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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.	**THE UTE TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND A PERMANENT INJUNCTION BARRING DEFENDANTS FROM RELITIGATING ISSUES THAT HAVE BEEN CONCLUSIVELY ADJUDICATED AND FROM EXERCISING CRIMINAL JURISDICTION OVER NATIVE AMERICANS INSIDE THE UINTAH AND OURAY RESERVATION** Consolidated Action Civil Case Nos. 2:75-cv-00408 and 2:13-cv-00276 Senior Judge Bruce S. Jenkins

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Exhibit X Letter of 10/29/2013 from Attorney Bassett to the Utah Attorney General's Office and Wasatch County Prosecutor, requesting dismissal of charges against Lesa Jenkins for lack of jurisdiction

Exhibit Y Docket in *State of Utah v. Lesa Ann Jenkins*, Case No. 135402644

Pursuant to Federal Rules of Civil Procedure 56, the Ute Indian Tribe respectfully moves for partial summary judgment and for issuance of a permanent injunction to enjoin the Defendants from exercising criminal jurisdiction over Indians for offenses committed inside the Uintah and Ouray Indian Reservation ("U&O Reservation"), and from relitigating the boundaries of the Tribe's U&O Reservation.

STATEMENT OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE

I. Undisputed Facts Related to the Tribe's Reservation Boundaries

1. The Ute Indian Tribe of the Uintah and Ouray Reservation (the "Ute Tribe") was organized under a constitution and bylaws adopted in 1936 and approved by the Secretary of the Interior in 1937.[1]

2. The Tribal Constitution was adopted in accordance with Section 16 of the Indian Reorganization Act of 1934, 43 Stat. 984, 25 U.S.C. § 476. The territory of the U&O Reservation includes both the Uintah Valley Reservation and the Uncompahgre Reservation. See Tribal Constitution, Art. I.

3. The Uintah Valley Reservation was established by an Executive Order dated October 3, 1861, before the State of Utah was admitted to statehood in 1896. Exhibit A.

[1] The Tribe asks the Court to take judicial notice of the Tribe's Constitution and Bylaws, available online at the National Indian Law Library: http://www.narf.org/nill/Constitutions/uteconst/uteconsttoc.htm (last visited 11/27/2013). When a party asks a court to take judicial notice of adjudicative facts and supplies the necessary information, Federal Rule of Evidence 201 "requires the court to comply with the request." *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997).

4. The Uncompahgre Reservation was established by an Executive Order dated January 5, 1882, before the State of Utah's admission to statehood. Exhibit B.

5. The Reservation was later expanded by Congress in 1948. Act of March 11, 1948 (62 Stat. 72). Kappler, Charles J., ed., *Indian Affairs, Laws and Treaties*, Vol. I, p. 901 (Washington Govt. Printing Office 1904).

A. The Uncompahgre Reservation Boundary

6. The Tenth Circuit, sitting *en banc*, ruled in 1985 that "the Uncompahgre Reservation was neither disestablished nor diminished." *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1093 (10th Cir. 1986) ("*Ute III*"). Thus, the Uncompahgre Reservation boundary remains intact as it was established under the 1882 Executive Order, except as modified by the Act of March 11, 1948.

7. Eleven years later in *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"), the Tenth Circuit reaffirmed its ruling in *Ute III* that the Uncompahgre Reservation was never "disestablished nor diminished."

8. The 1882 Executive Order creating the Uncompahgre Reservation established the Reservation boundary as follows:

> Beginning at the southeast corner of township 6 south, range 25 east, Salt Lake meridian; thence west to the southwest corner of township 6 south, range 24 east; thence north along the range line to the northwest corner of said township 6 south, range 24 east; thence west along the first standard parallel south of the Salt Lake base-line to a point where said standard parallel will, when extended, intersect the eastern boundary of the Uintah Indian Reservation as established by C. L. Du Bois, United States deputy surveyor . . . thence along said boundary southeasterly to the Green River; thence down the west bank of Green River to the point where the southern boundary of said Uintah Reservation, as surveyed by Du Bois, intersects said river; thence northwesterly with the southern boundary of

> said reservation to the point where the line between ranges 16 and 17 east, Salt Lake meridian, to the third standard parallel south; thence east along said third standard parallel to the eastern boundary of Utah Territory; thence north along said boundary to a point due east of the beginning; thence due west to the place of beginning.

Exhibit B (emphasis added).

B. The Uintah Valley Reservation Boundaries

9. In *Ute V*, the Tenth Circuit defined the boundaries of the Uintah Valley Reservation to include all lands within the original Reservation boundary except for lands that "passed from [Indian] trust to fee status pursuant to non-Indian settlement under the 1902-1905 allotment legislation." *Ute Indian Tribe v. State of Utah*, 114 F.3d at 1529-31.

10. In *Ute III* the Tenth Circuit said the evidence was "clear" that Congress "did not intend to extinguish the forest lands of the Uintah Reservation," and thus the Court ruled that the forest lands remain a part of the Uintah Valley Reservation. 773 F.2d at 1090. Eleven years later, in *Ute V*, the Tenth Circuit reaffirmed its *Ute III* ruling that the national forest lands remain within the coundary of the Uintah Valley Reservation. 114 F.3d at 1528-29.

11. Following the ruling in *Ute V*, the Tenth Circuit remanded the case to the district court. At the district court's direction, extensive title work was undertaken and two separate maps were produced, the first map showing land ownership inside the original boundary of the Uintah Valley Reservation, and the second map showing jurisdictional boundaries within the same area. See Exhibit C, Uintah Valley Indian

Reservation Jurisdiction and Ownership Maps dated October 21, 1997. (hereinafter "J*urisdiction Map"* or *"Ownership Map*").

12. Indian country inside the original Uintah Valley Reservation boundary is depicted in yellow on the *Jurisdiction Map*, and non-Indian lands are depicted in blue.

13. The State of Utah, Duchesne County, Uintah County, and the Ute Indian Tribe filed a stipulation with the Court related to the maps. See Dkt. 99, Case No. 75-cv-408. Based on the parties' stipulation, the federal district court entered an Order on November 20, 1998, which Order states in pertinent part:

> There will hereafter exist a rebuttable presumption that the maps accurately depict the [ownership and jurisdictional] status of the land. Any individual or entity may seek to rebut this presumption if it is in his, her, or its interest to do so in connection with a particular case or controversy.

Ute Indian Tribe v. State of Utah, Case No. 75-CV-408J, Dkt. 100 (D.Utah Nov. 20, 1998). See Dkt. 100, Case No. 75-cv-408.

