G. Mark Thomas (6664)
UINTAH COUNTY ATTORNEY
Jonathan A. Stearmer (11217)
CHIEF DEPUTY UINTAH COUNTY ATTORNEY—CIVIL
641 East 300 South, Suite 200
Vernal, Utah 84078
Telephone: (435) 781-5432
Email: mark@uintahcountyattorney.org
jonathan@uintahcountyattorney.org

E. Blaine Rawson (7289)
John W. Mackay (6923)
Jacquelyn D. Rogers (9062)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
Email: brawson@rqn.com
jmackay@rqn.com
jrogers@rqn.com

Attorneys for Uintah County

IN THE 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.	**UINTAH COUNTY'S REPLY IN SUPPORT OF ITS RULE 12(c) MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION** Consolidated Action: Civil Nos. 2:13-cv-00276 & 2:75-cv-00408-BSJ Judge Bruce S. Jenkins

UINTAH COUNTY, a political subdivision of the State of Utah, in its individual capacity and as parens patriae and/or in jus tertii,

Counterclaim and Third-Party Plaintiff,

v.

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH; a federally recognized Indian Tribe; BUSINESS COMMITTEE FOR THE UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION; BRUCE IGNACIO, Chairman of the Ute Tribal Business Committee, in his official capacity; RONALD J. WOPSOCK, Vice Chairman of the Ute Tribal Business Committee, in his official capacity; GORDON HOWELL, Member of the Ute Tribal Business Committee, in his official capacity; STEWART PIKE, Member of the Ute Tribal Business Committee, in his official capacity; TONY SMALL, Member of the Ute Tribal Business Committee, in his official capacity; PHILIP CHIMBURAS, Member of the Ute Tribal Business Committee, in his official capacity; PAUL TSOSIE, Chief Judge of the Ute Tribal Court, in his official capacity; and WILLIAM REYNOLDS, Judge of the Ute Tribal Court, in his official capacity.

Counterclaim and Third-Party Defendants.

INTRODUCTION

Uintah County submits this reply brief in support of its Rule 12(c) motion to dismiss (Dkt. 250) and in response to the Ute Tribe's opposition (Dkt. 282, "Opp'n Mem."). First, the Tribe has either overstated the law concerning sovereign immunity or, if believed, it has reversed and gutted its theory of this case. This is because every prior allegation and statement of fact in its complaint and in its motion for injunctive relief – including the sworn testimony of the Tribe's counsel – asserts that the State and County were acting as one entity in the state court prosecutions, thus making the County an "arm of the state." Indeed, by express state statute, the Uintah County prosecutor acts "on behalf of the state." Utah Code Ann. § 17-18a-401(1). As a result, the County enjoys sovereign immunity in that regard. Yet now, in response to a motion to dismiss, the Tribe effectively disavows any joint conduct by the State and County in the prosecutions giving rise to these "emergency" proceedings. The Tribe's conflicting positions cannot be reconciled.

Next, the Tribe misunderstands (and thus doesn't directly respond to) the motion concerning Mr. Blackhair's lack of standing and, instead, spends the majority of its opposition memorandum addressing non-issues. (*See* Opp'n Mem. at 6-11.) Indeed, the Tribe does not inform the Court that only after this motion was filed, and after the Court's questions at the last hearing, a record of tribal membership was generated for Mr. Blackhair. (*See* Dkt. 264.) Consequently, discovery will reveal the circumstances of his membership, and whether he was a registered member during the events in question.

Finally, the Tribe's opposition memorandum highlights the County's reciprocity argument, namely, that if any waiver of sovereign immunity has occurred, then that immunity necessarily runs both ways.

ARGUMENT

I. UINTAH COUNTY HAS SOVEREIGN IMMUNITY UNDER THE CLAIMS IN THIS CASE.

"To make the determination whether an entity is an arm of the state we engage in two general inquiries. The court first examines the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state. Second the court examines the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1421 n.1 (10th Cir. 1997) (citations and quotations omitted). Thus, for example, the Boulder County Social Services was found to be an "arm of the state," based in large part on explicit statutory provisions, and was thus immune under the Eleventh Amendment. *Starkey v. Boulder Cnty. Social Servs.*, No. 06-CV-00659, 2006 U.S. Dist. LEXIS 84768, *10-*15 (D. Colo. Nov. 21, 2006).

A. Utah Statutory Law and the Tribe's Pleadings Establish That Uintah County Has Sovereign Immunity as an "Arm of the State."

