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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, vs. 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.	**STATE OF UTAH'S RESPONSE TO PLAINTIFF'S RULE 12(b) MOTION AND SUPPORTING MEMORANDUM TO DISMISS STATE OF UTAH'S COUNTERCLAIMS** CONSOLIDATED CASES Case No. 2:75-cv-00408 and 2:13-cv-00276 Judge Bruce S. Jenkins

INTRODUCTION

The State of Utah is pleased to read that the Ute Tribe is backing off of its previous claims of exclusive jurisdiction. The State sees an opportunity for stipulated resolution of the criminal jurisdiction issues. The problem we are all facing is that the *UTE* line of cases addressed the resolution of tribal boundaries but not jurisdictional authority. These questions remain unresolved. The parties attempted to stipulate by agreement on the sharing and dividing of jurisdictions. The Tribe has now withdrawn from those agreements and raised challenge to any jurisdiction by the State or its entities. These are not just academic in nature, for example, the Tribe has challenged the right of State officers to continue in hot pursuit of suspects when the pursuit crosses any piece of trial land. The Tribe's attorneys have opined that pursuit of a suspected impaired driver must be halted upon entry into Reservation lands. The Tribe has challenged the authority of the State in child protection matters even when the child is not a member of the tribe. These are serious matters which should be addressed by cooperation between the two sovereigns. A further dilemma exists in that the Utah Supreme Court and the United States Supreme Court has applied a critical analysis of the lands removed from the Uintah Valley reservation but such analysis has never been applied to the Uncompahgre reservation. Those decisions are binding on the State and because the 10th circuit in *Ute V* did not perform that analysis, the State is placed in a somewhat conflicted position.

In response to Plaintiff's Rule 12(b) Motion and Supporting Memorandum to Dismiss the State of Utah's Counterclaims, the State of Utah hereby asserts that the Plaintiff's Motion does

not provide sufficient grounds to dismiss the State's counterclaims. Specifically, Plaintiff asserts that: 1) that there is no Article III Case or Controversy; 2) the State lacks standing; 3) an indispensable party has not been joined; 4) the Tribe is immune to the State's counterclaims; and, 5) the State has failed to state a claim upon which relief can be granted. The Plaintiff's Motion must be denied as the Plaintiff has failed to establish a sufficient basis, under the law, for dismissal of the State's counterclaim.

Statement of Undisputed Facts

As this Court is well aware, this matter has a complex history. What follows is a summary refresher of the long and arduous path this case, as well as a summary of the events of the past few years, to put into context the dispute currently presented in the re-opened case.

1. Ute I: Ute Indian Tribe v. State of Utah, Duchesne County, Uintah County, Roosevelt City and Duchesne City, 521 F.Supp. 1072 (D. Utah, 1981)

In October 1975 the Ute Tribe (the "Tribe") filed a Complaint in Utah District Court, Central Division. The Tribe sought declaratory and injunctive relief to establish the exterior boundaries of the Ute Reservation in Utah. Additionally, the Tribe wanted the Court to find that the Tribe's Law and Order Code was the prevailing code on the Reservation and that neither the State, nor the Counties, nor Roosevelt or Duchesne City had jurisdiction on the Reservation.

This Court conducted an exhaustive investigation into the history of Executive Orders, federal legislation, Congressional Records, treaties and administrative decisions regarding the Uintah Basin and the Ute Reservation. Additionally, the Court reviewed and summarized Indian case law, current at the time, regarding whether any land within the exterior boundaries of the original Reservation had been extinguished or disestablished. The findings from the Court's investigation were memorialized in its 92 page Decision issued on June 19, 1981.

2. Ute II: Ute Indian Tribe v. State of Utah, Duchesne County, Uintah County, Roosevelt City and Duchesne City, 716 F.2d 1298 (10th Cir, 1983)

The Tribe appealed this Court's decision to the 10th Circuit Court of Appeals. A three Judge panel of the Appeals Court upheld parts, and overturned parts, of the District Court decision as follows: 1) upheld this Court's decision that the Uncompaghre Reservation had been disestablished; 2) over-turned the decision relative to the Uintah and Ouray Reservation boundaries, concluding that the original boundaries of the Reservation had indeed been diminished by Congress; 3) found that the unallotted lands within the original exterior boundaries of the Reservation were not in the public domain; and, 4) that the Hillcreek Extension, in the former Uncompaghre Reservation, was part of the Uintah and Ouray Reservation.

