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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 REPLY IN SUPPORT OF ITS RULE 12(b) MOTION 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 Tribe respectfully replies in support of its motion to dismiss the counterclaim filed by the State of Utah, Dkt. 219. The Tribe moved for dismissal 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.

RESPONSE TO THE STATE'S STATEMENT OF UNDISPUTED FACTS

The State's memorandum includes a discussion of the negotiations that took place between the Tribe and the Defendants after the 1998 Referral Agreement expired. See State's Response, Dkt. 284, pp. 7-8. While perhaps not relevant to the legal issues before the court, the Tribe would like to include additional facts related to the parties' discussions. During the negotiations the Ute Tribe sought clarification in the written documents that the Disclaimer of Civil/Regulatory Authority applied only to the Uintah Valley Reservation, and not to the Uncompahgre Reservation. Uintah County objected to the clarification. See Exhibit C, Declaration of Jeremy Patterson, Esq., ¶ 4. When negotiations later reached an impasse, Uintah County and Duchesne County incorporated additional changes to the agreements without the Tribe's approval. The other parties then approved the revised agreements without involving the Tribe or securing the Tribe's consent. See Exhibit C, ¶ 5.

I. THERE IS NO ARTICLE III CASE OR CONTROVERSY

The Tribe contends there is no Article III case or controversy because the State's counterclaim, Dkt. 219, contains no factual allegations showing that the Ute Tribe is

claiming or exercising "exclusive" criminal jurisdiction authority over lands within its reservation boundaries, or that the Tribe is illegally asserting civil and regulatory authority over non-Indians within the Tribe's reservation boundaries, or that enactment of the Tribe's UTERO Ordinance violates federal law and exceeds the Tribe's civil regulatory authority.

In response, the State relies on three cases for the proposition that there is an Article III case or controversy.[1] However, one of the cited cases actually supports the Tribe's position, not the State's, and the other two cases are readily distinguishable. The Tribe will begin by addressing the case that supports the Tribe's position, and will then distinguish the other two cases.

A. Legal Issues are Not Tantamount to an Article III Case or Controversy

The Tenth Circuit made clear in *Columbia Fin. Corp.* that legal issues, standing alone, do not constitute an Article III case or controversy.[2] *Columbia Fin.* was a declaratory judgment action brought by Insureds against an Insurer to determine coverage. On appeal, the Tenth Circuit reversed a judgment in favor of the Insureds on the ground that no Article III case or controversy existed when judgment was entered.[3] *Columbia Fin.* is pertinent here for two reasons: first, because the Tenth Circuit decision includes a survey of Supreme Court jurisprudence on Article III in declaratory judgment actions, and secondly because of the obvious parallels between the lack of a case or controversy in *Columbia Fin.* and the equivalent lack of a case or controversy under the

[1] *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906 (10t**h** Cir. 2012); *Awad v. Ziriax*, 670 F.3d 1111, 1124 (10th Cir. 2012); and *Columbia Fin. Corp. v. Bancinsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011).
[2] *Columbia Fin. Corp.*, *supra*, 650 F.3d at 1381.
[3] *Id*. at 1385.

State's counterclaim for declaratory judgment in this case. Indeed, the Tenth Circuit observed that the Supreme Court's jurisprudence in this area "illustrate[s] the limits" of declaratory-judgment jurisdiction under Article III.[4]

In *Columbia Fin.* there was no case or controversy because the Insurer had agreed to cover the Insureds during the pendency of litigation. Yet despite the stipulation, both parties insisted that a judicial declaration of the policy terms was necessary in view of the possibility of future claims under the policy. The Tenth Circuit disagreed, and it did so by citing language that is equally apropos of the "claim" asserted by the State of Utah in its counterclaim here:

> Regardless of how well-founded AGL's concerns about its insurers may have been, speculation based on the insurance companies' dealings with other insureds does not present a concrete case or controversy. At the time the complaint was filed, AGL could claim neither actual nor threatened injury resulting from the insurers' conduct, nor any injury traceable to the insurance companies at all. When AGL sought the court's guidance through a declaratory judgment, the issues it presented were no more than conjectural questions based on the fact that other utilities had battled with insurers over . . . cleanup costs. (emphasis added)[5]

