EXHIBIT B

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UTE INDIAN TRIBAL COURT
UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

MICHAEL P. AUSTIN, Plaintiff, v. GARY DIETZ, HOWARD G. WARREN, FERRINGTON EVANS and WADE BUTTERFIELD, Defendants.	MOTION TO DISMISS Case No. CV13-041 Judge

Defendants move the Court to dismiss Plaintiff's Complaint for the reason that this Court has neither subject matter jurisdiction nor personal jurisdiction to hear this case. Alternatively, if the Court were to find jurisdiction, the Defendants move the Court to decline to exercise that jurisdiction based on the established legal principals set forth in this motion.

INTRODUCTION

Plaintiff and his wife, Wanda, purchased land in Neola and moved into a dwelling on it.

Since that time, he has had a number of confrontations with and filed not less than three lawsuits against his neighbors.

In May, 2008, Plaintiff and his wife, Wanda, sued Jon and Adree Bingham asking the Utah Eighth Judicial District Court in Duchesne county to prevent Binghams from entering and leaving their home on a roadway used to access the Bingham house for about 30 years. The roadway connects a county road to the Bingham house. The deed by which Austins acquired their property expressly subjects the land to a right of way to Binghams' house. The road is the only legal access to the Bingham house and is expressed in the conveyance documents numerous times.

Binghams counterclaimed for damages for Austins' interference with the use of the road. The case was tried before Judge Lyle Anderson, who dismissed all of Austins' claims and awarded damages to Binghams. Austins appealed the Judgment which is at the Utah Court of Appeals.

Plaintiff crossed his north fence, went out in the fields north of his house and started building a fence. When the owners of the fields stopped the fence building by Plaintiff, he called the Duchesne County Sheriff and deputy came and stopped Plaintiff from any further building on threat of arrest.

Plaintiff, Pro se, then filed a lawsuit (Case No. CV11-088) against Dietz, Warren and Evans in Ute Tribal Court asserting that he now owned land out in those Defendants' fields. Defendants filed a Motion to Dismiss the Complaint for lack of jurisdiction by the Tribal Court. The Motion was briefed and eventually Mr. Austin's complaint was dismissed on a procedural issue.

The Plaintiff again Pro se next filed the present action against Evans, Dietz, Warren and this

time added Defendant, Butterfield.

Mr. Butterfield was at the time of the fence building incident, a Duchesne County Deputy Sheriff who stopped Mr. Austin from building the fence in the other Defendants' fields. Mr. Butterfield has at times also helped farm the fields where Austin tried to build a new fence. Mr. Austin has asserted that he has a new survey that marks his north boundary out some 35 feet into the Evans, Dietz and Warren fields rather than the fence line observed by the property owners before Austins for many years.

FACTS

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 Dietz, Warren, Evans, and Butterfield 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. There is no allegation that Defendants are Indians and within the jurisdiction of this Court.

4. The Plaintiffs property for which he now claims a new north boundary has been owned by him and his wife for more than 20 years. 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. There is no allegation in the complaint that any of the lands involved are owned by a member of the Ute Indian Tribe or that the 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 Binghams 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, finding of Fact and a Final Judgement entered in that case. Copies attached as Exhibit "D", hereinafter the Bingham case.

11. The Bingham case is presently on appeal to the Utah Court of Appeals. No challenge to the Jurisdiction of the Utah State Courts in being made at the Court of appeals. See Docketing Statement and Table of Contents for Appellants Brief. Copy 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". Defendant Butterfield leases and operates as a farmer some of the land owned by other defendants.

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

Ute Tribe Law and Order Code

The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation states:

> Section 1-2-5 General Subject Matter Jurisdiction; Limitations states:
> "Subject to any contrary provisions, exceptions, or limitations contained in either federal law or the Tribal Constitution, the Courts of the Ute Indian Tribe shall have jurisdiction over all civil causes of action, and over all offenses prohibited by this Code except the Courts of the Ute Indian Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its members may be directly or indirectly affected."

United States Supreme Court and other Federal Court Case Law

The United States Supreme Court has long held that Indian Tribes do not have jurisdiction over crimes committed by non Indians in Indian County 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."

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.

United States Supreme Court and Federal Court Cases

pertaining to the Uintah and Ouray Reservation.

In 1985 the United States Tenth Circuit Appeals in an En Banc decision held in Ute Indian Tribe v Utah,773 F.2nd 1087 (1985) (hereafter Ute Indian Tribe 1985) that all the lands within the original boundaries of the Uintah and Ouray Indian Reservation retained reservation status. That case was part of a series of cases decided during the 1970s, 1980s and 1990s defining the status and boundaries of the Uintah and Ouray Reservation. In 1994 the Supreme Court of the United States in Hagen v. Utah, 510 U.S.399, (hereafter Hagen) held contrary to the Ute Indian Tribe that the reservation had been diminished by Congress in a series of acts passed beginning in 1902-1905 which provided for making individual allotments for members of the Ute Indian Tribes and for allowing un-allotted lands within the reservation to be restored to the public domain and subject to entry by non-Indians under Homestead and other laws. The Ute Indian Tribe and Hagen were clearly

inconsistent on several points. In May of 1997 United States Court of Appeals Tenth Circuit in Ute Indian Tribe v Utah et. al. hereafter (Ute Indian Tribe 1997) addressed the inconsistencies and concluded that it should withdraw and modify its 1985 decision to the extent the 1985 decision was inconsistent with the U.S. Supreme Court decision in Hagen.