II. Undisputed Facts Related to the Defendants' Exercise of Criminal Jurisdiction Over Indians Inside the Tribe's Reservations

A. The State of Utah's First Prosecution of Keith K. Blackhair for the 9/28/2009 Assault of Ute Tribal Member Ramos Ray Cesspooch in the Uncompahgre Reservation "*State v. Blackhair I*"

14. Keith Kessley Blackhair is an enrolled member of the Ute Tribe. See Exhibit D and Exhibit E, Declaration of Keith Kessley Blackhair, ¶ 1.

15. On or about September 28, 2009, Mr. Blackhair was arrested by officers of the Uintah County Sheriff's Department for an alleged assault that occurred that day inside the exterior boundaries of the Uncompahgre Reservation. Exhibit E, Blackhair

Declaration, ¶ 2.

16. The assault victim was another member of the Ute Indian Tribe, Ramos Ray Cesspooch. Exhibit E, Blackhair Declaration, ¶ 2.

17. Mr. Blackhair was handcuffed and arrested by Uintah County Sheriff's deputies and taken to the Uintah County Jail where he was incarcerated and required to post bond of $10,000.00 to secure his release. Exhibit E, ¶ 3.

18. On October 1, 2009, the State of Utah, through Uintah County, formally charged Mr. Blackhair in Utah state court with one count of aggravated assault, a second degree felony, for the 9/28/2009 alleged assault of Ramos Ray Cesspooch, *State of Utah v. Keith Blackhair*, Case No. 091800519, Eighth Judicial District Court, Uintah County, Utah (hereinafter "*State v. Blackhair I*"). Exhibit E, ¶ 3.

19. The case was subsequently dismissed because of the State of Utah's lack of jurisdiction over offenses committed within Indian Country. Exhibit E, ¶ 3.

20. The Tribe asks the Court to take judicial notice of the docket in *State v. Blackhair I*, Case No. 091800519, attached hereto as Exhibit F, as well as the judgment of dismissal that was attached as Exhibit 6 to Mr. Blackhair's Declaration, attached hereto as Exhibit E.

B. The United States' Prosecution of Mr. Blackhair for the 9/28/2009 Assault of Tribal Member Ramos Ray Cesspooch

21. On December 15, 2010, a federal grand jury indicted Mr. Blackhair for the 9/28/2009 alleged assault of Ramos Ray Cesspooch, charging Mr. Blackhair with Assault Resulting in Serious Bodily Injury While Within Indian Country, a violation of 18

U.S.C. §113 (a)(6) and § 1153(a), *United States v. Keith Kessley Blackhair*, Case No. 2:10-cr-01110-CW, U.S. District Court, District of Utah. See Exhibit E, ¶ 6.

22. The Tribe asks the Court to take judicial notice of the federal indictment of Mr. Blackhair in *United States v. Blackhair*, a copy of which is attached as Exhibit 2 to Mr. Blackhair's Declaration, attached hereto as Exhibit E.

23. On March 8, 2012, Mr. Blackhair pled guilty to a reduced misdemeanor assault charge and was sentenced to a term of imprisonment by the U.S. District Court. See Exhibit E, ¶ 5. The Tribe asks the Court to take judicial notice of the judgment and sentence that were entered in *United States v. Blackhair*, a copy of which is attached as Exhibit 3 to Mr. Blackhair's Declaration, Exhibit E.

24. The Tribe asks the Court to take judicial notice of the Indian Country Jurisdiction Memorandum that was filed by the United States in *United States v. Keith Kessley Blackhair*. A copy of that Memorandum is attached hereto as Exhibit G.

C. The State of Utah's Second Prosecution of Mr. Blackhair for the 9/28/2009 Assault of Tribal Member Ramos Ray Cesspooch "*State v. Blackhair II*"

25. Subsequently, on June 6, 2012, the State of Utah, through Uintah County, *again* instituted a criminal prosecution against Mr. Blackhair for the 9/28/2009 assault of Ute tribal member Ramos Ray Cesspooch—the same offense for which Mr. Blackhair was federally convicted just three (3) months earlier. Uintah County's second prosecution of Mr. Blackhair for the 9/28/2009 assault of Ute tribal member Ramos Ray Cesspooch is *State of Utah v. Keith K. Blackhair*, hereinafter "*State v. Blackhair II*", Case No. 121800379, Eighth Judicial District Court, Uintah County, Utah. See Mr.

Blackhair's Declaration, Exhibit E, ¶ 7.

26. On November 1, 2012, Mr. Blackhair, though counsel, filed a motion to dismiss *State v. Blackhair II*, based on the State of Utah's lack of criminal jurisdiction over offenses committed by Indians within Indian Country. See Exhibit 4 to Mr. Blackhair's Declaration, Exhibit E, ¶ 8.

27. On December 18, 2012, the State of Utah, through Uintah County, filed a 40-page objection to Mr. Blackhair's motion to dismiss *State v. Blackhair II*. Exhibit E, ¶ 9.

28. The Tribe asks the Court to take judicial notice of the docket in *State v. Blackhair II*, and the State's objection to Mr. Blackhair's motion to dismiss *State v. Blackhair II*, which are attached hereto as Exhibits H and I.

29. In its objection to Mr. Blackhair's motion to dismiss *State v. Blackhair II*, the State of Utah, through Uintah County, seeks to relitigate the boundaries of the Tribe's Uncompahgre Reservation, as that boundary was determined by the Tenth Circuit in *Ute III* (en banc), and reaffirmed in *Ute V*. The State argues that the Tenth Circuit rulings in *Ute III* and *Ute V* were "wrongly decided" and that the Tenth Circuit rulings are not binding on Utah state courts. See Exhibit I, pp. 1-12.

D. The State of Utah's Prosecution of Maria Josie Jenkins for Alleged Crimes Committed on Her Family's Indian Allotment in the Uintah Valley Reservation

30. Maria Jenkins is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation. See Exhibit J, Declaration of Maria Jenkins, ¶ 1.

31. On October 4, 2012, a Uintah County Sheriff's Deputy drove his patrol car

into the driveway of an Indian allotment in Randlett, Utah, that is owned by Maria Jenkins' family. Exhibit J, Declaration of Maria Jenkins, ¶¶ 2, 3.

32. The Sheriff's Deputy searched Ms. Jenkins' vehicle, handcuffed and arrested her, and took her to the Uintah County Jail where she was incarcerated for over six weeks. Ms. Jenkins had to post bond of $1,000.00 bond in order to secure her release. Exhibit J, Declaration of Maria Jenkins, ¶ 4.