3. Ute III: Ute Indian Tribe v. State of Utah, Duchesne County, Roosevelt City, Duchesne City and Uintah County, 773 F.2d 1087 (10th Cir, 1985) (en banc), *cert. denied* 479 U.S. 994, 107 S. St. 596 (1986)

In 1985, on Motion for rehearing by the Tribe, the 10th Circuit conducted a Rehearing on Banc of the District Court decision. The *En Banc* Court held that neither the Uintah and Ouray Reservation nor the Uncompahgre Reservation had been diminished or disestablished. The *En Banc* decision was based on the Court's interpretation of a 1984 U.S. Supreme Court case, *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161 (1984). The Court read the Solem case to require explicit language of disestablishment or diminishment by Congress, without which, Congress' intent would be interpreted in the light most favorable to maintaining the existence of the Reservation. The U.S. Supreme Court denied the State's writ of certiorari.

4. Ute IV: Ute Indian Tribe v State of Utah, Duchesne County, Uintah County, Roosevelt City and Duchesne City, 935 F. Supp. 1473 (D. Utah, 1996)

After the 10th Circuit decision in Ute III, the Tribe asked the District Court to enforce the permanent injunction against the State, the counties, and the cities of Roosevelt and Duchesne prohibiting them from exercising jurisdiction within the original exterior boundaries of the Uintah and Ouray Reservation. The Defendants, (the State, Duchesne and Uintah County, and Duchesne and Roosevelt City), argued that in light of U.S. Supreme Court ruling in *Hagen*, the District Court had to disregard the Appeals Court decision in *Ute III* and Court should dissolve the permanent injunction.

This Court listed the issues that were not in conflict between the two cases, and therefore were not in dispute as follows: 1) Ute tribal jurisdiction exists on trust lands held by the U.S. in trust for the tribe as well as on land allotted to individual tribal members; 2) withdrawal of approximately 1 million acres for national forest did not diminish the Reservation boundaries; and, 3) the existence and boundaries of the Uncompahgre Reservation. According to this Court the only controversy remaining was who has jurisdiction over the "various categories of *non-trust*, i.e., fee, lands within the Uintah Reservation." The Court requested further instruction from the 10th Circuit Court of Appeals as to whether the mandate in *Ute III*, under the law of the case doctrine, was binding on the District Court in light of the divergent holding in *Hagen*.

5. Ute V: Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, Duchesne County, Roosevelt City, Duchesne City and Uintah County, 114 F.3d 1513 (10th Cir, 1997)

The 10th Circuit accepted the District Court's request for instruction and held that in light of the conflict between the decisions in *Ute III* and *Hagen*, a modification of *Ute III* was appropriate. However, the Court restricted its modification of *Ute III* to only the holding that was in conflict with *Hagen* and did not address any of the findings in *Ute III* that were not the subject of the U.S. Supreme Court decision in *Hagen*. Thus, the *Ute III* ruling on the Tribe's jurisdiction over Ashley National Forest and the Uncompahgre Reservation remained intact.

The modification to *Ute III* was limited to: 1) *Hagen* reduced or diminish the boundaries of the Uintah Reservation, it did not disestablish or terminate the Reservation; and, 2) lands within the original exterior boundaries of the Uintah Reservation that were not allotted, or that

were opened to non-Indian settlement in the early 1900s, and have not been returned to tribal ownership subsequently, are not Indian Country.

In March, 2000, this Court entered a Stipulated Order Vacating Preliminary Injunction and Dismissing the Suite with prejudice. Attached to the Order were three Agreements executed by the Tribe and the Defendant parties. Those Agreements were entitled: Cooperative Agreement for Mutual Assistance in Law Enforcement; Cooperative Agreement to Refer Tribal Members Charged with Misdemeanor Offenses to Tribal Court for Prosecution; and, Disclaimer of Civil/Regulatory Authority (the "Agreements"). The Agreements established a framework and procedure for cooperation between the law enforcement bodies for the Tribe, the State, Duchesne and Uintah County and Duchesne and Roosevelt city.

In November 2008, the Cooperative Agreement to Refer Tribal Members Charged with Misdemeanor Offenses to Tribal Court for Prosecution expired. The other two Agreements entered into between the Tribe and the Defendant entities remained in full force and effect. In November 2009, the Tribe proposed a new Agreement that essentially was a combination of the two agreements that dealt with criminal jurisdiction. The Disclaimer of Civil/Regulatory Authority was not addressed. A meeting was held with legal counsel for the Tribe, the county attorneys, and representatives from the AG's office. The county attorneys expressed concerns regarding compliance with the terms of the original cooperative agreements, and made suggestions as to how to resolve these issues. It was also noted that the Disclaimer of

Civil/Regulatory Authority was a necessary element for any new cooperative arrangement to be considered.

