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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 RULE 12(b) MOTION AND SUPPORTING MEMORANDUM TO DISMISS DUCHESNE COUNTY'S COUNTERCLAIM** Consolidated Action Civil Case Nos. 2:13-cv-00276-BSJ & 2:75-cv-00408-BSJ Senior Judge Bruce S. Jenkins

The Ute Indian Tribe respectfully moves to dismiss the counterclaim filed by the Duchesne County, Dkt. 238. Duchesne County's counterclaim 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 counterclaim fails to state a claim for relief.

Duchesne County's counterclaims have numerous independent flaws, each of which leads to dismissal of the claims. First, and most fundamentally, there is no case or controversy, only abstract questions of law and alleged controversies which simply do not exist.

The County's arguments are additionally flawed because it is bringing arguments for which it lacks standing, including several claims which, even if factually supportable, could only be brought by a sovereign, i.e. by the State of Utah, not the County

The County's claims are additionally barred by the Tribe's sovereign immunity from suit. The County erroneously thinks that it can evade sovereign immunity by the simple subterfuge of making demeaning and grossly offensive conclusory allegations. The law says otherwise.

The Counterclaims must also be dismissed because they are based in whole upon County's assertion, directly contrary to the holdings in *Ute III* and *Ute V*, that the Reservation has been disestablished or diminished beyond the holding in *Ute III*/*Ute V*, Complaint, passim (e.g. asserting approximately 80 times that the Reservation is now only a "former Reservation"); and that therefore tribal acts which would be permissible

under those holdings should be enjoined. This, standing alone, leads to dismissal of the complaint based upon res judicata. *Ute III*; *Ute V*.

Count I of Duchesne County's counterclaims is additionally barred by res judicata because it is cut and pasted from a claim which this Court has already dismissed another suit in this Court.

The County's claims are also contrary to the core of the holding, and the core purpose, of the well-established United States Supreme Court holdings regarding exhaustion of tribal court remedies and the "infringement doctrine." For nearly all of the claims the County is bringing, under federal law, the case would have to first be brought by the allegedly harmed individual, within the Tribe's Court.

The County's complaint is also woefully deficient because it does not provide a factual basis for any of the County's claims. There are almost no facts stated in the counterclaims. The few factual allegations in the Counterclaim are stated only in vague conclusory terms, which are insufficient as a matter of law. And even if those conclusory allegations were considered, they are still insufficient to state any cause of action. Most of the facts that are stated are merely contrived by the County, in a transparent attempt to avoid dismissal. Grounded upon its false premise that land which is Reservation under *Ute III/Ute V* is, according to the County, not Reservation, the County then asserts that the Tribe is exercising jurisdiction which it should not be exercising. Since the foundational premise must be rejected, those claims must be dismissed.

Each of these issues will be discussed in turn in this brief, and each, independently provides grounds for dismissing Duchesne County's counterclaims.

A. STATEMENT OF RELEVANT FACTS

The Tribe is a sovereign Indian Tribe, with a federal Reservation, over which it exercises governmental authority, located within this Court's judicial district. *Ute Indian Tribe of the Uintah & Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1528-29 (10th Cir. 1997) (hereinafter *Ute V*). The Tribe has a court system which is open to complaints filed by both Indians and non-Indians. Ex. 1 (Ute Court Rules). Where a case is filed within the Tribe's court system, that system has rules for raising and resolving claims that a tribal administrative agency (for example, its TERO officers or police) or the Tribal Court itself lacks jurisdiction. *Id.*

The counter-complaint filed by the Duchesne County does not identify a single non-Indian individual who has been:

(*i*) stopped, detained, cited, or arrested by tribal police,

(*ii*) incarcerated in a tribal jail, or

(*iii*) prosecuted and convicted by the Ute Tribe in the Tribe's court.

Facts such as these would exist if, as alleged by Duchesne County, the Ute Tribe was asserting and exercising "exclusive" criminal jurisdiction inside the Tribe's reservation boundaries. Further, in contrast to the Tribe's complaint, Dkt. 2 ¶¶ 21-23, the County's counter-complaint contains no allegation that the Ute tribal police:

(*i*) conduct routine police patrols on lands outside the reservation boundaries, or

(*ii*) conduct roadblock inspections of non-Indian motorists or regularly impound motor vehicles belonging to non-Indian individuals, or

(*iii*) racially profile, stop and detain, arrest, cite, and otherwise harass non-Indians when those non-Indians travel inside the Tribe's reservation boundaries.

