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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, v. THE STATE OF UTAH, 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.	**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 12(B) MOTION TO DISMISS DUCHESNE COUNTY'S COUNTERCLAIMS** Consolidated Action Civil Nos. 2:75-cv-00408-BSJ & 2:13-cv-00276-TS Senior Judge Bruce S. Jenkins

INTRODUCTION

Duchesne County's response to the Tribe's motion to dismiss is a disservice to this Court and to the interests of justice. The history of this case is more complex than nearly any other federal case. In order to make informed decisions, the Court needs reasoned, accurate discussion, based upon the actual pleadings and the prior decisions and history of this matter. If a reasoned and careful analysis is conducted, all of Duchesne County's new claims will be dismissed on multiple independent grounds.

Duchesne County seeks to avoid that reasoned discussion. For some dispositive arguments, the County makes no response. For others, it cannot come up with any legal response to the Tribe's argument, and so it substitutes straw man arguments that it then seeks to defeat. In a badly misguided reading of this Court, Duchesne County also appeals to some of the worst of anti-tribal and anti-Indian biases.

There have been very serious disputes between the Tribe and the State of Utah. The Tribe raised those issues in its complaint in this consolidated matter 38 years ago, and this Court decided those issues. The Court rendered a final judgment. Narrow portions of that judgment were vacated and remanded to this Court for further consideration. Ute Tribe v. Utah, 114 F.3d at 1531 (Ute V). But the remainder of this Court's judgment in favor of the Tribe remains in place. Duchesne County's dislike of that judgment does not state a claim upon which relief can be granted, and the hyperbole in its response brief is simply not a basis for avoiding res judicata.

Other than the narrow remanded issues, any dispute litigated prior to Ute V has already been conclusively adjudicated. Because so much has already been

adjudicated, that res judicata is a very formidable hurdle in this case. Duchesne County's few non-fabricated claims do not clear that hurdle.

Nor do Duchesne County's fabricated, bald, and ironic claims of a vast racist conspiracy undertaken by the Tribe state a claim on which relief can be granted. In fact, Duchesne County has brought these same factually and legally unsupported claims multiple times, and this Court has repeatedly dismissed the claims. It must merely do so again, although it is perhaps time the Court chastise Duchesne County for squandering County resources and forcing the Tribe to expend resources defending against Duchesne County's unsupported, fabricated claims.

Equally concerning and legally unsupported is Duchesne County's pretense that it is a sovereign State, and its attempt to bring claims that the State of Utah, properly, has chosen not to bring, and which Duchesne County simply lacks the power to bring. If the State of Utah wanted to bring the types of arguments that Duchesne County brings, arguments that often use the language of an anti-tribal or anti-Indian crusade, the Court would have a very different set of legal issues to deal with. But the State has wisely chosen not to take those legal and political risks, and Duchesne County simply lacks authority to assert those claims when the State has not asserted them.

I. Counts I and V of the Counterclaim.

Counts I and V[1] of the Counterclaims are reiterations of the same unsupported and offensive allegations that Duchesne County has now brought against the Tribe and

1 In addition to the flaws which Counts I and V share, Count V has numerous additional flaws. As the Tribe discussed in detail in its motion to dismiss, a bald claim of race-based discrimination does not survive a motion to dismiss under Rule 12. Other

its Council members three times. The Court has dismissed those claims the first two times Duchesne County brought them, Poulson v. Ute Tribe, D. Utah case no. 12-cv-00497(Judge Jenkins, presiding), Dkt. 117, Wopsock v. Dalton, D. Utah case no. 12-cv-00570 (Judge Shelby, presiding), and it must dismiss them this third time also.

Counts I and V are multi-element claims, and each failure to plead anything more than bald conclusory accusations provides an independent basis for dismissal. Tribe's Mot. to Dism. §II (discussing standing and citing numerous cases); §V (discussion dismissal of bald conclusory allegations, and citing numerous cases) (Dkt. 271).

