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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH and OURAY RESERVATION, UTAH, Plaintiff, v. THE STATE OF UTAH, DUCHESNE COUNTY, a political subdivision of the State of Utah, ROOSEVELT CITY, a municipal Corporation, DUCHESNE CITY, a municipal Corporation, MYTON, a municipal corporation, and UINTAH COUNTY, a political subdivision of the State of Utah, Defendants.	**DUCHESNE COUNTY'S OPPOSITION TO UTE TRIBE'S MOTION TO DISMISS** CONSOLIDATED CASES Civil No. 2:75-cv-00408 and 2:13-cv-00276-BSJ Judge Bruce S. Jenkins Magistrate Judge Evelyn J. Furse

Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Tribe") has moved to dismiss the *Counterclaims* and *Third-Party Complaints* filed by the State of Utah, Uintah County and Duchesne County.[1] The State of Utah and Uintah County have both submitted *Memoranda* in opposition to those *Motions*.[2] Duchesne County, therefore,

[1] Doc. 222, 270 and 271.

[2] Doc. 249 and 284.

adopts, joins in and incorporates by reference the arguments raised by the State of Utah and Uintah County to the Ute Tribe's *Motions to Dismiss*. In addition, Duchesne County now submits the *Memorandum* in opposition to the Tribe's *Motion to Dismiss*.[3]

INTRODUCTION

By way of *Counterclaim* or *Third-Party Complaint*, Duchesne County has asserted five claims for declaratory and injunctive relief. These are: to enjoin the Ute Tribe's efforts to obstruct justice by orchestrating, funding or otherwise aiding and abetting its members in bringing sham lawsuits against County officials;[4] to enjoin the Ute Tribe's illegal and unconstitutional assertion of law enforcement authority over federal, State and County roads and rights-of-way;[5] to enjoin the Ute Tribe's illegal and unconstitutional assertion of civil regulatory authority over non-members and non-tribal lands;[6] to enjoin the Ute Tribe from closing public road and rights-of-way to County officials and

[3] Doc. 271.

[4] Doc. 239, *Counterclaim* and *Third-Party Complaint*, ¶'s 42 through 49.

[5] Id. at ¶'s 51 through 65.

[6] *Id.* at ¶'s 66 through 92.

members of the general public;[7] and to enjoin the Ute Tribe from continuing to violate the constitutional rights, privileges and immunities of the County and its citizens.[8]

The Ute Tribe argues that these claims should be dismissed because there is no justifiable case or controversy; because Duchesne County lacks standing to assert any claims; because Duchesne County has failed to exhaust its remedies in the Ute Tribal Court; because the Ute Tribe is immune from suit; because Duchesne County's claims are somehow barred by *res judicata*; and because Duchesne County has failed to state a claim for relief.[9] Duchesne County will address each of the Ute Tribe's arguments in turn but first it is important to reflect upon Utah's unique history when it comes to eventually determining the County's criminal jurisdiction and civil regulatory authority within the Ute Tribe's "*former Reservation*."[10]

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[7] *Id.* at ¶'s 93 through 100.

[8] *Id.* at ¶'s 101 through 104. For purposes of proceeding under federal civil rights laws, Duchesne County is a "person." *See Rural Water District No. 1 v. City of Wilson, Kansas*, 243 F.3d 1263, 1274 (10th Cir. 2001).

[9] In its argument in opposition to the Ute Tribe's contention that Duchesne County has failed to state a claim for relief, the County will also address the "*Statement of Relevant Facts*" set out by the Tribe in pages 4 through 5 of its *Motion to Dismiss*. Doc. 271.

[10] Duchesne County's use of the term "*former Reservation*" is intended to emphasize that the Ute Tribe is attempting to assert civil and criminal jurisdiction over non-members and non-member owned land within the exterior boundaries of its original reservation; whereas the original Ute Reservation has been considerably diminished by decisions of the Tenth Circuit and United States Supreme Court. *See, e.g. Ute Indian*

BACKGROUND

At the heart of the Ute Tribe's *Motions to Dismiss* is the notion that state law stops at the borders of an Indian reservation. But that is not so. The United States Supreme Court has made clear that Utah and Duchesne County's sovereignty do not end at the *former Reservation's* borders. "[A]n Indian reservation is now considered part of the territory of the State." [11] Moreover, in resolving conflicts between state and tribal authority, federal courts typically look to the historical relationships between the tribe, state and federal governments.[12] In fact, Utah's governmental history reveals a

