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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

VANCE NORTON, GARY JENSEN, KEITH CAMPBELL, ANTHONEY BYRON, BEVAN WATKINS, and TROY SLAUGH,

Plaintiffs,

v.

THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian Tribe; the BUSINESS COMMITTEE FOR THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, in its official capacity; the UTE TRIBAL COURT OF THE UINTAH AND OURAY RESERVATION; the HONORABLE WILLIAM REYNOLDS, in his official capacity as Acting Chief Judge of the Ute Tribal Court; DEBRA JONES and ARDEN POST, individually and as the natural parents of Todd R. Murray; and DEBRA JONES as personal representative of the Estate of Todd R. Murray.

Defendants.

UINTAH/VERNAL PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT TRIBAL COURT AND TRIBAL COURT JUDGE'S MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 12(B)(7)

Case No. 2:15-cv-00300

Judge: Dee Benson

ORAL ARGUMENT REQUESTED

This action arises out of the death of Todd R. Murray on April 1, 2007, which in 2009, resulted in civil rights and common law wrongful death claims being brought first in the Utah State District Court and then removed to the United States District Court for the District of Utah. That lawsuit was brought by Todd R. Murray's parents, Debra Jones, and Arden Post, as well as the Estate of Todd R. Murray. Hereinafter, that federal court case will be referred to as the "*Original Murray Action*."

In the *Original Murray Action*, after years of contentious litigation, the District Court found that Murray had in fact committed suicide and, therefore, entered summary judgment in favor of all of the defendants on the civil rights claims, and dismissed the State common-law claims without prejudice.[1] That matter is now on appeal to the United States Court of Appeals for the Tenth Circuit.[2]

If the District Court's judgment is upheld on appeal, it will also dispose of any wrongful death claims associated with Murray's death. That is undoubtedly why, on March 5, 2015, the Ute Tribe joined with the Murray's parents and Estate to file another lawsuit in the Ute Tribal Court seeking damages for their alleged injuries arising out of Todd R. Murray's suicide.[3] That lawsuit filed in Tribal Court will be hereinafter referred to as the "*Re-filed Murray Action*."

In that *Re-filed Murray Action*, the Ute Indian Tribe, Murray's parents, and Murray's

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[1] Doc. 32-1.

[2] Doc. 32-2.

[3] *See* Tribal Court *Complaint*, Doc. 2-1.

Estate named as defendants, among others, Vernal City Officer Norton, Deputy Byron, Deputy Watkins, and Deputy Slaugh, all of whom had been defendants in the *Original Murray Action*.[4] In the *Re-filed Murray Action*, the Ute Indian Tribe, Murray's parents and his Estate also named as defendants Gary Jensen and Keith Campbell. Jensen was the Chief of Police of Vernal City at the time of Murray's suicide and Campbell was at that time both a Deputy Uintah County Sheriff and a Deputy Medical Examiner for the Utah State Office of the Medical Examiner. But neither Jensen nor Campbell were named as a defendants in the *Original Murray Action*. In the *Re-filed Murray Action*, Vance Norton, Gary Jensen, Keith Campbell, Anthoney Byron, Bevan Watkins, and Troy Slaugh are named solely in their "individual and unofficial capacity."[5]

In response to the *Re-filed Murray Action*, Vance Norton, Gary Jensen, Keith Campbell, Anthoney Byron, Bevan Watkins, and Troy Slaugh (collectively "Uintah/Vernal Plaintiffs") commenced this action. The Uintah/Vernal Plaintiffs are seeking this Court's review of the Ute Tribe and Ute Tribal Court's jurisdiction and lawful authority over them in the *Re-filed Murray Action*. The Uintah/Vernal Plaintiffs are seeking only declaratory and prospective injunctive relief. Specifically, the Uintah/Vernal Plaintiffs are asking for a declaratory judgment to the effect that the Ute Tribe and Ute Tribal Court lack subject matter jurisdiction to prosecute and/or to hear the claims being brought against the Uintah/Vernal Plaintiffs in the Ute Tribal Court and,

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[4] Other State law enforcement officers also named in the *Re-filed Murray Action* were named as Defendants in the *Original Murray Action*. Those State officers have moved to intervene as co-plaintiffs in this action. *See* Motion to Intervene, Doc. 12.

