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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, *et al*; Defendants.	**DUCHESNE COUNTY'S MEMORANDUM IN OPPOSITION TO THE UTE TRIBE AND THIRD-PARTY DEFENDANTS MOTION TO DISMISS DUCHESNE COUNTY'S COUNTERCLAIM AND THIRD-PARTY COMPLAINT**
DUCHESNE COUNTY, Counter-Claim and Third-Party Plaintiff, v. UTE INDIAN TRIBE OF THE UINTAH and OURAY RESERVATION, UTAH, *et al*; Counter-Claim and Third-Party Defendants	CONSOLIDATED CASES Civil No. 2:75-cv-00408 and 2:13-cv-00276-BSJ Judge Bruce S. Jenkins

The Ute Indian Tribe of the Uintah and Ouray Reservation, the Business Committee of the Ute Tribe, Gordon Howell, Chairman of the Business Committee, and Ronald Wopsock, Vic-Chairman of the Business Committee (collectively "Defendants") have moved pursuant to *Fed. R. Civ. P.* 12(1) and (6) to dismiss Duchesne County's *Counterclaim* and *Third-Party Complaint*. Defendants have also moved in the alternative for summary judgment as to Duchesne County's *Counterclaim* and *Third-Party Complaint*. Duchesne County hereby submits this *Memorandum* in opposition to the Defendants' *Motion to Dismiss*.[1] Duchesne County objects, however, to this *Motion to Dismiss* being converted in to a *Motion for Summary Judgment* by the Court considering matters outside of the pleadings.[2]

BACKGROUND

By way of its original *Counterclaim* and/or *Third-Party Complaint*, Duchesne County asserted five claims for declaratory and injunctive relief. These were: (1) to enjoin Defendants' efforts to obstruct justice by orchestrating, funding or otherwise aiding and abetting its members in bringing sham lawsuits against County officials,[3] which the Court dismissed in response to the

[1] Doc. 417.

[2] It is reversible error for a court to grant a motion to dismiss that has been one converted to one for summary judgment without providing all parties a reasonable opportunity to present material relevant to the summary judgment motion. *Mack v. South Bay Beer Dist., Inc.*, 798 F. 2d 1279, 1282 (9th Cir. 1986). In the instant case, Duchesne County has had no opportunity to respond in a meaningful fashion to the materials submitted by Defendants in support of their alternative *Motion for Summary Judgment*. This is so because the Ute Tribe has refused to participate in discovery. Consequently, in conjunction with this *Memorandum*, Duchesne County has filed a *Fed.R.Civ.P.* 56(d) *Motion*. *See* Doc. 469.

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

Ute Tribe's first *Motion to Dismiss*;[4] (2) to enjoin Defendants' illegal and unconstitutional assertion of law enforcement authority over Federal, State and County roads and rights-of-way,[5] which the Court refused to dismiss in response to the Ute Tribe's first *Motion to Dismiss*; (3) to enjoin Defendants' illegal and unconstitutional assertion of civil regulatory authority over non-members and non-tribal lands, including allegations of racketeering,[6] which Court refused to dismiss except for the allegations of racketeering; (4) to enjoin the Defendants from closing public road and rights-of-way to County officials and members of the general public,[7] which the Court refused to dismiss; and (5) to enjoin Defendants from continuing to violate the constitutional rights, privileges and immunities of the County and its citizens,[8] which the Court refused to dismiss. In the latest *Motion to Dismiss*,[9] Defendants raise the same arguments that were raised by the Ute Tribe in its first *Motion to Dismiss* and rejected by the Court.

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[4] Exhibit 1 hereto is an *Order* from the January 10, 2014 hearing which the Ute Tribe prepared and submitted with Duchesne County's approval to the Court for entry.

[5] Doc. 239, *Counterclaim* and *Third-Party Complaint*, ¶'s 51 through 65.

[6] *Id.* at ¶'s 66 through 92.

[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] The Ute Tribe has a pattern and practice of repeatedly bring essentially the same *Motions*. *See* e.g. Doc. 154, 176, and 361.

INTRODUCTION

In their *Motion to Dismiss*, Defendants claim that Duchesne County's *Counterclaim* and *Third-Party Complaint* should be dismissed because the Court (1) lacks of subject matter jurisdiction; (2) because there is no Article III case or controversy; (3) because Duchesne County's lack of standing; (4) because of sovereign immunity, (5) because of res judicata; (6) because of Duchesne County's failure to join the United States as an indispensable party; (7) because the *Counterclaim* and *Third-Party Complaint* fail to state a claim for relief; (8) because Duchesne County has allegedly failed to exhaust tribal remedies; and/or (9) because of the intra-corporate conspiracy doctrine.