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Tribe of Uintah and Ouray Reservation v. Utah, 114 F.3d 1513 (10th cir. 1997); *Hagan v. Utah*, 510 U.S. 399 (1985). Similarly, the federal courts have severely restricted the Ute Tribe's governmental authority over non-members and non-member land within the *former Reservation* as the result of decisions such as *Nevada v. Hicks*, 533 U.S. 353 (2001); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *Strate v. A-1 Contractors*, 520 U.S. 438 (1981); whereas these same decisions and others such as *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946)("In the absence of limiting treaty obligations or Congressional enactment each state has a right to exercise jurisdiction over Indian reservations within its boundaries), *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885)(on reservation non-Indian-owned property is taxable) and *United States v. Mc Bratney*, 104 U.S. 621 (1881)(Colorado had jurisdiction over non-Indian who murdered another non-Indian within a reservation boundaries) have consistently recognized a state's right to govern-regulate on reservation activities.

[11] *Hicks*, 533 U.S. 353, 360-61 (2001). *Accord, Shakopee Mdewakanto Sioux Community v. City of Prior Lake, Minnesota*, 771 F.2d 1153, 1156 (8th Cir. 1985)(Reservation communities are still part of the state in which they are located and the political subdivisions of that state).

[12] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

sovereignty and dominion over Indians and Indian lands not enjoyed by other states and not otherwise diminished by Utah's admission to the Union.

Utah has a unique history because it first existed as an independent country established beyond the territorial boundaries of the United States. Originally known as the State of Deseret, Utah was established in an area which was part of the Territory of Mexico. The land occupied by the State of Deseret did not become part of the United States until the *Treaty of Guadalupe Hidalgo* was signed, thereby ending the Mexican War. Furthermore, the dominion which the State of Deseret enjoyed over its lands and the people residing on those lands is very instructive on the issue of the State of Utah and its political subdivision's broad jurisdiction within a reservation's boundaries.

As a separate, independent nation, the State of Deseret had its own *Constitution*. The following language from its *Preamble* reveals that the framers considered the State of Deseret to be not only a free and independent government, but to have dominion over a tremendous area of what would later become the Western United States:

> WE THE PEOPLE, Grateful to the SUPREME BEING for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of these blessings, DO ORDAIN, AND ESTABLISH A FREE AND INDEPENDENT GOVERNMENT, by the name of the STATE OF DESERET; including all the Territory of the United States, within the following boundaries, to wit: Commencing at 33°, North Latitude where it crosses the 108°, Longitude, west of Greenwich; thence running South and West to the Northern boundary of Mexico, thence West to, and down the Main Channel of the Gila

> River, (or the Northern line of Mexico,) and on the Northern boundary of the Lower California to the Pacific Ocean; thence along the Coast North Westerly to the 118°, 30' of west Longitude; Thence North to where said line intersects the dividing ridge of the Sierra Nevada Mountains to the dividing range of the Mountains, that separate the Waters flowing into the Columbia River, from the Waters running into the Great Basin; thence Easterly along the dividing range of Mountains that separate said waters flowing into the Columbia river on the North, from the waters flowing into the Great Basin on the South, to the summit of the Wind River chain of mountains; thence South East and South by the dividing range of Mountains that separate the waters flowing into the Gulf of Mexico, from the waters flowing into the Gulf of California, to the place of BEGINNING; as set forth in a map drawn by Charles Preuss, and published by order of the Senate of the United States, in 1848.[13]

The land area over which the State of Deseret claimed dominion included not only the entire States of Utah and Nevada, but one-third or more of the States of Arizona, Colorado and New Mexico, as well as all of what is now Southern California.

It is also important to note that there is no reference in the *Constitution* of the State of Deseret to "**Indians**" or "**Indian lands**." But it is perhaps more important to note that the lands and people falling within the jurisdiction of the State of Deseret included Indian lands and their Indian residents and that the *Constitution* of the State of Deseret established legislative, executive and judicial branches to govern all lands and people within the State of Deseret, including Indians. In other words, the *Constitution* of the

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[13] *Deseret Constitution Preamble*.

State of Deseret provided for its governance and dominion over all people and lands lying within its boundaries, which included Indians and Indian lands. Moreover, the State of Deseret's dominion over tribal governments did not change when it became a United States territory.

In 1850, Utah officially became a territory of the United States of America. The *Organic Act of the Territory of Utah* established the Utah Territory and, like the *Constitution* of the State of Deseret, does not reference either "Indians" or "Indian lands." [14] Instead, it established the boundaries of the Utah Territory, changed the name from State of Deseret to "Utah," created the Utah Territorial Government and vested it with jurisdiction over **all** people and lands within the Utah Territory. The land mass of the Utah Territory was much smaller than its former State of Deseret and included what would become the States of Utah and Nevada as well as the western half of Colorado. Within this territory were Indian lands and Indian people, including the Ute Tribe, over whom the Utah Territorial Government could exercise jurisdiction.