[5] *See* Doc. 2-1.

based upon that ruling, for an *Order* enjoining the prosecution of those claims in the Ute Tribal Court. In the alternative, if this Court determines that the Uintah/Vernal Plaintiffs are subject to suit in the Ute Tribal Court, then they are asking for a declaratory judgment to the effect that the Ute Tribe and Ute Tribal Court are "*Federal Actors"* so as to entitle Uintah/Vernal Plaintiffs to the full protections of the *United States Constitution* in all proceedings before the Ute Tribal Court, and for an *Order* enjoining the Ute Tribe and Ute Tribal Court from denying Uintah/Vernal Plaintiffs their rights under the *United States Constitution*.

The Uintah/Vernal Plaintiffs have named as defendants herein the Ute Tribe, the Ute Tribal Court, Honorable Williams Reynolds Chief Judge of the Ute Tribal Court, the Ute Tribal Business Committee, Debra Jones, Arden Post and the Estate of Todd Murray. Instead of an *Answer,* however, the Ute Tribal Court and Judge Reynolds, both of whom are sued and named only in their official capacities, (collectively "Tribal Court Defendants") have filed a *Motion to Dismiss*.[6]

With respect to the Uintah/Vernal Plaintiffs' *First Claim For Relief* seeking review of the Tribal Court's jurisdiction to hear and decide the *Re-filed Murray Action*, Tribal Court Defendants contend that claim should be dismissed because of the failure to exhaust tribal court remedies and because of Tribal Court Defendants' sovereign immunity. In their *Second Claim For Relief*, the Uintah/Vernal Plaintiffs are seeking a ruling from this Court that if the Ute Tribal Court does have the requisite jurisdiction to hear and decide the *Re-filed Murray Action* then,

[6] Doc. 23.

because the Tribal Defendants are federal actors, the Uintah/Vernal Plaintiffs are entitled to the full protections of the United States Constitution and not just to the rights accorded them under Ute tribal law. Tribal Court Defendants contend that the *Second Claim For Relief* should be dismissed because: there is no case or controversy; the United States is a necessary and indispensable party that cannot be joined because of its immunity; and, this Court has no authority to supervise the Tribal Court. The Uintah/Vernal Plaintiffs hereby submit this *Memorandum* in opposition to Tribal Court Defendants' *Motion to Dismiss*.[7] **Oral argument is requested.**

MEMORANDUM OF LAW

Plaintiffs hereby submit the following *Memorandum* in opposition to the Tribal Court Defendants' *Motion to Dismiss*..

STANDARD OF REVIEW

In deciding Tribal Court Defendants' *Motion to Dismiss*, the allegations contained in the Uintah/Vernal Plaintiffs' *Complaint* must be accepted as true and construed in the light most favorable to them.[8] It is likewise noteworthy that since the issues involved in that *Complaint* are all related to the jurisdiction that Tribal Court Defendants are asserting and/or claim to have the authority to assert, they have the burden of proof even though they are defendants.[9]

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[7] Doc. 23.

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

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

STATEMENT OF FACTS

Pursuant to 28 U.S.C. § 1746, Jesse C. Trentadue, hereby declares as follows:

1. The matters set forth herein are based upon my personal knowledge:

2. On April 1, 2007, Todd R. Murray died. Thereafter, his parents and Estate brought the *Original Murray Action*, first in the Utah District Court for the Eighth District. That case was removed without objection to the United States District Court for the District of Utah. The *Original Murray Action* asserted federal and state civil rights and common-law tort and wrongful death claims.

3. Named as defendants in the *Original Murray Action* were Vernal City Police Officer Norton, Uintah County Deputy Sheriffs Anthoney Byron, Bevan Watkins and Troy Slaugh, and almost everyone else who happened to show up at the scene of Murray's death.[10] According to Ms. Jones, and Mr. Post, that lawsuit was fully funded by the Ute Tribe,[11] and without doubt the Ute Tribe is also funding the *Re-filed Murray Action*.

4. In the *Original Murray Action*, Norton was sued in both his individual and official capacities.[12] The other Uintah/Vernal Plaintiffs in the *Original Murray Action* were sued only in their individual capacities.[13]

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[10] Doc. 32-3. The Ute Tribe and Murray family have even sued the Unites States for damages arising out of Todd R.. Murray's suicide. *See Jones et. al. v. United States*, Federal Court of Claims, Case No. 1:13-CV-227.

[11] Doc. 32-4 and 32-5.

[12] Doc. 32-3.

[13] *Id.* at ¶¶ 8 through 15.