Revised versions of the original Cooperative Agreement were circulated for execution by the counties. In the interim the counties maintained the status quo – handling matters as they came up in the same manner as when all three agreements were in effect. The revisions were not extensive, and the Duchesne and Uintah County Commissions eventually executed the Agreement. The Tribe did not execute the revised Agreement.

On November 22, 2010, the Tribe adopted a Resolution rejecting concurrent criminal jurisdiction with the State within Indian Country. The State doesn't have any evidence regarding why the Tribe took this action. However, the Tribal Law and Order Act of 2010, signed by President Obama in July 2010 amended the Indian Civil Rights Act of 1968 to allow concurrent and state jurisdiction in Indian County under limited circumstances.

In January 2011, the Tribe sent a letter to the Uintah County Commission, and copied, among others, the Governor of Utah, the ACLU, the US Attorney and Department of Justice, the BIA, and Duchesne County. The letter quotes *Ute V* and asserts that all rights of way running through the Uintah and Ouray Reservation is Indian Country for criminal jurisdictional purposes and that the State and the Counties do not have jurisdiction on said rights of way. A second such letter was sent in August, 2011, asserting the position that "State officers do not possess criminal jurisdiction over highways or roads running through reservation lands," but stating that "the

Tribe remains committed to working cooperatively with Uintah County in securing a Cooperative Law Enforcement Agreement. A third letter was sent in January 2012; this letter did not refer to any intent to work cooperatively to secure a new Agreement.

The Tribe also issued a notice of termination of the Disclaimer of Civil/Regulatory Authority Agreement for Mutual Assistance in Law Enforcement. To date the Cooperative Agreement for Mutual Assistance in Law Enforcement has not, to the State's knowledge, been terminated.

On April 14, 2013, the Tribe filed a Motion for Supplemental Proceeding or Motion to Supplement Complaint or Motion for Relief from Judgment as well as an Expedited Motion for Emergency Temporary Restraining Order in the original Ute case. In its Expedited Motion the Tribe asserted that the Tribe would be irreparably harmed if the Court didn't enjoin the State from, among other things, "asserting in any court, administrative forum, or other law-applying forum that the Ute Tribe lacks any power of a sovereign Indian Tribe over any part of the Uintah Valley Reservation".

The State makes a very basic argument in its Counterclaim against the Tribe, simply that the Tribe is attempting to overreach in asserting its jurisdiction in the Uintah Basin, contrary to the 2000 Order in this case and the Agreements reached between the parties hereto as well as current case law under the *Montana v United States* line of cases. The State's objective is to assure that its law enforcement officers are not hindered in protecting the health, safety, and welfare of the Uintah Basin and Uncompaghre residents, including tribal members. Contrary to

the Tribe's interpretation and assertion, to preclude the State and/or the counties from patrolling or conducting any law enforcement activity within the original boundaries of the Uintah and Ouray Reservation is not what *Ute V* held.

ARGUMENT

Article III Case or Controversy

The State's Counterclaim seeks only declaratory and injunctive relief, which is significant because declaratory relief has its own formulation of the case and controversy requirement. The Declaratory Judgment Act provides: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interest party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "case of actual controversy" in the Act "refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III of the United States Constitution." *Columbian Fin. Corp. v Bancinsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011) (citations and additional quotations omitted). In considering whether there is an Article III case or controversy in the declaratory-judgment context, "[t]he question comes down to 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, or sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" Id. (citation and emphasis omitted); see also Consumer Data Indus. *Ass'n v. King,* 678 F.3d 898, 906 (10th Cir. 2012) ("To satisfy the 'case or

controversy' requirement, a request for declaratory relief must settle 'some dispute which affects the behavior of the defendant toward the plaintiff.'" (citation omitted.)).

The Tribe's motion to dismiss also appears to contend the issues raised in the State's Counterclaim are not ripe. (Mot. to Dismiss at 7-8.) The ripeness doctrine "aims to prevent courts 'from entangling themselves in abstract disagreements' by avoiding 'premature adjudication.'" *Awad v. Ziriax,* 670 F.3d 1111, 1124 (10th Cir. 2012) (citation omitted). The ripeness inquiry focuses on "'whether the harm asserted has matured sufficiently to warrant judicial intervention.'" Id. (citation omitted). "'Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction.'" Id. "'[I]f a threatened injury is sufficiently "imminent" to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.'" Id. (citations omitted); see also id. at 1120 (explaining injury is "imminent" when it is "not conjectural or hypothetical"). Prudential ripeness is analyzed by "'examining both the fitness of the issues raised . . . for judicial review and the hardship to the parties from withholding review.'" Id. at 1124 (citations omitted). Concerning "fitness," courts focus on "'whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed.'" Id. (citation omitted). Concerning "hardship," courts "ask 'whether the challenged action creates a direct and immediate dilemma for the parties.'" Id. at 1125 (citation omitted).

