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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, UTAH, Plaintiff, v. THE STATE OF UTAH, et al. Defendants.	**THE UTE TRIBE AND THIRD-PARTY DEFENDANTS' MOTION AND SUPPORTING MEMORANDUM TO DISMISS DUCHESNE COUNTY'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT UNDER RULE 12(b), or alternatively, FOR A SUMMARY JUDGMENT OF DISMISSAL** Consolidated Action Civil Nos. 2:75-cv-00408-BSJ & 2:13-cv-00276-TS Senior Judge Bruce S. Jenkins

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The Business Committee of the Ute Tribe of the Uintah and Ouray Reservation and Gordon Howell and Ronald J. Wopsock, the Chairman and Vice-Chairman of the Business Committee ("Third-Party Defendants"), move under Rule 12(b)(1) and (6) to dismiss the third-party complaint filed by Duchesne County, see Dkt. 239.

Alternatively, if the Court does not dismiss the complaint, the Ute Tribe and the Third-Party Defendants move the Court to decide the issues raised by the counterclaim and third-party complaint on summary judgment and to dismiss the claims against the Ute Tribe, its Business Committee, and individual Committee members.

INTRODUCTION

Duchesne County's countersuit and third-party complaint comprise a single pleading with no distinction drawn between claims under the counterclaim and claims under the third-party complaint. Dkt. 239. The counterclaim is filed against the Ute Tribe; the third-party complaint is filed against the Tribe's Business Committee and the Committee's Chairman and Vice-Chairman, Gordon Howell and Ronald J. Wopsock, who are sued in their individual capacities, not their official capacities.[1] Paragraph 21 alleges that "the *Ute Tribe*, *Business Committee*, Gordon Howell, Ronald J. Wopsock, Jane Doe, John Doe, John Doe Two, and John Doe Three will be collectively referred to as '*Ute Tribal Co-Conspirators*.'" (emphasis in original). See Dkt. 239, p. 23. The complaint then proceeds to allege an overarching conspiracy that supposedly provides

[1] The Third-Party Complaint also lists Defendants identified only as "Jane Doe, John Doe, John Doe Two, and John Doe Three," for additional members of the Tribe's Business Committee; however, no members of the Business Committee other than Messrs. Howell and Wopsock have been served with process or asked to waive service of process.

the factual and legal predicate for all five counts in the complaint. However, Duchesne County's underlying premise is fatally flawed: just as it is impossible for a single individual to conspire with himself or herself, it is impossible for a private or governmental corporation such as the Ute Indian Tribe to conspire with its corporate agents. Under the long-established intracorporate conspiracy doctrine, there can be no conspiracy between the Ute Tribe, its Business Committee, and individual Business Committee members. In addition to this fatal flaw—a flaw on which the County's entire complaint is premised—the third-party complaint must be dismissed for (*i*) the absence of an Article III case or controversy; (*ii*) Duchesne County's lack of standing; (*iii*) the Tribe's sovereign immunity from suit, (*iv*) res judicata, (*v*) the failure to join the United States as an indispensable party, (*vi*) because the third-party complaint fails to state a claim for relief, and/or alternatively, (*vii)* because Duchesne County has failed to exhaust tribal remedies.

SUMMARY OF THE CLAIMS UNDER DUCHESNE COUNTY'S COMPLAINT

Count 1 of the complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to provide "financial assistance" and to facilitate and/or otherwise aid and abet members of the Ute Tribe in bringing what Duchesne County calls "sham and baseless" lawsuits against unnamed officials of Duchesne County.[2] The Duchesne County complaint does not identify a single sham lawsuit in any fashion: not by party names, not by lawsuit captions, not by case numbers, not by date, and not by any information concerning the

[2] See Dkt. 239, ¶¶ 34, 45.

ultimate disposition of the alleged sham case(s). The Tribe and the Third-Party Defendants deny that they have provided financial assistance, facilitated and/or otherwise aided or abetted members of the Ute Tribe in bringing sham lawsuits against officials of Duchesne County. Affirmatively, the Tribe and Third-Party Defendants state that on March 27, 2013, the Tribe's Business Committee amended the Tribe's Law and Order Code, Section 1-2-3 to add a subsection (6). Subsection (6) states explicitly that "[t]he Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against the United States Government or the State of Utah and its political subdivisions, or any of their officers or employees in their official capacities, except as otherwise provided by law."[3]

Under Count 2, Duchesne County alleges that it is being irreparably harmed by a letter the Tribe sent to Duchesne County dated January 30, 2012.[4] In that letter the Tribe demanded that Duchesne County stop exercising criminal jurisdiction over Ute tribal members "on lands subject to exclusive federal and tribal control." Duchesne County fails to specify how or why Duchesne County is being irreparably harmed by the 1/30/2012 letter. It was indisputably within the Tribe's governmental powers and prerogative to send the 1/30/2012 letter to Duchesne County. Neither the contents of the letter nor the sending of the letter violates federal law.

Count 3 of the complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to assert

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[3] See Motion Appendix, Exhibit A.
[4] See Dkt. 175-2.

"civil and regulatory jurisdiction over non-members of the *Ute Tribe* who do business or engaged (sic) in interstate commerce on land within the *former Reservation* owned by non-members of the *Ute Tribe*, such as private fee land and public land owned by the federal government and administered by the Bureau of Land Management."[5] (emphasis in original) However, Duchesne County does not identify a single individual, nor a single tract of land, over which the Ute Tribe "has asserted civil and regulatory jurisdiction over non-members of the Ute Tribe." The Ute Tribe and its tribal officers deny that the Tribe has ever unlawfully exercised civil, regulatory, or criminal jurisdiction outside the boundaries of the Uintah and Ouray Reservation ("U&O Reservation").