5. The *Complaint* in the *Original Murray Action* alleged that each of the Defendants in that action was "at all times . . . acting under color of state laws and as employees of their respective law enforcement agencies."[14]

6. On March 7, 2014, the United States District Court granted Summary Judgment in favor of all of the defendants, including Norton, Byron, Watkins, Slaugh and the State officers, dismissing the civil rights claims with prejudice. The Court declined to exercise supplemental jurisdiction over the state common-law claims.[15] Specifically, the Court found that Todd R. Murray had committed suicide.[16] Judge Campbell's ruling is now on appeal to the United States Court of Appeals for the Tenth Circuit.[17]

7. On March 5, 2015, the Ute Tribe, Murray's parents and his Estate brought the *Re-filed Murray Action* asserting therein the dismissed common-law claims, and again seeking damages for injuries allegedly arising out of Todd R. Murray's death.[18] Named as defendants in the *Re-filed Murray Action* are, among others, Vernal City Officer Norton, Deputy Byron, Deputy Watkins, and Deputy Slaugh and the State officers, all of whom had been defendants in the *Original Murray Action*.

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[14] Doc. 32-3, ¶ 45; *see also* ¶¶ 77, 93, 103, 130, 139; *see also* Doc. 32-6, ¶¶ 44, 74, 76, 93, 94, 113, Exhibit 6 hereto.

[15] *Memorandum Decision*, Doc. 32-7..

[16] *Id.* at pp 28-30.

[17] *See Notice of Appeal,* Doc. 32-2.

[18] *See* Re-filed Murray *Complaint*, Doc. 2-1.

8. In the *Re-Filed Murray Action*, the Ute Tribe, Murray's parents and his Estate also named Gary Jensen and Keith Campbell as defendants. Jensen was the Chief of Police of Vernal City at the time of Murray's suicide and Campbell was at the time both was a Deputy Uintah County Sheriff as well as Deputy Medical Examiner for the Utah State Office of the Medical Examiner. But neither Jensen nor Campbell were named as a defendants in the *Original Murray Action*.[19]

9. On April 14, 2015, I learned that the firm Fredericks Peebles & Morgan LLP had re-filed the *Murray* case in the Ute Tribal Court. I immediately called Jeffrey Rasmussen of that firm, who along with Fredericks Peebles & Morgan also represent Tribal Court Defendants, the Ute Tribe, Murray's parents and his Estate in the instant case, to discuss the matter, including asking him to dismiss the *Re-filed Murray Action*. He refused.

10. During that conversation Mr. Rasmussen told me that the *Murray* case had been re-filed in the Ute Tribal Court because his clients were "dissatisfied" with the Federal Court's decision in the *Original Murray Action.* Mr. Rasmussen essentially told me that the Tribal Court had jurisdiction by virtue of the *Ute Tribal Code* and that the Ute Tribal Court's jurisdiction was to be determined under Ute Tribal Law, not Federal Law.

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[19] The Plaintiffs in the *Original Murray Action* moved to join Jensen as an additional party. *See Motion to Add Additional Parties*, Doc. 110 District of Utah Case No. 2:09-CV-00730. The District Court, however, denied that *Motion*. *See id.* Order, Doc.198. The Plaintiffs in the *Original Murray Action,* however, made no similar *Motion* to join Campbell as a defendant in the Federal Court suit.

11. I followed up my conversation with Mr. Rasmussen with an e-mail to him stating therein the substance of our conversation. Mr. Rasmussen responded essentially disavowing our conversation.[20]

12. On April 30, 2015, Frances Bassett, another attorney for the Ute Tribe, Murray's parents and his Estate in the present case, as well as in both *Original Murray Action* and *Re-filed Murray Action*, issued a public statement that her clients had re-filed the *Murray* case in the Ute Tribal Court "**because it was the only forum with jurisdiction to adjudicate the tort claims related to the death of 21-year old Ute tribal member Todd Murray**."[21]

13. But Ms. Bassett's statement about the Ute Tribal Court being the only forum with jurisdiction over the *Re-filed Murray Action* was obviously not so since she had filed the *Original Murray Action* in State Court, and the case was later removed to the United States District Court for the District of Utah. More importantly, in the initial *Complaint* that was filed in State Court, Ms. Bassett alleged on behalf of her clients that: "Jurisdiction lies in this [State] Court because the district courts have exclusive, original jurisdiction over any action against Vernal City and the State of Utah and/or their respective employees or agents arising out of the performance of the employee's duties, within the scope of their employment, or under color of authority."[22]

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[20] Doc. 32-8.