The County's counterclaim does not identify a single non-Indian individual who has been subjected to an illegal act of civil regulatory or adjudicatory jurisdiction exercised by the Ute Tribe over non-Indian individuals inside the Tribe's reservation boundaries. Facts such as these would also exist if the Tribe were taking the actions which the County conclusorily asserts.

B. LEGAL ARGUMENT

I. STANDARD OF REVIEW

a. Under Rule 12(b)(1).

"Federal courts are courts of limited jurisdiction . . . empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress." *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994) (citations omitted). A plaintiff generally bears the burden of demonstrating the court's jurisdiction to hear his or her claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). A court's first obligation is to determine whether it has subject matter jurisdiction, because that the existence of subject-matter jurisdiction is a threshold inquiry which must precede any merits-based determination. *Id.* at 94 (1998). This requirement is "inflexible and without exception." *Id.* at 95 (internal quotation marks omitted). "For a court to pronounce upon [the merits] when it has no jurisdiction to do so is . . . for a court to act ultra vires". *Id.* at 101-02.

In the Tenth Circuit, motions to dismiss for lack of jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject-matter jurisdiction; or (2) a challenge to the actual facts upon which subject-matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

The Tribe's motion to dismiss Duchesne County's counterclaim is based on both a facial challenge to the sufficiency of the pleading, and a challenge to the facts on which subject-matter jurisdiction is claimed. In a factual challenge to jurisdiction, "a district court *may not* presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Holt v. United States,* 46 F.3d 1000, 1003 (10th Cir. 1995) (citations omitted; emphasis added). When subject matter jurisdiction is challenged, the court presumes lack of subject matter jurisdiction until the plaintiff proves otherwise." *Alleman v. United States,* 372 F. Supp. 2d 1212, 1225 (D. Or. 2005) (citing *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994)).

b. Under Rule 12(b)(6).

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court assumes the well-pled facts in favor of the non-movant, and the Court determines if proof of those assumed facts would constitute a claim for which the claimant would be entitled to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court can take judicial notice of facts and can consider the contents of documents attached to the complaint without converting a 12(b)(6) motion into a summary judgment motion, *Telllaps, Inc. v. Makor Issues & Rights,*

Ltd., 551 U.S. 308 (2007); *Indus. Constr. Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963 (10th Cir. 1994).

"Well-pled facts", as that term applies in a Rule 12(b)(6) analysis, do not include mere conclusory allegations. Where a pleader only makes conclusory allegations (as the County does here for most of its essential allegations) the Court ignores those conclusory allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

II. THERE IS NO ARTICLE III CASE OR CONTROVERSY.

Article III of the United States Constitution limits the jurisdiction of federal courts to "cases and controversies," meaning that cases must be "ripe" for adjudication. The ripeness requirement is a constitutional limitation on the power of federal courts, not just a statutory limitation as found under 28 U.S.C. §§ 1331 and 1332. *See New Mexicans for Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995) (stating that the ripeness inquiry "bears on the court's subject matter jurisdiction under the case or controversy clause of Article III of the Constitution").

Ripeness is a justiciability doctrine that both implements Article III's case-or-controversy requirement and reflects additional prudential considerations that require federal courts to refrain from premature intervention in nascent legal disputes. *Nat'l Park Hospitability Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (citing *Abbott Labs v. Gardner,* 387 U.S. 136, 148-49 (1967)). The ripeness requirement is designed to avoid "premature adjudication." *Id*.

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States.*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580-81 (1985) (the purpose of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.")). Where the likelihood of harm is speculative, the Supreme Court has found cases unripe. *See, e.g., Nat'l Park Hospitability Ass'n,* 538 U.S. at 811; *Reno v. Catholic Social Servs., Inc.,* 509 US. 43, 59 n. 20 (1993); *Poe v. Ullman,* 367 U.S. 497, 508 (1961). It cautions courts against adjudicating "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 580-81 (1974). And if "no irremediable adverse consequences flow from requiring a later challenge," judicial intervention may be premature. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