Paragraph 86 of the complaint alleges that the Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to engage in a "pattern of racketeering and extortion" with respect to the Tribe's Ute Tribal Employment Rights Office ("UTERO") Ordinance, Ordinance 13-025.[6] The complaint alleges that the Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock engage in racketeering and extortion by "demanding payments, bribes and/or kickbacks from business owners in order to do business within the *former Reservation* or to engage in business with anyone that is engaged in interstate commerce within or without the *former Reservation*."[7] (emphasis in original) However, no "tribal official" is named. No victim of the alleged extortion is identified. And no other facts beyond the conclusory allegations quoted above are alleged. In fact,

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[5] See Dkt. 239, ¶ 71.
[6] See Motion Appendix, Exhibit B.
[7] See Dkt. 239, ¶ 86.

the Duchesne County complaint resorts to inflammatory words such as "extortion" and "payments" and "bribes" to disparage, and to denigrate, and to grossly mischaracterize the fees that are lawfully assessed by the Tribe under the UTERO Ordinance. The UTERO Ordinance was enacted to "promote the self-sufficiency of the Tribe, its members and families, and [to] address the employment needs" of Indian residents of the Uintah and Ouray Reservation.[8] The Ordinance imposes an "Employment Right Fee" on employers and contractors who engage in business "within the exterior boundaries of the Uintah and Ouray Reservation."[9] (emphasis added) The purpose of the fee is "to raise revenue for the operation of the Ute Tribe Employment Rights Office ("UTERO"), the UTERO Commission, and the Ute Tribal Court."[10] It is the imposition of this Fee on business activities "within the exterior boundaries of the Uintah and Ouray Reservation" that Duchesne County characterizes as "extortion," "payments" and "bribes." The Tribe and the Third-Party Defendants deny that the Tribe has ever unlawfully exercised civil and regulatory jurisdiction outside the boundaries of the U&O Reservation. The Tribe and the Third-Party Defendants further deny that that they have expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts of "demanding payments, bribes and/or kickbacks" under the UTERO Ordinance.

Count 4 of the complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to order

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[8] See Motion Appendix, Exhibit B, Section 2.1 and 2.2.
[9] See Motion Appendix, Exhibit B, Section 6.1.
[10] See Motion Appendix, Exhibit B, Section 6.1.

"armed officers of the *Ute Tribe* to remove signs identifying roads and rights-of-way as public and installing "No Trespassing" signs on these otherwise public roads and rights-of-way within or without the *former Reservation*."[11] (emphasis in the original) Count 4 further alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to order "armed officers" to stop motorists "on these public roads and rights-of-way to search their vehicles and to otherwise deny them the right to travel on these public roads and rights-of-way within or without the *former Reservation*."[12] (emphasis added)

The complaint does not identify a single public road or right-of-way, or a single person whose travel on public roads and rights-of-way has been impeded by the Ute Tribe, or whose vehicles have been searched by Tribal officers. The complaint does not identify a single Tribal officer involved in the allegedly improper stops. The roads that Duchesne County calls "public roads and rights-of-way" are in fact roadways within the U&O Reservation to which Duchesne County has never acquired lawful rights-of-way under the requirements of 25 U.S.C. §§ 323-328. By letter dated 8/17/2011, the Tribe terminated a Surface Use Agreement between the Tribe and Duchesne County because of the County's failure to recognize and comply with 25 U.S.C. §§ 323-328 in obtaining lawful rights-of-way over roadways inside the U&O Reservation.[13] The Tribe and the Third-Party Defendants deny that they have ever expressly or tacitly ordered,

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[11] See Dkt. 239, ¶ 96.
[12] See Dkt. 239, ¶ 96.
[13] See Motion Appendix, Exhibit D.

authorized, approved, participated in, or condoned any acts of impeding travel on public roads and rights-of-way within or without the U&O Reservation.

Count 5 of the complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to engage in invidious discrimination against Duchesne County in violation of 42 U.S.C. § 1985 through acts of "intimidation, threats and/or harassment to deter, impede, hinder, defeat and/or obstruct justice, and the right to travel within out without the *former Reservation*." (emphasis in original) The Tribe and the Third-Party Defendants deny that they have ever expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts of invidious discrimination against Duchesne County or the non-Indian residents of Duchesne County.

STATEMENT OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE

I. Undisputed Facts Regarding the Tribe's Corporate Status and Governmental Structure

1. The Ute Indian Tribe of the Uintah and Ouray Reservation (the "Ute Tribe") was chartered as a federal corporation pursuant to Section 17 of the Indian Reorganization Act of 1934 ("IRA"), 43 Stat. 984, 25 U.S.C. § 477. See Dkt. 222-1, pp. 29-33, By-Laws of the Ute Indian Tribe.

2. The Tribal Constitution was adopted in accordance with Section 16 of the IRA, 43 Stat. 984, 25 U.S.C. § 476. See Dkt. 222-1, pp. 19-28.[14] The territory of the U&O Reservation includes both the Uintah Valley Reservation and the Uncompahgre Reservation. See Dkt. 22-1, Tribal Constitution, Art. I.

3. The Uintah Valley Reservation was established by an Executive Order dated October 3, 1861, before the State of Utah was admitted to statehood in 1896. See Dkt. 336-1.

4. The Uncompahgre Reservation was established by an Executive Order dated January 5, 1882, before the State of Utah's admission to statehood. See Dkt. 336-2.

5. The Tribe's governing body is a six-member business committee known as the Uintah and Ouray Tribal Business Committee. See art.III, §§ 1, 2 of the Tribe's Constitution, Dkt. 222-1, p. 21.

6. The Tribe's By-Laws provide that "[n]o tribal business shall be transacted" except through a majority vote of a quorum of the Business Committee's six members. See Tribe's By-Laws, art. VI, §§ 3, 5, Dkt. 222-1, p.31.