First, the Tribe asserts there is no case or controversy because the Tribe is not claiming or exercising exclusive criminal jurisdiction over roadways inside the Reservation's boundaries. (Mot. to Dismiss at 8.) However, the Tribe's Complaint alleges that the Defendants' act of patrolling within the Reservation is itself a violation of the prior Ute decisions. The Complaint states, "Defendants regularly and intentionally send their law enforcement agents onto tribally owned Reservation lands, to take action which is inconsistent with the land's reservation status," including "routine police patrolling on land owned by the United States in trust for the Tribe or a member of the Tribe." (Compl. ¶ 22 (emphasis added).)

In addition to this allegation in its Complaint, the Tribe has repeatedly asserted that it (and/or it and the federal government) has exclusive jurisdiction over roadways within the Reservation and Indian Country in its demand letters to Uintah County ordering it and the State to stop patrolling. For example, as noted in the Statement of Facts above, all three of the Tribe's letters to the County assert that the Tribe (and federal government) has exclusive jurisdiction and that the State and County Defendants do not:

- State officers do not possess criminal jurisdiction over highways or roads running through reservation lands or alternatively lands meeting the definition of Indian County." (Dkt. 222-1 at 4.)

- "There have been ongoing problems with the Uintah County Sherriff patrolling and setting up checkpoints on [Whiterocks Road], on areas of exclusive Tribal and Federal Jurisdiction." (Id. at 8.)

- "[B]ased on the plan language of 18 U.S.C.A. § 1151 and current case law, State and County officers do not possess criminal jurisdiction over highways or roads running through reservation lands or alternatively lands meeting the definition of Indian county."

The Tribe cannot disclaim or ignore its own allegations, as well as its repeated demands that the State and County Defendants stop patrolling on roads and rights-of-way within the Reservation and Indian Country, in order to now claim that there is no case or controversy between the parties or that this issue is not ripe. To the contrary, there is such an "actual controversy," in that "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Columbian Fin Corp.,* 650 F.3d at 1376 (citation omitted). Further, the injury alleged is imminent as opposed to hypothetical, a determination on the merits would not require facts that may have not yet be sufficiently developed, and the Tribe's actions, which are in direct conflict with the State's obligation to patrol in order to assure the health, safety and welfare of its residents, both tribal members and non-tribal members, "creates a direct and immediate dilemma for the parties." *Awad,* 670 F.3d at 1125.

Secondly, the Tribe asserts there is no case or controversy and/or the issue is not ripe because "the enactment of UTERO Ordinance does not violate federal law and does not exceed the Tribe's civil regulatory authority." (Mot. to Dismiss at 8.) The Tribe's argument is apparently based on its assertion that a Bureau of Indian Affairs official has reviewed the

Ordinance and has approved it "subject to additional technical and legal review by the DOI's regional office." (Id. at 5.) The Tribe seems to be asserting that because the Ordinance has received conditional approval from a federal official, it cannot be the subject of a legal challenge. However, on its own admission, the Utero Ordinance is still subject to additional technical and legal review by the Department of the Interior's regional office. Therefore, the Ordinance that the Tribe has been enforcing is not currently legally effective.

Moreover, the UTERO Ordinance as it is currently drafted, and being applied by the Tribe, illegally regulates non-tribal members who are not doing business with the Tribe. Such illegal regulation exceeds the Tribe's limited authority and jurisdiction. *See Montana v. United States,* 450 U.S. 544 (1981).

Finally, such an argument does not belong in a motion to dismiss, where the Court must "accept as true all well-pleaded factual allegations" in the counterclaim and "view them in a light most favorable" to the County. *Burnett,* 706 F.3d at 1235. Accordingly, the Tribe's argument in no way supports its motion to dismiss.

State Standing

The Tribe next asserts the Counterclaim should be dismissed because the State lacks standing, both constitutional and prudential, to assert its claims. (Mot. to Dismiss at 8-11.) This argument by the Tribe also lacks merit.