STANDARD OF REVIEW

In deciding Defendants' *Motion to Dismiss*, the allegations contained in the Duchesne County's *Counterclaim* and *Third-Party Complaint* must be accepted as true and construed in the light most favorable to the County.[10] It is likewise noteworthy that since the issue involved in Duchesne County's *Counterclaim* and *Third-Party Complaint* are all related to the jurisdiction that Defendants are asserting and/or claim to have the authority to assert, Defendants have the burden of proof even though they are defendants.[11]

SUMMARY OF ARGUMENT

What Defendants are seeking with this *Motion to Dismiss* is essentially a safe-haven or sanctuary for members of the Ute Tribe who commit crimes within the State of Utah. Not only

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[10] *See Brever v. Rockwell International Corporation,* 40 F.3d 1119, 1125(10th Cir. 1994)

[11] *Austin's Express, Inc. v. Arneson,* 996 F. Supp. 1269, 1270 (D. Mont. 1998).

do Defendants contend that members of the Ute Tribe cannot be prosecuted for offenses allegedly occurring within the *former-Reservation,* but it is also Defendants' position that if a Ute tribal member commits a crime, even a serious felony, off-*Reservation* that tribal member is entitled to sanctuary if he or she can reach the *Reservation's* borders prior to being apprehended by State and/or local law enforcement. Defendants even take the position that State and/or local law enforcement's hot pursuit of a tribal member or other Indian who committed an off-*Reservation* crime, even a felony, must stop at the *Reservation's* borders.[12] Defendants are also seeking to oust State and County civil and criminal authority over an area extending from Wasatch and Carbon Counties to the Colorado border, and to govern this area and all person s within unfettered by the United States *Constitution*.

Duchesne County's *Counterclaim* and *Third-Party Complaint,* however, are intended to see that this situation does not occur. Nor can it be allowed to occur in society founded upon civil rights and the rule of law. The Ute Tribe failed in its earlier attempt to carve its f*ormer-Reservation* out of the State of Utah when the Court denied the Tribe's first *Motion to Dismiss.* Based on the same arguments Defendants are now back before the Court in another attempt at creating a super sovereign unrestrained by the *Constitution*, which the Court should also prevent by denying their latest *Motion to Dismiss* for the same reasons as the first such *Motion*.

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[12] *See Motion for Partial Summary Judgment*, Doc. 335, p. 15. However, under the common law doctrine of *fresh pursuit*, an officer may pursue a felon or suspected felon, with or without a warrant, into another jurisdiction and arrest the suspect. *Six Feathers v. State*, 611 P.2d 857, 861 (Wyo. 1980). Utah has also codified the common law with the *Uniform Act On Fresh Pursuit*, *Utah Code Ann*. §§ 77-9-1, *et seq. Fresh Pursuit Statutes* such as that of Utah even authorize arrests within the boundaries of a reservation. *See State v. Waters*, 971 P.2d 538, 543 (Wash. App. 1999).

RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE

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

Duchesne County responds to each of Plaintiff's 51 statements of fact, with a response below.

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.

RESPONSE: Admitted.

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 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.

RESPONSE: Admitted.

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

RESPONSE: Admitted.[13] However, originally known as the State of Deseret, Utah was

[13] Defendants' reference to Utah's history is interesting because in resolving conflicts between state and tribal authority, federal courts typically look to the historical relationships between the tribe, state and federal governments. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

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. More importantly, as a separate, independent nation, the State of Deseret also had its own *Constitution*, and the following language from the *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.[14]

The land area over which the State of Deseret claimed dominion included not only the entire

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[14] *Deseret Constitution Preamble*.

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.[15]

There is also no reference in the *Constitution* of the State of Deseret to "**Indians**" or "**Indian lands**." Consequently, 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 State of Deseret provided for its governance and dominion over all people and lands lying within its boundaries.

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."[16] 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 Act*, with its recognition of the Utah Territorial Government's

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[15] *Deseret Constitution Preamble*.

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

dominion and governance over all persons residing within the Utah Territory, differs from the *Organic Acts* for other western states. For example, 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.[17]

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.

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 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

[17] 12 *Stat.* 85, Ch. 95, §1.(emphasis added).

United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."[18] But a disclaimer with respect to the "right and title" to Indian lands is NOT a surrender of jurisdiction. Furthermore, the "absolute jurisdiction" language from the Utah *Enabling Act* and *Constitution* is not the same as "exclusive jurisdiction and control."[19] This "absolute jurisdiction" 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.[20]

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

RESPONSE: Disputed. Duchesne County objects to this "fact." The subject Act provides for the creation of the Hill Creek Extension, but recognized the Uncompahgre Reservation was disestablished. The cited document speaks for itself. Moreover, this Act of Congress defined the boundaries of the Uintah and Ouray Reservation. This Act did not expand either the Uintah Valley or Uncompahgre Reservations, but classifies the Uncompahgre as a "former" reservation. Additionally, the boundaries of the *Reservation* have been considerably

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

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

[20] *See id.*

reduced as the result of *Ute V*, *Hagen v. Utah,*[21] *Strate v. A-1 Contractors*[22] and *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*[23]

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

RESPONSE: Admitted.

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.

RESPONSE: Admitted.

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.

RESPONSE: Admitted.

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

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[21] 510 U.S. 399 (1994).

