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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, v. THE STATE OF UTAH, DUCHESNE COUNTY, a political subdivision of the State of Utah, ROOSEVELT CITY, a municipal Corporation, DUCHESNE CITY, a municipal corporation, MYTON, a municipal corporation, and UINTAH COUNTY, a political subdivision of the State of Utah Defendants.	**MEMORANDUM IN OPPOSITION TO DEFENDANT UINTAH COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS** Consolidated Action Civil Nos. 2:75-cv-00408-BSJ & 2:13-cv-00276-TS Senior Judge Bruce S. Jenkins

COMES NOW the Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, (hereinafter "the Tribe") by and through the undersigned counsel, and respectfully files this Memorandum in Opposition to Defendant Uintah County's Rule 12(c) Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction

I. UINTAH COUNTY IS NOT A SOVEREIGN, AND THEREFORE DOES NOT HAVE ELEVENTH AMENDMENT IMMUNITY.

Uintah County's Motion to Dismiss is premised upon its erroneous assertion that it is a sovereign state for Eleventh Amendment purposes. Justice Thomas, one of the Supreme Court's most ardent state's rights jurists, writing for a unanimous Supreme Court, stated the applicable legal rule:

> A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. See *id.,* at 740; *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 280 (1977). Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 401 (1979); *id.,* at 401, n. 19, (gathering cases); *Workman v. New York City,* 179 U.S. 552, 565 (1900); *Lincoln County v. Luning,* 133 U.S. 529, 530 (1890). See also *Jinks v. Richland County,* 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). This is true even when, as respondent alleges here, "such entities exercise a 'slice of state power.' " *Lake Country Estates, supra,* at 401.

N. Ins. Co. of New York v. Chatham Cnty., Ga., 547 U.S. 189 (2006). *See also Moor v. County of Alameda*, 411 U.S. 693, 717-721 (1973); *Gallagher v. Evans*; 536 F.2d 899 (10th Cir. 1976).

The whole of the part of its brief where Uintah County seeks to have this Court overrule all of these United States Supreme Court cases is that the State of Utah's Eleventh Amendment Immunity "applies equally to counties of the State of Utah.

MacArthur v. San Juan County, 931 [sic, s.b. 391] F.Supp. 2d 895, 1035-37 (D. Utah 2005), *aff'd in relevant part,* 497 F.3d 1057 (10th Cir. 2007)." Dkt. 250 at 3.

Everything about Uintah County's rudimentary argument is wrong. First, *MacArthur* contains no such holding. This Court's decision in *MacArthur is* 179 pages, but the Court does not mention the Eleventh Amendment once in all of those pages. Second, the portion of the decision Uintah County cites to this Court is this Court's holding related to the San Juan Health Services District--not the County. Third, directly contrary to Defendant's citation of the case, this court in *MacArthur* exercised jurisdiction over the county and the San Juan Health Services District.[1] Fourth, the holding that Uintah County cites as its only authority for its assertion of Eleventh Amendment immunity in a federal court suit is this Court's decision that the Health Services District had sovereign immunity from the claims asserted against it in a tribal court. In the relevant part of its decision, this Court described why state or tribal jurisdiction over the underlying dispute was "problematic, for each sovereign naturally defends the jurisdictional reach of its own courts and resists being 'dragged before' the courts of the other." *MacArthur*, 391 F.2d at 1036. Fifth, Uintah County's explanatory phrase "aff'd in relevant' part" is wrong. The Tenth Circuit vacated this Court's decision regarding the County's sovereign immunity.[2]

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1 Because Eleventh Amendment immunity would have been a jurisdictional bar to the federal court suit, the court's exercise of jurisdiction over the county and the health district was an implicit decision that the immunity did not apply to the federal court action.

2 Given the other obvious errors in Uintah County's argument, the latter point—regarding the Tenth Circuit reversing this Court—is an issue of little importance but great complexity. In the Tenth Circuit's 2002 decision in *MacArthur v. San Juan County*, 309 F.2d 1216 (10th Cir. 2002), the Tenth Circuit vacated this Court's sovereign immunity decisions, holding (dubiously) that a federal court could not go on to issues of sovereign immunity unless and until it determined that

Sixth, and most basic, even assuming, contrary to all of the above, that this Court's decision in *MacArthur* were in disagreement with the United States Supreme Court's Eleventh Amendment jurisprudence, this Court would be required to follow the United States Supreme Court's holdings.