7. Ordinances adopted by the Business Committee are subject to review by the Secretary of Interior, or his designee, the Superintendent of the Bureau of Indian Affairs ("BIA"), Department of Interior, Uintah and Ouray Agency. See art.VI, § 1(k) of the Tribe's Constitution, Dkt. 222-1, p. 23.

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[14] The Tribe's Constitution and Bylaws are available online at the National Indian Law Library: http://www.narf.org/nill/Constitutions/uteconst/uteconsttoc.htm (last visited 1/21/2014).

8. Under federal law the Secretary of Interior or his designee cannot approve an ordinance adopted by the Tribal Business Committee if the ordinance is "inconsistent with the provisions of any act of Congress or of any treaty or of the tribal constitution or charter under which the resolution" was adopted. See Exhibit Appendix, Exhibit E, Section 18 of Secretarial Order No. 2508, 14 Fed. Reg. 258, 259 (Jan. 18, 1949).

9. Federal law does not authorize federal courts to function as a clearing house for reviewing the legality of newly-adopted tribal ordinances and issuing advisory opinions on the legality of tribal ordinances in the abstract. Even if such a federal law were to be enacted, it would violate the constitutionally-imposed limitations on the federal judiciary under Article III of the U.S. Constitution.

II. Undisputed Facts Related to Count 1 of the Third-Party Complaint

10. As permitted under the Tribe's Constitution, art.VI, § 1(k), the Tribe operates a Tribal Court, and both Indians and non-Indians can file complaints in the Tribal Court. The Tribe and Third-Party Defendants ask the Court to take judicial notice of The Law and Order Code of the Ute Indian Tribe ("Tribal Law and Order Code"), §§ 1-3-1 et seq. See Dkt. 271-1.

11. The Tribal Law and Order Code allows individuals "appearing as a party in any judicial proceeding" in Tribal Court to be represented by "a lay counselor (not a professional attorney)." See Dkt. 222-1, pp. 37-40, §1-5-1(1).

12. However, the Tribe itself does not employ the lay counselors; in fact the Tribal Law and Order Code expressly provides that the "Ute Indian Tribe shall have no obligation to provide or pay for such lay counselors . . . such obligation shall rest entirely

with the person desiring such a counselor." See Dkt. 222-1, p. 38, §1-5-1(2). See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 5; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 5.

13. When suits have been filed in the Ute Tribal Court against persons not subject to the Tribal Court's jurisdiction, those suits have been dismissed for lack of jurisdiction. The Tribe and Third-Party Defendants ask the Court to take judicial notice of various judgments of dismissal issued by the Tribal Court that were attached as Exhibit 11 to the Tribe's Motion to Dismiss Uintah County's Counterclaim, Dkt. 222.[15] See Dkt. 222-1, pp. 51-66.

14. On May 7, 2013, lay advocates Lynda Kozlowicz and Edson Gardner, doing business as Kozlowicz and Gardner, Inc. were permanently disbarred from practicing before the Tribal Court because of their actions in filing frivolous lawsuits, including lawsuits against officials of Duchesne County. The Tribe and Third-Party Defendants ask the Court to take judicial notice of the correspondence relating to the discipline and disbarment of Lynda Kozlowicz and Edson Gardner, attached as Exhibit 9 to the Tribe's Motion to Dismiss Uintah County's Counterclaim, Dkt. 222. See Dkt. 222-1, pp. 44-50.

15. On March 27, 2013, in Ordinance No. 13-010, the Tribe's Business Committee amended the Tribe's Law and Order Code, Section 1-2-3 to add a

[15] When a party asks a court to take judicial notice of adjudicative facts and supplies the necessary information, Federal Rule of Evidence 201 "requires the court to comply with the request." *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997).

subsection (6). Subsection (6) states explicitly that "[t]he Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against the United States Government or the State of Utah and its political subdivisions, or any of their officers or employees in their official capacities, except as otherwise provided by law." See Exhibit Appendix, Exhibit A, § 1-2-3(6).

16. On May 10, 2013, the Superintendent of the BIA approved Ordinance No. 13-010. See Exhibit Appendix, Exhibit A, p. 23-24. The Tribe and Third-Party Defendants ask the Court to take judicial notice of Ordinance No. 13-010, including the BIA Superintendent's approval of the Ordinance on page 23/24 of the Ordinance.

17. Neither the Ute Tribe, nor its Business Committee, nor its tribal officers has provided financial assistance, facilitated and/or otherwise aided or abetted members of the Ute Tribe in bringing sham lawsuits against officials of Duchesne County. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 5; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 5.

18. Paragraphs 43 through 50 of the Duchesne County complaint consist of nothing more than pure legal conclusions or legal conclusions couched as factual allegations. These paragraphs do not allege a legally-cognizable claim for relief.

III. Undisputed Facts Related to Count 2 of the Third-Party Complaint

19. Count 2 of the complaint alleges that Duchesne County is being irreparably harmed by a letter the Tribe sent to Duchesne County dated January 30, 2012. Dkt. 239, ¶¶ 52-65. In that letter the Tribe demanded that Duchesne County stop exercising criminal jurisdiction over Ute tribal members "on lands subject to exclusive

federal and tribal control." The Tribe and Third-Party Defendants ask the Court to take judicial notice of the Tribe's 1/30/2012 letter to Duchesne County. See Dkt. 175-2.

20. The complaint does not explain how Duchesne County is being irreparably harmed by the 1/30/2012 letter.

21. It was within the Tribe's governmental powers and prerogative to send the letter of 1/30/2012 to Duchesne County. See Exhibit Appendix, Exhibit G, Declaration of Ronald J. Wopsock, ¶ 9.

22. Neither the contents of the letter nor the sending of the letter violates federal law.

23. Third-Party Defendant Gordon Howell, the current Chairman of the Tribe's Business Committee, was not a member of the Business Committee when the 1/30/2012 letter was sent to Duchesne County. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 10.