This sovereign immunity motion was based on black-letter law and apparent admissions in operative pleadings by the Tribe. The Tribe acknowledges that counties acting as an "arm of the state" enjoy sovereign immunity, but then avoids discussing that point or the applicable test that it calls into question. (Opp'n Mem. at 2.) The Tribe's response is both surprising and puzzling. Without explicitly saying so, the Tribe appears to take the position that Uintah County

was not acting as an "arm of the state" as it relates to the claims and allegations in this case. But that is not what the complaint says or what the sworn testimony offered by the Tribe says – much less, what Utah's legislature says.

First and foremost, Utah statutory law mandates that the county prosecutors shall "conduct, on behalf of the state, all prosecutions for a public offense committed within a county." Utah Code Ann. § 17-18a-401(1). In addition, county prosecutors must "draw all indictments and information for offenses against . . . the laws of the state occurring within the county," Utah Code Ann. § 17-18a-402(1)(a)(ii), and "shall assist and cooperate" in appeals concerning "a criminal violation of state statute," § 17-18-403(1). Importantly, Utah law provides that a county prosecutor "represents the state," is "considered the representative of the state," and "is empowered to make commitments for and decisions on behalf of the state." Utah Code Ann. § 17-18a-801.

Likewise, the Tribe's pleadings make no distinction between prosecutions by the state and prosecutions by the county. It asserts that "each of the Defendants, through it agents, has taken actions inconsistent with the federal court decisions" (Compl. at 5) through law enforcement, patrols and "of greater concern" through "four currently pending criminal prosecutions" in Uintah County. (Compl. at 7-9.) The emergency motion for a temporary restraining order is even more explicit. (Dkt. 176.) No less than ten times, the Tribe explains its theory of this case as resting on prosecutions "**by the State of Utah, through Uintah County**." (Dkt. 176, emphasis added.) And the Second Declaration of Frances C. Basset, Esq. (Dkt. 176-2) reiterates the identical statement under oath eight more times. There are no separate allegations concerning "county" prosecutions and "state" prosecutions or court proceedings

because, in Utah, county prosecutors prosecute state laws. A more concise allegation of an "arm of the state" is difficult to imagine.

In short, there can be no mistake that the heart of this action centers on the Tribe's concern that an action in Utah state court may affect jurisdictional or boundary issues contrary to the Tribe's view. (*See* Prayer for Relief, 3(a)-(f).) The Tribe's own pleading thus recognized that the only way to obtain relief and enjoin the State of Utah is to enjoin Uintah County and its prosecutors from bringing certain cases or making certain arguments in the district court in Uintah County. But therein lies the rub; the alleged harm occurs in state court where Uintah County is the voice and the prosecutorial arm of the State – and is thus immune.

B. Other Federal Courts Have Found Sovereign Immunity in Similar Cases.

Despite the import of the Tribe's legal arguments – and its categorical denial of immunity to any county functions – many federal cases have dismissed claims against county-related entities or divisions under similar circumstances on the grounds of sovereign immunity. In *New Jersey*, for example, the federal court noted statutory authority similar to Utah's and had no trouble in finding that the county prosecutor's office was immune from suit. *Slinger v. State of New Jersey*, No. 07-CV-5561, 2008 U.S. Dist. LEXIS 71723 (D.N.J. Sept. 4, 2008) ("Based on statute and case law, it is clear that the [county prosecutor's office] does not exist independently from the State, but rather it is an arm of the State."), *rev'd in part on other grounds*, 366 Fed. App'x 357 (3d. Cir. 2010). It further noted the Supreme Court's general rule that if "the judgment operates to compel the state to act or to restrain it from acting, the suit is against the sovereign." *Id.* at *11; *see also Cohen v. State of New York*, No. 1:10-CV-1300, 2011 U.S. Dist. LEXIS 89293, *16 (N.D.N.Y. Aug. 11, 2011) (unified court system), *aff'd*, 481 Fed. App'x 696

(2d Cir. 2012); *Ortero v. Cnty. of Monmouth*, No. 06-3435, 2007 U.S. Dist. LEXIS 40743 (D.N.J. June 5, 2007) (county probation office immune); *Haybarger v. Lawrence Cnty. Adult Probation & Parole*, No. 06-862, 2007 U.S. Dist. LEXIS 18314 (W.D. Penn. Mar. 13, 2007) (county probation and parole).