1. Constitutional Standing

To satisfy constitutional standing requirements, a party must satisfy three requirements. First, it must show it has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *S. Utah Wilderness Alliance v. Palma,* 707 F.3d 1143, 1153 (10th Cir. 2013) (citation and quotations omitted). In addition, the injury must be "fairly traceable to the challenged action of the defendant." Id. (citation and quotations omitted). Finally, the party must show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. (citation and quotations omitted). "When evaluating a plaintiff's standing at the stage of a motion to dismiss on the pleadings, '. . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" Id. at 1152 (citation omitted). In addition, "[a]t the pleading stage, 'general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Id. (citations and additional quotations omitted). Further, "w]here, as here, the original complaint has been superceded by an amended complaint, we examine 'the amended complaint in assessing a plaintiff's claims, including the allegations in support of standing.'" Id. (citations omitted).

a. Injury-in-Fact

All three claims in the State's Counterclaim meet the injury-in-fact requirement, in that they allege injuries that are both "concrete and particularized" and "actual or imminent." Id. at 1153.) If the State's law enforcement officers are unable to perform their official obligations, including patrolling roads and highways within the Uintah Basin and the Uncompahgre area directly injures the State's ability to protect the health, safety and welfare of its citizens. As such, the State has alleged a sufficient injury-in-fact.

Regarding the issue of jurisdiction over roads and rights-of-way, the State has a "concrete and particularized" and "actual and imminent" injury based on the Tribe's demands that the State stop patrolling and its assertion of exclusive jurisdiction. It is the State's obligation to protect the safety and welfare of its citizens and to maintain peace and order within the State.

Regarding the Tribe's unlawful exercise of civil and regulatory authority, the State has adequately alleged an injury that is "concrete and particularized" and "actual or imminent." The State has alleged it was a party to the three agreements, including the Disclaimer, that were entered into in order to resolve the 1975 litigation. The fact the Tribe has now claimed to terminate the Disclaimer and has begun to exercise civil and regulatory jurisdiction over non-member State citizens is a breach of the agreement with the State, which was necessary to and

incorporated in the 2000 resolution of the 1975 litigation. This has created a "concrete and particularized" and "actual and imminent" injury for the State and its duties to protect its citizens.

b. Traceability

The claims in the County's Counterclaim also meet the traceability element. "'The element of traceability requires the plaintiff to show that the defendant is responsible for the injury, rather than some other party not before the court.'" *Palma,* 707 F.3d at 1153 (citation omitted). The Counterclaim alleges that the Tribe has asserted that it, not the State and County Defendants, has exclusive jurisdiction over state and county roads in the Reservation and Indian County, and has repeatedly demanded that the County stop patrolling in these areas. Additionally, the State's Counterclaim alleges that the Tribe, and not some other party, has exceeded the scope of its permissible civil and regulatory jurisdiction. As such, the Counterclaim adequately alleges the Tribe is the cause of the County's injury.

c. Redressability

The State's Counterclaim also meets the redressability requirement. "'[T]he requirement of redressability ensures that the injury can likely be ameliorated by a favorable decision.'" *Palma,* 707 F.3d at 1153 (citation omitted). A declaration from this Court that the State has jurisdiction to patrol state and county roads within the original boundaries of the Uintah and Ouray Reservation and the Uncompaghre area would redress the State's injury should the Tribe

continue to assert exclusive jurisdiction and continue to threaten the State's ability to protect the health, safety and welfare the residents of the State. Additionally, a ruling by this Court that the Utero Ordinance with not legally effective until the technical and legal review by the DOI regional office has been completed assuring that the scope of the Ordinance is consistent with the case law on Tribal jurisdiction, would have the effect of redressing injury being imposed by the illegal enforcement of the Ordinance on the State citizens.

2. Prudential Standing

Prudential standing "encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches and the requirement that a plaintiff's complaint fall within the zone of interested protected by the law invoked.'" *Elk Grove Unified Sch. Dist. v Newdow,* 542 U.S. 1, 12 (2004) (citation omitted). Here the Tribe argues the State cannot meet the first element, arguing 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" (Mot.to Dismiss at 11). The State's counterclaim asserts the State's right to protect its own sovereignty as well as its obligation to protect the rights, and the health, safety and welfare of its citizens and residents.

3. Parens Patraie

Just as the Ute Tribe proposes to represent and protect its members through this action, the State of Utah enjoys the sovereign responsibility to all citizens to see that law enforcement is uniformly enforced within the exterior boundaries of the State. The doctrine of parens patriae provides that a State take steps to protect the health and well-being, both physical and economic, of its citizens. The Ute tribe has challenged the authority of State officers to enforce laws in Duchesne and Uintah counties. In a broader sense, the Tribe has challenged both criminal and civil jurisdiction in areas of economic regulation and child protection. While the State does not question the Tribes jurisdiction over its members on Indian lands the State does question the Tribes jurisdiction over non-members and non-Indian lands. The right of the State to exert its sovereign interests to the protection of its citizens as a whole is long recognized in the United States. *See Alfred L. Snapp & Sons, Inc v. Puerto Rico, ex rel Barez*, 458 U.S. 592, (1982), 102 S.Ct 3260, 73 L.Ed.2d 995 and more recently in an apportionment of interstate waters case, *South Carolina v. North Carolina*, 558 U.S. 256, (2010) 130 S.Ct 854, 169 L.Ed.2d 845.