24. Paragraphs 52 and 55 through 65 of the Duchesne County complaint consist solely of pure legal conclusions or legal conclusions couched as factual allegations. The remaining paragraphs under Count 2, paragraphs 53 and 54, do not state a legally-cognizable claim for relief.

IV. Undisputed Facts Related to Count 3 of the Third-Party Complaint

25. Count 3 of the complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to assert "civil and regulatory jurisdiction over non-members of the *Ute Tribe* who do business or engaged in interstate commerce on land within the *former*

Reservation owned by non-members of the *Ute Tribe*." (emphasis in original) See Dkt. 239, ¶ 71.

26. However, the Ute Tribe has never unlawfully exercised civil and regulatory jurisdiction on lands outside of the boundaries of the U&O Reservation. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 13; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 12.

27. Inside the boundaries of the U&O Reservation, the Tribe exercises jurisdiction only as permitted by federal law and by the decisions rendered in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985) ("*Ute III*"), and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"). See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 13; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 12.

28. Duchesne County alleges that the Tribe is still bound by the Disclaimer of Civil/Regulatory Authority ("Disclaimer") executed by the Tribe in 1998. See Dkt. 162-2. However, by its express terms, the Disclaimer granted the Tribe the legal right to terminate the Disclaimer for any reason, or for no reason, "at any time by giving 60 days advance notice in writing to the State of Utah and the Counties of Duchesne and Uintah." See Dkt. 162-2, p. 4.

29. By letter dated, May 9, 2011, the Tribe exercised its legal right of termination under the Disclaimer by giving written notice that the Disclaimer would be terminated effective July 8, 2011. See Dkt. 222-1, pg. 15. The Tribe and Third-Party

Defendants ask the Court to take judicial notice of both the Disclaimer and the Tribe's letter of May 9, 2011, giving notice of its termination of the Disclaimer.

30. Duchesne County alleges that the Tribe exercises jurisdiction over non-members through application of the Tribe's Ute Tribal Employment Rights Office ("UTERO") Ordinance, Ordinance No. 13-025. See Dkt. 239, ¶¶ 73-85.

31. Paragraph 86 of the complaint alleges that the Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to engage in a "pattern of racketeering and extortion" with respect to the UTERO Ordinance. See Dkt. 239, ¶¶ 73-85.

32. The complaint alleges that the Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock engage in racketeering and extortion by "demanding payments, bribes and/or kickbacks from business owners in order to do business within the *former Reservation* or to engage in business with anyone that is engaged in interstate commerce within or without the *former Reservation*." (emphasis in original) See Dkt. 239, ¶¶ 73-85.

33. However, no "tribal official" is named in the complaint. No specific acts amounting to extortion or bribes is described. No victim of the alleged extortion is identified. Indeed, no facts beyond the conclusory allegations quoted above are alleged.

34. The Duchesne County complaint employs inflammatory words such as "extortion" and "payments" and "bribes" to disparage, and to denigrate, and to grossly mischaracterize the fees that are lawfully assessed by the Tribe under the UTERO

Ordinance. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 13; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 12.

35. The UTERO Ordinance was adopted by the Tribal Business Committee to "promote the self-sufficiency of the Tribe, its members and families, and [to] address the employment needs" of Indian residents of the Uintah and Ouray Reservation. See Exhibit Appendix, Exhibit A, Section 2.2.

36. The Ordinance imposes an "Employment Right Fee" on employers and contractors who engage in business "within the exterior boundaries of the Uintah and Ouray Reservation." See Exhibit Appendix, Exhibit A, Section 6, pp. 14-16.

37. The purpose of the Employment Right Fee is to raise revenue for the operation of the Ute Tribe Employment Rights Office ("UTERO"), the UTERO Commission, and the Ute Tribal Court." Exhibit A, Section 6.1, p. 14.

38. It is this imposition of an "Employment Right Fee" on business activities "within the exterior boundaries of the Uintah and Ouray Reservation" that Duchesne County characterizes as "extortion," "payments" and "bribes."

39. The Tribe and the Third-Party Defendants deny that the Tribe has ever unlawfully exercised civil and regulatory jurisdiction outside the boundaries of the U&O Reservation. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 13; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 12.

40. Furthermore, the UTERO Ordinance is not enforced on private fee lands inside the Reservation. Exhibit F, Declaration of Gordon Howell, ¶ 14; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 13.

41. The Tribe and the Third-Party Defendants also deny that that the Tribe or the Third-Party Defendants have ever expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts of "demanding payments, bribes and/or kickbacks" under the UTERO ordinance. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶¶ 18, 19; Exhibit G, Declaration of Ronald J. Wopsock, ¶¶ 17, 18.

42. The UTERO Ordinance was enacted by the Tribal Business Committee on March 27, 2013. The Ordinance was approved by the Superintendent of the Bureau of Indian Affairs ("BIA"), Department of Interior, Uintah and Ouray Agency by letter dated July 25, 2013. The Tribe and Third-Party Defendants ask the Court to take judicial notice of both the UTERO Ordinance and the BIA Superintendent's letter. See Exhibit Appendix, Exhibits A and C.

43. In approving the UTERO Ordinance, the BIA Superintendent necessarily determined that the UTERO Ordinance is not "inconsistent with the provisions of any act of Congress or of any treaty or of the tribal constitution or charter under which the resolution" was adopted. See Exhibit Appendix, Exhibit E.

44. Duchesne County does not allege that the Tribe's UTERO Ordinance has been enforced against Duchesne County.

45. Instead, paragraphs 74 through 89 of the Duchesne County complaint consist of nothing more than (*i*) an examination of different provisions of the UTERO Ordinance, (*ii*) speculation, conjecture, and/or outright misrepresentations about the hypothetical application of the UTERO Ordinance, and (*iii*) a request that this Court

function as a clearing house and issue an advisory opinion invalidating the UTERO Ordinance in the abstract.