II. ANY ARGUMENT FOR DISMISSAL BASED UPON THE ELEVENTH AMENDMENT HAS BEEN WAIVED.

As is clear from both the case history of these consolidated suits and Uintah County's June 18, 2013 motion to dismiss, Uintah County is only seeking dismissal of claims in the 2013 Complaint, not in the Tribe's 1975 complaint. Uintah County's motion expressly states that it is seeking dismissal of the "Complaint filed by the Plaintiff . . . on April 17, 2013," Dkt. 250 at 2. *See also id.* at 3 (asserting that "the Tribe's newly filed Complaint should be dismissed."). The County limits itself to the claims in the new complaint because, in around 1975, the State either lost or waived any basis for dismissal of claims in the 1975 complaint. Here, the State and counties litigated the 1975 complaint to a final resolution of the reservation boundaries and jurisdiction, and they lost, *Ute Tribe of the Uintah and Ouray Reservation v. Utah*, 773 F.2d 1298 (10th Cir. 1985) (hereinafter *Ute III*), refused to abide by the federal court decision, and have continued to try to overturn the decision. *E.g.*, *Ute Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513, 1527 (10th Cir. 1993) (hereinafter *Ute V*).

The County fails to recognize the consequence from the fact that it has no claim

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the Tribal Court had adjudicatory authority. In *MacArthur II*, 497 F.3d 1057 (10th Cir. 2007) the Court held that the Tribal Court lacked adjudicatory authority. If one then applies the Tenth Circuit's 2002 decision, the result is vacation of any decision on sovereign immunity as beyond the scope of federal authority in the matter.

of immunity from the claims in the 1975 suit or for enforcement of the decisions previously issued in that complaint. The 2013 complaint contains the same claims as the 1975 complaint,[3] and the State has lost or waived any claims of immunity or other preliminary issues related to those claims.[4]

Even if we assume arguendo that the State had Eleventh Amendment immunity for the claims in the 1975 complaint,[5] it has waived that immunity for the claims in the 1975 complaint. *E.g.*, *Lapides v. Bd. Of Regents of Univ. Sys of Ga.*, 535 U.S. 613 (2002) ("a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity).[6]

The United States Court of Appeals has previously rebuked the State of Utah for making this same type of "grossly inequitable," *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 12261236 (10th Cir. 1999), and legally unsupported misuse of Eleventh

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3 As the Tribe explained when it simultaneously moved to reopen the 1975 suit and filed a new complaint, it filed that new complaint in case the motion to reopen the 1975 suit was denied. Here, the motion to reopen was granted without objection either before or after that order to reopen was issued.

4 At pages 5-6 of its motion to dismiss, Uintah County seeks to analogize its flawed sovereign immunity argument to the correct sovereign immunity analysis which the Tribe has provided in response to Uintah and Duchesne County's new claims. While the County is correct that federal courts "emphasize the equal application of State immunity and Indian tribal immunity," Dkt. 250 at 6, application of that equal immunity to the vastly different claims of the Tribe and County leads to different results. In contrast to the Tribe, which is remaining within the scope of the 1975 complaint, Uintah and Duchesne County are each expressly seeking to add claims which are outside the scope of the 1975 suit. To the extent they are asserting new claims, they must face preliminary jurisdictional defenses which the Tribe has raised by motion. In its motion to dismiss (Dkt. 250), Uintah County attempt to tie its flawed argument to the Tribe's correct argument must fail.

5 Because any Eleventh Amendment immunity has been waived, the Court need not determine whether the immunity could have applied had it been raised in 1975. The Tribe's position is that Eleventh Amendment immunity did not apply to the claims in the Tribe's 1975 Complaint.

6 As discussed in *Lapides*, a state can waive Eleventh Amendment immunity or consent to jurisdiction, and in this way Eleventh Amendment immunity is unlike most subject matter jurisdiction issues, which cannot be waived or established by consent of the parties..