33. When the Uintah County Sheriff's Department arrested Ms. Jenkins, they impounded her automobile and towed the vehicle to an impoundment lot where it was damaged during the impoundment. Ms. Jenkins had to pay more than $300.00 to retrieve the vehicle. Exhibit J, Declaration of Maria Jenkins, ¶ 5.

34. The Indian allotment where the Uintah County Sheriff's Department arrested Ms. Jenkins and impounded her vehicle is located within the Uintah Valley Indian Reservation. Exhibit J, Declaration of Maria Jenkins, ¶ 5.

35. The State of Utah, through Uintah County, is prosecuting Ms. Jenkins in *State of Utah v. Maria Josie Jenkins*, Case No. 121800379, Eighth Judicial District Court, Uintah County, Utah. See Exhibit J, Declaration of Maria Jenkins, ¶ 7.

36. Ms. Jenkins, through counsel, has filed a motion to dismiss *State v. Jenkins*, see Exhibit K, and the State of Utah, through Uintah County, has filed an objection to Ms. Jenkins' motion to dismiss. Exhibit L.

37. The Tribe asks the Court to take judicial notice of the docket in *State v. Maria Josie Jenkins*, Exhibit M, as well as Ms. Jenkins' motion to dismiss the case and the State's objection to Ms. Jenkins' motion to dismiss, Exhibits K and L.

38. In its objection to Ms. Jenkins' motion to dismiss *State v. Jenkins*, the State of Utah, through Uintah County, seeks to relitigate the boundaries of the Tribe's Uncompahgre Reservation, as that boundary was determined by the Tenth Circuit in *Ute III* (en banc), and reaffirmed in *Ute V*. The State argues that the Tenth Circuit rulings in *Ute III* and *Ute V* were "wrongly decided" and that the Tenth Circuit rulings are not binding on Utah state courts. See Exhibit L, pp. 3-16.

E. The State of Utah's Prosecution of Jaymoe Tapoof for Alleged Traffic Offenses Committed Inside the Uncompahgre Reservation

39. Jaymoe Tapoof is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation. See Exhibit N, Declaration of Jaymoe Tapoof, ¶ 1.

40. On November 23, 2012, Mr. Tapoof was cited by a Utah State Highway Trooper for two misdemeanor traffic offenses that occurred on U.S. 40 inside the boundary of the Uncompahgre Reservation. Mr. Tapoof was handcuffed, arrested, and incarcerated in the Uintah County Jail, and had to post a $500.00 bond in order to secure his release. See Exhibit N, ¶¶ 6 & 7.

41. The Utah Highway Patrol also impounded Mr. Tapoof's vehicle. The Tribe asks the Court to take judicial notice of the Vehicle Impound Report completed by the State Highway Patrol from Mr. Tapoof's vehicle. See Exhibit O.

42. Mr. Tapoof filed a motion to dismiss the case for lack of criminal jurisdiction and provided the court with documentary proof that the alleged traffic offenses occurred inside the Uncompahgre Reservation. See Exhibit P.

43. The State of Utah, through Uintah County, does not dispute that Mr.

Tapoof's traffic offenses occurred inside the Uncompahgre Reservation. In a motion seeking additional time to respond to Mr. Tapoof's motion to dismiss, the State of Utah, through Uintah County, admits that "Mr. Tapoof is charged with reckless driving *on the Uncompahgre Reservation*." See Exhibit Q (emphasis added).

44. However, Uintah County Prosecutor Daniel Bokovoy, Esq., advised the Tribe's attorneys that the State of Utah plans to oppose Mr. Tapoof's motion to dismiss by challenging the rulings of the Tenth Circuit in *Ute III* and *Ute V*. See Dkt. 155, Declaration of Frances C. Bassett, ¶ 11. Attorney Bokovoy said that the State prosecutors will ask the Uintah County Justice Court to rule that, contrary to the Tenth Circuit rulings in *Ute III* and *Ute V*, that the Ute Tribe's Uncompahgre Reservation was disestablished or diminished. Id.

F. The State of Utah's Prosecution of Lesa Jenkins for Alleged Traffic Offenses Committed Inside the Uintah Valley Reservation

45. Lesa Ann Jenkins is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation. See Exhibit S, Declaration of Lesa Jenkins, ¶ 1.

46. On July 27, 2013, Ms. Jenkins was cited by a Utah State Highway Trooper for alleged traffic offenses that occurred on State Road 35, Mile Post 23, inside the boundary of the Uintah Valley Reservation. Id. at ¶ 3 and attached citation.

47. The Utah Highway Patrol impounded Ms. Jenkins' vehicle. The Tribe asks the Court to take judicial notice of the Vehicle Impound Report completed by the State Highway Patrol for Ms. Jenkins' vehicle. See Exhibit T, Vehicle Impound Report for Lesa Jenkins' vehicle.

48. The location of Ms. Jenkins' alleged offenses is within the national forest lands of the Uintah Valley Reservation. See Exhibit U, BIA Land Status Verification for MP 23, State Road 35.

49. The location of the alleged offenses is within the area designated as "Indian Country" under the 1997 Uintah Valley Indian Reservation Map, to which the State of Utah stipulated in 1998 in this case. See Dkt. 99, Case No. 75-cv-408; see also Exhibit W, Enlargement of the 1997 Jurisdiction Map with an arrow showing the location of Ms. Jenkins' alleged offenses; see also Exhibit V, Third Declaration of Attorney Frances C. Bassett.

50. On October 29, 2013, Attorney Bassett sent a letter to the Utah Attorney General's Office and the Wasatch County Prosecutor, asking the state to dismiss charges against Lesa Jenkins for lack of criminal jurisdiction over Ms. Jenkins. See Exhibit V. To date, the State of Utah and the Wasatch County Prosecutor have neither responded to Attorney Bassett's letter nor dismissed the charges against Lesa Jenkins.

51. The Tribe asks the Court to take judicial notice of the docket in *State v. Lesa Ann Jenkins*, Wasatch County Justice Court, Case No. 135402644, Exhibit Y.

LEGAL ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of fact is genuine if the issue could be decided in favor of either party. *E.g., Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574 (1986). A fact is material if it might reasonably affect the outcome of the case. *E.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The existence of some alleged factual disputes between the parties does not defeat an otherwise properly supported motion for summary judgment. To defeat the motion, the non-moving party must affirmatively set forth facts showing a genuine issue of disputed material fact. *Id.* at 248-49; *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-86.

Rule 56 does not require that "any discovery take place before summary judgment can be granted." *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). "Indeed, summary judgment can and often should be granted without discovery." *Banks v. Mannoia*, 890 F. Supp. 95, 98 (N.D.N.Y. 1995).

