

EXHIBIT A

Judge

The facts can be taken from Plaintiff's Complaint and a few other facts established by judicial notice and the attachments to the Motion. The following facts are relevant to Tribal Court Jurisdiction.

1. Plaintiff is not a member of the Ute Indian Tribe but is a member of the Cheyenne River Sioux Tribe which has its reservation outside of the State of Utah. Complaint paragraph #1

2. The Plaintiff lives on and this controversy involves land owned by Plaintiff and his wife a non-Indian and is not tribal owned land nor land held in trust for the Ute Indian Tribe or any other Indian tribe. Complaint paragraph #3. Exhibit "A" deposition of Wanda Jean Austin. Exhibit "B" Warranty Deed of land to Plaintiff and his wife.

3. The Defendants are non-Indians living on land within the exterior boundaries of the Uintah and Ouray Indian Reservation which the Defendants own as fee lands. Complaint paragraph #2. No allegation that Defendants are Indians and within the jurisdiction of this Court.

4. Plaintiff purchased the property which is the subject of the Complaint 20 plus years ago and it is owned in fee by Plaintiff. Complaint paragraph #3

5. None of the lands neither those owned by Plaintiff or those owned by Defendants are Tribal lands nor lands held in trust for the Ute Tribe or any other Indian tribe. No allegation in the complaint that lands are tribal or trust lands. Exhibit "C"

Duchesne County plat map and deeds showing private ownership of Defendants lands.

6. The subject matter of the law suit is a boundary line dispute between Plaintiff and Defendants on their separate non-Indian properties. Complaint.

7. Plaintiff claims that a resurvey has established a new boundary line different than that recognized by the parties when Plaintiff purchased his property and the boundary line that has been recognized by the parties as the boundary for many years since before Plaintiff purchased his land. Complaint paragraphs #4&5.

8. There have been actions taken by the Plaintiff which resulted in the Duchesne County Sheriff's Office becoming involved and trespass charges filed by Duchesne County. Complaint paragraph #7

9. There has been filed by Plaintiff a law suit in the Eighth Judicial District Court in Duchesne County involving a right of way across Plaintiff's property which is adjacent to Defendants' property. Exhibit "D" Copy of Complaint and Court order.

10. If this Plaintiff succeeds in his claim that a new survey has established a new boundary line, the Bingham's who are the Defendants in the other law suit, are affected and are necessary

parties and should be joined in this action, and if not, the case should be dismissed. See copy of Complaint filed by Plaintiff in the State of Utah District Court and Temporary Order entered in that case. Copies attached as Exhibit "D", hereinafter the Bingham case.

11. Plaintiff has recently requested an extension of time for discovery in the Bingham case based on Plaintiff's claims in this case contending that this case is relevant to the claims in the Bingham case. See Motion to Extend Case Management Order attached as Exhibit "E".

12. All of the parties both Plaintiff and Defendants in this action have recorded deeds in their names in the Duchesne County Recorder's Office, a political subdivision of the State of Utah. See Duchesne County ownership plat Exhibit "C".

13. The Plaintiff's title to his property comes through a chain of title of non-Indians and non-members of the Ute Tribe. Exhibit "F".

14. The Plaintiff has relied on the State of Utah and Duchesne County Sheriff's Office for enforcement of his positions concerning his land. Bingham case and State of Utah v. Jon Bingham Exhibit "G".

15. The Plaintiff has not relied on the Ute Tribal Police or Bureau of Indian Affairs for handling disputes involving fence lines, boundaries or access. See criminal case filed and dismissed against Jon Bingham at the instigation of Plaintiff attached as Exhibit "G."

THE LAW

The United States Supreme Court has long held that Indian Tribes do not have jurisdiction over crimes committed by non Indians in Indian Country under the doctrine of implied divestiture. United States v Wheeler, 435 U.S. 313 (1978)

The United States Supreme Court in the case of Olifant v. Suquamish Indian Tribe, 435 U.S. 191 held that:

"Exercise of tribal power beyond what is necessary to protect tribal self government or control internal relations is inconsistent with the dependent status of tribes and so cannot survive without express delegation."

X

The Olifant case pointed out that tribal jurisdiction over non Indians is consistent with the dependent status of tribes and so cannot survive without express delegation. The Olifant case dealt with tribal criminal jurisdiction. Following Olifant, the United States Supreme Court, in Montana v. United States, 450 U.S. 544 (1981), held that as a general proposition the inherent sovereign powers of an Indian tribe do not extend to the activities of non-

members of the tribe and especially involving or taking place on non-tribal land owned in fee by non-tribal members within the boundaries of the reservation. In Atkinson Trading Co., Inc. v. Shirley et al., 532 U.S. 645 (2001), the United States Supreme Court held that the tribe could not tax non-tribal member guests of a hotel located on non-Indian fee land within the boundaries of the reservation. Citing the Montana case, the Court stated that the general rule that Indian tribes lack civil authority over non-members on non-Indian fee lands unless there are consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements or that the conduct of the non-Indians on fee lands within the reservation threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe. In the case of Strate v. A-1 Contractors, 520 U.S. 438 (1997) and the case of Nevada v. Hicks, 533 U.S. 353 (1001), United States Supreme Court imposed limitations on the power of Indian tribes to exercise civil adjudicative authority over the conduct of non-members in Indian country. In Strate v. A-1 Contractors, the Supreme Court denied an Indian tribe's inherent power to adjudicate a civil law suit among non-Indians for personal injuries arising from an