Amendment immunity. *Id.* *See also* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167, 1227 (2003) ("Such tactics are unfair and unworthy of sovereign dignity."). The County's grossly inequitable, unfair and undignified argument must be rejected.

III. DEFENDANT'S UNDEVELOPED ARGUMENT REGARDING STANDING IS WITHOUT MERIT.

On page 9 of its brief, Defendant baldly asserts that because the Tribe is not a party to the "state enforcement action", (which is the County's euphemism for its knowing and purposeful violations of the decisions issued by this Court and the Tenth Circuit in *Ute Tribe v. Utah*), the Tribe has no injury in fact. That virtually unbriefed assertion must be rejected. The Tribe clearly has injury in fact.

A. THE STATE AND COUNTY HAVE INJURED THE TRIBE'S SOVEREIGN RIGHTS AND THE TRIBE'S RIGHTS AS THE BENEFICIAL OWNER OF ITS RESERVATION LANDS.

The Tribe has a very substantial and well-recognized interest in preservation of its sovereign authority over its members and its territory, and the County's violation of that interest creates an injury in fact. *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 710 (10th Cir. 1989) (violation of a Tribe's sovereignty over its tribal members and its tribal territory rises to the level of irreparable injury). The Tribe's sovereign rights are here coupled with its rights as the beneficial owner of the Reservation land. The Tribe has standing to protect both of these interests. In *Seneca-Cayuga* the Tenth Circuit ruled that a Tribe is injured if it is "forced to expend time and effort on litigation in a court that does not have jurisdiction over them, and risk inconsistent binding judgments for state and federal courts." *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 716. The dilemma faced by the Tribes in *Seneca-Cayuga* is

exactly the situation faced by the Ute Tribe under the facts of this case.

Similarly, in *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001) ("*Prairie Band*"), the Court held that a Tribe was injured when the surrounding state sought to enforce its state motor vehicle registration and title laws against the Tribe and its members. In holding that the Prairie Band had shown not merely injury but irreparable injury, the Tenth Circuit made several observations that apply with equal force to the Tribe's motion here. The tribal interest at stake in *Prairie Band* was the registration and titling of motor vehicles owned by tribal members; here the tribal interest at stake is even weightier--the exercise of criminal jurisdiction power over Indians whose offenses were committed inside Indian Country. The Tenth Circuit observed that the Tribe in *Prairie Band* "instituted its motor vehicle code not out of whim but because of the need to "control[] the access and presence of persons to and on [the] Reservation territory," and that "the threat of continued citation by the state created the 'prospect of significant interference with [tribal] self-government.'" *Id*. at 1250. The same can be said with equal, or even greater, force of the Ute Tribe's interests at stake here, the Tribe's interest in preventing the State of Utah and its political subdivisions from enforcing the State's criminal code inside the Ute Tribe's Reservation boundaries. *See also Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) (holding, as a matter of law, that harm to a tribe's sovereign power rise to the level of irreparable injury).

B. THE TRIBE HAS A VERY SUBSTANTIAL AND WELL-RECOGNIZED INTEREST IN PRESERVATION OF THE RESULTS WHICH IT OBTAINED IN *UTE III* AND *UTE V*.

As should have been undisputed, but now must be discussed in response to the

County's argument regarding standing, the Tribe, like most other parties in this case,[7] has a significant interest in preserving the settled results from the 25 prior years of active litigation in this matter. For ten full years, beginning in 1975, the Ute Tribe and the defendants spent incalculable time and money exhaustively litigating in this Court over whether the Uintah Valley and Uncompahgre Reservations were disestablished or diminished. *Ute Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072 (D. Utah 1981) (*Ute I*); *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983) (*Ute II*) (subsequently vacated); *rev'd en banc* 773 F.2d 1298 (10th Cir. 1985) (*Ute III*). Defendants asked the United States Supreme Court to grant certiorari to review *Ute III*, and the Supreme Court denied that petition. 479 U.S. 994 (1986). The *Ute III* decision became final in 1986.

