. art. III § 2. The standing doctrine ensures that a litigant's claims arise in a concrete factual context that is appropriate for a judicial resolution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454

U.S. 464, 472 (1982). To have standing, (1) a litigant must have suffered an "injury in fact," defined as an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992). The injury cannot be conjectural or hypothetical, and must be "certainly impending to constitute injury in fact." *Whitemore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations omitted). It is the claimant's burden of proof to establish each element of the standing inquiry. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.

"Standing is determined as of the time the action is brought." *Smith v. U.S. Court of Appeals, for the Tenth Circuit*, 484 F.3d 1281, 1285 (10th Cir. 2007)(quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149m 1154 (10th Cir. 2005)).

The State of Utah lacks constitutional standing because it cannot satisfy even the first prong of the three-pronged test: the State of Utah has not suffered any injury-in-fact. Nor does the State of Utah face the threat of any actual imminent harm.

B. Alternatively, There Is No Prudential Standing

"Prudential standing is not jurisdictional in the same sense as Article III standing." *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007). Prudential standing consists of "a judicially-created set of principles that, like constitutional standing, places limits on the class of persons who may invoke the courts' decisional and remedial

powers." *Bd. Of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002)(internal quotation marks omitted). Generally, there are three prudential-standing requirements: (i) "a plaintiff must assert his own rights, rather than those belonging to third parties"; (ii) "the plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens"; and (iii) "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bd. Of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d at 1112 (internal quotation marks and citations omitted).

Most relevant here is the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006)(quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). There is an exception to this general rule, however, known as third-party standing or *jus tertii*. Third-party standing is allowed when: (i) "the party asserting the right has a close relationship with the person who possesses the right"; and (ii) "there is a hindrance to the possessor's ability to his own interests." *Aid for Women v. Foulston*, 441 F.3d at 1111-12.

Here, there is no prudential standing because the State of Utah cannot base its claim to relief on the legal rights or interests of individuals residing in, or businesses transacting business in, Uintah County. See Dkt. 162, ¶¶ 59-64.

III. THE STATE HAS FAILED TO JOIN A NECESSARY AND DISPENSABLE PARTY

The United States is a necessary and indispensable party to the State's counterclaim. In *Texas v. New Mexico*, 352 U.S. 991 (1957), the Supreme Court adopted the Special Master's finding that the United States was an indispensable party in litigation that would affect the federal government's role as the trustee for various Indian tribes in New Mexico. The Special Master found that the litigation in *Texas v. New Mexico* would have "necessarily affect[ed] adversely and immediately the United States" in its capacity as fiduciary for the Indians. See Report of the Special Master, O.T. 1956, No. 9 Orig., p. 41.

The same is equally true here. And the reason is obvious. The Tribe's pleadings identify four pending cases in which the State of Utah and Uintah County are exercising criminal jurisdiction over Ute tribal members for criminal offenses that indisputably occurred within the exterior boundary of the Uintah and Ouray Reservation.[4] Furthermore, there is no factual dispute over the situs of the alleged criminal offenses; that is, stated differently, neither the State of Utah nor Uintah County is *mistaken* about the situs of the alleged offenses. Quite the contrary: the State of Utah and Uintah County are deliberately using the criminal prosecutions of Ute Indians for the deliberate and premeditated purpose of seeking a judicial ruling through the Utah state courts that the Uncompahgre Reservation was diminished or disestablished. The Ute Tribe has come before this federal court to enjoin the State's prosecution of its tribal members. In

[4] See the allegations and supporting exhibits for the Tribe's Expedited Motion For Emergency Temporary Restraining Order, Dkts. 154 to 160, and the Tribe's Renewed Motion for

response, the State of Utah has filed a counterclaim against the Tribe, asking this Court to rule on the extent of the Tribe's criminal, civil and regulatory jurisdiction. As in *Texas v. New Mexico*, litigation of the State's counterclaim will necessarily affect the United States in its capacity as a trustee for the Ute Indian Tribe.

Because the State has not joined the United States, the counterclaim must be dismissed for failure to join a necessary and indispensable party.

IV. THE TRIBE HAS IMMUNITY AGAINST THE STATE'S CLAIMS

As a matter of law Indian tribes and their governing bodies are not subject to suit unless a tribe has waived its sovereign immunity or Congress has expressly authorized the action. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1988). The issue of tribal sovereign immunity is jurisdictional. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Indian tribes enjoy immunity from suits whether the conduct giving rise to a complaint occurs on or off reservation. *Id*. Moreover, tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). As pertinent here, a tribe does not waive its sovereign immunity "from actions that could not otherwise be brought" against it merely because the claims are "pleaded in a counterclaim to an action filed by the tribe." *Oklahoma Tax Comm'n v. Potawatomie Indian Tribe*, 498 U.S. 505 (1991). This rule applies even to compulsory counterclaims under Rule 13(a). *Macarthur v. San Juan County*, 391 F. Supp.2d 995, 1036 (D. Utah 2005).

The Tenth Circuit has recognized that tribal sovereign immunity does not preclude suits brought to enjoin alleged violations of federal law that are ongoing. *Crowe & Dunlevy P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011) (extending the *Ex parte Young* exception to tribal sovereign immunity). In *Dunlevy* the violation of federal law consisted of a tribal court's issuance of an unlawful order in excess of the tribal court's jurisdiction. *Id.* at 1155-56. However, *Dunlevy* is readily distinguishable from the case at bar in the following respects: first, the State's counterclaim does not allege any violations of federal law by the Ute Indian Tribe; secondly, the enactment of UTERO Ordinance does not violate federal law and does not exceed the Tribe's civil regulatory authority; and thirdly, the Ute Tribe is neither claiming, nor exercising, exclusive criminal jurisdiction authority inside the Tribe's reservation boundaries.

Because the Ute Tribe has not waived immunity to the claims alleged by the State of Utah, the State's counterclaim must be dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity.

V. ALTERNATIVELY, THE STATE OF UTAH HAS FAILED TO STATE A CLAIM FOR RELIEF

A Rule 12(b)(6) motion turns on whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). To pass muster, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face," and that requires "more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007). Under this standard a claim need not be probable, but there must be facts showing more than a "sheer possibility" of wrongdoing. *Id.*

Although all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp.*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

Here, the dearth of allegations in the State's counterclaim do not establish any claim on which relief may be granted. The complaint does not allege a single instance wherein the Ute Tribe has illegally exercised criminal jurisdiction over a non-Indian individual. Nor does the complaint cite a single instance wherein the Tribe has exceeded its civil and regulatory authority over the State of Utah or over any individual non-Indian within the Tribe's reservation.

CONCLUSION

Based on the arguments and authorities cited herein, the Court must dismiss the State of Utah's counterclaim.

Respectfully submitted this 9th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2013, I electronically filed the foregoing **PLAINTIFF'S RULE 12(b) MOTION AND SUPPORTING MEMORANDUM TO DISMISS THE STATE OF UTAH'S COUNTERCLAIM** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record as follows:

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