The State standing is not based on protecting any single individual but both the sovereign and citizen interests as a whole. As to names of specific individuals affected by tribal action, discovery will disclose those details.

Indispensable Party

The Tribe also argues that the Counterclaim should be dismissed for failure to join the United States as an indispensable party. The United States is not automatically an indispensable party to a case involving federal civil action regarding Indian tribes or Indian lands. *Spirit Lake Tribe v. North Dakota*, 262 F. 3d 732 (8th Cir.2001). When determining whether an absent party is indispensable, the Tenth Circuit requires a two-part analysis. *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, 94 F.3d 1407, 1411 (10th Cir. 1996). First, the court must determine if the party is necessary to the suit and must be joined if joinder is at all feasible. *Id.* Second, where the Court determines that an absent party is indispensable, and joinder of the indispensable party is infeasible, the action must be dismissed. *Id.* The party urging joinder of an indispensable party bears the burden of showing that an absent party is needed for a just adjudication. Fed. Rules Civ. Proce. Rule 19, 28 U.S.C.A.

The State, after an exhaustive search, was unable to ascertain the facts at issue in the case *Texas v. New Mexico*, 352 U.S. 991 (1957), cited by the Tribe to support the assertion that the United States is a necessary and indispensable party. However, similar to the present action brought by the Ute tribe concerning jurisdiction, the court in *Lower Brule Sioux Tribe v. State of S.D.*, held that the United States was not an indispensable party in an action brought by the tribe against the state seeking relief regarding state jurisdiction over hunting and fishing rights on reservation lands. 711 F.2d 809 (8th Cir. 1983).

The absence of an indispensable party is grounds for dismissal of the Counterclaim *only* where the defect of the absence cannot be corrected or is not corrected. 35B C.J.S. Federal Civil Procedure § 790 (emphasis added). When a motion to dismiss for failure to join an indispensable party is brought, the court should be reluctant to deny a party their day in court. *Id.* "An opportunity should be afforded to bring in the indispensable party…" *Id.* In *Bonneville Tower Condominium Management Committee v. Thompson Michie Associates, Inc.*, the Supreme Court of Utah held that the defendant's failure to bring all indispensable parties before the court may be overcome by joining the party required. 728 P.2d 1017, 1020 (Utah 1986). Dismissal for failure to join an indispensable party should only be carried out where joinder of that party is infeasible. *Id.* A person may be added as a party at any stage of the action on motion or on the court's initiative. Fed. R. Civ. P 21.

Because joinder of the United States as an indispensable party is feasible, the Tribe's motion to dismiss the State's Counterclaim should be denied. Additionally, should the Court find that the United States is an indispensable party, the State will take the necessary action to join the United States in the current proceeding.

Waiver of Immunity

The Tribe also argues the Counterclaim should be dismissed because the Tribe is protected from suit by sovereign immunity. (Mot. To Dismiss at 13) The Tribe's argument fails because (1) the Tribe has expressly waived its sovereign immunity; (2) the Counterclaim seeks to

enjoin tribal officials from violating federal laws; and, (3) the claims in the Counterclaim are recoupment actions falling within the scope of the Tribe's Complaint.

1. Express Waiver of Sovereign Immunity

In following with this Court's instruction regarding the need for comity between two disputing sovereigns, in *MacAruthur v. San Juan County*, the Tribe, the State, and the Counties entered into three cooperative jurisdictional agreements (the "Agreements"). The Agreements were expressly incorporated into this Court's order dismissing the original litigation regarding the claims that have been revived in this proceeding.[1] *See* 391 F.Supp.2d 895 (D. Utah 2005). In each of the agreements signed by the parties hereto, the Tribe waived its sovereign immunity. First, the Disclaimer of Civil/Regulatory Authority provides, "Original jurisdiction to hear and decide any dispute or litigation arising under or as a result of this Disclaimer shall be in the United States District Court of the District of Utah." (*Id.* At 3) Second, the Cooperative Agreement to Refer Tribal Members Charged with Misdemeanor Offenses to Tribal Court for Prosecution provides, "Original jurisdiction to hear and decide any dispute or litigation arising under or as a result of this Agreement shall be in the United States District Court of the District of Utah." (*Id.* at 10) The Cooperative Agreement for Mutual Assistance in Law Enforcement, contains the same language. (*See Id.* at 11) It has been established that once a tribe has contractually consented to jurisdiction in a particular court, the tribe has waived its sovereign

1 All three agreements are attached to the Court's Stipulated Order found at Dkt. 96, and all three were then incorporated into this Court's Stipulated Order dated March 28, 2000, found at Dkt. 145.

immunity. *See, e.g., C&L Enters. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411 (2001) (holding the tribe had contractually agreed to dispute resolution procedures that included enforcement in Oklahoma state courts, and thus had waived its tribal immunity).