Even when a case is not fully adjudicated under Rule 56, subsection (d)(1) authorizes the court to "determine what material facts are not genuinely at issue" and enter partial summary judgment. Fed. R. Civ. P. 56(d)(1).

When the moving party has met the standard of Rule 56, summary judgment is mandatory." *U.S. Southern Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1006-07 (S.D. Ind. 2003) (citing *Celotex*, 477 U.S. at 322-23).

II. LEGAL AND FACTUAL FRAMEWORK

The Supreme Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory' … and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 *1975), and *Washington v.*

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980); *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-33 (1983).

"Jurisdictional status of land implicates not only ownership, but also the core sovereignty interests of Indian tribes and the federal government in exercising civil and criminal authority over tribal territory." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245-46 (10th Cir. 2000) *abrogated in part on other grounds*, 562 F3d 1249 (10th Cir. 2009).

Indian tribes possess inherent sovereign power to regulate not only the activities of their own tribal members, but the conduct of non-member Indians (members of other federally recognized Indian tribes) when that conduct occurs within the regulating tribe's jurisdictional authority. *See* 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193 (2004) (interpreting 25 U.S.C. § 1301(2); *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 4.01 (12th Ed.).

There is a presumption against state jurisdiction in Indian country. *See Cabazon*, 480 U.S. at 216 n.18; *see also Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980).

> Indian tribes are the wards of the nation. They are communities dependent on the United States … They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (emphasis added).

The term "Indian Country" refers to territory that has been "set aside for the operation of special rules allocating governmental power among Indian tribes, the

federal government, and the states." HANDBOOK OF FEDERAL INDIAN LAW, § 3.01, p. 131. The legal definition of Indian country is found in the U.S. Criminal Code at 18 U.S.C. § 1151. *E.g., Cabazon*, 480 U.S. at 208 n.5 (1987) (citing *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975); *see Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993).

As pertinent here, 18 U.S.C. § 1151 defines Indian Country to include:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation*,
>
> * * * *
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same*.

(emphasis added). The words "all land" and "notwithstanding the issuance of any patent" are terms that were intended by Congress to avoid checkerboard jurisdiction. *See Seymour v. Superintendent*, 368 U.S. 351, 358 (1962); *accord Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477-479 (1976). *See generally* HANDBOOK OF FEDERAL INDIAN LAW, § 3.04[2][c] , p. 192.

Under federal law a state can assume criminal jurisdiction over Indians in Indian Country only "with the consent" of the Indian tribe(s) affected by the assumption. 25 U.S.C. § 1321(a)(1).[2] 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

[2] 25 U.S.C. § 1321(a)(1) reads in pertinent part: "The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption. . . ."

(10th Cir. 1985). In the absence of tribal consent, "state jurisdiction over crimes committed in Indian Country is limited to criminal acts committed 'by non-Indians against non-Indians . . . and victimless crimes by non-Indians.'" *State v. Valdez*, 65 P.3d 1191(Utah App. 2003) (alteration in original), *quoting Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

III. THE DEFENDANTS MUST BE PERMANENTLY ENJOINED FROM EXERCISING CRIMINAL JURISDICTION OVER NATIVE AMERICANS FOR OFFENSES THAT OCCUR IN INDIAN COUNTRY

The U.S. Constitution guarantees the right of each citizen to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. An arrest of a tribal member on tribal land by a state officer is unconstitutional because a warrantless arrest executed outside the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause. *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990); *see also Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002) (extra-territorial search of tribal offices by California district attorney and county sheriff was unconstitutional), *rev'd on other grounds sub nom.*, *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003); *United States v. Foster*, 566 F. Supp. 1403, 1411-1412 (D.C.D. 1983) (extra-territorial arrest was illegal); *District of Columbia v. Perry*, 215 A.2d 845, 847 (D.C. 1996) (extra-territorial arrest was illegal); *South Dakota v. Cummings*, 679 N.W.2d 484 (S.D. 2004) (state deputy in "fresh pursuit" could not pursue a tribal member onto the Pine Ridge Reservation for an off-reservation speeding violation); *Farmington v. Benally*, 892 P.2d 629 (N.M. App. 1995) (disallowing arrest after pursuit).

A. Keith Kessley Blackhair

It is undisputed that Keith Kessley Blackhair is an enrolled member of the Ute Indian Tribe.[3] It is also undisputed that the assault on tribal member Ramos Ray Cesspooch occurred inside the Uncompahgre Reservation.[4] Indeed, based on evidence supplied by the U.S. Attorney's Office for the District of Utah,[5] Mr. Blackhair was convicted by the U.S. District Court for the District of Utah for the assault on Ramos Ray Cesspooch, an assault within Indian Country in violation of 18 U.S.C. § 113(a)(4).[6]

It is undisputed that Mr. Blackhair was incarcerated in the Uintah County Jail and had to post bond to secure his liberty.[7] The State of Utah and Uintah County do not dispute that the assault on Ramos Ray Cesspooch occurred inside the Uncompahgre Reservation. To the contrary, the State of Utah and Uintah Country are utilizing the State prosecution of Mr. Blackhair to relitigate the boundaries of the Tribe's Uncompahgre Reservation, arguing to the state court in *State v. Blackhair* that the Tenth Circuit's rulings in *Ute III* and *Ute V* were "wrongly decided" and that the Utah state court is not bound by the federal court rulings.[8]

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[3] See Undisputed Fact ¶ 14; Exhibits D and E.
[4] See Undisputed Fact ¶ 15; Exhibit E; Undisputed Fact ¶ 18.
[5] See Exhibit G.
[6] See Undisputed Fact ¶ 15; copy of judgment attached as Exhibit 3 to Mr. Blackhair's Declaration, Exhibit E.
[7] See Undisputed Fact ¶ 17; Exhibit E.
[8] Undisputed Fact ¶ 29; Exhibit I.