The Utah *Organic Acts*, with its recognition of the Utah Territorial Government's dominion and governance over all persons residing within the Utah Territory, is significant when compared with the *Organic Acts* for other western states. For example,

[14] *See* 9 *Stat.* 453, Ch. 51.

the *Organic Act* creating the Montana Territory placed the following limitation upon that Territorial Government's jurisdiction over Indians and/or their lands:

> **That nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians or to include any territory which by treaty within the Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be accepted out of the boundaries and constitute no part of the territory of Montana, until said tribes shall signify their assent to the president of the United States to be included within said territory**, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, or property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this Act had never passed.[15]

With the creation of the Montana Territory, Congress reserved to itself jurisdiction over Tribes and Tribal lands; whereas Utah's *Organic Act*, on the other hand, did not place such limitations/restrictions on the Utah Territorial Government's jurisdiction over Indians or Indian lands. The Utah Territory was vested with complete jurisdiction over tribes and tribal lands, and that did not change with Utah statehood.

Utah became part of the United States in 1896. In order to obtain admission to the Union, the Utah *Constitution* had to "disclaim all right and title . . . to all lands lying

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[15] 12 *Stat.* 85, Ch. 95, §1.(emphasis added).

within said limits owned or held by any Indian or Indian tribe, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."[16] But "absolute jurisdiction" is not the same as "exclusive jurisdiction and control."[17] This language was merely an acknowledgment by the State of Utah of Congress's plenary power over tribes and tribal lands, it was not a divestiture of the jurisdiction over tribes and tribal lands that had passed from the Utah Territorial Government to the State of Utah.[18]

ARGUMENT: THERE IS A JUSTIFIABLE CASE OR CONTROVERSY

The argument proffered by the Ute Tribe on the issue of a case or controversy is simple. The Ute Tribe contends that there is no case or controversy because it is neither claiming nor exercising "exclusive" criminal jurisdiction within the boundaries of its *former Reservation*; the County has failed to allege facts showing an illegal assertion of civil regulatory authority; and the *UTERO Ordinance* does not exceed the Tribe's

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[16] *Utah Constitution, Art. III, Section 2.*

[17] *See Organized Village of Kake v. Eagan,* 369 U.S. 60, 67 (1962)(Construing identical language in the *Alaska Statehood Act*).

[18] *See id.*

authority. These, however, are issues of disputed fact which means that there is indeed a case or controversy.

In making this argument, the Ute Tribe likewise ignores the allegations contained in Duchesne County's *Counterclaim* and *Third-Party Complaint* about the Tribe not only exceeding its lawful authority *vis-a-vis* the activities and rights of non-Indians, but also the allegations about the Ute Tribe interfering with and obstructing Duchesne County in its exercise of the County's civil and law enforcement authority. The Ute Tribe ignores, too, the exhibits attached to Duchesne County's pleadings and incorporated by reference. Exhibits such as the January 30, 2012 letter from Tribal Business Committee's to the Duchesne County Commission announcing that the Ute Tribe "retains criminal jurisdiction over any right-of-way running through Indian Country . . .[and further stating that] the granting of an easement for a right-of-way does not confer criminal jurisdiction to the State of Utah or its officers."[19]

Similarly, the Ute Tribe ignores the Business Committee's December 14, 2012 letter to Kirk Wood, Chairman of the Duchesne County Commission, and County Sheriff

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[19] Doc. 239-4, Duchesne County *Counterclaim*, Exhibit 4 page 3. The Tribe's claim to jurisdiction over public right-of-ways is contrary to law. *See Montana DOT v. King*, 191 F.3d 1108 (9th Cir. 1997)(Montana's jurisdiction over public right-of-way through reservation not subject to tribal authority-control) and *United States v. McBratney*, 104 U.S. 621 (1881)(Colorado had jurisdiction over non-Indian who murdered another non-Indian within a reservation boundaries)

Travis Mitchel about a confrontation between Duchesne County Deputies and Tribal Officers with respect to jurisdiction over a public road across the Midview Reservoir and access via that road by non-Indians to their property.[20] Notwithstanding the Tribe's arguments to the contrary, these and the other exhibits attached to Duchesne County's *Counterclaim* and *Third-Party Complaint* certainly evidence a case or controversy.[21]

ARGUMENT: DUCHESNE COUNTY DOES HAVE STANDING

Uintah County has moved to dismiss the Ute Tribe's *Complaint* on, among other grounds, the Tribe's lack of standing or otherwise having an actionable injury.[22] In response to that lack of standing argument the Ute Tribe asserted, based upon the Tenth Circuit holdings in *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*[23] and *Prairie Band of Potawatomi Indians v. Pierce*,[24] that it had standing because Uintah County's assertion of jurisdiction within the boundaries of the *former Reservation* interferes with

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[20] *Id.* Doc. 239-2, Exhibit 2.