[21] Doc. 32-9.

[22] *State Complaint*, Case No. 2:09-CV-730, Doc. 1-2, ¶ 12, Exhibit 1 hererto.

14. Prior to the filing of the *Re-Filed Murray Action*, the Ute Tribal Court and Chief Judge were parties to *Poulson v. Ute Indian Tribe*.[23] In *Poulson*, a Duchesne County Judge and Deputy Sheriff brought a similar action challenging the jurisdiction of the Ute Tribal Court and its Chief Judge to hear claims asserted against them by tribal members. In the *Poulson Complaint*, the plaintiffs alleged that:

> 31. The Ute Tribal Court is housed in a building constructed upon land held in trust for the Ute Tribe by the United States of America, and the Ute Tribal Court's operations are overseen by the Bureau of Indian Affairs. The Ute Tribal Court provides judicial services to the Ute Tribe and its members that would otherwise have to be provided by the United States of America through the Bureau of Indian Affairs.
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> 32. Pursuant to 25 U.S.C. §§ 3611 through 3631, the Ute Tribal Court is funded and supported by the United States of America. Pursuant to *Public Law* 93-638, the Ute Tribe has contracted with the Bureau of Indian Affairs to operate the Ute Tribal Court.[24]

In their *Answer*,[25] the Ute Tribal Court and its Chief Judge admitted those allegations without qualification.[26]

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[23] District of Utah Case No. 2:12-CV-497.

[24] Doc. 32-10.

[25] Doc. 32-11.

[26] *Id.* at ¶¶ 31 and 32. Allegations contained in prior pleadings are admissible as evidence in subsequent litigation. *See LWT, Inc. v. Childers*, 19 F.3d 539, 542 (10th Cir.1994). Furthermore, those are crucial admissions since they make the Ute Tribal Court a "federal actor" for the purpose of imposing upon that forum the obligation to provide those appearing before it their right to due process under the United States Constitution. *Cf.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)(Public moneys and facilities used to support a restaurant otherwise privately owned made the restaurant a "state actor" for purposes of prohibiting the otherwise private restaurant from engaging in conduct violative of the *Constitution*). Moreover,

15. If Uintah/Vernal Plaintiffs are subjected to the jurisdiction of the Ute Tribal Court, they are not entitled to the due process and/or other rights normally guaranteed to them under the United States Constitution in Federal and State judicial proceedings.[27]

16. Counsel for Tribal Court Defendants has stated to this Court that if the Uintah/Vernal Plaintiffs are subjected to the jurisdiction of the Ute Tribal Court, then the due process accorded them will be defined by Ute Tribal law, and not by the United States Constitution.[28]

17. In the instant case, the Tribal Court Defendants are named solely in their official capacities and the Uintah/Vernal Defendants are seeking only declaratory and prospective injunctive relief.[29] The Uintah/Vernal Plaintiffs have likewise alleged that:

> 23. Defendant Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Business Committee") is the governing body of the Ute Tribe. The Ute Business Committee is being sued solely in its official capacity as the governing body of the Ute Tribe.
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> 24. Defendant Ute Tribal Court for the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Tribal Court") is located at Fort Duchesne, Utah. The Ute Tribal Court is controlled by the Ute Business Committee and the Chief Judge of the Ute Tribal Court.

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these same "federal actor" allegations appear in the Uintah/Vernal Plaintiffs' *Complaint*, which Tribal Court Defendants have yet to answer. Doc. 2, ¶¶ 30 and 31.

[27] *See Talton v. Mayes,* 163 U.S. 376 (1986)*; Trans-Canada Enter. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980); *Settler v. Lameer*, 507 F.2d 231, 241-47(9th Cir. 1974).

[28] *Motion to Dismiss*, Doc. 23 at p. 4.

[29] See Doc. 2.

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30. The Ute Tribal Court is housed in a building constructed upon land held in trust for the Ute Tribe by the United States of America, and overseen by the Bureau of Indian Affairs. The Ute Tribal Court provides judicial services to the Ute Tribe that would otherwise have to be provided by the United States of America through the Bureau of Indian Affairs.

31. Pursuant to 25 U.S.C. §§ 3611 through 3631, the Ute Tribal Court is funded and supported by the United States of America. Pursuant to *Public Law* 93-638, the Ute Tribe has contracted with the Bureau of Indian Affairs to operate the Ute Tribal Court. [30]

Executed in Salt Lake City, Utah under penalty of perjury this 19th day of June, 2015.