Here, the Counterclaims do not create a viable Article III case or controversy for the following reasons: first, contrary to the allegations in Duchesne County's counterclaims, the Ute Tribe is neither claiming, nor exercising, "exclusive" criminal jurisdiction authority over lands within its reservation boundaries; second, the County has failed to allege facts showing an illegal assertion of civil and regulatory authority within the Tribe's reservation boundaries;[1] and third, the enactment of UTERO Ordinance does

[1] In Count II and III of its Counterclaim, Duchesne County attempted to plead facts which would create a case or controversy through their assertion that the Tribe was taking actions which were contrary to a "disclaimer agreement." Regardless of whether the Court is reviewing that assertion under Rule 12(b)(1), 12(b)(6), or any other rule, the Court is not bound by the County's erroneous

not violate federal law and does not exceed the Tribe's civil regulatory authority. Duchesne County's counterclaims rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" *Texas v. United States*, 523 U.S. 296, 300, and must be dismissed.

III. ALTERNATIVELY, DUCHESNE COUNTY LACKS STANDING; OR THE THIRD PARTIES ON WHOSE BEHALF DUCHESENE COUNTY SEEKS TO LITIGATE HAVE NOT EXHAUSTED TRIBAL COURT REMEDIES.

A federal court may hear only those cases where a plaintiff has standing to sue. Standing has two components. First, standing has a constitutional component arising from Article III's requirement that federal courts hear only genuine cases or controversies. Second, standing has a prudential component. *See Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1224 n.7 (10th Cir. 2008) (noting that in addition to constitutional standing requirements, "the Supreme Court recognizes a set of 'prudential' standing concerns that may prevent judicial resolution of a case even where constitutional standing exists"). The burden of establishing standing rests on the plaintiff. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). The plaintiff must "allege . . . facts

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allegations. Where a document like this is of record, the Court is bound by the document, not by a party's factually misstatements of the contents of that document. *Indus. Constr. Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963 (10th Cir. 1994). The document is of record in this matter, Dkt. 162-2, Dkt. 238-5, and the contents of the submitted disclaimer agreement expressly provide that it was subject to termination by the Tribe at any time upon 60 days' notice, and further provides that the consideration for the document was the State entering into a related document (which the State, through the counties, then violated). As the County itself admits, Comp. ¶72, the Tribe terminated the "disclaimer" by letter dated May 9, 2011. Doc. 238-1. The County's attempt to rely upon that properly terminated disclaimer is unexplained and unexplainable.

Count I of the counterclaim is flawed for the same reasons discussed in section I of this brief, but is more readily dismissed based upon res judicata, because Count I is a repetition of a claim which this Court, in another matter, has already dismissed.

essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal citations and quotations omitted). Moreover, where the defendant challenges standing, a court must presume lack of jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312. 316 (1991) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) (internal quotation omitted). "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (quoting *FW/PBS v. City of Dallas*, 493 U.S. at 231) (internal citations and quotations omitted).

If Defendant lacks standing for some claims, the Court must dismiss those claims, even if Defendant has standing for other claims "The standing inquiry is both plaintiff-specific and claim-specific. Thus, a reviewing court must determine whether each particular plaintiff is entitled to have a federal court adjudicate each particular claim that he asserts." *Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006) (citing *Allen v. Wright*, 468 U.S. 737 (1984)). *See also Johnstown Feed & Seed, Inc. v. Cont'l W. Ins. Co.*, 641 F. Supp. 2d 1167, 1172 (D. Colo. 2009) (citing *Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265, 1279 (10th Cir. 1998) for the holding that, "Standing is assessed on a claim-by-claim basis, and a plaintiff who has sufficient standing to raise some claims may lack standing to raise others.").

a. Duchesne County Lacks Constitutional Standing.

"Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007). *See* U.S. Const. art. III § 2. The standing doctrine ensures that a litigant's claims arise in a concrete factual context that is appropriate for a judicial resolution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). To have standing, (1) a litigant must have suffered an "injury in fact," defined as an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action; and (3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury cannot be conjectural or hypothetical, and must be "certainly impending to constitute injury in fact." *Whitemore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations omitted). It is the claimant's burden of proof to establish each element of the standing inquiry. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.

"Standing is determined as of the time the action is brought." *Smith v. U.S. Court of Appeals for the Tenth Circuit*, 484 F.3d 1281, 1285 (10th Cir. 2007) (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005)).