B. Maria Jenkins

It is undisputed that Maria Jenkins is an enrolled member of the Ute Indian Tribe.[9] It is also undisputed that a Uintah County Sheriff's Deputy arrested Ms. Jenkins inside the boundary of the Tribe's Uintah and Ouray Reservation.[10] It is undisputed that Ms. Jenkins was incarcerated inside the Uintah County Jail; that her vehicle was impounded; and that Ms. Jenkins had to post bond and pay impoundment fees in order to secure her liberty and the return of her vehicle.[11]

The State of Utah and Uintah County do not dispute that Ms. Jenkins was arrested inside the boundary of the Tribe's Reservation. Instead, the State of Utah and Uintah Country are utilizing the state court prosecution of Ms. Jenkins to relitigate the boundaries of the Tribe's Reservation, arguing to the state court in *State v. Jenkins* that the Tenth Circuit's rulings in *Ute III* and *Ute V* were "wrongly decided" and that those rulings are not binding on the Utah state court.[12]

C. Jaymoe Tapoof

It is undisputed that Jaymoe Tapoof is an enrolled member of the Ute Indian Tribe.[13] It is also undisputed that a Utah State Highway Trooper arrested Mr. Tapoof for two misdemeanor traffic offenses that occurred inside the boundary of the Uncompahgre Reservation.[14] It is undisputed that Mr. Tapoof was incarcerated in the Uintah County Jail; that Mr. Tapoof's vehicle was impounded; and that Mr. Tapoof had

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[9] Undisputed Fact ¶ 30; Exhibit J.
[10] Undisputed Facts ¶¶ 31, 32; Exhibit J.
[11] Undisputed Facts ¶¶ 32, 33; Exhibit J.
[12] Undisputed Fact ¶ 38; Exhibit L.
[13] Undisputed Fact ¶ 39; Exhibit N.
[14] Undisputed Fact ¶ 40; Exhibit N.

to post bond in order to secure his liberty.[15]

The State of Utah and Uintah County do not dispute that Mr. Tapoof was arrested inside the boundary of the Tribe's Reservation. To the contrary, the State of Utah and Uintah Country admit in pleadings filed in *State of Utah v. Tapoof* that Mr. Tapoof's traffic offenses occurred "*on the Uncompahgre Reservation*." (emphasis added)[16] The State's prosecutor, Daniel Bokovoy, Esq., admitted to the Tribe's attorney Frances C. Bassett that the State plans to ask the Uintah County Justice Court to relitigate the boundaries of the Uncompahgre Reservation, and to rule, contrary to the holdings in *Ute III* and *Ute V*, that the Uncompahgre Reservation was disestablished or diminished.[17]

D. Lesa Ann Jenkins

It is undisputed that Lesa Ann Jenkins is an enrolled member of the Ute Indian Tribe.[18] It is also undisputed that a Utah State Highway Trooper cited Ms. Jenkins for alleged misdemeanor traffic offenses that occurred inside the boundary of the Uintah Valley Reservation.[19] It is undisputed that Ms. Jenkins' vehicle was impounded and that Ms. Jenkins had to pay impoundment fees in order to secure the return of her vehicle.[20]

There is no genuine issue of material fact surrounding the State Defendants' prosecution of tribal members Keith Blackhair, Maria Jenkins, Jaymoe Tapoof, and Lesa Jenkins. In each case, the State of Utah and its counties are willfully exercising criminal

[15] Undisputed Facts ¶¶ 40, 41; Exhibits N and O.
[16] Undisputed Fact ¶ 43; Exhibits N and Q.
[17] Undisputed Fact ¶ 44; Declaration of Attorney Frances Bassett, Dkt. 155, ¶11.
[18] Undisputed Fact ¶ 45; Exhibit S.
[19] Undisputed Fact ¶ 46; Exhibits S and U.
[20] Undisputed Fact ¶ 47; Exhibit V.

jurisdiction over tribal members for offenses that undisputedly occurred inside the Uintah and Ouray Reservation. By their own admission, the Defendants are prosecuting these tribal members for the improper purpose of relitigating the boundaries of the Ute Tribe's reservation. All four tribal members were illegally arrested by State/County officers; three of the four tribal members were incarcerated in the Uintah County jail; three of the four tribal members had to post bond to secure their liberty; and three of the four tribal members had their vehicles illegally seized by state officers, forcing the three tribal members to pay impoundment fees in order to secure the return of their property.

As a matter of law, the state officers' illegal seizure of Ute tribal members and their property is unconstitutional under the Fourth and Fourteenth Amendments of the U.S. Constitution. *Ross v. Neff*, 905 F.2d 1349, 1354. Further, by their actions the state officers have violated the territorial sovereignty of the Ute Indian Tribe and are deliberately extending the State of Utah's "jurisdiction inside the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction." *South Dakota v. Cummings*, 679 N.W.2d at 487. Therefore, the Ute Tribe is entitled to partial summary judgment and a permanent injunction enjoining all pending and future criminal prosecutions of Native Americans for offenses committed inside the Tribe's reservation. As a matter of law the Tribe has satisfied the requisites for issuance of a permanent injunction.

To obtain a permanent injunction a party must prove (1) actual success on the merits, (2) irreparable harm unless the injunction is issued, (3) the threatened injury

outweighs the harm that the injunction may cause the opposing party, and (4) that the injunction, if issued, will not adversely affect the public interest. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007). The only difference between the requirements for a preliminary injunction and the requirements for a permanent injunction is that a permanent injunction requires a showing of actual success on the merits, whereas a preliminary injunction requires a showing of a substantial likelihood of success on the merits. *Id*.

As to the first requirement, the Tribe prevails on the merits because the State of Utah and its political subdivisions and municipalities have no criminal jurisdiction over Native Americans inside the Tribe's reservation. *See United States v. Felter*, 752 F.2d at 1508 n.7; *United Keetoowah Band of Cherokee Indians v. State of Oklahoma*, 927 F.2d 1170, 1182 (10th Cir. 1991) (affirming a permanent injunction enjoining the Tulsa County District Attorney from exercising criminal jurisdiction over a single Indian allotment in Tulsa County); *Langley v. Ryder*, 602 F. Supp. 335 (W.D. La. 1985) (holding the State of Louisiana lacks criminal jurisdiction to prosecute Native Americans for offenses committed on tribal trust lands).

As to the second requirement, the Tribe has made a sufficient showing of irreparable harm "*as a matter of law*." *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998) (emphasis added). Indian tribes are irreparably harmed when they suffer an unlawful deprivation of their jurisdictional authority. *Comanche Nation v. United States*, 393 F. Supp. 2d 1196, 1205-06, 1210-1211 (W.D. Okla. 2005). Indeed, the Tenth Circuit has "repeatedly stated" that enforcing state

criminal jurisdiction on Indian land is an "invasion of tribal sovereignty" constituting irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255-56 (10th Cir. 2006). State encroachments on tribal sovereignty constitute an irreparable injury because the harm to tribal self-government is "not easily subject to valuation," but more importantly, because "monetary relief might not be available because of the state's sovereign immunity." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001); *see also Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. OKla. 2010) (remedies at law are inadequate to remedy illegal assertions of state jurisdiction in Indian Country); *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d 1217, 1222 (D. Kansas 2002) (monetary damages are not sufficient "to undo the damage" caused by illegal seizures of property and encroachments on tribal sovereignty).