automobile accident on a state highway within the reservation boundaries. The Supreme Court held that the test devised in Montana v. United States for determining whether a tribe possesses inherent sovereign power to regulate the conduct of non-members on non-Indian fee land applies not only to legislative but to adjudicative authority over non-members on non-Indian fee lands. The state highway was on the reservation but not owned by the tribe nor on Indian trust lands or lands owned by the Indian tribe. Hence the Montana doctrine, that as a general rule absent different congressional direction Indian tribes lack civil authority over the conduct of non-members on non-Indian land within the reservation. In State of Nevada v. Hicks the United States Supreme Court had before it whether a tribe could adjudicate a civil action brought by a tribal member Hicks against Nevada game wardens acting in their individual capacities who were charged with committing various civil offenses under tribal law. The Court held that the tribal court lacked authority to hear Hicks case concluding that tribal jurisdiction over Hicks tribal law claims against the Defendants was lacking pursuant to an application of the Montana test there being no federal authorization for the tribe to hear the Hicks case.

The Court has consistently held since Montana that assertions of tribal authority over non-members' conduct on non-Indian fee land does not exist unless authority or jurisdiction is necessary to protect tribal self government or to control internal relations. The cases consistently hold that the tribe's power to exercise its legislative and adjudicative power over non-member conduct is limited when it occurs on property owned by non-Indians within Indian country unless the conduct threatens Indian interests. Thus land ownership becomes relevant when the subject matter is non-member conduct on non-Indian land in Indian country. Even if the land was once owned by the tribe or by Indians, the Montana Court stated that treaty provisions securing tribal authority over reservation lands "must be read in light of the subsequent alienation of those lands." Consequently, when non-Indians have a right to be in Indian country by virtue of land ownership, the usual presumption favoring tribal jurisdiction is reversed.

ARGUMENT

There is no allegation in Plaintiff's Complaint that the alleged actions of the Defendants threatens or affects Indian tribal interests. On the face of the complaint, Plaintiff's action should be dismissed as there are no allegations that the alleged

actions of the Defendants in any way threatens or has some direct economic effect on the political integrity, the economic security or the health or welfare of the tribe as required by the United States Supreme Court in Montana v. United States.

Plaintiff's attempt to bring ^{which} should be a state court action into Tribal Court should be denied and Plaintiff should be required to continue to deal with the non-Indian Defendants in state court where he filed his other pending action the Bingham case, and where he filed trespass charges against Mr. Bingham. That case involves Plaintiff's same land and has been pending since May, 2008. The State Court has accepted the jurisdiction chosen by the Plaintiff, and entered orders in the case. It would be inappropriate for the Tribal Court to now get involved in a case involving the same events with non-Indians.

Think if the Tribal Court were to issue an order in favor of Plaintiff, granting the relief prayed for in the Complaint, how would it be enforced. What if it is inconsistent with the Ruling in the State Court on the same issues? Could the Tribal Court and Tribal Government enforce any such order or judgment against the non-Indians involved. The answer is clearly "No" under the Montana, Strate and Hicks line of cases.

An additional point is that the land which Plaintiff claims to own is only partially owned by the Plaintiff. As the attached deed Exhibit "B" reveals, it is also owned by Plaintiff's wife who is a non-Indian. See copy of deposition attached as Exhibit "A" taken in the Bingham case where in the wife of the Plaintiff testified that she is not an Indian of any reservation.

Also, Plaintiff, although an Indian, is not a member of the Ute Indian Tribe and has no standing to bring a case alleging the interests of the Ute Tribe are affected by this controversy. He has not done so as required by the Montana line of cases. That is relevant to the consideration of whether the Tribal security, integrity, health or welfare of the Tribe is at stake in the case.

An additional reason for dismissing this action is that the Complaint on its face is barred by Tribal Statute^s of Limitations which is three years. See §1-8-7 Ute Tribe Law and Order Code Exhibit "H". Plaintiff's Complaint reveals that the boundary line accepted by all of the parties which now Plaintiff is trying to move has been located at its present location since before 1990 and that Plaintiff has had notice of such. X

Defendants respectfully request the Court to dismiss this action based on this Court's lack of personal jurisdiction over

non-Indians on non-Indian land owned in fee by the Defendants, and based on subject matter jurisdiction that the kind of dispute involved, a boundary line dispute, on non-Indian owned lands involving non-Indians is not within the subject matter jurisdiction of this Court as stated in the Montana, Strate and Hicks cases.

Respectfully submitted this 31th day of January, 2011.

McKeachnie Law Offices, P.C.

By: Gayle McKeachnie
Gayle F. McKeachnie

MAILING CERTIFICATE

Tina L. Hemstreet, legal assistant of McKeachnie Law Offices, P.C., attorneys for Defendants certifies that she served the attached MOTION TO DISMISS upon Plaintiff by placing a true and correct copy in an envelope addressed to:

MICHAEL P AUSTIN
RR 1 BOX 1335
ROOSEVELT UT 84066

and deposited the same, sealed, with first class postage prepaid thereon, in the United States Mail at Vernal, Utah, on the 27th day of January, 2011.



Tina L. Hemstreet