/s/ jesse c. trentadue

EXHAUSTION OF TRIBAL COURT REMEDIES

Tribal Court Defendants argue that the Uintah/Vernal Plaintiffs must exhaust their tribal court remedies before asking this Court to review the question of the Ute Tribal Court's jurisdiction over them. In fact, Tribal Court Defendants claim that exhaustion of tribal court remedies is a jurisdictional prerequisite to this Court's ability to consider the question of the Ute Tribal Court's jurisdiction. According to the Tribal Court Defendants, "[b]ecause they [Uintah/Vernal Plaintiffs] have not exhausted tribal court remedies, this Court lacks subject matter jurisdiction over this case."[31] But that is not so. The exhaustion of tribal court remedies is not a prerequisite to this Court's jurisdictional review of the issue of the Ute Tribal Court's

[30] Doc. 2, ¶'s 23, 24, 30 and 31.

[31] *Motion to Dismiss*, Dc. 23, p. 2.

jurisdiction.[32]

It is also not necessary for the Uintah/Vernal Plaintiffs to exhaust the remedies that might otherwise be available to them in the Ute Tribal Court because the actions of Tribal Court Defendants are patently violative of express jurisdictional prohibitions,[33] and/or because it is otherwise clear that there has been no federal grant to the Ute Tribal Court of jurisdiction over the conduct of non-members, such as the Uintah/Vernal Plaintiffs.[34] Exhaustion of Ute Tribal Court remedies is likewise not required when it serves no purpose other than delay,[35] as would be the situation in the present case given the decisional law holding that jurisdiction does not exist in the Ute Tribal Court,[36] and/or when the assertion of tribal jurisdiction is motivated by a desire

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[32] *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8 (1987) (Stating that tribal court exhaustion is not a jurisdictional prerequisite).

[33] *See National Farmers Union Ins. Cos.*, 471 U.S. at 857 n.21 (Noting that exhaustion of tribal court remedies is not required "where the action is patently violative of express jurisdictional prohibitions"). *See also Nevada v. Hicks*, 533 U.S. 353, 369 (2001)(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 1100, 1115-116 (9th Cir. 1997); *Montana v.Gilham*, 133 F.3d 1130,1133 (9th Cir. 1997).

[34] *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n. 14 (1981).

[35] *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"). *See also, Burrell v. Armijo*, 456 F. 3d 1159, 1168 (10th Cir. 2006) (Exhaustion of tribal court remedies is not required when it is clear that the tribal court lacks jurisdiction); and *Crowe & Dunlevey, P.C. v. Stidham*, 640 F.3d 1140,1150 (10th Cir. 2001)(Exhaustion of tribal court remedies was not required because tribal court had no jurisdiction over non-members).

[36] *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001)(Holding since it is clear that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of

to harass or is conducted in bad faith, such as disrupting the authority and/or functioning of government,[37] which is the obvious purpose of the *Re-filed Murray Action.*[38]

More importantly, in a case on point decided over 15 years ago, *Nevada v. Hicks*, the United States Supreme Court made it patently clear that exhaustion of tribal court remedies is not required of the Uintah/Vernal Plaintiffs, and that this Court does have jurisdiction to review the Ute Tribal Court's alleged jurisdiction over them. In *Hicks*, the issue before the Supreme Court was whether the Fallon Paiute Tribal Court had jurisdiction to hear civil claims being asserted against state officials by a tribal member.[39] The claims were for civil rights violations and common-law torts arising out of the execution of several search warrants by Nevada Fish and Game wardens looking for evidence of an off-reservation crime allegedly committed by a tribal member.[40] The tribal member sued the state officers in both their official and individual capacities, but later dismissed the official capacity claims and proceeded solely against the officers in their individual capacities.[41]

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official duties, adherence to the tribal exhaustion requirement in such cases would serve no purpose other than delay).

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

[38] *See* Doc. 17, ¶ 26.

[39] 533 U.S. at 355.

[40] *Id.* at 356-57.

[41] *Id.* at 357.