[22] 520 U.S. 438 (1997).

[23] 554 U.S. 316 (2008).

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).

RESPONSE: Disputed. While the Secretary of Interior or his designee should not approve an ordinance adopted by an Indian Tribe's governing body that is unlawful, they nevertheless, do so. Furthermore, even if the law approved by the Secretary of Interior or his designee is otherwise lawful, the Tribe's application of that law, as in the instant case, can nevertheless be unconstitutional and unlawful.

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.

RESPONSE: Disputed. Federal Courts have the jurisdiction to determine the authority claimed and/or exercised by Tribal governments. .

II. Response to 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.

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed.

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).

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed.

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.

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed. Likewise disputed since Duchesne County was never given an opportunity to conduct discovery.

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 Exhibt 11 to the Tribe's Motion to Dismiss Uintah County's Counterclaim, Dkt. 222. See Dkt. 222-1, pp. 51-66.

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed. Likewise disputed since Duchesne County was never given an opportunity to conduct discovery and actions against Duchesne County Officials are still pending in the Ute Tribal Court.

14. On May 7, 2013, lay advocates Lynda Kozlowicz and Edson Gardner, doing business as Kozlowicz and Gander, 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 0 to the Tribe's Motion to Dismiss Uintah County's Counterclaim, Dkt. 222. See Dkt. 222-1, pp. 44-50.

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed. Likewise disputed since Duchesne County was never given an opportunity to conduct discovery.

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 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 the official capacities, except as otherwise provided by law." See Exhibit Appendix, Exhibit A, § 1-2-3(6).

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed. Likewise disputed since Duchesne County was never given an opportunity to conduct discovery. Also disputed in that on its fact the ordinance allows for suit against officers or employees in their individual capacities.

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.

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed.

Likewise disputed since Duchesne County was never given an opportunity to conduct discovery.

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.

RESPONSE: Irrelevant. Duchesne County's *First Claim for Relief* has been dismissed. Likewise disputed since Duchesne County was never given an opportunity to conduct discovery.

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.

RESPONSE: Disputed.

II. Response to 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 Stoop exercising criminal jurisdiction over the 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.

RESPONSE: Disputed. As alleged in the *Second Claim for Relief* of Duchesne County's *Counterclaim* and *Third-Party Complaint*, the allegations of wrongdoing by the

Defendants are much broader that the letter of January 30, 2012.[24]

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

RESPONSE: Disputed.[25]

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.

RESPONSE: Disputed.

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

RESPONSE: Disputed.

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.

RESPONSE: Admitted. But Mr. Howell is being sued in his individual capacity as the current Chairman of the Business Committee and for continuing the unconstitutional and illegal practices of his predecessor in office.

24. Paragraphs 52 and 55 through 65 of the Duchesne County complaint

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[24] *See* Doc. 238, pp. 27 through 29 and 33 through 37.

[25] *See id.*

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.

RESPONSE: Disputed.

IV. (sic) Response to 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 with the *former Reservation* owned by non-members of the *Ute Tribe*." See Dkt. 239, ¶ 71.

RESPONSE: Admitted.

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; See Exhibit Appendix, Exhibit G, Declaration of Ronald J. Wopsock, ¶ 12.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. It is also well settled that only admissible evidence can be considered by the Court in ruling on *Motions*.[26] Furthermore, a court may not consider either hearsay evidence or unsworn

[26] *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

documents submitted either in support of or in opposition to a party's *Motion*.[27] The *Declaration* or *Affidavi*t submitted in support of or in opposition to a *Motion* must also be based upon the witness' personal knowledge;[28] set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters." [29] A declarant or affiant also cannot state legal opinions/conclusions in his or her *Declaration* or *Affidavit*.[30] Similarly, a *Declaration* or *Affidavi*t that makes conclusory factual assertions and/or is based upon speculation is likewise deficient and not to be considered by the Court.[31] Finally, even if the *Declaration* or *Affidavit* is not hearsay, not improper speculation or otherwise free of conclusory statements, including legal opinions, it still must be relevant in order to be considered by the Court.[32] The Court, therefore, should strike and not consider the paragraph 12 of the *Wopsock Declaration* and paragraph 13 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.[33]

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[27] *Martin v. John W. Stone Oil Distributor, Inc*., 819 F.2d 547, 549 (5th Cir. 1987); *See Rogers v. Ford Motor Co.*, 952 F. Supp. 606, 610 (N.D. Ill. 1997).

[28] *See Bright v. Ashcroft*, 259 F. Supp. 2d 494 (E.D. La. 2003)(Statements not based upon affiant's personal knowledge should be stricken).

[29] *Federal Rule of Civil Procedure* 56(b)(4).

[30] *See Fedler v. Oliverio,* 934 F. Supp. 1032, 1047 (N.D. Ind. 1996).