The threat of repeated state prosecutions creates the "prospect of significant interference with [tribal] self-government." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1250, citing *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 716 (10th Cir. 1989). Neither the Ute Tribe nor its tribal members should be "forced to expend time and effort on litigation in a court that does not have jurisdiction over them, and risk inconsistent binding judgments from state and federal courts." *Seneca-Cayuga* at 716.

In *Coeur D'Alene Tribe v. Hammond*, 244 F. Supp.2d 1264 (D. Idaho), the Coeur D'Alene Tribe—like the Ute Tribe here—requested a permanent injunction by means of a motion for partial summary judgment. The district court granted the Tribe's motion for

summary judgment and permanently enjoined the State of Idaho from enforcing a state motor fuel tax on fuel sold inside the Coeur d'Alene, Nez Perce, and Shoshone Bannock Reservations. In doing so the district court emphasized a point that applies with equal force to the Defendants' prosecution of Ute tribal members and the Defendants' illegal assertion of state criminal jurisdiction inside the Ute Tribe's reservation:

> Generally, courts grant equitable relief in the event of irreparable injury and the inadequacy of legal remedies. . . . [citation omitted] . . . When a plaintiff's constitutional rights are violated, there is a *presumption* of irreparable harm. An injunction is therefore the appropriate remedy for a constitutional violation. (emphasis added)

Id. at 1267. Each time the State of Utah extends its criminal jurisdiction inside the Tribe's reservation boundaries, Ute tribal members suffer unconstitutional deprivations of their liberty and/or property, *Ross v. Neff*, 905 F.2d 1349, 1354, and the Ute Tribe suffers an illegal encroachment on its territorial jurisdiction. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1250 (Indian tribes have the inherent right to control access and presence of persons on their Reservations); *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (the disclaimer in the Oklahoma Enabling Act—identical to the Utah Enabling Act of 1894—disclaims both proprietary and governmental authority); *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d 967, 976-81 (10th Cir. 1987) (same);

As a matter of law the threatened injury to the Ute Tribe and its tribal members outweighs any conceivable harm to the State of Utah and its political subdivisions and municipalities. "The federal nature of the law and of the issues to be decided,"

combined with the State's lack of criminal jurisdiction over Native Americans inside the Tribe's reservation, "reduce the State's interest in this litigation to the vanishing point." *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d at 716; *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1251-1252 (the state "has not been prevented from enforcing its registration and titling laws *wholesale*—only with respect to the tribe and its members") (emphasis added).

As a matter of law a permanent injunction will not adversely affect the public interest. Exactly the opposite is true: there is a strong public interest in requiring the State of Utah to recognize and comply with federal laws that protect the integrity of the Ute Tribe's sovereign territory and the Tribe's right to self-governance. *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d at 1223 ("the public has a significant interest in assuring the viability of tribal self-government, self-sufficiency, and self-determination"). *See also Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 988 (affirming injunction against state regulation and taxation over tribal bingo enterprise); *Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d at 1187 (permanently enjoining state court jurisdiction over Indian country tort lawsuits on the Tribe's motion for summary judgment); *Swimming Turtle v. Bd. Of County Commissioners of Miami County*, 441 F. Supp. 374 (N.D. Ind. 1977) (permanently enjoining state taxation of Indian individual); *United States v. Bennett County, South Dakota*, 265 F. Supp. 249 (D. S. Dakota 1967) (permanently enjoining the County from opening a roadway in the Pine Ridge Indian Reservation); *United States v. Fraser*, 156

F. Supp. 144 (D. Montana 1957) (permanently enjoining livestock trespass on Indian lands).

There is a strong public interest in requiring the state defendants to stop violating Ute tribal members' rights under the Fourth and Fourteenth Amendments of the Constitution.

IV. THE DEFENDANTS MUST BE PERMANENTLY ENJOINED FROM RELITIGATING THE TRIBE'S RESERVATION BOUNDARIES

Whether under the doctrine of stare decisis, res judicata, or collateral estopel, both as a matter of law and a matter of equity, the Ute Tribe is entitled to a permanent injunction to enjoin the State defendants from relitigating—for the *third time*—the boundaries of the U&O Reservation. The original litigation and the *second* relitigation of the Tribe's reservation boundaries spanned twenty-five years in the federal courts, between October 15, 1975—when the Tribe's complaint in this action was filed—until the stipulated dismissal was entered on March 28, 2000. The *first* relitigation spanned five years in state and federal courts, culminating in the partial overruling of the decision in *Ute III*.[21] See United States' Memorandum as *Amicus Curiae* in Support of Ute Indian Tribe's Motion for Injunctive Relief, Dkt. 10, filed November 23, 1992.

As a matter of law the Tribe is entitled to a permanent injunction to prevent the State defendants from relitigating and relitigating and relitigating and relitigating the same legal issues that were fully and conclusively adjudicated *for the second time* more than sixteen years ago under the decision in *Ute V*.

[21] *Hagen v. Utah*, 510 U.S. 399 (1994).

The ultimate dismissal of the action under the parties' stipulation does not alter the Tribe's entitlement to injunctive relief.[22] A court-approved voluntary dismissal by stipulation constitutes a judgment on the merits and operates to bar a relitigation of the same legal issues, transactions, or occurrences:

> Because a dismissal with prejudice by order of the court is a judgment on the merits, we hold that a federal court can enjoin a state court proceeding adjudicating an action dealing with the same transaction or occurrence that was the subject of the dismissed cause.

Brooks v. Barbour Energy Corp., 804 F.2d 1144, 1146 (10th Cir. 1986) (permanently enjoining a state court relitigation of matters litigated in earlier federal court proceeding); see also *G.C. and K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1106-07 (9th Cir. 2002) (permanently enjoining litigants from attempting to circumvent a federal court ruling through the state courts in Hawaii); *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556, 565 (2d Cir. 1991) (permanently enjoining a litigant from relitigating federal securities claims, "no matter how denominated"); *Royal Ins. Co. of Am. V. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992) (enjoining a state court relitigation of issues adjudicated in earlier federal court action).

See also Browning Debenture Holders' Committee v. DASA Corp., 454 F. Supp. 88, 97 (S.D. New York 1978) (permanently enjoining a litigant from "*starting this six-year-old action all over again in a new forum*"), aff'd 605 F.2d 35 (2nd Cir. 1978).