[21] Insofar as these Exhibits reflect the collective actions of the Ute Tribe and the Business Committee, including the individual members of the Business Committee, they are also evidence of a conspiracy in violation of 42 U.S.C. § 1985.

[22] Doc. 250, Uintah County *Motion to Dismiss*, p. 9.

[23] 874 F.2d 709, 710 (10th Cir. 1989).

[24] 253 F.3d 1234 (10th Cir. 2001).

its right to govern.[25] Duchesne County does not concede that this law supports standing-actionable injury on behalf of the Ute Tribe but if it does, then the same case law and arguments would also support Duchesne County's standing-actionable injury with respect to the latter's *Counterclaim* and *Third-Party Complaint*.[26]

Duchesne County has standing because the Ute Tribe, with its efforts to obstruct justice by orchestrating, funding and otherwise aiding and abetting its members in bringing sham lawsuits against County officials, illegally and unconstitutionally asserting law enforcement authority over federal, State and County roads and rights-of-way, illegally and unconstitutionally asserting of civil regulatory authority over non-members and non-tribal lands, closing public road and rights-of-way to County officials and members of the general public, and continuing to violate the constitutional rights, privileges and immunities of the County and its citizens, has exceeded its lawful authority

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[25] Doc. 282, *Ute Tribe's Memorandum*, pp. 12-13.

[26] Particularly appropriate is the Ute Tribe's reference to *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) and *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 716 for, respectively, the propositions that harm to a tribe's sovereign powers confers standing-actionable injury and so, too, does being forced to litigate in a court that does not have jurisdiction over them, both of which mirror the allegations of Duchesne County's *Counterclaim* and *Third-Party Complaint*.

and irreparably harmed both Duchesne County and its citizens. Duchesne County.[27] Duchesne County likewise has third-party standing under the *jus tertii doctrine*.[28]

There are essentially two types *jus tertii* standing, and both exist in this case.[29] The first type of *jus tertii* standing is when defendant's activities and/or actions regulate or infringe upon the rights of the plaintiff and, as result, also violate the rights of third parties.[30] By law, Duchesne County is charged with protecting the health, safety and well-being of its citizens.[31] The activities of the Ute Tribe at issue in this case not only

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[27] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992)(To satisfy the standing requirement of Article III, a party must demonstrate: (1) that he or she has suffered an injury in fact; (2) that there is a casual connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision).

[28] The Ute Tribe attempts to characterize Duchesne County's standing as that of a *parens patriae* and proceeds to argue that as a political subdivision of the State of Utah, Duchesne County cannot sue in that capacity. There are, however, several flaws with this argument. First, Duchesne County has alleged an actionable injury and, therefore, has standing in its own right. Hence, there is no need to address the *parens patrie* issue. Second, the cases relied upon by the Ute Tribe to advance this argument are not totally supportive of the Tribe's position. When, as in the instant case, the issue to be litigated is one of overriding public concern, cities and counties can proceed in *parens patrie*. *See City of Lexington v. City of Columbia*, 400 S.E.2d 146, 147 (S.C. 1991).

[29] *Planned Parenthood Association of Cincinnati, Inc. v. The City of Cincinnati et. al.*, 822 F.2d 13901394 (6th Cir. 1987).

[30] *Id.*

[31] *See Utah Code* §17-53-223; *Redwood Gym v. Salt Lake County Commission*, 624 P.2d 1138, 1142 (Utah 1981).

interfere with Duchesne County's ability to discharge this duty to the public, but they also violate the rights of County citizens. In these types of cases, the plaintiffs "have uniformly been permitted to assert the rights of affected third parties."[32]

The second type of standing under the *jus tertii doctrine* exists when the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance or inability of the possessor of the right to pursue vindication of his or her rights.[33] It is admittedly more difficult to obtain the second type of *jus tertii* standing because the plaintiff must meet two additional requirements: (1) the plaintiff's relationship with the third-party whose right he or she seeks to assert is such that "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue;" [34] and the third party is not as able to assert the allegedly affected right on his or her own behalf.[35] Both factors exist in this instance.