[31] *See e.g. Falls Riverway Realty, Inc. v. Niagra Falls,* 754 F.2d 49 (2nd Cir. 1985); *Koclanakis v. Merrimack Mutual Fire Insurance Co.,* 899 F.2d 673, 675 (7th Cir. 1990); *First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co.*, 891 F. Supp. 510, 514 (N.D. Cal. 1995).

[32] *See McKeithen v. S.S. Frosta*, 430 F. Supp. 899, 905-906 (E.D. La. 1977).

[33] This *Motion* and objection is authorised by *DUCivR* 7-1(b)(1)(B).

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; See Exhibit Appendix, Exhibit G, Declaration of Ronald J. Wopsock, ¶ 12.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. The Court is likewise requested to strike and not consider paragraph 12 of the *Wopsock Declaration* and paragraph 13 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.

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 anytime by giving 60 days advance notice in writing to the State and the Counties of Duchesne and Uintah." See Dkt. 162-2, p. 4.

RESPONSE: Disputed. Also states a legal conclusion.

29. By letter dated, May 9, 2001, 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. 222-2 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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. Also states a legal conclusion.

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.

RESPONSE: Admitted.

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.

RESPONSE: Irrelevant but disputed. The Duchesne County's extortion and racketeering claims have been dismissed.

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.

RESPONSE: Irrelevant but disputed. The Duchesne County's extortion and racketeering claims have been dismissed.

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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. Furthermore, the racketeering and extortion claims have already been dismissed by the Court.

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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. Furthermore, the racketeering and extortion claims have already been dismissed by the Court. The Court is likewise requested to strike and not consider paragraph 12 of the *Wopsock Declaration* and paragraph 13 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.

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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery.

36. The Ordinance imposes and "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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery

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

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery.

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."

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. Furthermore, Defendants could not impose their "employment right fee" upon non-members' business activities within the *Former-Reservation* without some direct consensual relationship between the non-member or the Ute Tribe or tribal member.

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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. The Court is likewise requested to strike and not consider paragraph 12 of the *Wopsock Declaration* and paragraph 13 of the *Howell Declaration* because they are not based upon personal knowledge, ad they are legal opinions, conclusory and hearsay.

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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. The Court is likewise requested to strike and not consider paragraph 13 of the *Wopsock Declaration* and paragraph 14 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.

41. The Tribe and the Third-Party Defendants also deny that the Tribe or the Third-Party Defendants have ever expressly or tacitly ordered, authorized, approved, participated in, or condoned any acts or "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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. The Court is likewise requested to strike and not consider paragraphs 17 and 18 of the *Wopsock Declaration* and paragraphs 18 and 19 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.

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 the 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, Exhibit A and C.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. Duchesne County also objects on the basis of hearsay and a lack of foundation to the BIA Superintendent's letter.

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.

RESPONSE: Disputed. Duchesne County was never given an opportunity to conduct discovery. Duchesne Count also objects on the basis of hearsay and a lack of foundation to the BIA Superintendent's letter.

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

RESPONSE: Admitted.

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.

RESPONSE: Disputed.

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.

RESPONSE: Disputed.

V. Response to 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 Commitee, and Committee Chairman Howell and Vice-Chairman Wopsock have conspired to order "armed officers of th *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.

RESPONSE: Admitted.

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-or-way within or without the *former Reservation*." (emphasis in the original) See Dkt. 239, ¶ 97.

RESPONSE: Admitted.

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.

RESPONSE: Disputed.[34] Furthermore, Duchesne County has not been allowed to conduct discovery.

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

RESPONSE: Disputed.

51. What Duchesne County calls "public roads and rights-of-way" are in fact roadways withing 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.

RESPONSE: Disputed. The Court is likewise requested to strike and not consider paragraph 21 of the *Wopsock Declaration* and paragraph 22 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay. Furthermore, Defendants have the burden of proof with respect to these roads being under the

[34] *See* Exhibits to Duchesne County's *Counterclaim* and *Third-Party Complaint*, Doc. 238-1 through 238-6.

jurisdiction of the Ute Tribe.[35]

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.

RESPONSE: Disputed. The Court is requested to strike and not consider Exhibit D based upon hearsay and lack of authentication. The Court is likewise requested to strike and not consider paragraph 21 of the *Wopsock Declaration* and paragraph 22 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.

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 with out the U&O Reservation. See Exhibit Appendix, Exhibit F, Declaration of Gordon Howell, ¶¶ 25, 26; Exhibit G, Declaration of Ronald J. Wopsock, ¶¶ 24, 25.

RESPONSE: Disputed. The Court is likewise requested to strike and not consider paragraphs 24 and 25 of the *Wopsock Declaration* and paragraphs 25 and 26 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions,

[35] ***See Supra* F. d 10.**

conclusory and hearsay.

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.

RESPONSE: Disputed**.**

V. Response to 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 engaged 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 or without the *former Reservation*." (emphasis in original) See Dkt. 239, ¶ 102.

RESPONSE: Admitted.

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).

RESPONSE: Disputed.

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

RESPONSE: Disputed.

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.

