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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, et al.

Defendants.

**THIRD-PARTY DEFENDANTS' RULE
12(b) MOTION AND SUPPORTING
MEMORANDUM TO DISMISS UINTAH
COUNTY'S THIRD-PARTY COMPLAINT**

Consolidated Action

Civil Nos.
2:75-cv-00408-BSJ & 2:13-cv-00276-TS

Senior Judge Bruce S. Jenkins

Third-Party Defendants, the Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation, Gordon Howell, Ronald J. Wopsock, Bruce Ignacio, Stewart Pike, Tony Small, Phillip Chimburas, Chief Judge Paul Tsosie, and Judge William Reynolds ("Third-Party Defendants"), by and through the undersigned counsel, respectfully move to dismiss the third-party complaint filed by the Third-Party Plaintiff Uintah County ("Uintah County" or "Third-Party Plaintiff"), Dkt. 248/252. Uintah County's third-party complaint must be dismissed based on (i) the absence of an Article III case or controversy; (ii) lack of standing; (iii) the Tribe's sovereign immunity from suit, (iv) res judicata, or alternatively, (v) because the third-party complaint fails to state a claim for relief.

Uintah County's third-party complaint has numerous independent flaws, each of which has been briefed in depth in the Ute Tribe's Motion to Dismiss the County's claims directly against the Tribe. Dkt 278 (motion to dismiss and opening brief in support); Dkt. 312 (reply brief in support of motion to dismiss). All of the reasons for dismissal discussed in those briefs, save one, apply in exactly the same way and with exactly equal force for dismissal of Uintah County's claims against the Ute Tribe's Business Committee and the individual tribal officers.¹

The sole issue for which the analysis differs is that analysis of immunity of individually named tribal officers varies slightly from the analysis of immunity of the Tribe/tribal agencies.

¹ The arguments contained in Dkt. 278 and Dkt. 312 are incorporated herein by reference.

Like state and federal officers, tribal officers are generally protected by the sovereign's immunity. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 & n. 22, (1949); Burrell v. Armijo, 603 F.3d 825, 832 (10th Cir. 2010); Burlington N. v. Blackfeet Indian Tribe, 924 F.2d 899, 901 (9th Cir. 1991); United States v. Yakima Tribal Ct., 806 F.2d 853, 861 (9th Cir. 1986); Runsafter v. United States, 766 F.2d 347 (8th Cir. 1985).

In its third-party complaint, Third-Party Plaintiff acknowledges that the named individual counterclaim defendants are tribal officers. Third-Party Complaint ¶¶8-15. Those Business Committee members tribal judges presumptively have sovereign immunity unless Third-Party Plaintiff has pled and is now able to clearly prove an exception to sovereign immunity.

Uintah County's claim is that tribal officers lack immunity through application of Ex Parte Young by analogy to the Tribe and its officers. Under Ex Parte Young, a state or state agency has immunity from federal court suit (including suits for declaratory or injunctive relief), Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487, 495 (10th Cir. 1998)(holding that Ex Parte Young "has no application in suits against the States and their agencies, which are barred regardless of the relief sought."). But under Ex Parte Young, individually named state officers who are violating supreme federal law do not have immunity from a limited group of suits seeking prospective injunctive or declaratory relief if the claimant pleads and proves that the state officers acted "outside the scope of authority". Id.

The Tribal officers' position is that application of Ex Parte Young by analogy to tribal officers is contrary to Supreme Court case law.² "[N]either the Tribe's Constitution nor the federal Constitution is the font of any sovereign power of the Indian tribes." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n. 14 (1981), and Indian tribes were not parties to the plan of convention adopting the Constitution. See Kiowa Tribe of Okla. v. Mfg. Tech., 533 U.S. 751, 756 (1998) (stating "tribes were not at the Constitutional Convention[, t]hey were thus not parties to the mutuality of concession.") (citations omitted); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (citing Blatchford for the proposition that "the plan of the Convention did not surrender Indian tribes' immunity"); Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (noting that "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties"). Compare Central Virginia Comm'y College v. Katz, 546 U.S. 356 (2006) (coming to the "ineluctable conclusion . . . that States agreed in the plan of the Convention not to assert any sovereign immunity defense" to some federal court actions). While states have chosen to enter into a union through which they have subjected their officers to federal suit, the Tribe has not made that choice. The United States has taken many tribal sovereign rights by force, but as noted above, one of the rights which it has NOT taken is tribal sovereign immunity from suit by non-federal plaintiffs.

² The Tenth Circuit recently held that federal courts can apply Ex Parte Young to tribal officers by analogy. Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140 (10th Cir. 2011). Respectfully, the Tenth Circuit is wrong.

But even if the Court were to apply Ex Parte Young to tribal officials by analogy, Third-Party Plaintiff has not made, and cannot make, sufficient allegations to invoke that limited exception, for each of the independent reasons discussed below.