As noted above, the Agreements were expressly incorporated into this Court's Order dismissing the original case with prejudice. The Order specifically stated that "questions of jurisdiction on the various categories of land within the original boundaries of the Uintah and Ouray Reservation have been determined by the decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals, as modified by the agreements between the parties, which are referred to above and are appended hereto." (Dkt. 145) The claims now brought by the State fall within these waivers of immunity. The issues of jurisdiction over county and state roads and rights, and the issue of civil and regulatory jurisdiction, were addressed in the three agreements and made a part of this Court's 1998 Order. The Tribe's efforts to expand its civil and regulatory jurisdiction, including the UTERO Ordinance, are a clear violation of Disclaimer Agreement. Additionally, the Tribe expressly waived its sovereign immunity in the UTERO Ordinance, which reads: "The Tribe hereby agrees to waive its sovereign immunity for the sole and limited purpose of enforcement of the terms of this Ordinance. This waiver is expressly limited to injunctive and/or declaratory relief with respect to the enforcement of this Ordinance and does not include monetary damages." (UTERO Ordinance § 13.3, Dkt. 162-3 p.25) Thus, the State's Counterclaim falls within the Tribe's express waiver of its sovereign immunity.

2. The Tribe Does Not Have Sovereign Immunity Where the State Seeks to Enjoin the Tribe from Violations of Federal Law

The Tribe also lacks sovereign immunity in this litigation because of the *Ex parte Young* doctrine. In this case, the Supreme Court carved out an exception to sovereign immunity "for suits against state officials seeking to enjoin alleged ongoing violations of federal law." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). "The *Ex parte Young* exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state and, as a result, is not subject to the doctrine of sovereign immunity." *Id.* The Tenth Circuit (as well as other circuits) has extended the doctrine of *Ex parte Young* as an exception to tribal sovereign immunity. *See Id.* Moreover, the Tenth Circuit has held that the *Ex parte Young* doctrine may be applied to "enjoin a violation of federal common law," including the "unlawful exercise of tribal court jurisdiction." *Id.* at 1155. In *Crowe*, the Court explained that "there is an established 'federal right to be protected against the unlawful exercise of Tribal Court judicial power.'" *Id.* at 1156 (citation omitted). It follows that the same analysis would apply to other unlawful exercises of tribal jurisdiction. Under the Tenth Circuit's holding in *Crowe*, the Tribe does not have sovereign immunity as against the State's counterclaims, all of which seek prospective, injunctive relief.

As stated above, in *Crowe*, the Court found that the unlawful exercise of tribal court jurisdiction was a violation of federal law. *Id.* Similarly, this case revolves around the Tribe's

unlawful exercise of jurisdiction by asserting civil criminal, and regulatory authority over lands owned by the State of Utah and state and federal roadways.

The commerce clause in Article I, Section 8, Clause 3 of the Constitution of the United States, describes the enumerated federal power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl.3. Threatened interference with vehicles, and specifically transportation of goods on federal highways within the reservation boundaries is a violation of the Commerce Clause. As in *Dunlevy*, the Tribe has threatened, and according to allegations made by the County law enforcement agencies has actually interfered which violates federal law. Therefore, tribal sovereign immunity does not preclude the State's counterclaim.

3. The Tribe Does Not Have Sovereign Immunity Because the State's Claims are Recoupment Actions Falling Within the Scope of the Tribe's Complaint

Because the State's counterclaims sound in recoupment to the Tribe's suit, the argument for tribal sovereign immunity fails. "[W]hen a tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment." *Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006). "The waiver of sovereign immunity is predicated on the rationale that 'recoupment is in the nature of a defense arising out of some feature of the transaction upon which the [sovereign's] action is grounded.'" *Id.* (citation omitted). "Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and

do not seek an amount in excess of that sought by the plaintiff." *Id.* Here, all of the claims asserted in the Counterclaim sound in recoupment.

a. The State's Counterclaim arises from the same transaction or occurrence.