RESPONSE: Disputed. The Court is likewise requested to strike and not consider paragraphs 28 and 29 of the *Wopsock Declaration* and paragraphs 29 and 30 of the *Howell Declaration* because they are not based upon personal knowledge, and they are legal opinions, conclusory and hearsay.

ARGUMENT: THIS COURT HAS SUBJECT MATTER JURISDICTION

Defendants assert that the Court lacks subject matter jurisdiction because the Tribe has the authority to enact and enforce its UTERO Ordinance, because the *Indian Civil rights Act* [36] does not authorize suits against tribal governments other than for *habeas corpus* relief, and because no matter how abusive and corrupt their actions have been, the *Fifth* and *Fourteenth Amendments* to the United States *Constitution* do not apply to either the Tribe or to the Third-Party Defendants.[37] These arguments are so lacking in merit as to deserve little by way of response.[38] Nowhere, for example, does it appear in the *Counterclaim* or *Third-Party Complaint* that Duchesne County is asserting any claims under the *Indian Civil Rights Act* or the *Fifth* and/or *Fourteenth Amendments*, which is not surprising since neither the *Bill of Rights* nor the *Fourteenth Amendment* apply to Defendants.[39]

This Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. §

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[36] 25 U.S.C. §§1301-1303.

[37] *See* Doc. 417, pp. 25-26.

[38] Another of Defendants' arguments not deserving of response is their contention that the County's *Counterclaim* and *Third-Party Complaint* should be dismissed because they are not set out in separate pleadings. According to Defendants, there should have been separate pleadings that drew distinctions between the claims under the *Counterclaim* and those under the *Third-Party Complaint*. *See* Doc. 417, p. 3. The *Federal Rules of Civil Procedure* allow for the joinder of additional parties to a *Counterclaim*. *See Fed. R. Civ. P.* 13(h). And the case supports this procedure. *See Dairyland Ins. Co. v. Hawkins*, 292 F. Supp. 947, 949 (S. D. Iowa 1968)(When defendant's counterclaim is compulsory, third-party defendants are properly joined in the *Counterclaim*).

[39] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

1331 because it raises substantial federal questions as to the scope of the Defendants' jurisdiction and/or lawful authority over Federal, State and County roads, over non-members and Duchesne County, including County officials and employees as well as and the enforcement of rights guaranteed to Duchesne County and non-members under the *Constitution*, which rights are being infringed by the Defendants.[40] In fact, federal courts have the jurisdiction to determine whether a tribe has exceeded its jurisdiction in the application of tribal employment ordinances such as UTERO to non-members.[41]

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*; because the County has failed to allege facts showing an illegal assertion of civil regulatory authority; and because the *UTERO Ordinance* as enacted and/or applied does not exceed the Tribe's authority, and because they have done none of the things alleged in the *Counterclaim*

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[40] *See National Farmers Union Ins. Cos.v. Crow Tribe,* 471 U.S. 845, 853 (1985)("a federal court may determine . . . whether a tribal court has exceeded the lawful limits of its jurisdiction"). *See also Nevada v. Hicks*, 533 U.S. 353 (2001); *Montana DOT v. King,* 191 F.3d 1108 (9th cir. 1991); *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

[41] *See Montana DOT,* 191 F.3d at 1108. Counsel for the Ute Tribe and Third-Party Defendants hold themselves out as one of the major national firms practicing in the area of Indian Law. *See* http://www.ndnlaw.com/ They obviously know, therefore, that these arguments are specious, yet they continue to advance them to the Court.

and/or *Third-Party Complaint*. These were the same arguments advanced by the Tribe in support of its first *Motion to Dismiss*, which the Court rejected.[42] These, however, are likewise issues of disputed fact which means that there is indeed a case or controversy.

In making this argument, the Defendants likewise ignore the allegations contained in Duchesne County's *Counterclaim* and *Third-Party Complaint* about them not only exceeding their lawful authority *vis-a-vis* the activities and rights of non-Indians and the County, but also the allegations about Defendants interfering with and obstructing Duchesne County in its exercise of the County's civil and law enforcement authority. Defendants ignore, too, the exhibits attached to Duchesne County's pleadings and incorporated by reference. Exhibits such as the Business Committee's December 14, 2012 letter to Kirk Wood, Chairman of the Duchesne County Commission, and County Sheriff Travis Mitchell 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.[43] Notwithstanding Defendants' 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 [44] as do the allegations contained in those pleadings.

Finally, Defendants argue that there is not a case or controversy as to any conspiracy

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[42] *See* Doc. 271, pp. 7 through 9.