Duchesne County lacks constitutional standing because it cannot satisfy even the first prong of the three-pronged test: Duchesne County has not suffered any injury-in-fact. For Counts II, III and IV, it does not even allege injury: it does not claim that it has

been subjected to the UTERO ordinance, or that its own alleged right to travel has been violated.[2] For Counts I and V, it makes patently insufficient conclusory allegations of injury. The County also not allege and does not face the threat of any actual imminent harm.

b. Alternatively, There Is No Prudential Standing.

"Prudential standing is not jurisdictional in the same sense as Article III standing." *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007). Prudential standing consists of "a judicially-created set of principles that, like constitutional standing, places limits on the class of persons who may invoke the courts' decisional and remedial powers." *Bd. of Cnty. Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (internal quotation marks omitted). Generally, there are three prudential-standing requirements: (i) "a plaintiff must assert his own rights, rather than those belonging to third parties"; (ii) "the plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens"; and (iii) "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.* at 1112 (internal quotation marks and citations omitted).

[2] Although Count IV of the counterclaim alleges that the County has a right to travel, Compl. ¶94, the County does not make (and would have no basis upon which to make) the additional required assertion that the Tribe violated the County's alleged right to travel. Count IV is therefore solely based upon alleged third party standing, and is insufficient for third party standing for the reasons discussed in the body of this brief.

Most relevant here is the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

There is an limited exception to this general rule which permits third party standing when: (i) "the party asserting the right has a close relationship with the person who possesses the right"; and (ii) "there is a hindrance to the possessor's ability to his own interests." *Aid for Women*, 441 F.3d at 1111-12.

Duchesne County seeks to fit within this exception by asserting that it has the requisite relationship under the doctrine of *parens patriae*. It is plainly wrong—Duchesne County is not a sovereign, and therefore simply lacks the power to sue under *parens patriae*. "[P]olitical subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae* ...." *In re Multidist. Vehicle Air Pollution M.D.L. No. 31, California v. Auto. Mfrs. Ass'n, Inc.*; 481 F.2d 122, 131 (9th Cir. 1973). *See also Safety Harbor v. Birchfield,* 529 F.2d 1251 (5th Cir. 1976); *Coldsprings Twp. v. Kalkaska Cnty. Zoning Bd. of Appeals,* 755 N.W.2d 553, 555-56 (Mich. App. 2008) (explaining that "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae.*"); *Cnty. of Lexington v. City of Columbia,* 400 S.E.2d 146, 147 (S.C. 1991) ("As a political subdivision of the State, however, it lacks the sovereignty to maintain a suit under the doctrine of *parens patriae*"); *Bd. of Cnty. Comm'rs v. Denver Bd. of Water Comm'rs*, 718 P.2d 235, 241 (Colo. 1986) ("Without belaboring the point, we hold that counties lack the element of sovereignty that

is a necessary prerequisite for *parens patriae* standing."). *Cf. Massachusetts v. Mellon,* 262 U.S. 447, 485–86 (1923) (explaining that when a state's authority is derivative of the federal government, a state cannot use the doctrine of *parens patriae* to sue on behalf of its citizens with respect to the federal government, because "[i]n that field, it is the United States, and not the state, which represents them as *parens patriae*")

The County's attempt to invoke the rights of Utah citizens must be rejected. The State, not the County, was the only party who might have been able to invoke *parens patriae* for Utah citizens; but the State has (we believe for very good reason) not taken the path that Duchesne County unfortunately has taken. The County's claims of standing based upon third parties must be dismissed.

c. Even if the County were permitted to litigate on behalf of third parties, suit would still be barred for failure to exhaust tribal court remedies.

In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), the Supreme Court held that when federal jurisdiction under 28 U.S.C. § 1331 is invoked to determine whether a tribal forum "has exceeded the lawful limits of its jurisdiction . . . exhaustion [of tribal court remedies] is required before such a claim may be entertained by a federal court." *Id.* at 857. The Court reasoned:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Brach policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. at 855-56. The Court was clear in its decision that the "examination should be conducted in the first instance in the Tribal Court itself." *Id.* at 856. The Supreme Court relied on Congress' policy of supporting tribal self-government and self-determination:

> That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

Id. See also, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 (1987).