First, the State's counterclaim arises from the same transaction or occurrence as the Tribe's claims. "Counterclaims arise from the same transaction or occurrence if they are compulsory counterclaims under Rule 13(a) of the Federal Rules of Civil Procedure." *Id.* at 645. A counterclaim is compulsory if (1) the issues of fact and law raised in the claim and counterclaim are largely the same, (2) res judicata would bar a subsequent suit on the defendant's claim, (3) the same evidence supports or refutes the principal claim and the counterclaim, and (4) there is a logical relationship between the claim and counterclaim. *See id.*

The Tribe's Complaint alleges that the Defendants (including the State) have violated prior court decisions concerning the parties' respective jurisdictions and that the Defendants "regularly and intentionally send their law enforcement agents onto tribally owned Reservation lands, to take action which is inconsistent with the land's reservation status," including "routine police patrolling on land owned by the United States in trust for the Tribe or a member of the Tribe." (Compl. ¶ 22.) It also complains about Defendants' actions in stopping tribal members for alleged violations of state law and detaining, searching, and arresting tribal members "for matters which are outside the scope of state jurisdiction under the holdings from the 1975 suit." (*Id.*) The Tribe also complains about Defendants' actions in bringing criminal actions against tribal members in state court. (*Id.* ¶ 29.) These allegations concern issues of fact and law and

involve the same evidence as those raised in the State's counterclaim, specifically, the issue of which entities have jurisdiction over roads and rights-of-way in Reservations and Indian Country. The Tribe's exercise of jurisdiction outside of the scope of the agreements that settled the Ute litigation and that are otherwise inconsistent with the Tribe's jurisdiction under federal and state law is also in dispute. Because the State's claims qualify as compulsory counterclaims, they are considered to arise from the same transaction or occurrence as the Tribe's claims for purposes of recoupment. *See Berrey*, 439 F.3d at 643.

The State's counterclaims also meet the other two recoupment factors. Both the Complaint and the Counterclaim seek "the same kind of relief," *id.*, in that they both are actions for injunctive and declaratory relief. The final factor, for the counterclaim to not seek "an amount in excess of that sought by the plaintiff," *id.*, is inapplicable here because neither party is seeking money damages.

Therefore, because the State's counterclaims properly sound in recoupment, the Tribe's sovereign immunity is waived for purposes of the State's counterclaims. *See id.* at 643; see also *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995):

> By requesting equitable relief, the Tribe consented to the district court exercising its equitable discretion to resolve the status of the disputed lands. To hold that the district court could exercise its discretion to quiet title in favor of the plaintiff (the Tribe) but not the defendant (Rupp and Henderson) would be anomalous and contrary to the court's broad equitable powers.

at page 1245.

Claims Made by the State in its Counterclaim

The State makes the following basic allegations in its counterclaim against the Tribe: 1) seeks declaratory relief against the Ute Tribe for violating the sovereignty of the State of Utah by asserting jurisdiction of a civil, criminal and regulatory nature which is in violation of the law of the case; 2) the Tribe is challenging the judicial authority and the law enforcement authority of the sovereign State of Utah as recognized by the law of the case; 3) the Tribe is attempting to assert civil, criminal and regulatory authority over lands owned by the State of Utah, but located within the external boundary asserted by the Ute Tribe over the Umcompahgre Reservation. Title to these lands was obtained from the United States Congress and the Ute Tribe has no jurisdiction over these state lands; 4) Tribal members appearing in State Courts have an adequate remedy under Utah law; 5) the cities and counties, co-Defendants to the underlying action, are political subdivisions of the sovereign State of Utah and are charged to provide regulatory and law enforcement services to the citizens of the State and their jurisdiction. What the State seeks in its counterclaim is a declaratory judgment that the Ute Tribe is asserting jurisdiction, which not only exceeds the law of the case, but established case law regarding tribal jurisdiction. The Ute Tribe should be ordered to honor the stipulated Cooperative Agreements, which are incorporated into the law of the case.

CONCLUSION

The Ute Tribe's Complaint and the State of Utah's Counterclaim seek similar claims for relief and parallel remedies.

Both parties seek clarification of criminal jurisdictions. The State's Counterclaim seeks further resolution of issues of civil jurisdiction. Utah asserts fact issues exist which require discovery.

DATED this 6th day of August, 2013.

JOHN E. SWALLOW

/s/ Randy S. Hunter
RANDY S. HUNTER
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of August, 2013, copies of the foregoing **STATE OF UTAH'S RESPONSE TO PLAINTIFF'S RULE 12(b) MOTION AND MEMORANDUM TO DISMISS STATE OF UTAH'S COUNTERCLAIMS** were served by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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