Similarly, here the State of Utah's counterclaim alleges no "concrete case or controversy," no "actual or threatened injury" to the State or its citizens that is traceable to the actions of the Ute Indian Tribe. Though striving mightily, the best the State can do in describing a concrete injury is to parrot the language the Tribe used in describing *the Tribe's injury*, i.e., the State repeats the Tribe's allegation in its complaint that State, County and local law enforcement agencies "regularly and intentionally send their law

[4] *Id.* at 1377-78.
[5] *Columbia Fin. Corp.*, *supra*, 650 F.3d at 1384, citing *Atlanta Gas Light Co. v. Aetna Casualty & Surety Co.*, 68 F.3d 409, 414-15 (11th Cir. 1995).

enforcement agents onto tribally owned Reservation lands, to take action which is inconsistent with the land's reservation status." See State's Response, Dkt. 284, p. 12. But clearly—even to a non-lawyer—the foregoing language is language that describes a "concrete injury" to the Tribe and its sovereign interests; it is not language that describes any injury to the State. Indeed, there would be a concrete injury-in-fact to the State only if the factual predicate was reversed, and if it was the Tribe that was "regularly and intentionally" sending *tribal* law enforcement agents onto State lands "to take action inconsistent with" the sovereign rights and interests of the State of Utah. Obviously, that factual predicate does not exist.

The State appears to suggest that the Tribe's vindication of its tribal sovereign interests necessarily implies a corresponding diminution of the State's sovereignty. However, this is a false premise because the Tribe's sovereign interests can be fully and fairly vindicated without any corresponding diminution of the State's sovereignty. Nonetheless, proceeding from this false premise, the State's counterclaim seems to have been "asserted prophylactically" in response to the Tribe's complaint. "Asserted prophylactically" is how the State of Kansas described the cross claims it filed in *Wyandotte Nation v. Salazar*, asking for declaratory relief and an injunction to prohibit the federal government from taking land into trust for the Wyandotte Nation.[6] However, the *Wyandotte* court dismissed the State of Kansas' prophylactic cross claims for the same reasons that the Court should dismiss the State's counterclaim here: because legal issues "asserted prophylactically" do not rise to the level of an Article III concrete

[6] *Wyandotte Nation v. Salazar*, No. 11-2656, 2012 WL 3156810, at *5 (D. Kansas Aug. 3, 2012).

case or controversy. Specifically the *Wyandotte* court said that the Kansas claims did not allege "imminent, concrete and particularized injury-in-fact necessary to establish jurisdiction."[7] The same is true of the State's allegations here.

B. The State's Other Two Cited Cases are Distinguishable

The State quotes from *Consumer Data Indus. Ass'n v. King* that for the case or controversy requirement to be satisfied, "a request for declaratory relief must settle 'some dispute which affects the *behavior of the defendant toward the plaintiff*.'"[8] (emphasis added). And this language articulates precisely the Tribe's point. The Tribe is the defendant under the State's counterclaim, but the State cannot identify *any behavior of the Tribe towards the State* that can, or should be, judicially enjoined. Indeed, it is the absence of this necessary predicate, or nexus, that distinguishes the case here from both *Consumer Data Indus. Ass'n* and *Awad v. Ziriax*.

II. ALTERNATIVELY, THE STATE OF UTAH LACKS STANDING

A. Constitutional Standing

The Tribe contends the State lacks constitutional standing because the State cannot satisfy even the first prong of the three-pronged standing test: the State of Utah has neither suffered an actual concrete injury-in-fact, nor faces the threat of any particularized imminent harm. See Tribe's motion, Dkt. 270, p. 10. In its response, the State can identify only two conceivable injuries, both of which are preposterous. First, the State claims injury from state law enforcement officers being "unable to perform their official obligations, including patrolling roads and highways within the Uintah Basin

[7] *Id.*
[8] *Supra*, n.1, 673 F.3d at 906.

and the Uncompahgre area." See State's Response, Dkt. 284, p. 16. The State makes this hyperbolic claim even though its own counterclaim does not—and cannot—identify a single instance in which the Ute Tribe has taken action to block, or threatened to block, state law enforcement officers from patrolling roads and highways within the Uintah Basin and the Uncompahgre area. Lacking such specificity, there is no concrete, particularized, actual injury-in-fact. Like the allegations in *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316 (1945), the State's allegations here are "without legal significance and can involve no justiciable question unless and until" the Ute Tribe has acted affirmatively to block, or imminently block, state law enforcement officers from patrolling highway rights-of-way within the exterior boundaries of the Tribe's reservation. *Id*. at 324.