Duchesne County's duty to provide for the safety, health and well-being of its citizens meets the first requirement for standing under the second genre of *jus tertii* standing. The second or hindrance factor is established by the fact that many citizens

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[32] *Id.*

[33] *Id. See also, Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006).

[34] *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

[35] *Id.* at 115-116.

have no knowledge that their rights have been and/or are being violated by the Ute Tribe. For example, when public roads and rights-of-way within the *former Reservation* are closed to non-members by the *Ute Tribe*, the constitutional rights of countless unknown citizens and inhabitants of Duchesne County are being violated and many of those citizens and inhabitants, thinking that those closed roads and rights-of-way are not public, turn away not realizing that their fundamental right to travel has been violated. Neither do they report those road closures to Duchesne County.

Another example of hindrance would be those persons who succumb to the *Ute Tribe's* extortion by payment of bribes in order to continue to do business within or without the *former Reservation* and to exclude their competitors for that same business opportunity are not going to complain of this practice for fear of retaliation from the *Ute Tribe*. Conversely, those businesses who succumb to the racketeering and extortion of *Ute Tribal* officials, obtain a substantial economic advantage over their competitors who are not only shut out or foreclosed from engaging in business activities within or without of the *former Reservation*, but have no knowledge of the reasons therefore so as to challenge the illegal boycott.

That Duchesne County has standing is further illustrated by reference to the concept of real party in interest. "Standing" focuses upon whether a plaintiff has suffered harm or threatened harm, whether that harm or threatened harm can be fairly traced to the

defendant's allege wrongful conduct and, and whether the plaintiff's alleged harm is likely to be redressed by the relief he or she requests.[36] The real party in interest rule, on the other hand, focuses upon whether the plaintiff is the person who is entitled to enforce the rights being asserted. In other words, is the plaintiff personally entitled to the relief that he is seeking?[37] Duchesne County has the right to seek a determination of the Ute Tribe's jurisdictional authority, which certainly equates to standing.

ARGUMENT: DUCHESNE COUNTY DOES NOT HAVE TO EXHAUST TRIBAL REMEDIES

The argument that Duchesne County must allow the Ute Tribal Court to determine the reach of the County's authority under both federal and state law, as well as the constitutional rights of its citizens is unprecedented. Duchesne County knows of no case supporting or even acknowledging this principle of law. Nor would anyone expect to see such case law given the fact that as between the County and the Ute Tribe, Duchesne County is the superior sovereign. Duchesne County's rights, privileges and immunities are guaranteed- protected under the *Tenth Amendment.*[38] The Ute Tribe, on the other hand, exists at the pleasure of Congress, which has plenary power over tribes and their

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[36] *See Lujan*, 504 U.S. at 560-61.

[37] *See Certain Interested Underwriters v. Layne*, 26 F.3d 39, 42-43 (6th Cir. 1994).

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lands pursuant to the *Indian Commerce Clause.*[39] This power allows Congress to both create tribes[40] and to terminate them.[41]

Furthermore, jurisdictional disputes between states-counties and tribes are determined by the federal court, not a tribal court, especially when the Ute Tribe is asserting jurisdiction and/or authority over non-members and attempting to oust Duchesne County from exercising its jurisdiction.[42] In a word, tribal courts are courts of limited jurisdiction, which means that unless expressly granted jurisdiction by Congress, tribal court's have no authority to litigate and determine issues of federal or state law,[43] and the limits of a tribe's governmental authority is to ultimately to be determined by the federal courts.[44]

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[39] *U.S. Constitution* Art. 1, Clause 8.

[40] Congress has delegated to the Department of Interior the authority to recognize tribes under federal law. *See* 25 C.F.R. §§ 83 *et. seq*.

[41] *See* 25 U.S.C. §§ 564 *et. seq.*(termination of Klamath Tribe); *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974).

[42] *See Hicks*, 533 U.S. at 369 (tribal courts have no jurisdiction over state officials for causes of action arising out of the performance of their official duties); *MacArthur v. San Juan County,* 391 F. Supp. 2d 895, 1037 (D. Utah 2005); *MacArthur v. San Juan County,* 497 F.3d 1057 (10th Cir. 2007); *Montana DOT v. King,* 191 F.3d 1108, 1115-1116 (9th Cir. 1999); *Montana v. Gilham*, 133 F.3d1133 (9th Cir. 1997).

[43] See *Hicks*, 533 U.S. at 367.