1) The County asserts that it is being wrongly sued by individual Ute tribal members. It does not cite even one case where it has been wrongly sued.
2) The County then makes the legally and factually unsupported leap that the Tribe is responsible for these supposed suits by its tribal members. The County does not provide a single fact in support. Just as the County is not responsible for every unsupported suit filed by residents of Duchesne County, the Tribe is not responsible for filings by its members—the Tribe is not an all-powerful despot over tribal members and litigation brought by tribal members.[2]

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plaintiffs, far more plausibly, have made bald assertions of racial discrimination, and have had their claims promptly dismissed. Here the claim is even less warranted because it is premised at least in part on the concept that Duchesne County is Caucasian or some race other than Indian. Defendant's view of itself is telling and troubling.

2 Had the County pled facts related to the supposedly unwarranted tribal court suits, the Tribe's understanding is that the facts would have revealed that the County's allegation is based upon what the County now knows is a false assertion that the Tribe employed some now-disbarred lay advocates who have in the past filed suits in Tribal Court against County officers.

3) The County then claims that the Tribe is funding some suits, but it does not cite a single case. It then makes the bald and false factual assertion that the unnamed suits the Tribe is supposedly funding are sham lawsuits.[3]

It is ironic that Counts I and V of the counterclaims are based on bald allegations that that the Tribe is filing harassing suits against the County, when those counts are actually repetitions of unfounded, false harassing suits brought by the County against the Tribe. The County has not alleged a single fact in support of its claims that the Tribe is engaged in a vast conspiracy against the County, and Counts I and V therefore must be dismissed.

Counts I and V also must be dismissed because the Tribe has not waived sovereign immunity to the claims. As the Tribe discussed in its motion to dismiss, for claims within the scope of the 1975 complaint, sovereign immunity and preliminary defenses by all parties have either been resolved or waived. But Counts I and V of Duchesne County's 2013 counterclaims are plainly outside of the scope of the 1975 complaint. They are new claims, for which the County would have to establish a waiver.

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3 Duchesne County is likely referring to a single case, Jones v. Norton, D. Utah case no. 9-cv-730, in which Mr. Murray, a tribal member who was a passenger in a vehicle, was killed after State, county and Vernal City law enforcement officers chased a vehicle for miles on the Tribe's Reservation and the officer then chased Mr. Murray on foot, also on the Reservation. The Tribe's General Counsel is representing Mr. Murray's next-of-kin in civil rights and wrongful death claims brought against the officers. There were only two witnesses to the killing—Mr. Murray and Vernal City Officer Vance Norton; and very suspiciously the evidence that could have been used to contradict Officer Norton's account has been spoliated. In that suit, the Court has under advisement a motion to determine the consequences stemming from the Defendants' destruction of evidence. Although the parties may disagree regarding who is likely to prevail in the case, it is beyond the pale for Duchesne County to refer to that suit as a sham lawsuit.

Tr. Mot. to Dism. (Doc. 271) §IV. The County has not established a waiver, and the claims therefore must be dismissed.

II. Count II of the Complaint.

Count II of the County's counterclaim raises one of the key issues that was conclusively adjudicated in the prior 35 years of this lawsuit. The County simply does not like the prior decision, and is seeking to relitigate. The claim must be dismissed based upon res judicata. Ute V, 114 F.3d at 1521, 1528-29 (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, and **the State of Utah and its countries were properly enjoined from exercising such jurisdiction**).