A case on all fours with the Tribe's case is *Jackson v. Carter Oil Co.*, 179 F.2d 524, 526 (10th Cir. 1950). In that case the Tenth Circuit affirmed a lower court order that *perpetually* enjoined a litigant from relitigating a matter that—like the case here—

[22] Dkt. 145, Order of Dismissal.

had been "*in the courts*" for decades and was before the Tenth Circuit for "*the third time.*" *Id*. at 525-526 (emphasis added). Like the recalcitrant litigant in *Jackson v. Carter Oil Co.*, the State defendants in this case should be perpetually enjoined from relitigating and relitigating and relitigating and relitigating the Tribe's reservation boundaries.

A. The Anti-Injunction Act Does Not Prevent Entry of a Permanent Injunction

Application of the Anti-Injunction Act is a question of law. *See G.C. and K.B. Investments,* 326 F.3d at 1106. The Act, 28 U.S.C. §2283, prohibits a federal court from enjoining state court proceedings except where "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (emphasis added) The highlighted language was added by Congress to legislatively overrule the holding in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). Although the Act on its face "appears to countenance only three exceptions," historically the courts have recognized "a variety of judicially created exceptions" to the Act's application. *Browning Debenture*, 454 F. Supp. at 100.

The Anti-Injunction Act was "intended to give effect to a familiar rule of comity" and like the rule of comity, the Act itself is "limited in its field of operation." *Id.*, citing *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 183 (1920). Application of the Anti-Injunction Act is tied to "the question of equity" in a given case. *Id.*, citing *Smith v. Apple*, 264 U.S. 274, 279 (1924). One of the traditional judicial exceptions to the Act is invoked to enjoin a state-court proceeding that is patently baseless and vexatious. *Id*.

The baseless/vexatious exception is clearly applicable here: the State of Utah's prosecution of tribal members Blackhair, Tapoof, Maria Jenkins and Lesa Jenkins is plainly baseless and vexatious. The prosecution of Mr. Blackhair is especially baseless/vexatious because the State of Utah and Uintah County actually have had the effrontery to prosecute Mr. Blackhair for an offense that he was previously convicted of and punished by this very federal court in *United States v. Keith Kessley Blackhair*, Case No. 2:10-cr-01110-CW, U.S. District Court, District of Utah. See Exhibit E, ¶ 6.

But, here, as in *Browning Debenture*, it is unnecessary to rely on one or more of the judicial exceptions to the Anti-Injunction Act because this case, like *Browning Debenture*, "falls squarely within the statute's express relitigation exception." *Id.*

> [W]hen a party who has prevailed in federal court has been subjected to multiple lawsuits on the same issues in state fora, injunctive relief will be granted. . . [citation omitted] . . . However, a multiplicity of state lawsuits is *not* a prerequisite to this equitable relief; where the federal litigation has been unusually burdensome or protracted and the losing party simply refuses to be bound by the outcome, even a single state-court action attempting to relitigate the same issue will be enjoined. (emphasis added)

Id. at 101. Both of these factual predicates exist here: the previous federal litigation—both the original litigation and the first and second relitigations—were unusually protracted and burdensome; in addition, the State defendants are attempting a *third relitigation*, this time through a *multiplicity* of state suits. Under these facts, the Tribe's entitlement to injunctive relief is simply beyond cavil. *E.g., Brooks v. Barbour Energy*, 804 F.2d at 1146; *Jackson v. Carter Oil*, 179 F.2d at 526.

B. The Younger Doctrine Does Not Prevent Entry of a Permanent Injunction

Application of the *Younger* doctrine[23] is a question of law. *Younger* abstention requires (*i*) an ongoing state judicial proceeding, (*ii*) the presence of a vital state interest, and (*iii*) an adequate opportunity to raise federal claims in the state proceeding. *See Middlesex County Ethics Comm. V. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). All three conditions must be satisfied before *Younger* abstention is warranted. *Id.* at 432. In *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, the Tenth Circuit ruled that *Younger* abstention is not available when, as here, a State is attempting to extend its state criminal code extra-territorially inside the boundaries of an Indian reservation. *Seneca-Cayuga*, 874 F.2d at 716. The Court explained that "federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country." *Id.* at 713.

Like the Oklahoma state defendants in *Seneca-Cayuga*, the Utah state defendants in this case argue that the Utah state courts are competent to rule on jurisdictional challenges raised by tribal defendants in Utah state courts. In *Seneca-Cayuga*, the Tenth Circuit rejected that same argument:

> State courts are, of course, competent to decide such jurisdictional questions, but the fact that this central issue is not one of state law indicates that the importance of the State's interest in the state litigation is minimal. Where, as in this case, a state court is asked to decide issues of federal law in an area in which federal interests predominate, the State's interest in the litigation is in our view not important enough to warrant *Younger* abstention. Nor would resolution of these issues in state court prevent conflict between the interests of the Tribes, protected by federal law, and the interests of the State. The conflict is inevitable. Because abstention would not mitigate this conflict, the

[23] *Younger v. Harris*, 401 U.S. 37 (1971).

> proper forum to resolve it is federal court. *Cf. United States v. Composite Bd. of Medical Examiners*, 656 F.2d 131, 136 (5th Cir. 1981) (holding alternatively that purpose of *Younger* abstention is to avoid conflict between state and federal governments; where conflict is unavoidable, the proper forum is federal court).

Seneca-Cayuga, 874 F.2d at 714. The Court concluded its analysis by that the "federal nature of the law and of the issues to be decided, combined with the lack of state jurisdiction, reduce the State's interest in [the state litigation] to the vanishing point." *Id.* at 716. Clearly, the same is true here.

Not only is there no vital state interest in the criminal prosecutions of tribal members Blackhair, Tapoof, and Maria and Lesa Jenkins, but in addition, the Ute Tribe, whose sovereign interests are being threatened, has no ability to defend its sovereignty in the state court criminal proceedings because there is no right of intervention in criminal cases generally, nor under the Utah Rules of Criminal Procedure in particular. *See, e.g., United States v. Sullivan*, 6 Fed. Appx. 723 (10th Cir. 2001) (civil rule allowing intervention in civil cases does not apply to criminal cases).

C. Eleventh Amendment Immunity Does Not Prevent Entry of a Permanent Injunction

The State of Utah waived sovereign immunity in 1975 when this suit was first instituted and the State continuously waived sovereign immunity throughout the entire twenty-five years duration of the litigation. Therefore, the State is equitably estopped from asserting sovereign immunity to prevent enforcement of the appellate court rulings that were rendered in the litigation. Furthermore, the U.S. Supreme Court carved out an exception to state sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), to permit prospective injunctive relief against state officers "if the Constitution is to remain the

supreme law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999). The State's prosecution of Ute tribal members for offenses committed inside the Tribe's reservation boundaries is an ongoing violation of federal law that can be prospectively enjoined under the *Ex parte Young* doctrine.