46. Paragraphs 67-70, 73-84, and 87-92 of the Duchesne County complaint consist of nothing more than pure legal conclusions or legal conclusions couched as factual allegations. The remaining allegations under Count 3, paragraphs 71-72, 84 and 86 do not allege a legally-cognizable claim for relief.

V. Undisputed Facts Related to Count 4 of the Third-Party Complaint

47. Count 4 of the Duchesne County complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to order "armed officers of the *Ute Tribe* to remove signs identifying roads and rights-of-way as public and installing "No Trespassing" signs on these otherwise public roads and rights-of-way within or without the *former Reservation*." (emphasis in the original) See Dkt. 239, ¶ 96.

48. Count 4 further alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to order "armed officers" to stop motorists "on these public roads and rights-of-way to search their vehicles and to otherwise deny them the right to travel on these public roads and rights-of-way within or without the *former Reservation*." (emphasis added) See Dkt. 239, ¶ 97.

49. The complaint does not identify a single public road or right-of-way, or a single person whose travel on public roads and rights-of-way has been impeded by the Ute Tribe, or whose vehicles have been searched by Tribal officers.

50. The complaint does not identify a single Tribal officer involved in the allegedly improper stops.

51. What Duchesne County calls "public roads and rights-of-way" are in fact roadways within the exterior boundaries of the U&O Reservation to which Duchesne County has never acquired lawful rights-of-way under the requirements of 25 U.S.C. §§ 323-328. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶ 22; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 21.

52. By letter dated 8/17/2011, the Tribe terminated a Surface Use Agreement between the Tribe and Duchesne County because of the County's failure to recognize and comply with 25 U.S.C. §§ 323-328 in obtaining lawful rights-of-way over roadways inside the U&O Reservation. The Tribe and Third-Party Defendants ask the Court to take judicial notice of the 8/17/2011 letter and the attachments thereto. See Exhibit Appendix, Exhibit D; see also Declaration of Gordon Howell, ¶ 22; Exhibit G, Declaration of Ronald J. Wopsock, ¶ 21.

53. The Tribe and the Third-Party Defendants deny that they have ever expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts of impeding travel on public roads and rights-of-way within or without the U&O Reservation. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶¶ 25, 26; Exhibit G, Declaration of Ronald J. Wopsock, ¶¶ 24, 25.

54. Paragraphs 94-95 and 98-100 of the Duchesne County complaint consist of nothing more than pure legal conclusions or legal conclusions couched as factual

allegations. The remaining allegations under Count 4, paragraphs 96 and 97, do not allege a legally-cognizable claim for relief.

VI. Undisputed Facts Related to Count 5 of the Third-Party Complaint

55. Paragraph 102 of the complaint alleges that the Ute Tribe, its Business Committee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to engage in invidious discrimination against Duchesne County in violation of 42 U.S.C. § 1985 by acts of "intimidation, threats and/or harassment to deter, impede, hinder, defeat and/or obstruct justice, and the right to travel within out without the *former Reservation*." (emphasis in original) See Dkt. 239, ¶ 102.

56. The language of paragraph 102 is virtually identical to the conclusory language that the Supreme Court rejected as insufficient to allege a claim for invidious discrimination in *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

57. The remaining allegations under Count 5, paragraphs 103-104 do not allege a legally-cognizable claim for relief.

58. Tribe and the Third-Party Defendants deny that they have ever expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts of invidious discrimination against Duchesne County or the non-Indian residents of Duchesne County. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶¶ 29, 30; Exhibit G, Declaration of Ronald J. Wopsock, ¶¶ 28, 29.

STANDARDS OF REVIEW

I. Rule 12(b)(1) Standard of Review

"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 the existence of subject-matter jurisdiction is a threshold inquiry that 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.

A party can challenge a federal court's subject matter jurisdiction at any time in judicial proceedings. *Ramey Construction Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982).

A. Factual Standard of Review

In *Holt v. United States* the Tenth Circuit categorized Rule 12(b)(1) motions into two categories: either a "facial attack on the complaint's allegations as to subject matter jurisdiction" or "a party may go beyond allegations contained in the complaints and challenge the facts upon which subject matter depends." *Holt v. United States*, 46 F.3d 1000, 1002-1003 (10th Cir. 1995). When, as here, the defense of tribal sovereign

immunity is asserted, a court may rely on evidence outside the pleadings in resolving the issue of tribal sovereign immunity. *Native American Distributing v. Seneca-Cayuga Tobacco, Co.*, 491 F.Supp. 2d 1056 (N.D. Okla 2007). In *Native American Distributing*, the district court applied *Holt* and concluded that if the parties look to materials outside of the pleadings when litigating tribal sovereignty, the motion to dismiss is considered a factual attack, meaning that "a district court may not presume the truthfulness of the complaint's factual allegations." *Holt*, 46 F.3d at 1003 (emphasis added). "Instead, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rules 12(b)(1)." *Native American Distributing*, 491 F. Supp. 2d at 1061, citing *Holt*, 46 F.3d at 1003 (internal citations omitted).

B. Facial Standard of Review.

In contrast to a factual challenge, a facial challenge to subject-matter jurisdiction simply looks to the four corners of the complaint in determining whether the plaintiff's allegations are sufficient, if taken as true. *See Paper, Allied-Industrial, Chemical And Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). In this case the Tribe and the Third-Party Defendants challenge both the existence of subject-matter jurisdiction (i.e., a factual challenge), and the sufficiency of the pleading of subject-matter jurisdiction (i.e., a facial or technical challenge).

III. Rule 12(b)(6) Standard of Review

The Supreme Court abolished the concept of bare notice pleading in *Ashcroft v. Iqbal,* 556 U.S. at 678-79. The plaintiff in *Iqbal* brought various claims against U.S.