The County's primary response to the motion to dismiss Count II is to seek to confuse the legally distinct issues of: 1) which law enforcement agencies have authority to patrol; 2) which law enforcement authorities have the power to arrest or detain; and 3) which courts have jurisdiction over criminal prosecutions. The County courts have prosecutorial authority of criminal matters against non-Indians, and the Tribe has never asserted otherwise. But as dispositively decided under Ute III/Ute V, the County does not have authority to patrol or to arrest/detain (unless it can work out a cross-deputization agreement with the Tribe), and the Tenth Circuit decision establishes, as res judicata, that the County was properly enjoined from exercising that jurisdiction.[4]

4 Because the issue was decided in Ute III and Ute V, we need not consider Defendant's assertion that there have been judicially created changes in the underlying law. The Tribe notes that it disagrees with Defendant's assertion that if the Court were

The Tribe is keenly aware that because police authority follows jurisdictional boundaries, the jurisdictional patchwork created by Ute III and Ute V creates complexity for tribal, state, and federal law enforcement. But that complexity is not remediable by the Court—it flows directly out of the unique patchwork jurisdictional boundaries created by Ute III and Ute V. The best solution to that complexity must come from the Tribe and State working cooperatively, rather than adversarially. Given the County's various bald and false claims that the Tribe and its officers are engaged in extortion, bribery, racial discrimination, and other wrongs, it seems unlikely that Duchesne County is willing to work cooperatively for the good of state and tribal citizens, but the Tribe remains hopeful that after this Court dismisses the County's unfounded claims, the Tribe and the State, acting more responsibly, maturely, and respectfully, might be able to work toward the types of cooperative agreements which this Court cannot provide.

III. Count III of the Counterclaim.

For clarity of analysis, the Tribe will divide its reply discussion of Count III of the counterclaim into two parts: A) the portion of the claim based upon the civil "disclaimer agreement"; Counterclaim ¶¶ 67-71; and B) the portion of the claim based upon the Tribe's Employment Rights Ordinance ¶¶ 73-92.

A. The Disclaimer of Civil/Regulatory Authority.

In paragraphs 67 to 71 of its counterclaims, Duchesne County asserts a claim premised upon the Tribe being bound by the Disclaimer of Civil/Regulatory Authority

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to re-decide the issues in Ute III and Ute V based upon current judicial interpretations, the results would be any different. As when Ute III and Ute V were decided, the Tribe, not the County, has the power to patrol and detain.

which the Tribe executed on October 14, 1998. That part of Count III presents a simple straightforward Rule 12(b) issue. The parties agree that the Tribe sent a letter terminating the disclaimer agreement, but they disagree about whether the Tribe had the right to terminate the agreement. If the Tribe retained the right to terminate the disclaimer agreement, then its alleged failure to comply with the agreement, alleged in paragraphs 67-71 of the Counterclaim, does not state any claim.

In its motion to dismiss, the Tribe set forth its unassailable argument on the dispositive issue. The Tribe retained the right to terminate because the Disclaimer expressly stated that the Tribe retained the right to terminate on 60 days' notice. Dkt. 295-2. The Tribe provided that notice, and Duchesne County admits that it received that notice. Dkt. 238 ¶72 and Dkt. 238-1. The Tribe's Rule 12 motion challenges Duchesne County's legal theory that the Tribe cannot terminate the disclaimer agreement. The Court must resolve that legal issue in favor of the Tribe, and it then must dismiss the claim stated in paragraphs 67-71 of the counterclaim.

B. TERO.

The portion of Count III in which Duchesne County complains about the Tribe adopting a tribal employment rights ordinance is flawed for multiple independent reasons. In its motion to dismiss, the Tribe ran through each of those obvious flaws, and Defendant provides virtually no on-point response.

First, Duchesne County does not allege, and would have no basis to allege, that the Tribe has sought to enforce, or even threatened to enforce, the TERO ordinance

against the County. Duchesne County does not dispute that it failed to allege any factual basis for the claim,[5] and therefore the claim must be dismissed.

Second, Duchesne County's claim is based upon its faulty parens patriae claim. Throughout its response to the motion to dismiss, the County asserts, without a single case citation in support, and likely to the shock of the State of Utah, that the County is a sovereign. It is not a sovereign, and therefore the County lacks the authority to bring claims in a parens patriae capacity.