Secondly, the State claims it was injured by the Tribe's exercise of its legal right of termination under the *Disclaimer of Civil/Regulatory Authority*, an act the State characterizes as a "breach" of contract. This claim is preposterous because the State cannot claim injury based on the Tribe's exercise of a legal right of termination—a right the State defendants expressly conferred on the Tribe by their signatures on the Disclaimer![9]

B. Prudential Standing

The Tribe does not dispute that the State, as a sovereign, can represent its citizens in a *parens patraie* capacity. However, the State must have a factual predicate

[9] When a document such as the Disclaimer is of record, the Court is bound by the document, not by a party's factual misstatements of the contents of the document. *Indus. Constr. Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963 (10th Cir. 1994). The Disclaimer is of record in this matter, Dkt. 162-2, Dkt. 238-5, and the terms of the Disclaimer expressly recognized a legal right of termination in the Ute Tribe.

for doing so. There must be some factual basis for asserting that the Ute Tribe is illegally asserting criminal or civil jurisdiction over Utah citizens. It not sufficient for the State to say that the State hopes to utilize discovery in this case as a means of ascertaining the "names of specific individuals affected by tribal action." See State's Response, Dkt. 284, p. 19. When a party's complaint consists of nothing more than conclusory allegations, the Court must ignore the conclusory allegations. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Here, the State's allegations provide no basis for prudential standing even on a *parens patraie* basis.

III. THE STATE OF UTAH HAS NOT JOINED AN INDISPENSALE PARTY

The application of Rule 19 is highly fact specific, and the determination of a party's necessity is a "pragmatic and equitable judgment." *Gonzales v. Metropolitan Transp. Authority*, 174 F.3d 1016, 1019 (9th Cir. 1999); *U.S. ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476, 481 (7th Cir. 1996). The United States is a necessary party to the State's counterclaim for various reasons: the United States has treaty and trust obligations to protect the Tribe's reservation from non-Indian intrusion and encroachment; it is the United States that prosecutes non-misdemeanor crimes committed by Indians within the Reservation, and it is the U.S. Bureau of Indian Affairs (BIA) that provides the bulk of law enforcement services on the Uintah and Ouray Reservation; it is the BIA that reviews and approves the Tribe's civil and criminal ordinances such as the Ute Tribal Employment Rights Office Ordinance ("UTERO Ordinance"), Ordinance 13-016, on March 27, 2013. The State's counterclaim seeks to

have the Tribe's UTERO Ordinance invalidated; it also seeks a judicial declaration that State law enforcement officers have the right to patrol freely inside the exterior boundaries of the Tribe's Reservation and that State officers have the right to stop, detain, arrest and prosecute tribal members for offenses committed inside the Reservation. The State contends that "Tribal members appearing in State Courts" are adequately protected "under Utah law." See State's Response, Dkt. 284, p. 28. In this regard the State's counterclaim is analogous to a suit seeking to adjudicate title to Indian property, the title to which is held in trust by the United States. In such cases, the United States is a necessary *and* indispensable party. *See, e.g., Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975); *Town of Okemah v. United States*, 140 F.2d 963 (10th Cir. 1944).

In addition, however, the State's counterclaim requests that the Court issue a mandatory injunction, compelling the Tribe to "honor the stipulated Cooperative Agreements" that were appended to the Court's order of October 30, 1998, Dkt. 96. The United States is a signatory to each of those agreements and it is a party to the Cooperative Law Enforcement Agreement, Dkt. 96, pp. 17, 26, 27-44. Because two of the agreements have terminated, and the conditions precedent to the third agreement were never satisfied, the State is necessarily asking this Court to mandate that the parties enter into *replacement* agreements. Because the United States was a party to one agreement, and is a signatory to all three agreement, the United States is both a necessary and an indispensable party under the State's counterclaim.