Unwilling to accept the results of the completed federal court litigation, Defendants then did an end-around the Tenth Circuit mandate regarding one part of the Uintah Valley Reservation. Defendants snuck into their own court system to attempt to create a conflict between their courts and the Tenth Circuit. Because of various strategic errors by attorneys, this end-around worked. Defendants created a conflict between the mandate of the Tenth Circuit in *Ute III* and the results they were able to get from their own court system, and the United States Supreme Court accepted certiorari to then resolve the conflict. The United States Supreme Court decision resolving that conflict is *Hagen v. Utah*, 510 U.S. 399 (1994).

After the Supreme Court issued its decision in *Hagen*, the parties returned to the

7 In the prior years of litigation, most parties have prevailed in part and lost in part.

federal courts, to litigate for another six years about the effect of *Hagen*. In that phase of the case, this Court correctly determined that it was bound by the final mandate of the Tenth Circuit, and this Court requested direction from the Tenth Circuit. 935 F.Supp. 1473 (D. Utah 1996) (*Ute IV*).

In the parties' second trip to the Tenth Circuit, the State argued that the Tenth Circuit was required to withdraw its prior mandate and required to reinstate its vacated decision in *Ute II* as the applicable law of the case, while the Tribe asserted that the Tenth Circuit's mandate from *Ute III* was final and was therefore still controlling. *Ute V* at 1520. The Tenth Circuit rejected both positions, and instead held that it could not withdraw its prior mandate, but that it would modify that mandate only to the extent necessary to conform it to the narrow decision in Hagen. 114 F.3d 1513, 1527 (10th Cir. 1993) (*Ute V*). The Court held: "To the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen,* finality requires those decisions to remain undisturbed. *Ute V* at 1527.

Defendants then asked the United States Supreme Court to accept certiorari to review the Tenth Circuit's decision in *Ute V*. The United States Supreme Court denied the petition for certiorari. 522 U.S. 1034 (1998). The mandate from *Ute III*, as modified by *Ute V,* therefore became final in 1998. That mandate remains binding on all of the parties to this case and remains binding in and on this Court.

1) The Existing Mandate Regarding the Uintah Valley Reservation.

In *Ute III*, the United States Court of Appeals concluded that the Uintah Valley Reservation had not been diminished or disestablished, and the Tenth Circuit issued a

conforming mandate. In *Hagen*, the Supreme Court concluded that the Reservation had been diminished. In *Ute V*, the Court of Appeals modified its mandate related to the Uintah Valley Reservation only to the extent necessary to conform to the Supreme Court decision.

2) The Existing Mandate Regarding the Uncompahgre Reservation.

Ute III held that the Uncompahgre Reservation had been neither disestablished nor diminished. As definitively discussed in *Ute V*, the State and counties did not place the status of the Uncompahgre Reservation at issue in *Hagen*. *Id.* at 1519. Therefore the Tenth Circuit, in Ute V, expressly concluded that it could not and would not withdraw or alter in any way its mandate from *Ute III*, *Ute III* at 1093, related to the Uncompahgre Reservation. *Ute V* at 1529. As noted, Defendants asked the United States Supreme Court to review *Ute V*, and the Supreme Court refused. 522 U.S. 1034 (1998).

For the Uncompahgre Reservation, *Ute III* remains the final, conclusive, unaltered, and unimpeached decision—the Uncompahgre Reservation has been neither diminished nor disestablished. *Ute III* at 1093; *Ute V* at 1529.

3) Binding orders of this Court after remand from *Ute V*.

After the Tenth Circuit's decision in *Ute V*, the parties again returned to this Court to litigate for a few more years. Finally, after 25 years of litigation, this Court issued a final order holding "the basic issues in this case have been determined and the parties have agreed to accept the decision and not seek to further litigate the boundaries of the Reservation." Pacer Doc 145. (emphasis added). *See also* Pacer Doc. 100. (With agreement of the parties, this Court approved maps depicting presumed

Reservation/non-Reservation land status). Based upon the parties' agreement and the prior federal court decisions in this matter, this Court then dismissed the suit.

The Tribe has spent incalculable time and money in this litigation. It has established the scope of its sovereign rights over the land, and the County's use of so-called "enforcement actions" to overturn the settled law and to diminish the Tribe's sovereign rights clearly constitutes injury in fact. The Tribe has standing.

DATED this 5th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2013, I electronically filed the foregoing **Opposition Memorandum** with the Clerk of the Court using the CM/ECF

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