The defendants thereafter filed a declaratory action in the United States District Court for the District of Nevada against both the Fallon Paiute Tribe and the Fallon Paiute Tribal Court asking that the District Court declare that the Tribal Court lacked the subject matter jurisdiction to hear the case.[42] The District Court granted summary judgment in favor of the Tribe, and the Ninth Circuit Court of Appeals affirmed. The Supreme Court, however, reversed noting from the outset of its opinion that the Fallon Paiute Tribal Court was not a court of general jurisdiction[43] and, as to non-members, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.[44]

The Supreme Court went on to explain that "State sovereignty does not end at a reservation's borders," and that it is now clear that an Indian reservation is considered to be part of the territory of the State.[45] Consequently, "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land. . . ."[46]

In announcing the foregoing points of law, the *Hicks* Court considered and specifically rejected the argument that the Fallon Paiute Tribal Court somehow had jurisdiction because the officers were sued only in their individual rather than their official capacities. According to the *Hicks* Court, the alleged distinction between official and individual capacities suits was

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[42] *Id.*

[43] *Id.* at 367.

[44] *Id.* at 357-58.

[45] *Id.* at 361-62.

[46] *Id.* at 362.

"irrelevant" because the government can only act though its officers and agents, "and if a tribe can 'affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws.' 'The operations of the [state] government may at any time be arrested at the will of the [tribe].'"[47] The *Hicks* Court further noted that "'permitting damages suits against governmental officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'"[48]

Consequently, with respect to exhaustion requirement asserted by the Tribal Court Defendants in the instant case, the Supreme Court stated in *Hicks* that: "Since it is clear, as we have discussed, 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,' and is therefore unnecessary."[49] To make that point very clear, the *Hicks* Court went on to state in its opinion that: "**[T]here is no need to exhaust the jurisdictional dispute in tribal court [because] . . . state officials operating on reservation . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court, but not in Tribal Court**."[50]

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[47] *Id.* at 365. (Quoting from *Tennessee v. Davis*, 100 U.S. 257, 263 (1879).

[48] *Id.* (Quoting from *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

[49] *Id.* at 369 (Quoting from *National Farmers*, 471 U.S. at 459-60, fn. 4).

[50] *Id. Accord, Burrell*, 456 F. 3d at1168; *Crowe,* 640 F.3d at 1150. Furthermore, as previously noted, exhaustion of tribal court remedies is not a prerequisite to the existence of *Federal Question* jurisdiction. *See Iowa Mut. Ins. Co.,* 480 U.S. at 16 n. 8. (Stating that tribal

Another reason that exhaustion is not required in this instance is the futility of requiring the Uintah/Vernal Plaintiffs to proceed in the Ute Tribal Court given the serious conflicts-of-interest inherent in that proceeding, which virtually guarantee an adverse decision in that forum. It would be futile for the Uintah/Vernal Plaintiffs to proceed in the Ute Tribal Court because counsel for the Tribal Court Defendants in the instant action, Frederick Peebles & Morgan, also represent the Murray family and Estate in both the *Original Murray Action* and the the Ute Tribe, Murray family and Estate in *Re-filed Murray Action*,[51] and most certainly will, directly or indirectly, control all proceedings in the Ute Tribal Court. More specifically, the firm represents not only the Ute Tribe, Ute Tribal Court and Chief Judge in the instant case, but it also represents the Ute Business Committee, which controls the Ute Tribe, and the Ute Tribal Court.[52]

Furthermore, because it is the governing authority of the Ute Tribe, it was the Business Committee that not only authorized the bringing of the *Original Murray Action* and the *Re-filed Murray Action*, but it was also the Business Committee that authorized the Ute Tribe's payment of attorneys' fees in both cases. It is likewise the Uintah/Vernal Plaintiffs' understanding that the Business Committee serves as the Ute Tribal Court of Appeals.

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court exhaustion is not a jurisdictional prerequisite); *Strate*, 520 U.S. at 454; *Naranjo v. Ricketts*, 696 F.2d 83, 86(10th Cir. 1982)(The exhaustion requirement is not a matter of jurisdiction, but a matter a comity). Nor should exhaustion be required when constitutional rights are involved. *Cf. Ellis v. Dyson*, 421 U.S. 426, 433 (1975) (Exhaustion generally not required in 42 U.S.C. § 1983 suits).

[51] *See Motion for Pro HacVice*, Doc. 28.