The Court in Ute Indian Tribe 1997 found that the Federal Government and the Tribe had civil and criminal jurisdiction over Indian country. It defined Indian country to include all Indian allotments, the Indian titles to which have not been extinguished, lands held in trust by the Federal Government, and all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of a patent and including rights of way running through the reservation.

The Court concluded that there were four categories of non-trust lands involved in the case.

1. Lands apportioned to the mix-bloods use under the Ute Partition Act.

2. Lands allotted to individual Indians that have passed into fee status after 1905.

3. Lands which were held in trust after the reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then fee, now Trust lands in an effort to consolidate its land holdings pursuant to the Indian Reorganization Act.

4. Those lands passing in fee to non-Indians pursuant to the 1902-1905 allotment legislation. This was the category of fee lands at issue in Hagen. The Court modified its earlier Ute Indian Tribe 1985 holding to be in accordance with Hagen that those lands are no longer within

Indian County under §1151 U.S.C. and subject to the jurisdiction of the Tribe and the Federal Government.

ARGUMENT

POINT I

Section 1-2-5 of the Ute Tribe Law and order code specifically states that the ....the courts of the Ute Indian Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either the tribe, its officers, agents, employees, property or enterprises, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter, and if the matter is not one in which the rights of the tribe or its members may be directly or indirectly affected. This case does not involve any officer, employee, property, or enterprise of the tribe. The complaint alleges that the Plaintiff is a member of a federally recognized Indian Tribe. But nothing in the complaint alleges or asserts facts that would indicate that the matter is one "in which the rights of the tribe or its members may be directly or indirectly affected" as required by Section 1-2-5. As explained below there is another forum, the courts of the State of Utah for the handling of the dispute. In fact the Plaintiff has already invoked the help and jurisdiction of the Utah Eighth District Court involving disputes over the same land, and is presently in that court.

POINT II

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 what 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.

The United States Supreme Court has imposed limitations on the power of Indian Tribes to exercise civil adjudicative authority over the conduct of non-members even if they are within the boundaries of the reservation and in Indian country. In Strate v. A-1 Contractors, 520 U.S. 438 (1997) cited in Defendants' Motion, the Court stated that the test formulated in Montana v. United

States, 450 U.S. 544 (1981) with regard to whether a tribe possess inherent sovereign power (legislative) to regulate the conduct of non-members on non-Indian fee lands within Indian country applies as well to the question to the Tribe's inherent adjudicative authority over a non-member's conduct on lands owned by non-members on the reservation. The Court concluded that the Tribal Court's jurisdiction was not justified under either of the two Montana exceptions. Those exceptions are that Indian tribes retain inherent sovereign power to exercise jurisdiction over non-Indians when the non-Indian's activities are based on consensual relationships with the Tribe or its members through commercial dealing, contracts, leases or other arrangements. The second exception is that the Tribal Court may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or the welfare of the Tribe. Plaintiff's complaint in this case does not allege any of the elements necessary to bring a case within the jurisdiction of the Tribal Court under either of those exceptions.

POINT III

The lands owned by the Plaintiff, Mr. Austin and his wife, a non-Indian are in the fourth category under Ute Indian Tribe 1977. Lands which were patented to non-Indians pursuant to the 1902-1905 legislation allowing public entry on those lands under the land entry laws of the United States. Attached hereto as Exhibit "H" is the patent of the lands in Section 25, Township 1 North, Range 2 West, Uintah Special Base & Meridian. The Plaintiff Austin's lands and the Defendants'

lands were originally patented to Loren O. Johnson under the land entry act of 1820. The patent was dated 1912. Attached as Exhibit "C" is a map showing that the Plaintiff's land is located in Lot 2 of Section 25 Township 1 North, Range 2 West Uintah Special Meridian and the lands of Defendants are in Lot 1 of that same township and range. Both Plaintiff's and Defendants' lands were patented from the United States of America in the same patent to a non-Indian.

Under Hagen and Ute Indian Tribe 1997 the Tribe does not have civil jurisdiction over those lands in accordance with the federal statute or cases.

The lands involved are the category of fee lands at issue in Hagen. The Court modified its earlier Ute Indian Tribe 1985 holding to be in accordance with Hagen that those lands are no longer within Indian County Both Plaintiff's and Defendants' lands were patented from the United States of America in the same patent. Under Hagen and Ute Indian Tribe 1997 the Tribe does not have civil jurisdiction over those lands in accordance with the federal statute or cases.

The Hagen case and the Ute Indian Tribe, 10th Cir. 1997 case provide an additional alternate rationale for dismissing the case for lack of jurisdiction. The Hagen court held that lands granted to non-Indians as a result of the lands being made available under the 1902-1905 allotment legislation were part of the reservation which was diminished and like in Hagen therefore not under the jurisdiction of the Tribal Court, but rather under the jurisdiction of the state and local courts.

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, he 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.

POINT IV

An additional reason for dismissing this action is that the complaint on its face is barred by Tribal Statutes of Limitations which is three years. See §1-8-7 Ute Tribe Law and Order Code Exhibit "I". 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.

CONCLUSION

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.

Defendants' respectfully request that Plaintiff's Complaint be dismissed.

Respectfully submitted this 14th day of August, 2013.

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By: Gayle McKeachnie
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