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

A. There Has Been No Express Waiver of Immunity

The State contends that the three agreements appended to the Court's order of October 30, 1998, Dkt. 96, waive the Ute Tribe's immunity *by implication*. However, waivers of tribal immunity must be expressed unequivocally and cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Moreover, as the State itself concedes, two of the agreements have long since been terminated, and the third agreement, with its many conditions precedent, was never implemented, meaning there is no waiver of immunity, not even by implication.

B. Neither the *Ex Parte Young* nor the Recoupment Exceptions Apply

The *Ex Parte Young* exception applies to enjoin state and tribal governments from ongoing violations of federal law. However, it is not the Ute Tribe but the State of Utah and its counties and municipalities that are committing ongoing violations of federal law. In both the 1894 Utah Enabling Act and the Utah Constitution, Art. III, the State of Utah disclaimed "all right and title to . . . all lands . . . held by any Indian or Indian tribes" and agreed that such lands remained "under the absolute jurisdiction and control" of the federal government. It is a violation of the Fourth and Fourteenth Amendments for state officers to arrest Native Americans for crimes committed within Indian Country. *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). And both the U.S. Supreme Court and the Utah appellate courts recognize that state criminal jurisdiction in Indian country is limited to crimes committed "by non-Indians against non-Indians ... and

victimless crimes by non-Indians." *Solem v. Bartlett,* 465 U.S. 463, 465 n. 2 (1984); *State v. Valdez*, 65 P.3d 1191(Utah App. 2003). This means the State of Utah has no basis in law for suggesting that Ute tribal members must vindicate their federal rights through the Utah state courts, as the State argues. See State's Response, Dkt. 284, p. 28 ("Tribal members appearing in State Courts have an adequate remedy under Utah law"). Because the Indian tribes in Utah have never consented to state jurisdiction over their reservations, *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985), the State of Utah has no legal basis for requiring tribal members to defend themselves through the Utah state courts. By arresting and prosecuting members of the Ute Indian Tribe for offenses committed in Indian Country, it is the State defendants—not the Ute Tribe—who must be enjoined from committing ongoing violations of federal law.

Finally, the doctrine of recoupment has no application here. In *Berrey v. Asarco, Inc.*, 439 F.3d 636 (10th Cir. 2006), the Tenth Circuit held that recoupment applies only to:

> . . . the extent of defeating the [sovereign's] claim but not to the extent of a judgment against the [sovereign] *which is affirmative in the sense of involving relief different in kind or nature* to that sought by the [sovereign] *or in the sense of exceeding the amount of the [sovereign's] claims*. (emphasis added)

Id. at 644. Here, the State's counterclaim seeks *affirmative* relief that is "different in kind or nature," or that in fact exceeds the relief sought by the Tribe. The Tribe's new complaint, Dkt. 2, Case No. 2:13-cv-00276, was filed in the alternative to the Tribe's motion for additional proceedings in the original action, Dkt. 153, Case No. 2:75-cv-408. The motion and complaint both seek the same thing: judicial enforcement of the rulings

that were rendered in *Ute Tribe v. State*, 773 F.2d 1087, 1093 (10th Cir. 1986) ("*Ute III*"), and *Ute Tribe v. State*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"). The Tribe is not seeking a new judicial declaration of additional rights not previously adjudicated. The Tribe seeks nothing more than the enforcement of rights that were fully, fairly and *conclusively* adjudicated in the earlier litigation. In contrast, the State is seeking a restriction of the rights that were previously adjudicated. To that extent, there is no waiver of tribal sovereignty through recoupment because the State is affirmatively seeking relief that exceeds the relief sought by the Tribe. *Berrey v. Asarco*.

V. THE STATE'S COUNTERCLAIM FAILS TO STATE A CLAIM

The State does not respond to the Tribe's argument that "the dearth of allegations in the State's counterclaim do not establish any claim on which relief may be granted." See Tribe's Motion to Dismiss, Dkt. 270, p. 15. Instead, the State merely restates its claims in the same conclusory style as the counterclaim, failing to identify a single instance where the Tribe has illegally exercised criminal jurisdiction over a non-Indian individual, or a single instance where 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 and in the Tribe's motion and memorandum, the Court must dismiss the State of Utah's counterclaim.

Respectfully submitted this 6th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2013, I electronically filed the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF ITS RULE 12(b) MOTION 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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