[44] *See National Farmers Union Ins. Cos.*, 471 U.S. at 853; *Hicks*, 533 U.S. at 353; *Montana DOT,* 191 F.3d at1108; *Gilham*, 133 F.3d at1133; *Santa Clara Pueblo v.*

This, too, is not a situation in which the exhaustion doctrine even applies. exhaustion of tribal court remedies is not required, for example, when the actions of an Indian tribe and its officials are patently violative of express jurisdictional prohibitions[45] or when, as in the instant case, it is otherwise clear that there has been no federal grant to the tribal court of jurisdiction over the conduct of non-members,[46] especially Duchesne County. Nor could Congress vest the Ute Tribal Court with such jurisdiction because of the denial of the rights guaranteed to the County and its citizens under the *Constitution* if they were to be subject to the jurisdiction of the Ute Tribal Court.[47] Simply put, Congress could not give away the constitutional rights and powers enjoyed by Duchesne County and its citizens by vesting the Ute Tribal Court with the jurisdiction to determine the County's governmental authority.[48]

Martinez, 436 U.S. at 49; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 483 (1999); *Enlow v. Moore*, 134 F.3d 993, 995 (10th Cir. 1998).

[45] *See National Farmers Union Ins. Cos.*, 471 U.S. at 857 n.21 (noting that exhaustion of trial court remedies is not required "where the action is patently violative of express jurisdictional prohibitions").

[46] *See Strate*, 520 U.S. 438, 459 n. 14 (1981).

[47] Neither the *Bill of Rights* nor the *Fourteenth Amendment* apply to tribal governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

[48] *Reid v. Covert*, 354 U.S. 1 (1956)(Congress cannot, by treaty or legislation, give away the rights provided to citizens under the Constitution).

Exhaustion of Ute Tribal Court remedies is likewise not required when it serves no purpose other than delay,[49] as would be the situation in the present case given the decisional law holding that jurisdiction does not exist in the Ute Tribal Court;[50] and/or when the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, such as disrupting the authority and/or functioning of the Duchesne County government.[51] In addition, exhaustion of tribal court remedies is not a prerequisite to the existence of *Federal Question* jurisdiction.[52] Nor should it be when constitutional rights are involved.[53]

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[49] *See Strate*, 520 U.S. at 459 n. 14 (1981) (determining that "when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay").

[50] *See Hicks*, 533 U.S. at 369(holding since it is clear that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases would serve no purpose other than delay).

[51] *National Farmers*, 471 U.S. at 857, n. 21. *See also Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006).

[52] *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8 (1987) (stating that tribal court exhaustion is not a jurisdiction prerequisite); *Strate*, 520 U.S. at 454.

[53] *Cf. Ellis v. Dyson*, 421 U.S. 426, 433 (1975) (Exhaustion generally not required in 42 U.S.C. § 1983 suits).

It is also nonsensical to require the exhaustion of tribal court remedies with respect to compulsory counterclaims.[54] Besides, the principle underlying the exhaustion requirement is that of "*tribal preemption*," which is a tribe's right to makes its own laws and to be ruled by them.[55] When it applies, *tribal preemption* means state laws that impermissibly interfere with a tribe's right of trial self-government are deemed to be preempted. However, in *Hicks,* the Supreme Court held that tribal preemption of the State of Nevada's on-reservation activities and governance was limited to what was needed to protect tribal self-government and to control internal relations, such as the

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[54] *See Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 633-34 (3rd Cir. 1961)(If district court has subject matter jurisdiction over the complaint, it has ancillary jurisdiction over any *Counterclaim* that arises out of the same transaction and occurrence that is the subject of the *Complaint*); *Payne v. AHFI Netherlands, B.V.*, 482 F. Supp 1158, 1162 (N.D. Ill. 1980); *Revere Cooper & Brass, Inc. v. Aetna Cas & Sur. Co.*, 426 F.2d 709 5th Cir. 1970)(Third-party claims arising out of the same transaction and occurrence as the original *Complaint* are considered to be within the Court's ancillary jurisdiction); *Baker v. Gold Seal Liquors, Inc.,* 417 U.S. 467, 469 (1974)(If a counterclaim is compulsory, federal court has ancillary jurisdiction to hear that claim); *Berrey v. Asarco Inc.,* 439 F.3d 636, 645-46 (10th Cir. 2006)(A counterclaim is compulsory if: (1) th issues of fact and law raised by the principal claim and the counterclaim are largely the same; (2) res judicata would br a subsequent suit on defendant's claim; (3) the same evidence supports or refutes the principal claim and the counterclaim; and (4) there is a logical relationship between the claim and counterclaim); *Baltimore & Ohio R. Co. v. Central Ry. Services, Inc.,* 636 F. Supp. 782, 787 (E.D. Pa. 1986)(third party defendants were properly joined as necessary parties to counterclaim of defendants who alleged that third party defendants caused, aided or abetted acts underlying counterclaim).