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

[44] 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.

claims because of the intra-corporate conspiracy doctrine, which holds that a corporation or governmental entity cannot conspire with its officers or agents.[45] Defendants cite to *Bever v. Rockwell Int'l Corp.*,[46] in support of this contention. However, *Bever* holds the opposite. In *Bever*, the Tenth Circuit clearly stated that the intra-corporate conspiracy doctrine does not apply to conspiracy to violate civil rights,[47] and either does it apply to non-civil rights conspiracies when corporate or governmental agents/officers are alleged to have acted in their individual capacities and/or beyond the scope of their authority.[48]

ARGUMENT: DUCHESNE COUNTY DOES HAVE STANDING

Defendants allege that Duchesne County does not have the requisite standing to pursue its *Counterclaim* and *Third-Party Complaint*. These are also the same arguments raised by the Ute Tribe in its first *Motion to Dismiss,* and already rejected by the Court.[49] In addition, it should be noted that Uintah County moved to dismiss the Ute Tribe's *Complaint* on, among other grounds, the Tribe's lack of standing or otherwise having an actionable injury.[50] In response to that lack of standing argument the Ute Tribe asserted, based upon the Tenth Circuit holdings in *Seneca-*

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[45] *See* Doc. 417, p. 9.

[46] 40 F.3d 1119, 1126-27 (10th Cir. 1994).

[47] *See id.* at 1127-28.

[48] *Id.* at

[49] *See* Doc. 271, pp. 9 through 14.

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

Cayuga Tribe of Oklahoma v. State of Oklahoma[51] and *Prairie Band of Potawatomi Indians v. Pierce*,[52] that it had standing because Uintah County's assertion of jurisdiction within the boundaries of the *former Reservation* interferes with its right to govern.[53] The Court denied Uintah County's *Motion to Dismiss*.

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*.[54] Duchesne County also has standing because Defendants, with their efforts to obstruct justice and the County's jurisdiction by 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, have exceeded their lawful authority and irreparably harmed both

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[51] 874 F.2d 709, 710 (10th Cir. 1989).

[52] 253 F.3d 1234 (10th Cir. 2001).

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

[54] 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, which mirror the allegations of Duchesne County's *Counterclaim* and *Third-Party Complaint*.

Duchesne County and its citizens.[55] Duchesne County likewise has third-party standing under the *jus tertii doctrine*.

There are essentially two types *jus tertii* standing, and both exist in this case.[56] The first type of *jus tertii* standing is when the 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.[57] By law, Duchesne County is charged with protecting the health, safety and well-being of its citizens.[58] The activities of the Ute Tribe at issue in this case not only 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

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[55] *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). The Ute Tribe and third-Party Defendants attempt 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 Defendants 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).

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

[57] *Id.*

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

third parties."[59]

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.[60] 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;" [61] and the third party is not as able to assert the allegedly affected right on his or her own behalf.[62] 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 have no knowledge that their rights have been and/or are being violated by the Defendants. For example, when public roads and rights-of-way within the *former Reservation* are closed to non-members by Defendants, 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

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[59] *Id.*

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

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

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

violated. Neither do they report those road closures to Duchesne County.

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.[63] 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?[64] Duchesne County has the right to seek a determination of the Defendants' jurisdictional authority, which certainly equates to standing.

ARGUMENT: DUCHESNE COUNTY DOES NOT HAVE TO EXHAUST TRIBAL REMEDIES

Again, Defendants raise the same exhaustion of tribal court remedies argument that the Tribe asserted in its first *Motion to Dismiss*, and which the Court rejected:[65] 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 the County and its citizens. That argument was unprecedented when it was originally made (there are no cases supporting or even acknowledging this principle of law) and it remains more so today since it has already been

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

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

[65] See Doc. 271, pp. 14-15.

considered and rejected by the Court in ruling on the Ute Tribe's first *Motion to Dismiss*.

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.* The Ute Tribe, on the other hand, exists at the pleasure of Congress, which has plenary power over tribes and their lands pursuant to the *Indian Commerce Clause.*[66] This power allows Congress to both create tribes[67] and to terminate them.[68]

Furthermore, jurisdictional disputes between states-counties and tribes are determined by the federal court, not a tribal court, especially when the Defendants are asserting jurisdiction and/or authority over non-members and attempting to oust Duchesne County from exercising its jurisdiction within the *Former-Reservation*.[69] 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,[70] and the limits of a

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

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

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

[69] *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).

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

tribe's governmental authority is to ultimately to be determined by the federal courts.[71]

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[72] 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,[73] especially Duchesne County. Neither 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.[74] 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.[75]

Exhaustion of Ute Tribal Court remedies is likewise not required when it serves no

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[71] *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. 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).

[72] *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").

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

[74] 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).

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

purpose other than delay,[76] as would be the situation in the present case given the decisional law holding that jurisdiction does not exist in the Ute Tribal Court;[77] 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.[78] In addition, exhaustion of tribal court remedies is not a prerequisite to the existence of federal question jurisdiction.[79] Nor should it be when constitutional rights are involved.[80]

It is also nonsensical to require the exhaustion of tribal court remedies with respect to compulsory counterclaims.[81] Besides, the principle underlying the exhaustion requirement is that

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[76] *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").

[77] *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).

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

[79] *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.