The State has had ample opportunity to join the County in the County's reprehensible and bald assertions, without a single factual allegation in support, that the Tribe is engaged in "racketeering and extortion", Counterclaim ¶¶1(f); 26(f); 86, and demanding "bribes and/or kickbacks", Counterclaim ¶86. If the State had chosen to join in with the County's verbal bomb-throwing, we would have a different set of legal issues. But the State, wisely, perhaps even taking its responsibility as a parens patriae in the more mature manner that it should, has not taken the County's counterproductive path, and the Court must reject the County's pretense that it is a sovereign State.

IV. Count IV.

Count IV, the County's "right to travel" claim, must be dismissed for multiple independent reasons, each as discussed in more detail above.

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5 Though it does not dispute that it failed to allege any factual basis, Defendant asserts, without explanation, , and similar to its rejected argument in Poulson v. Ute Tribe and Wopsock v. Dalton, discussed supra, that its claim its claims should not be dismissed. Def. Resp. at 9-10. As in Poulson and Wopsock, its bare allegations are insufficient and the claim must be dismissed.

First, Count IV must be dismissed because the Tribe has not waived sovereign immunity, as discussed in the Tribe's motion to dismiss and in section I, supra.

Second, the right to travel claim is wholly dependent upon Defendant's assertion that it is a sovereign state, with the authority to bring parens patriae actions. Because it is not a sovereign, its claim fails.

Third, as with all of its claims, the count is based upon bald claims, without any allegation of any supporting facts. The County does not make even a single allegation of an actual violation of the alleged right to travel—no allegation of any time, place, or person related to the supposed violations. All the County does in Counterclaim IV is baldly assert that there is a violation of the alleged right. That type of pleading is insufficient.

Fourth, the proper plaintiff or real party in interest has failed to exhaust tribal court remedies. Defendant's response is a straw man argument that is additionally contingent on its assertion that it is a sovereign state. The Tribe stands by the argument in its motion to dismiss, but will not belabor the point by showing the errors in Defendant's straw man argument. Defendant loses, because it is not a sovereign State.

V. Defendant's Argument Based on the Alleged History of the Nation or State of Deseret is Without Merit.

At the beginning of its brief, preceding and not as part of its legal discussion, Duchesne County includes a discussion of the "State of Deseret". It is unclear how that discussion relates to any issue in this case, and since it is not part of the County's legal argument, it is unclear whether any response is even necessary. But the Tribe briefly notes that it vehemently disagrees with the County's "history", and that the County's

new claim is contrary to core res judicata in this case. It is an argument that is at least twenty years too late.

Under federal law, the Ute Tribe had recognized "Indian title" to all land of its Reservation, and it reserved that ownership, and the United States obtained federally recognized title to that land in trust for the Tribe. But even if we were to put that history aside and assume, arguendo, all of the County's discussion of pre-statehood history, Utah did, after considerable debate and discussion, decide to become a state. Even if we assume, arguendo, that the State of Utah had any power over any aspect of Indian affairs, upon acceptance of the United States Constitution, the State of Utah transferred plenary authority over Indian affairs to the United States. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.02[3], p. 25 (5th Ed.) (the Indian commerce clause of the United States Constitution is "a broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy"); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (invalidating the Oneida Indian Nation's conveyance of 100,000 acres to the State of New York in 1795 because the conveyance was never approved by the federal government as required by the Constitution, art. 1, § 8, cl. 3.); Worcester v. Georgia, 31 U.S. 515, 559-562 (1832). See generally U.S. Code, Title 25. Duchesne County's claim based upon pre-statehood history is contrary to res judicata in this matter, inaccurate and contrary to Utah's decision to become a state, wherein it ceded any authority that it might arguably have had over Indian affairs to the United States.

CONCLUSION

Duchesne County is seeking to relitigate issues it lost, claiming that the Tribe cannot terminate a Disclaimer that expressly permits for such termination, and otherwise making up entire claims out of whole cloth. The County's counterclaims must be dismissed.

DATED this 11th day of September, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2013, I electronically filed the foregoing **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 12(B) MOTION TO DISMISS DUCHESNE COUNTY'S COUNTERCLAIMS** 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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