Similarly, county sheriff departments have been found to be immune, including in Georgia, where the *Chatham County* case cited by the Tribe was located. *See Ramos v. Berkeley Cnty.*, No. 2:11-3379-SB, 2012 U.S. Dist. LEXIS 153642 (D.S.C. Oct. 25, 2012); *Caperton v. McQuaig*, CV-510-045, 2011 U.S. Dist. LEXIS 89792 (S.D. Ga. Aug. 12, 2011); *Robinson v. Houston Cnty.*, 5:09-CV-156, 2010 U.S. Dist. LEXIS 58298 (M.D. Ga. June 14, 2010); *William v. Keenan*, 5:06-CV-290, 2007 U.S. Dist. LEXIS 793, *10 (M.D. Ga. Jan. 8, 2007) ("arm of the state" in enforcing state drug laws); *see also Ross v. Jefferson Cnty. Dep't of Health*, 701 F.3d 655 (11th Cir. 2012) (relying on state law, Alabama health department was immune); *C.A. v. Lowndes Cnty. Dep't of Family & Children Servs.*, 93 F. Supp. 2d 744 (N.D. Miss. 2000).

C. The Tribe Misapplies *Northern Ins. Co. v. Chatham County*.

The Tribe's brief quotes extensively from *Northern Ins. Co. v. Chatham County*, 547 U.S. 189 (2006), but in citing the dicta (and the general rule) misses the holding. There, the Supreme Court assumed – and the parties had stipulated – that a county in Georgia was not an arm of the state for purposes of a negligence claim regarding a bridge owned, operated and maintained by Chatham County. On the specific question before it, the Supreme Court refused the "adoption of a broader test" of immunity. *Id.* at 373-74. Nothing about that holding alters the "arm of the state" analysis set forth above.

Finally, the Tribe spends an entire page taking issue with the *MacArthur* decision, but the distinctions are irrelevant given the "arm of the state" test that must be applied. As noted previously, if the pleadings and prior submissions of the Tribe are taken at face value and applied consistently with the Utah statute – as the Court should do on a Rule 12(c) motion – then Uintah County should be afforded immunity under the clear theory of this case and the relief sought.

II. QUESTIONS OF FACT SURROUND MR. BLACKHAIR'S TRIBAL STATUS.

Uintah County's opening motion concerning standing was simple and narrow. If Mr. Blackhair is not a Tribal member, as it had appeared, then how can the Tribe base its claims (or request for injunctive relief) on his prosecution? Recognizing this problem, the Tribe generated and submitted a notice of tribal status, but it never states when or how Mr. Blackhair became a registered Tribe member. And although the County's motion discusses Mr. Blackhair in depth, the opposition memorandum never even mentions Mr. Blackhair. Given the questions of fact that surround this curious submission, Uintah County is willing to reserve this issue until after discovery occurs. The other voluminous "standing" arguments made by the Tribe (Opp'n Mem. at 6-11) miss the intended point; Uintah County only challenges the Tribe's standing as related to Mr. Blackhair. (Opening Mem. at 3.)

III. THE TRIBE HAS WAIVED JURISDICTIONAL ISSUES.

Generally, in the absence of an "unequivocal waiver" the Court will not find a waiver of immunity. However, extraordinary circumstances can compel such a conclusion. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999). For example, a state's removal of a case from state to federal court – including intentional assertion of claims in federal court – constitutes a waiver. *Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613

(2002). The Tribe's waiver of immunity is discussed more fully in Uintah County's opposition to the Tribe's motion to dismiss its counterclaims. (Dkt. 249 at 24-25.) But however this Court applies the test of waiver in this case, the result must apply equally to the Tribe and to defendants.

Finally, the Tribe continues to seek an unequal playing field on jurisdictional issues by confusing "jurisdiction" with "boundaries" – a point made in the opening memorandum but never addressed by the Tribe. (Opening Mem. at 4 n.4.) The point is important because there is squarely a dispute – in the complaint and in the counterclaims – as to what extent the State (and its counties) can regulate and enforce their own laws on the Reservation and on "Indian Country." Any recitation of the long history of this case applies both ways. These issues cannot have a one-sided waiver. Either sovereign immunity applies to both sides, or neither side.

IV. CONCLUSION

For the foregoing reasons, the Tribe's Complaint should be dismissed.

DATED this 22nd day of August 2013.

G. Mark Thomas
UINTAH COUNTY ATTORNEY
Jonathan A. Stearmer
CHIEF DEPUTY UINTAH COUNTY ATTORNEY—CIVIL

RAY QUINNEY & NEBEKER P.C.

/s/ E. Blaine Rawson
E. Blaine Rawson
John W. Mackay
Jacquelyn D. Rogers

Attorneys for Uintah County