As scope of authority is used in sovereign immunity analysis, a “tribal official—even if sued in his ‘individual capacity’—is only ‘stripped’ of tribal immunity when he acts ‘manifestly or palpably beyond his authority.’” Shenandoah v. Halbritter, 275 F.Supp.2d. 279, 287 n.5 (N.D. N.Y. 2003) (citing Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 359 (2d Cir. 2000)). See also Burrell v. Armijo, 603 F.3d at 833 (Pueblo Governor was shielded by sovereign immunity for official act performed in the scope of his authority); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-80 (9th Cir. 1985) (although tribal officials were sued in their individual capacities, they were protected by sovereign immunity because they were acting within the scope of their authority).

To overcome an official’s sovereign immunity, “a claimant must allege and prove that the officer has acted outside of the scope of his authority.” Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949)). A mere claim of error in the exercise of an official’s authority is not sufficient; the official’s actions must be completely without authority. Larson, 337 U.S. at 690; Bassett, 221 F.Supp.2d at 280; Diver v. Peterson 524 N.W.2d 288 (Minn. App. 1994).

If a tribal governmental agent’s actions relate to the performance of his or her official duties, the actions are generally treated as being within the scope of his or her authority. See Romanella v. Hayward, 933 F. Supp. 163 (D. Conn. 1996) (holding that

tribal employees responsible for the maintenance of a casino parking lot were entitled to assert the Tribe's immunity from suit in their individual capacities even if they may have been negligent, because the claims related directly to their performance of their official duties), aff'd, 114 F.3d 15 (2d Cir. 1997). Compare Romanella to Puyallup Tribe v. Department of Game, 433 U.S. 165, 168 n.3, 171-72 (1977) (suit to enjoin tribal officers permissible where they were acting in individual capacities as fishermen, rather than tribal officers).

Applying the above law to the named tribal court judges, Uintah County's third-party complaint is plainly insufficient, and borders on the frivolous for two independent reasons. First, the County's only allegation related to the Ute Indian Tribal Court is a conclusory assertion that at some unspecified time, some unnamed person sued some County officers in the Tribal Court. Third-Party Complaint ¶25. Uintah County does not identify the alleged suit(s), does not claim that any such suit(s) is/are currently pending, and does not claim that the named tribal court judges took any action whatsoever related to the vaguely referenced case(s). Second, Uintah County does not allege (and would have absolutely no basis to allege) that the named Ute Tribal Court judges have ever done anything as tribal judges other than exercise the judicial authority of the Tribe by hearing and deciding cases which were filed and pending before the Court. The County simply has not alleged that the named tribal court judges did anything outside the scope of their authority. The claims against the named judges must be dismissed.

The claims against the Tribe's Business Committee members must also be dismissed. There are actually no claims at all stated against individual Committee

members. Instead the allegations are against the Business Committee as a body, based upon decisions of that body. For example, Third-Party Plaintiff wants to litigate in this Court against the Tribe's Employment Rights Ordinance. Third-Party Complaint ¶¶68-94. No individual Committee member created or adopted that ordinance. Instead it was adopted by the Tribe, through its Business Committee as a whole, by majority vote of the Committee. Under Ex Parte Young, the Business Committee, as a tribal agency, is immune, see discussion at page 4, supra, and therefore the claims against the individual Business Committee members must be dismissed. Additionally, the claims against the Committee members are for actions within the very core of the "scope of authority" of the Business Committee. Third-Party Plaintiff complains that the Business Committee passed legislation terminating some voluntary agreements with the state or counties, Third-Party Complaint ¶¶62-67; that it adopted a tribal employment rights ordinance, Third-Party Complaint ¶¶68-94; and that it asserted the Tribe's legal positions regarding jurisdiction, Third-Party Complaint ¶¶35-60 and 96-104. As presumably will be undisputed, the Tribal Business Committee's official duties clearly include adopting legislation. Ute Constitution, Art. VI, Section 1(l) (conferring the power to safeguard and promote the peace, safety, moral and general welfare" of the Tribe); Art VI, Sect. 1(b) (conferring on the Tribal Business Committee the express power "to employ legal counsel for the protection and advancement of the rights" of the Tribe Art. VI. Sect 1(q) (conferring the power to cultivate and preserve the Tribe's culture). Even if Ex Parte Young is applied to the Business Committee members by analogy, the Committee members simply do not exceed their authority by passing legislation, and Ex

Parte Young simply does not permit claims against the legislature or the chief executives of a sovereign as a way of challenging legislative or executive acts. Ex Parte Young, 209 U.S. at 157 (expressly rejecting the argument that one can bring a claim against a state governor based upon “the theory that the [governor], as the executive of the state, was, in a general sense, charged with the execution of all its laws.”).

CONCLUSION

Based on the arguments and authorities cited herein and in the incorporated arguments of the Tribe, the Court must dismiss the Uintah County’s third-party complaint against the named Tribal Officers.

Respectfully submitted this 22nd day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2013, I electronically filed the foregoing **THIRD-PARTY DEFENDANTS' RULE 12(b) MOTION AND SUPPORTING MEMORANDUM TO DISMISS UINTAH COUNTY'S THIRD-PARTY COMPLAINT** 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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