Applying this rule requiring exhaustion of tribal court remedies, even if we assumed arguendo that Duchesne County could avoid dismissal based upon subsections (a) and (b) of this section of the brief, it still would not be able to bring the claims. Instead, the harmed party would need to first bring that claim in the Tribe's Court, and the Tribe's Court would then determine the facts and apply the law to make the initial determination of its jurisdiction. We need not belabor this point either. Tribal remedies have not even been initiated, and therefore, obviously, have not been exhausted. The County's claims on behalf of third parties must be dismissed.

IV. THE TRIBE HAS IMMUNITY AGAINST DUCHESNE COUNTY'S CLAIMS.

As a matter of law Indian tribes and their governing bodies are not subject to suit unless a tribe has waived its sovereign immunity or Congress has expressly authorized the action. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1988). The issue of tribal sovereign immunity is jurisdictional. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Indian tribes

enjoy immunity from suits whether the conduct giving rise to a complaint occurs on or off reservation. *Id*. Moreover, tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). As pertinent here, a tribe does not waive its sovereign immunity "from actions that could not otherwise be brought" against it merely because the claims are "pleaded in a counterclaim to an action filed by the tribe." *Okla. Tax Comm'n v. Potawatomie Indian Tribe*, 498 U.S. 505 (1991). This rule applies even to compulsory counterclaims under Rule 13(a). *Macarthur v. San Juan Cnty.*, 391 F. Supp. 2d 995, 1036 (D. Utah 2005).

The Tenth Circuit has recognized that tribal sovereign immunity does not preclude suits brought to enjoin alleged violations of federal law that are ongoing. *Crowe & Dunlevy P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011) (extending the *Ex parte Young* exception to tribal sovereign immunity). In *Dunlevy* the violation of federal law consisted of a tribal court's issuance of an unlawful order in excess of the tribal court's jurisdiction. *Id.* at 1155-56. However, *Dunlevy* is readily distinguishable from the case at bar in the following respects: first, Duchesne County's counterclaims do not adequately allege any violations of federal law by the Ute Indian Tribe;[3] second, the Tribe's enactment of UTERO Ordinance does not violate federal law and does not exceed the Tribe's civil regulatory

[3] In a transparent attempt to plead around sovereign immunity, Duchesne County makes conclusory allegations against individual tribal officers (who apparently have not been served as of the date this brief is written) and the County duplicates a claim which it previously made but which this Court previously dismissed.

authority;[4] and third, the Ute Tribe is neither claiming, nor exercising, exclusive criminal jurisdiction authority inside the Tribe's reservation boundaries.

Because the Ute Tribe has not waived immunity to the Duchesne County's counterclaims, those counterclaim must be dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity.

V. DUCHESNE COUNTY'S CLAIMS ARE WHOLLY BARRED BY RES JUDICATA.

Through final and unalterable orders to date, stemming from adversarial and disputed litigation, the federal courts have determined that the United States and the Tribe have exclusive jurisdiction over the Uintah Valley and Uncompahgre Reservations, *Ute V*, 114 F.3d at 1528-29; that the State of Utah and its countries were properly enjoined from exercising such jurisdiction, *id.* at 1521; and that the State has jurisdiction over non-Reservation land. The federal courts have further definitively determined the Reservation status of most of the land, including, *inte*r *alia*, that the Uncompahgre Reservation was neither disestablished nor diminished; the National Forest Lands remain part of the Reservation; allotted lands remain part of the Reservation; lands returned to the Tribe were returned to the Reservation; and land acquired by non-Indian people or entities other than through the 1902-1905 Act(s) remain Reservation.

For the Tribe's Uintah Valley Reservation, the United States Court of Appeals remanded the case to this Court to apply a specific three-element test to determine

[4] As discussed in detail in the Tribe's motion to dismiss Uintah County's similar counterclaim, in approving the Tribe's UTERO ordinance, the United States determined that the ordinance does not violate federal law.

whether its prior mandate (that all land within the Uintah Valley Reservation remained Reservation) should be modified. If any element is lacking, then the prior mandate--that the land is Reservation -- is binding. Only where all three-elements are met is the prior mandate modified.

The binding three-element test is that lands within the Uintah Valley Reservation remain Reservation unless it was:

> "1) unalloted,
> 2) opened to non-Indian settlement under the 1902-1905 legislation, and
> 3) not thereafter returned to tribal ownership."