[55] *Id.*

power to: punish tribal offenders, determine tribal membership, regulate domestic relations amongst members, and provide for rules of inheritance.[56] The *Hicks* court went on to hold that "State sovereignty does not end at a reservation's borders." [57] Thus, when a state's interests outside the reservation are implicated, the state can even regulate the activities of tribal members on tribal land . . ."[58] Finally, and most significantly, *Hicks* makes clear that tribal law only preempts state law under very narrow circumstances: when it is "**on-reservation activity**" AND involves "**only Indians**."[59]

ARGUMENT: THE UTE TRIBE IS NOT IMMUNE FROM SUIT

Federal Courts are specifically charged with the jurisdiction to review and determine the limits of a tribal government's authority. Hence, there is obviously no tribal immunity applicable to such actions seeking declaratory and injunctive relief with respect to a tribe unlawful and/or unconstitutional actions.[60] Sovereign immunity also

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[56] *Id.* at 360-361.

[57] *Id*. at 361.

[58] *Id*. at 362.

[59] *Id.* at 361(emphasis added).

[60] *See National Farmers Union Ins. Cos. v. Crow Indian Tribe*, 471 U.S. 845, 853, (1985) (holding that "a federal court may determine . . . whether a tribal court has exceeded the lawful limits of its jurisdiction"); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Montana DOT v. King*, 191 F.3d 1108 (9th Cir. 1999); *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

does not always apply to suits filed against governments or their officials. In particular, one well-established exception to the doctrine of sovereign immunity limits its application in declaratory and/or injunctive suits seeking to enjoin the enforcement of unconstitutional governmental acts.[61] "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess."[62]

In addition, under the holding in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*,[63] there is likewise no immunity in this instance because the Ute Tribal Court does not have the jurisdiction to determine civil rights claims or constitutional issues, to interpret federal law or state law and/or to decide constitutional-jurisdictional issues.[64] Tribal courts do not have the jurisdiction to decide such issues because these are matters of federal and state law far beyond the tribe's internal affairs.[65] Thus, if immunity were to be applied in this instance, then Duchesne County would have no

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[61] *Dugan v. Rank*, 372 U.S. 609, 621-22(1983); *Kelley v. U.S.*, 69 F.3d 1503, 1507 (10th Cir. 1996); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984).

[62] *Tenneco,* 725 F.2d at 574.

[63] 623 F.2d 682 (10th Cir. 1980).

[64] *Nevada v. Hicks*, 533 U.S. 353 (2001)(tribal courts lack subject matter jurisdiction over federal civil rights claims).

[65] 623 F.2d at 685.

forum in which to vindicate the violation of its constitutional rights and those of its citizens, and *Dry Creek Lodge* says that this is not the law. *Dry Creek Lodge* states that in such cases there must be a forum even if it requires overriding-disregarding tribal sovereign immunity to provide that forum in federal court.[66]

ARGUMENT: DUCHESNE COUNTY'S CLAIMS ARE NOT BARRED BY RES JUDICATA

The Ute Tribe contends that the claims asserted by Duchesne County in the *Counterclaim* and *Third-Party Complaint* are barred by the doctrine of *res judicata* based upon the Tenth Circuit's decisions in *Ute III*[67] and *Ute V*.[68] According to the Ute Tribe, all the issues raised in Duchesne County's *Counterclaim* and *Third-Party Complaint* were litigated and decided in those cases. But neither *Ute III* nor *Ute V* ever considered much less decided the lawfulness-constitutionality of the Ute Tribe's actions at issue in this case such as the Tribe's efforts to obstruct justice by orchestrating, funding and otherwise aiding and abetting its members in bringing sham lawsuits against County officials; illegally and unconstitutionally asserting law enforcement authority over federal, State and County roads and rights-of-way; illegally and unconstitutionally asserting civil

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[66] *Dry Creek Lodge* also holds that when this exception applies, it even authorizes suits against the tribe itself. *Id.*

[67] *The Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985).