Attorney General John Ashcroft and F.B.I. Director Robert Mueller. The Supreme Court ruled that the claims against Ashcroft and Mueller should have been dismissed under Rule 12(b)(6) because the factual allegations of the complaint were insufficient to "nudge" the plaintiff's claims "across the line from the conceivable to the plausible." *Id.* at 683. The Court observed that "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79. The Court said that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* at 678 (citation omitted). The Court emphasized that a court is not required to "*accept as true a legal conclusion couched as a factual allegation*." *Id*. (emphasis added) The Court said that when a complaint pleads facts that are "'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" of entitlement to relief. *Id*. 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." *Id.*; *see also Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007).

IV. Summary Judgment Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Rule 56 does not require that "any discovery take place before summary judgment can be granted." *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). "Indeed, summary judgment can and often should be granted without discovery." *Banks v. Mannoia*, 890 F. Supp. 95, 98

(N.D.N.Y. 1995). Even when a case is not fully adjudicated under Rule 56, subsection (d)(1) authorizes the court to "determine what material facts are not genuinely at issue" and enter partial summary judgment. Fed. R. Civ. P. 56(d)(1). When the moving party has met the standard of Rule 56, summary judgment is mandatory." *U.S. Southern Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1006-07 (S.D. Ind. 2003) (citing *Celotex*, 477 U.S. at 322-23). To defeat the motion, the non-moving party must affirmatively set forth facts showing a genuine issue of disputed material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-86.

LEGAL ARGUMENT

A. The Complaint Must Be Dismissed For Lack of Subject Matter Jurisdiction

I. There is No Subject Matter Jurisdiction Over Duchesne County's Claims

It is well-established that Indian tribes have jurisdictional authority to enact and enforce tribal employment rights ordinances ("TEROs"). *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-1315 (9th Cir. 1990); *Ariz. Pub. Serv. Co. v. Office of Navajo Labor Relations* (Navajo, No. A-CV-08-87, Oct. 8, 1990*); FMC v. Shoshone-Bannock Tribes*, 15 Indian L. Rep. 6023 (Sho-Ban. Tr. Ct., App. Div., May 19, 1988). Likewise, Indian tribes possess jurisdictional authority over non-members who enter into consensual relationships with Indian tribes and tribal members, through commercial dealings, contracts, leases or other arrangements. *Montana v. United States*, 450 U.S. 544, 565 (1981).

In *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F. 2d 474 (1980), a corporation instituted suit in federal court seeking to invalidate a tribal

business license ordinance, and asking for declaratory and injunctive relief, as well as monetary damages. The corporation alleged subject-matter jurisdiction on various alternative grounds. The district court entered judgment in favor of the corporation and against the Tribe. On appeal, the Ninth Circuit reversed and directed the district court to dismiss the complaint for lack of subject-matter jurisdiction. The Ninth Circuit disposed of all but one of the alleged jurisdictional grounds in a footnote. *Id.* at 476, n.3. The decision itself addressed only *Trans-Canada's* argument that subject-matter jurisdiction could be based on the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303. The Ninth Circuit rejected the ICRA as a possible basis for subject-matter jurisdiction as well. The Ninth Circuit explained that the district court had erred in assuming that federal constitutional guarantees applied to the Tribe's exercise of its police power over Trans-Canada's proposed construction project. *Id*. at 477. The Ninth Circuit ruled that although ICRA imposes due process and equal protection constraints on Indian tribes in the exercise of their police powers, the sole remedy for a vindication of federal constitutional rights in a federal court action is through a claim for federal habeas relief. *Id*. at 488. Stated differently, the Ninth Circuit ruled that a Tribe's exercise of tribal government and police powers is not subject to attack under the Fifth and Fourteenth Amendments to the U.S. Constitution except to the extent allowed by Congress under ICRA. On that basis the Ninth Circuit dismissed the *Trans-Canada* complaint for a lack of subject-matter jurisdiction and directed the district court to dismiss the complaint. The same result must apply here. The Court must dismiss Duchesne County's claims for lack of subject matter jurisdiction.

II. Alternatively, There is No Article III Case or Controversy

Article III of the Constitution does not permit federal courts to render advisory opinions because "it is not the role of federal courts to resolve abstract issues of law." *Columbia Fin. Corp. v. Bancinsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011) (citing e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be *a real and substantial controversy* admitting of specific relief through a decree of a conclusive character, *as distinguished from an opinion advising what the law would be upon a hypothetical state of facts*. (emphasis added)

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

All five counts of the Duchesne County complaint should be dismissed for lack of subject matter jurisdiction based on, *inter alia*, mootness, lack of ripeness, and/or lack of a justiciable controversy. Duchesne County has not identified any past, present, or future conduct on the part of the Tribe itself or the Third-Party Defendants that admits "to specific relief through a decree of a conclusive character." "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. U.S.*, 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.").

There is no Article III case or controversy under Count 1 of the complaint because Count 1 fails to allege a live controversy based on a single actual "sham" lawsuit funded by the Tribe or the Third-Party Defendants.[16]

There is no Article III case or controversy under Count 2 of the complaint because it was within the Tribal Business Committee's governmental power and prerogative to send the letter of 1/30/2012 to Duchense County; neither the contents of the letter, nor the sending of the letter violated federal law; and Duchesne County is not being irreparably harmed by the letter, Dkt. 175-2.[17]

There is no Article III case or controversy under Count 3 of the complaint because (*i*) the Ute Tribe did not violate federal law in terminating the Disclaimer of Civil/Regulatory Authority, Dkt. 162-2; (*ii*) there is no existing justiciable controversy for determining whether one or more specific provisions of the UTERO Ordinance violate federal law; (*iii*) the Tribe is not unlawfully exercising jurisdiction outside the U&O Reservation boundaries, (*iv*) the Tribe's lawful imposition of an Employment Right Fee under the UTERO Ordinance is not an act of "extortion" or "bribery," and (*v*) neither the Tribe nor the Third-Party Defendants have engaged in any acts of extortion or bribery in relation to Duchesne County or the residents of Duchesne County.[18]

There is no Article III case or controversy under Count 4 of the complaint because (*i*) neither the Tribe itself nor the Third-Party Defendants have blocked, or are blocking, a single public road or right-of-way inside the U&O Reservation; (*ii*) neither the

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[16] See Statements of Undisputed Material Fact, Nos. 10-18.
[17] See Statements of Undisputed Material Fact, Nos. 19-24.
[18] See Statements of Undisputed Material Fact, Nos. 25-46.