Ute V at 1528 (numbering added).

The Tenth Circuit remanded the case solely for this Court to apply the three-element test and to modify its injunction for land which met that three-element test. *Ute V* at 1529-1531.

Contrary to the binding res judicata of this case, the core element of Duchesne County's complaint is merely another attempt to relitigate the issues that it lost in *Ute III* and/or *Ute V*. Duchesne County pleads that the Reservation has been disestablished or has been further diminished. In fact, although the United States Supreme Court, the Tenth Circuit, this Court, and the Utah Supreme Court have all held that the Reservation has not been disestablished, Duchesne County's answer and counterclaims are based upon approximately 80 separate assertions that the existing Reservation is only a "former Reservation". Dkt. 238, passim.

Duchesne County's claims are barred by res judicata and by the mandate of issues decided and the narrow issues remanded by the Tenth Circuit in *Ute V*. This Court can

decide res judicata in a FRCP 12 motion, *see generally* 5C Charles Alan Wright & Arthur R. Miller, *Fed. Prac & Proc. Civ.* §1360 (3d ed.) (discussing the case law and policy reasons supporting dismissal under FRCP 12 when a claim is barred by res judicata)18 Charles Alan Wright and Arthur R. Miller, *Fed. Prac & Proc. Juris.* § 4405 at n. 32 (2d ed) (same), and when it does resolve the res judicata issue, it must dismiss Duchesne County's counterclaims.

This Court has previously ruled on this exact legal issue, but in a far more complex and closer context after the United States Supreme Court's decision in *Hagen v. Utah,* 510 U.S. 399 (1994). Even in that context--where Duchesne County had a stronger argument--this Court correctly rejected the County's argument; and on appeal the Tenth Circuit affirmed this Court, holding "the district court properly followed our mandate in *Ute Indian Tribe III* by continuing to enjoin the state and local defendants from exercising jurisdiction pursuant to *Hagen." Ute V. at 1521.* The Court must reject Duchesne County's newest invitation to relitigate Reservation boundaries based upon the County's 80 assertions that Reservation is a "former Reservation." This Court must dismiss Duchesne County's counterclaims.

Redundantly, the Court must also dismiss Count I of Duchesne County's counterclaims because that Count is a repetition of a claim the County previously brought, and which this Court dismissed, in *Poulson v. Ute Indian Tribe of the Uintah and Ouray Reservation*, case no. 12-cv-00497 BSJ, Order (Nov. 13, 2012). In Count I of its counterclaims, the County, without specificity, asserts that County officers have been sued in the Tribe's Court by members of the Tribe—i.e. not the Tribe. Comp. ¶43. But

from this, the County makes the legally unsupported and otherwise troubling leap to a claim against the Tribe and Tribal Council members.[5] Comp. ¶44. Uintah County made a similarly erroneous allegation, as discussed in more detail in the Tribe's motion to dismiss Uintah County's counterclaims. But Duchesne County then strays even father from the proper pleading requirements. It asserts that the Tribe is not only responsible for the filings by the private parties, but additionally asserts as a "fact" variously grossly offensive conclusory assertions that the Tribe is making these filings for various nefarious purposes.

As this Court knows, Duchesne County recently brought this same unsupported claim *Poulson,* and this Court dismissed that claim against the Tribe and its Council members. *Poulson v. Ute Indian Tribe of the Uintah and Ouray Reservation*, case no. 12-cv-00497 BSJ, Order (Nov. 13, 2012). We need not belabor the point—we need not again run through the numerous flaws in the claims which are in Count I of the County's Counterclaims.[6] As it did in Poulson, this Court must dismiss the claim.

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[5] It appears clear that the County would not argue that the Utah is responsible for all acts of Utah residents, and that the County would not argue that it could sue the State of Colorado if citizens or residents of that State were to file suits against County officers. There are enough real issues which need to be resolved between the Tribe and the State of Utah, without the County attempting to manufacture claims by assertions that the Tribe is legally responsible for all of the filings of reservation residents.