[68] *Ute Indian Tribe of Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th cir. 1997).

regulatory authority over non-members and non-tribal lands; closing public road and rights-of-way to County officials and members of the general public; and continuing to violate the constitutional rights, privileges and immunities of the County and its citizens.[69]

ARGUMENT: DUCHESNE COUNTY HAS ASSERTED VALID CLAIMS

As its last argument for dismissal, the Ute Tribe asserts that Duchesne County has failed to plead a claim for relief. But that argument is intentionally deceptive. The Ute Tribe, for instance, contends that with its *Fourth Claim for Relief* Duchesne County is asking the Court to create new public roadways within the *former Reservation*. However, this is not the substance of the *Fourth Claim for Relief*. Duchesne County is asking the Court to enjoin the Ute Tribe from closing public roads and right-of-ways to both non-members and to the County. The County is not asking the Court to create new public roads or right-of-ways.

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[69] The Ute Tribe also argues that as the result of the Court's decision in *Poulson v. Ute Indian Tribe*, Case No. 12-cv-00497, Duchesne County's *First Claim for Relief* to enjoin the Tribe's funding of sham lawsuits in the Ute Tribal Court against County officials is barred by the doctrine of *res judicata*. The decision to which the Tribe refers was the Court's Order dismissing the Ute Tribe from essentially the same claim in that action. But that was not a dismissal on the merits. The Ute Tribe was dismissed as essentially an unnecessary party since the Court in that case had jurisdiction over he Ute Tribal Court and its Chief Justice. In the absence of the Trial Court and Chief Justice as parties in *Poulson*, the Tribe would have been a necessary party. *Compare* Hicks, 533 U.S. 353 (tribal court named defendant) *with National Farmers*, 471 U.S. 845 (1985)(tribe and tribal officials are defendants).

The Ute Tribe's arguments with respect to Duchesne County's *Fifth Claim for Relief* are similarly deceptive. The Ute Tribe accuses the County of "playing the race card" be alleging a conspiracy claim under 42 U.S.C. § 1985. Section 1985 reaches private conspiracies; there is no state action or color of law requirement to state a claim under § 1985. Duchesne County alleges that the *Ute Tribal Co-Conspirators* conspired between and among themselves to violate the rights, privileges and immunities of Duchesne County and its citizens; and that there was racial animus behind the *Ute Tribal Co-Conspirators'* actions such as closing public roads and right-of-ways to non-Indians but not to members of the Ute Tribe. More importantly, the letters from the Business Committee are evidence of that racial animus. Duchesne County has sufficiently pled a claim under 42 U.S.C. §1985.[70]

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[70] *See Griffen v. Breckenridge*, 403 U.S. 88 (1971). Members of federally recognized Indian tribes are also subject to liability under § 1985 and § 1986. *See Thompson v. State of New York,* 487 F. Supp. 212, 216 (N.D. N.Y. 1979). There are several distinct causes of action in § 1985(2), including a conspiracy to deter by force, intimidation or threat any party or witness in any court of the United States from attending such court or from testifying to any matter pending therein freely, fully and truthfully; as well as conspiracies impeding, hindering, obstructing or defeating, in any manner, the due course of justice with the intent to deny to any citizen the equal protection of the laws, or to injury him or his property for lawfully enforcing or attempting to enforce, the rights of any person, or class of persons, to the equal protection of the laws. *See* 42 U.S.C. § 1985(2). Section 1985(3) likewise creates a claim with respect to conspiracies to deprive, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws. Duchesne County has alleged §§ 1985(2) and (3) conspiracy claims. *See Brever*, 40 F.3d at 1126; *Haddle v. Garrison*, 525 U.S. 121 (1998)

Duchesne County's allegations also meet the pleading standards set forth in *Rule* 8[71] and *Iqbal* [72] and *Twombly* [73] because "[d]etailed factual allegations" are not required to maintain a cause of action.[74] Rather, the factual allegations must be enough to raise a right to relief above the speculative level.[75] A well-pleaded *Complaint* may proceed even if it appears that recovery is very remote and unlikely.[76] Furthermore, a *Complaint* only need set forth "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,[77] which Duchesne County has done.

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[71] *Fed. R. Civ. P.* 8.

[72] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[73] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[74] *Id.* at 555.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 556. More importantly, in a recent decision, *Robbins v. State of Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), the Tenth Circuit addressed the new "notice pleading" requirements. According to the *Robbins* Court, a well-plead complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and that a recovery is very remote and unlikely. The *Robbins* Court went on to state that the degree of specificity in pleadings necessary to establish plausibility in fair notice depends on the type of case. *Id.* at 1248. The allegations in Duchesne County's pleadings and the exhibits attached thereto, especially the letters from the Business Committee, establish the requisite plausibility as well as the actual conspiratorial agreement.

DATED this 25th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2013, I electronically filed the foregoing document with the U.S. District Court for the District of Utah. Notice will automatically be electronically mailed to the following individual(s) who are registered with the U.S. District Court CM/ECF System:

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