D. The Requirements For a Permanent Injunction Are Met

In this motion the Ute Tribe has established as a matter of undisputed fact that the State of Utah is attempting, for the *third* time, to relitigate the boundaries of the Uintah and Ouray Indian Reservation. This is clear from the State's opposition memoranda filed in *State of Utah v. Blackhair* and *State of Utah v. Maria Jenkins*, where the State argues that the Tenth Circuit decisions in *Ute III* and *Ute V* were "wrongly decided," and that state courts in Utah are free to relitigate the Tribe's reservation boundaries in the Tribe's absence, in state criminal proceedings where the Ute Tribe is not a party before the court. See Exhibits I and L.

As a matter of law the Tribe will suffer irreparable injury if a permanent injunction is not issued. "[T]he question of adequacy of the legal remedy virtually answers itself." *Browning Debenture*, 454 F. Supp. at 99. If the State of Utah is "allowed to start this litigation over at the first rung of a whole new judicial structure, it may well require years to dispose of this case and all of its appeals." *Id*.

State encroachments on tribal sovereignty constitute an irreparable injury because the harm to tribal self-government is "not easily subject to valuation," but more importantly, because "monetary relief might not be available because of the state's sovereign immunity." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234,

1250 (10th Cir. 2001); *see also Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. OKla. 2010) (remedies at law are inadequate to remedy illegal assertions of state jurisdiction in Indian Country); *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d 1217, 1222 (D. Kansas 2002) (monetary damages are not sufficient "to undo the damage" caused by illegal seizures of property and encroachments on tribal sovereignty).

The threat of repeated state prosecutions creates the "prospect of significant interference with [tribal] self-government." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1250, citing *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 716 (10th Cir. 1989). Neither the Ute Tribe nor its tribal members should be "forced to expend time and effort on litigation in a court that does not have jurisdiction over them, and risk inconsistent binding judgments from state and federal courts." *Seneca-Cayuga* at 716.

As a matter of law the threatened injury to the Ute Tribe and its tribal members outweighs any conceivable harm to the State of Utah and its political subdivisions and municipalities. "The federal nature of the law and of the issues to be decided," combined with the State's lack of criminal jurisdiction over Native Americans inside the Tribe's reservation, "reduce the State's interest in this litigation to the vanishing point." *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d at 716; *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1251-1252 (the state "has not been prevented from enforcing its registration and titling laws *wholesale*—only with respect to the tribe and its members") (emphasis added).

As a matter of law a permanent injunction will not adversely affect the public interest. Exactly the opposite is true: there is a strong public interest in requiring the State of Utah to recognize and comply with federal laws that protect the integrity of the Ute Tribe's sovereign territory and the Tribe's right to self-governance. *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d at 1223 ("the public has a significant interest in assuring the viability of tribal self-government, self-sufficiency, and self-determination"). *See also Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 988 (affirming injunction against state regulation and taxation over tribal bingo enterprise); *Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d at 1187 (permanently enjoining state court jurisdiction over Indian country tort lawsuits on the Tribe's motion for summary judgment); *Swimming Turtle v. Bd. Of County Commissioners of Miami County*, 441 F. Supp. 374 (N.D. Ind. 1977) (permanently enjoining state taxation of Indian individual); *United States v. Bennett County, South Dakota*, 265 F. Supp. 249 (D. S. Dakota 1967) (permanently enjoining the County from opening a roadway in the Pine Ridge Indian Reservation); *United States v. Fraser*, 156 F. Supp. 144 (D. Montana 1957) (permanently enjoining livestock trespass on Indian lands).

The other public interest served by issuance of an injunction is to safeguard the finality of judgments. This important public interest is reflected in the legislative history of the 1949 amendment to 28 U.S.C. § 2283, and the cogent analysis of that policy by Justice Reed in *Toucey v. New York Life Ins. Co.*, 314 U.S. at (1941) (dissenting

opinion).[24] There is a strong public interest in expecting parties to abide by and show due respect for the decisions of the federal courts.

CONCLUSION

WHEREFORE the Ute Tribe respectfully requests entry of partial summary judgment and an order that permanently enjoins the Defendants, their agents, employees, successors, attorneys, and all those in active concert or participation with them to refrain from:

1) Prosecuting tribal members Keith Kessley Blackhair, Jaymoe Tapoof, Maria Josie Jenkins and Lesa Ann Jenkins for alleged offenses that undisputedly occurred outside the State of Utah's territorial jurisdiction.
2) Asserting in any court, administrative forum or other law-applying forum that the Uncompahgre Reservation has been disestablished or diminished.
3) 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 Uncompahgre Reservation.
4) Asserting in any court, administrative forum or other law applying forum that the Uintah Valley Reservation has been disestablished.
5) For any land recognized as remaining part of the Uintah Valley Reservation in *Ute Tribe of Indians of the Uintah and Ouray Reservation v. State of Utah*, 773

[24] Congress amended 28 U.S.C. § 2283 to legislatively overrule *Toucey*, and thereby permit federal courts to enjoin state court proceedings when necessary "to protect or effectuate" federal court judgments.

F.2d 1298 (10th Cir. 1985) (*Ute III*) as modified by *Ute Tribe of Indians of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513 (10th Cir. 1993) (*Ute V*), asserting in any court, administrative forum or other law applying forum that such land is not part of the Uintah and Ouray Reservation or is not part of an Indian Reservation as that term is defined in 18 U.S.C. § 1151(a).

6) 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.

7) Seeking, obeying, carrying out, issuing, enforcing, or otherwise treating as having any lawful force or effect any order of any court which is inconsistent with the mandate issued by the United States Court of Appeals for the Tenth Circuit in *Ute III*, as modified in *Ute V* or the orders of this Court after remand.

8) Taking any other action inconsistent with the mandate issued by the United States Court of Appeals for the Tenth Circuit in *Ute III*, as modified in *Ute V* or the judgment of this Court.

Respectfully submitted this 27th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2013, I electronically filed the foregoing **THE UTE TRIBE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND A PERMANENT INJUNCTION BARRING DEFENDANTS FROM RELITIGATING ISSUES THAT HAVE BEEN CONCLUSIVELY ADJUDICATED AND FROM EXERCISING CRIMINAL JURISDICTION OVER NATIVE AMERICANS INSIDE THE UINTAH AND OURAY RESERVATION** 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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