[6] The flaws include that there is no applicable waiver of sovereign immunity, that the County's allegations are based upon conclusory (and false) allegations; that the Tribe does not have strict liability for the acts of anyone who files a suit in Tribe's Court, and that the Tribe has absolutely every right to provide financial assistance to tribal members, e.g. for the estate of a Tribal member where the County admits that its officers killed the member, and there is contentious litigation regarding whether the killing was wrongful, where there is at this very moment a pending motion based upon the County apparently destroying evidence related to that killing. Reasonable minds might disagree about suits like that, but there is no way that suits like that can be dismissed as "sham lawsuits".

VI. ALTERNATIVELY, DUCHESNE COUNTY HAS FAILED TO STATE A CLAIM FOR RELIEF.

A Rule 12(b)(6) motion turns on whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). To pass muster, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face," and that requires "more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007). Under this standard a claim need not be probable, but there must be facts showing more than a "sheer possibility" of wrongdoing. *Id.* Although all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp.*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

Here, the dearth of allegations in Duchesne County's counterclaim do not establish any claim on which relief may be granted. The complaint does not allege a single instance wherein the Ute Tribe has illegally exercised criminal jurisdiction over a non-Indian individual. Nor does the complaint cite a single instance (other than in Count I, where it repeats the unsupported claim dismissed in Poulson) wherein the Tribe has exceeded its

civil and regulatory authority over Duchesne County or over any individual non-Indian within the Tribe's reservation.

In Count IV, for example, Duchesne County asks the Court to declare "public" the roadways inside the Tribe's Reservation. But as discussed above, the County does not allege any violation of its alleged right to travel, makes only conclusory (and factually incorrect) allegations of violations of the right of Utah citizens.

But even if it could get past those fatal deficiencies in its "right to travel claim, The requested relief is beyond the power of the judicial branch of government because it is the Congress that has "plenary and exclusive" authority with respect to Indian tribes. *E.g., United States v. Lara*, 541 U.S. 193, 200 (2004). And Congress has enacted a legal framework for the federal government's issuance of rights–of-way on Indian lands. See 25 U.S.C. §§ 323-328 and its implementing regulations. The framework established by the political branches of government provides the sole means for establishing roadway easements in Indian Country. Nonetheless, even assuming, arguendo, that this Court could constitutionally declare roadways in Indian Country, the United States is a necessary and indispensable party because the federal government "is an indispensable party to any suit brought to establish an interest in Indian trust land." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 n. 4 (9th Cir. 1991), *citing Minnesota v. United States*, 305 U.S. 382, 386 (1939). It is seeking to have the issue decided in the wrong forum, it does not have the proper parties, and fails to allege any cognizable violation in any case. Each, independent, requires dismissal of Count IV of the Counterclaims.

Finally, the Court must dismiss Count V of Duchesne County's counterclaims because that count is goes far beyond the bounds of legal pleading, to, without any factual basis, "play the race card"—alleging that the Tribe is engages in nefarious activities against white citizens based upon the Tribe's supposed racial animus. The Tribe notes, with appreciation, that neither Uintah County nor the State of Utah has joined Duchesne County in that improper argument.

Federal courts simply do not allow parties to get away with what Duchesne County is doing here. Under United States Supreme Court precedents, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). Applying that precedent to Count V of the Counterclaims, the count is plainly insufficient. For example, in *McKnight v. Middleton*, 699 F. Supp. 2d 507, 530 (E.D.N.Y. 2010) *aff'd*, 434 F. App'x 32 (2d Cir. 2011), the court applied the controlling holdings from *Twombly* and *Iqbal* to a civil rights claim in which a plaintiff made similar conclusory allegations of racial animus. The court held: "The events of intentional and purposeful discrimination, as well as the racial animus constituting the motivating factor for defendants' actions, must be specifically pleaded in the complaint." The court dismissed all federal law claims with prejudice and then dismissed all pendant state law claims. *See also Friemuth v. Fiskars Brands, Inc.* 681 F. Supp. 2d 985 (W.D. Wisc. 2010); *Johnson v. City of New York*, 669 F. Supp. 2d 444 (S.D.N.Y. 2009). A civil rights claim must be supported by factual allegations, not name calling and proverbial bomb-throwing.

CONCLUSION

Based on the arguments and authorities cited herein, the Court must dismiss the Duchesne County's counterclaims.

Respectfully submitted this 12th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2013, I electronically filed the foregoing **PLAINTIFF'S RULE 12(b) MOTION AND SUPPORTING MEMORANDUM 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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