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

[81] *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*

of "*tribal preemption*," which is a tribe's right to makes its own laws and to be ruled by them.[82] 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 power to: punish tribal offenders, determine tribal membership, regulate domestic relations amongst members, and provide for rules of inheritance.[83] The *Hicks* court went on to hold that "State sovereignty does not end at a reservation's borders." [84] Thus, when a state's interests outside the reservation are implicated, the state can even regulate the activities of tribal members on tribal land . . ."[85] Finally, and most significantly, *Hicks* makes clear that tribal law only preempts state law under very narrow circumstances: when it is "**on-**

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).

[82] *Id.*

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

[84] *Id*. at 361.

[85] *Id*. at 362.

reservation activity" AND involves "**only Indians**."[86]

ARGUMENT: DEFENDANTS ARE NOT IMMUNE FROM SUIT

Defendants raise once more the same sovereign immunity arguments that were presented and rejected by the Court in the Tribe first *Motion to Dismiss*.[87] 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's unlawful and/or unconstitutional actions.[88] Sovereign immunity also 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.[89] "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess."[90]

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

[87] *See* Doc. pp. 15 through 17.

[88] *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).

[89] *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).

[90] *Tenneco,* 725 F.2d at 574. *See also Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1153-56(10th Cir. 2001)(sovereign immunity does not shield tribes or tribal officials from suits to enjoin violations of federal law); *Arizona Public Service Co. v. Aspaas*, 77 F. 3d 1128, 1133-1134 (9th Cir. 1995)(tribal sovereign immunity does not bar suits for prospective injunctive

Third-Party Defendants fair no better with their sovereign immunity arguments, especially since the Business Committee members have been named solely in their individual capacity and all are alleged to have acted and continuing to act outside of and/or beyond the scope of their authority.[91]

In addition, under the holding in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*,[92] 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. [93] 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.[94] Thus, if immunity were to be applied in this instance, then Duchesne County would have no forum in which to vindicate the violation of its constitutional

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relief against tribal officers allegedly acting in violation of federal law).

[91] *See Burrell v. Armijo*, 456 F.3d 1159, 1174-75(10th Cir. 2006)(when tribal officials are alleged to have acted outside of and/or beyond the scope of their authority, they are not entitled to sovereign immunity). An Indian tribe's "sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. V. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n.1 (10th Cir. 1984)(McKay, J. Concurring). "When a complaint alleges that the named officer defendants have acted outside the amount of authority the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Id* as 576. *See also Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 902 (9th Cir. 1991)(A tribe's immunity extends to officials "acting in their representative capacity and within the scope of their valid authority").

[92] 623 F.2d 682 (10th Cir. 1980).

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

[94] 623 F.2d at 685.

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.[95]

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

In its first *Motion to Dismiss*, the Ute Tribe contended 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* [96] and *Ute V*.[97] 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.[98] The Court, however, has already rejected that argument and it should do so again with respect to the current *Motion to Dismiss* raised by the Defendants because neither *Ute III* nor *Ute V* even considered much less decided the lawfulness-constitutionality of the Defendants' actions at issue in this case, such as the their efforts to obstruct justice illegally and unconstitutionally asserting law enforcement authority over Federal, State and County roads and rights-of-way; illegally and unconstitutionally asserting civil regulatory authority over non-members and non-tribal lands; closing public road and rights-of-

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

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

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

[98] *See* Doc. 271 pp. 17 through 20.

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.[99] The Defendants' res judicata argument is also meritless because the *Ute III* and *Ute V* decisions are no longer relevant for several reasons.

First, *Ute III* and *Ute V* do not even address the issue of the Defendants' claims of jurisdiction that are at issue in the *Counterclaim* and *Third-Party Complaint*. In fact, *Ute V* does not even reference the *Strate* decision, which was issued approximately one week before *Ute V* and speaks directly to the question of the jurisdiction that the Defendants are now claiming over public roads and rights-of-way within the *former-Reservation*.

The second reason that *Ute III* and *Ute V* are irrelevant is the *Consent Decree*. In *Ute V*, the Tenth Circuit remanded this matter to the District Court for further proceedings, which did not occur. Instead, the parties entered into the *Consent Decree*,[100] which does not address the jurisdiction issues that are the subject of Duchesne County's *Counterclaim* and *Third-Party Complaint*, and that is fatal to their res judicata argument.

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[99] 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).

[100] Doc. 145.

It is fatal because a judgment by consent or by stipulation is construed as an agreement between the parties.[101] The essence of a judgment by consent is that the parties to the litigation have voluntarily entered into an agreement settling their dispute, and upon this agreement the court has entered judgment conforming to the terms of the agreement.[102] Consequently, the Court is not empowered to modify that *Consent Decree* to impose additional conditions or duties upon the parties to that contract because a judgment by consent in a private action imposes no more on the party to be bound than that to which the party agreed.[103] Duchesne County, however, never agreed to divest itself of civil and criminal jurisdiction within the *former-Reservation*. Moreover, Duchesne County certainly never agreed to cede to the Ute Tribe, nor could the County have ceded to the Ute Tribe the jurisdiction to close public roads and rights-of-way in violation of the public's constitutional right to travel.[104]

Similarly, a court only has the inherent power to enforce a judgment by consent when the terms of the agreement between the parties are clear and unambiguous,[105] which is certainly not the circumstances of the instant case. Here, the issue of the Ute Tribe's jurisdiction over Federal,

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[101] *In Matter of Estate of Anderson*, 671 P.2d 165, 168 (Utah 1983).