Tribe itself nor the Third-Party Defendants have ordered the removal of signs identifying public roads and rights-of-way as public; (*iii*) neither the Tribe itself nor the Third-Party Defendants have ordered tribal officers to impede traffic or search motorists' vehicles on public roadways inside the U&O Reservation; and (*iv*) the Tribe acted within its governmental powers and prerogative in terminating a 1999 Surface Use Agreement between the Tribe and Duchesne County after the County failed to abide by the terms of the Agreement in seeking lawful rights-of-way inside the Reservation under 25 U.S.C. §§ 323-28.[19]

There is no Article III case or controversy under Count 5 of the complaint for multiple reasons. Neither the Tribe nor the Third-Party Defendants have "ever expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts of invidious discrimination against Duchesne County or the non-Indian residents of Duchesne County."[20] Moreover, Count 5 alleges a conspiracy under 42 U.S.C. § 1985 between the Ute Tribe, its Tribal Business Committee, and Third-Party Defendants Howell and Wopsock, the Chairman and Vice-Chairman of the Business Committee. Under the intracorporate conspiracy doctrine the alleged conspiracy is a legal impossibility because a private or governmental corporation such as the Ute Tribe cannot conspire with its corporate agents. *See Bever v. Rockwell Int'l. Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994). The Ute Tribe is an entity that can act only though a

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[19] See Statements of Undisputed Material Fact, Nos. 47-54.

[20] See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶¶ 29, 30; Exhibit G, Declaration of Ronald J. Wopsock, ¶¶ 28, 29.

majority vote of a quorum of the Tribe's Business Committee; the individual Business Committee members have no authority to act on the Tribe's behalf as individuals.[21]

III. Alternatively, Duchesne County Lacks Constitutional or Prudential Standing

A federal court may hear only those cases where a plaintiff has standing to sue. Standing has both a constitutional component and 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 Duchesne County. *See*, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). The plaintiff must "allege . . . facts 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).

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[21] See Statements of Undisputed Material Fact, Nos. 1, 5 and 6.

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.").

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)).

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.

Duchesne County lacks constitutional or prudential standing because it cannot satisfy the three-pronged standing test.

There is no standing under Count 1 because Count 1 fails to allege a live controversy based on a single actual "sham" lawsuit funded by the Tribe or the Third-Party Defendants. In addition, there is no causal connection between the alleged injury and the actions of the Ute Tribe and the Third-Party Defendants.[22]

There is no standing under Count 2 of the complaint because it was within the Tribal Business Committee's governmental power and prerogative to send the letter of 1/30/2012 to Duchense County. Neither the contents of the letter, nor the sending of the letter violated federal law. There is no injury-in-fact nor the threat of any impending, concrete injury in fact to Duchesne County.[23]

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[22] See Statements of Undisputed Material Fact, Nos. 10-18.
[23] See Statements of Undisputed Material Fact, Nos. 19-24.

There is no standing under Count 3 of the complaint because (*i*) Duchesne County cannot claim injury-in-fact from the Tribe's exercise of its right to terminate the 1998 Disclaimer of Civil/Regulatory Authority inasmuch as Duchesne County agreed to the inclusion of a right of termination in the Disclaimer; (*ii*) the Tribe's UTERO Ordinance is not being applied to Duchesne County, the UTERO Ordinance is not being applied to fee lands inside the U&O Reservation, and the UTERO Ordinance is not being applied to lands outside the U&O Reservation;[24] (*iii*) the lawful imposition of an Employment Right Fee under the UTERO Ordinance is not an act of "extortion" or "bribery," and neither the Tribe nor the Third-Party Defendants have engaged in any acts of extortion or bribery in relation to Duchesne County or the residents of Duchesne County.[25]

There is no standing under Count 4 of the complaint because (*i*) neither the Tribe itself nor the Third-Party Defendants have blocked, or are blocking, a single public road or right-of-way inside the U&O Reservation; (*ii*) neither the Tribe itself nor the Third-Party Defendants have ordered the removal of signs identifying public roads and rights-of-way as public; (*iii*) neither the Tribe itself nor the Third-Party Defendants have ordered tribal officers to impede traffic or search motorists' vehicles on public roadways inside the U&O Reservation; and (*iv*) the Tribe acted within its governmental powers and prerogative in terminating a 1999 Surface Use Agreement between the Tribe and

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[24] See Statements of Undisputed Material Fact, Nos. 25-46.
[25] See Statements of Undisputed Material Fact, Nos. 34-38, 41.

Duchesne County after the County failed to abide by the terms of the Agreement in seeking lawful rights-of-way inside the Reservation under 25 U.S.C. §§ 323-28.[26]

There is no standing under Count 5 for the same multiple reasons discussed above under Counts 1 through 4.

IV. Alternatively, Tribal Sovereign Immunity Requires Dismissal of the Complaint

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 at 318. 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 County.*, 391 F. Supp. 2d 995, 1036 (D. Utah 2005).