[102] *Bernett v. Bernett*, 745 A.2d 827, 831 (Conn. 1999).

[103] *See International Technologies Consultants, Inc. v. Pilkington PLC*, 137 F.3d 1382, 1387 (9th Cir. 1998); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

[104] This is so because not even the United States can give away the constitutional rights of its citizens. *Reid v. Covert*, 354 U.S. 1 (1956)(Congress cannot, by treaty or legislation, give away the rights provided to citizens under the Constitution).

[105] *Bernett*, 745 A.2d at 831.

State and County roads was not even mentioned, much less addressed in an unambiguous manner in the *Consent Decree* that the Court entered in this case.

Thus, rather than *Ute III* and *Ute V* or the *Consent Decree*, the issue of the Defendants' alleged jurisdiction over public roads and rights-of-way within the *former-Reservation* is to be determined by *Strate v. A-1 Contractors* [106] and its progeny, which hold that the Defendants do NOT have the authority to prohibit or interfere with Duchesne County's exercise of civil and/or criminal jurisdiction over public roads and rights-of-way within the *former-Reservation*; and by *Califano v. Torres*[107] and its progeny, wherein the interstate and intrastate right to travel has been held to be virtually unqualified, which means that the Defendants do NOT have the right to close public roads and rights-of-way within the *former-Reservation* to travel by County officials or non-members.

ARGUMENT: THE UNITED STATES IS NOT AN INDISPENSABLE PARTY

Defendants argue that the United States is an indispensable party because in its *Fourth Claim for Relief* Duchesne County is asking the Court to create new public roadways within the *former Reservation*.[108] This is the third time that argument has been made to the Court. It was made in the Ute Tribe first *Motion to Dismiss* Duchesne County's *Counterclaim* and *Third-Party Complaint.*[109] It was advanced again by Ute Tribe in support of a *Motion to Dismiss* Uintah

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[106] 520 U.S. 438 (1997).

[107] 435 U.S. 1, 4 fn. 6 (1978).

[108] See Doc. 271, p. 22.

[109] *See* Doc, 271, p. 22.

County's *Counterclaim*.[110] In both instances, the Court rejected that argument, and it should do so again because Duchesne County is asking the Court to enjoin the Defendants 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 from land otherwise owned or held in trust by the United States. Furthermore, as previously noted, the Defendants have the burden to prove that they have jurisdiction over these public road and rights-of-way.[111]

ARGUMENT: DUCHESNE COUNTY HAS ASSERTED VALID CLAIMS

As its last argument for dismissal, the Defendants asserts that Duchesne County has failed to plead a claim for relief. But that argument has also been previously presented to the Court and rejected,[112] including accusing the County of "playing the race card" by 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 Defendants 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 Third-Party Defendants' 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

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[110] *See* Doc, 278, p. 21.

[111] *Austin's Express, Inc. v. Arneson,* 996 F. Supp. 1269, 1270 (D. Mont. 1998).

[112] *See* Doc. 271, p. 23.

U.S.C. §1985.[113]

Duchesne County's allegations also meet the pleading standards set forth in *Rule* 8[114] and *Iqbal* [115] and *Twombly* [116] because "[d]etailed factual allegations" are not required to maintain a cause of action.[117] Rather, the factual allegations must be enough to raise a right to relief above the speculative level.[118] The basic "notice" pleading standard remains the rule in Federal Courts.[119] A well-pleaded *Complaint* may proceed even if it appears that recovery is very remote

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[113] *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).

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

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

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

[117] *Id*. at 555.

[118] *Id*.

[119] *See Tamayo v. Balgojevich*, 526 F 3d. 1074, 1083 (7th Cir. 2008).

and unlikely.[120] Irrequisite "plausibility," therefore, is not measured by likelihood of success.[121] Furthermore, a *Counterclaim* or *Third-Party Complaint* only need set forth "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,"[122] which Duchesne County has done. A pleading of tediously detailed factual allegations is still not required.[123] And it is still not the Court's role to weigh its subjective assessment of whether the pleaders ultimate success on the merits is probable or unlikely.[124]

CONCLUSION

The latest *Motion to Dismiss* should be denied. Moreover, the Court should not convert this *Motion to Dismiss* into a *Motion for Summary Judgment* by considering matters outside of the pleadings because Duchesne County has been denied the opportunity to conduct any discovery.

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[120] *Id*.

[121] *Aktieselskabet AF 21, Nov. 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008).

[122] *See 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.

[123] *See Ashcroft*, 556 U.S. at 677-78.

[124] *See Aktieselskabet,* 525 F. 3d at 17.

DATED this 18th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2014, 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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