Similarly, the Business Committee is cloaked in the Tribe's sovereign immunity. In *Kenai Oil & Gas, Inc. v. Department of Interior*, this Court held that "claims against

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[26] See Statements of Undisputed Material Fact, Nos. 47-54.

the members of the Business Committee which are essentially against the tribe itself. . . are thus barred from this court's jurisdiction by the tribe's sovereign immunity." *Kenai Oil & Gas, Inc. v. Department of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981). Further, in this case"[T]ribal immunity may not be evaded by suing tribal officers, as plaintiffs have done in this suit." *Id*, citing *Seneca Constitutional Rights Organization v. George*, 348 F. Supp. 48, 50 (W.D.N.Y.1972); *Barnes v. United States*, 205 F. Supp. 97, 100-01 (D.Mont.1962). In *Fletcher v. United States*, the Tenth Circuit cloaked the Tribe's governing officials in the Tribe's sovereign immunity, stating:

> This principle has been applied to protect state and federal officials sued in their official capacity. *See, e.g., Hafer v. Melo,* 502 U.S. 21 ... (1991) (state); *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 689-90 ... (1949) (federal). Because there is no reason to treat tribal immunity differently from state or federal immunity in this sense, tribal immunity protects tribal officials against claims in their official capacity. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 ... (1982) (employing same rules for waiver of tribal immunity as are employed for waiver of state and federal immunity because no principled reason required different treatment).

Fletcher v. United States, 116 F.3d 1315 at 1324 (10th Cir. 1997).

Although Duchesne County has named Defendants Howell and Wopsock in their individual capacities, instead of their official capacities, the complaint fails to allege any actions that Messrs. Howell and Wopsock have taken that were outside the scope of their official capacities. As noted above, the Ute Tribe is an entity that can act only though a majority vote of a quorum of the Tribe's Business Committee and the individual Business Committee members have no authority to act on the Tribe's behalf

in their individual capacities.[27] Duchesne County does not, and cannot, articulate exactly how the legislative action taken by the Business Committee members together as a legislative body are outside of the scope of their authority. The law is clear that Tribal immunity extends to individual tribal officials acting in their representative capacity within the scope of their authority. *See, e.g., Burrell v. Armijo*, 603 F.3d 825, 832-834 (10th Cir. 2010) (dismissing individual capacity action where evidence showed defendant was acting within his authority as governor of the pueblo); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th 1985) (dismissing individual capacity action against tribal officials where they acted within their delegated authority in excluding plaintiff from reservation); *Native Am. Distrib. V. Seneca-Cayuga Tobacco Co.*, 490 F. Supp. 2d 1056, 1072 (D. Okla. 2007) (dismissing individual capacity actions were defendants acted with a "colorable" claim of authority from the tribe); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 307 (N.D.N.Y. 2003) (tribal officials have qualified immunity unless their challenged actions "were not related to the performance of their official duties); *Bassett v. Mashantucket Pequot Museum & Research Ct., Inc.*, 221 F. Supp. 2d 271, 280-81 (D. Conn. 2002) (merely alleging that defendants' actions were illegal was insufficient to surmount qualified immunity; instead actions must be " 'manifestly or palpably beyond his authority' ").

[27] See Statements of Undisputed Material Fact, Nos. 1, 5 and 6.

Both Mr. Howell and Mr. Wopstock deny that have taken any unlawful actions, either in their official capacities, or in their individual capacities.[28]

Because the Ute Tribe has not waived immunity to Duchesne County's countersuit and third-party complaint, those claims must be dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity.

B. The Complaint is 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

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[28] Exhibit Appendix, Exhibit F, Declaration of Gordon Howell; Exhibit G, Declaration of Ronald J. Wopsock.

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.

C. The United States is a Necessary and Indispensable Party

The United States is a necessary and indispensable party to the Duchesne County complaint. This is especially true under Count 4, wherein Duchesne County asks this Court to declare various roadways inside the U&O Reservation to be "public roadways." See Dkt. 239, ¶ 100. The United States is a necessary *and* indispensable party to any claim, such as Count 4 of the Duchesne County complaint, that seeks to

adjudicate title to, or interests in, Indian property, the title to which is held in trust by the United States. *See, e.g., Minnesota v. United States*, 305 U.S. 382, 386-87 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337, 1339 (9th Cir. 1975); *Town of Okemah v. United States*, 140 F.2d 963 (10th Cir. 1944).

D. The Complaint Fails to State a Claim for Relief

In *Ashcroft v. Iqbal,* 556 U.S. at 679, the Supreme Court said that a court considering a motion to dismiss should begin by identifying allegations that "are not entitled to the assumption of truth" because they are nothing more than legal conclusions couched as factual allegations. *Id*. at 678-79. The Court said a court should then review the well-pleaded factual allegations to determine whether those well-pleaded allegations "plausibly give rise to an entitlement to relief." *Id.* at 679. Applying this test, none of the Duchesne County claims allege a proper claim for relief.

E. Duchesne County Has Failed to Exhaust Tribal 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 the arguments above, the County still would not be able to bring its claims. Instead, the harmed party would need to first bring that claim in the Ute Tribe's Tribal 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 its own behalf or the behalf of third parties must be dismissed.

CONCLUSION

Based on the arguments and authorities cited herein, the Court must dismiss Duchesne County's third-party complaint under Rule 12(b). Alternatively, the Court must enter a summary judgment of dismissal in favor of both the Tribe and the Third-Party Defendants.

Respectfully submitted this 21st day of January, 2014.

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APPENDIX TABLE OF CONTENTS

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2014, I electronically filed the foregoing **THE UTE TRIBE AND THIRD-PARTY DEFENDANTS' MOTION AND SUPPORTING MEMORANDUM TO DISMISS DUCHESNE COUNTY'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT UNDER RULE 12(b), OR ALTERNATIVELY, FOR A SUMMARY JUDGMENT OF DISMISSAL** 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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