[52] *Doc. 32-13.*

It is undisputed, too, that although the Ute Tribal Court is a federal actor because of the financial and other support that it receives from the federal government, the only due process that the Uintah/Vernal Plaintiffs will receive in the Ute Tribal Court will be whatever due process is allowed them under tribal law, and not the due process guaranteed to them under the United States Constitution. Simply stated, under these circumstances not only are the Uintah/Vernal Plaintiffs not likely to receive a favorable and/or fair decision from the Ute Tribal Court but, because of the conflicts-of-interest, that ruling could never pass constitutional muster.

The Tenth Circuit has likewise stated that exhaustion of tribal court remedies is only required when the tribal court has jurisdiction. The case was *Crowe & Dunlevey, P.C. v. Stidham*,[53] which involved a tribal court's assertion of civil jurisdiction over a law firm involving a fee dispute. In *Crowe*, the Tenth Circuit's ruling as to the lack of tribal court jurisdiction and, therefore, no need to exhaust tribal court remedies was largely based upon an analysis of *Montana v. United States*,[54] which sets out two exceptions to the presumption against tribal jurisdiction over non-Indians. The *Montana* exceptions to the general presumption against tribal authority over non-Indians are: (1) when the non-Indian enters into some sort of consensual arrangement with an Indian or tribe, such as a contract; and (2) in those very narrow situations in which the conduct of a non-Indian "imperils the subsistence of the tribal community."[55] The

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[53] 640 F.3d 1140, (10th Cir. 2011).

[54] 450 U.S. 544(1981).

[55] 640 F.3d at 1153-54(Quoting from *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

Tenth Circuit, in *Crowe*, concluded that neither exception to the general presumption against tribal court jurisdiction applied. Hence, exhaustion of tribal court remedies did not apply.[56]

The Tenth Circuit's analysis of *Montana* and conclusion that the Muscogee Tribal Court lacked jurisdiction the hear and decide the claims against the *Crowe* law hence exhaustion of tribal court remedies was not required is equally applicable to the instant case. But more applicable still is *Hicks*, which was decided 20 years after *Montana*, and further expanded the limits on a tribal court's subject matter jurisdiction with respect to actions brought against state and local officials."[57] Based upon this Supreme Court precedent, Tribal Court Defendants have no basis for asserting that the Ute Tribal Court has jurisdiction to hear and decide the *Re-filed Murray Action*, and that renders moot their exhaustion argument and so, too, does the immunity from suit in the Ute Tribal Court that is applicable to the Uintah/Vernal Plaintiffs.

Uintah/Vernal Plaintiffs, as governmental actors and officials, are entitled to immunity because, in *MacArthur v. San Juan County,*[58] the United States District Court for the District of Utah ruled that counties and their employees are immune from suit in tribal court. That ruling

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[56] *See id.* at 1153. There is no mention by Tribal Court Defendants of *Crowe* in their *Motion to Dismiss*. Instead, in support of their exhaustion argument they rely upon Tenth Circuit precedent involving disputes between a tribal member and the tribe yet neglect to mention that crucial fact. *See e.g., United States v. Tsosie*, 92 F.3d 1037, 1043(10th Cir. 1996); *Tillett v. Lujan*, 931 F.2d 636, 640(10th Cir. 1991); *Kaul v. Wahquahboshkuk*, 838 F.Supp. 515, 516(D. Kan. 1993).

[57] *Hicks*, 533 U.S. at 369(emphasis added).

[58] 391 F. Supp. 2d 895, 1037 (D. Utah 2005).

was subsequently affirmed by the United States Court of Appeals for the Tenth Circuit.[59] And, "immunity means immunity from suit, not simply immunity from liability."[60] Thus, even if the Ute Tribal Court somehow enjoyed subject matter jurisdiction to adjudicate common-law tort claims against non-Indians in general, Uintah/Vernal Plaintiffs cannot be sued in the Ute Tribal Court because they are immune from suit in that forum.

SUBJECT MATTER JURISDICTION EXISTS

Subject matter jurisdiction exists because the issues before the Court in this case raise substantial federal questions both as to the scope of the Tribal Court Defendants' jurisdiction and/or lawful authority over the Uintah/Vernal Plaintiffs,[61] and because of the denial of the rights guaranteed to the Uintah/Vernal Plaintiffs under the United States Constitution and federal law as a result of the Ute Tribal Court's assertion of jurisdiction over the Uintah/Vernal Plaintiffs.[62]

Nevertheless, Tribal Court Defendants assert that subject matter jurisdiction does not exist because they are entitled to tribal sovereign immunity. However when, as in the instant case, the Uintah/Vernal Plaintiffs are not seeking monetary damages but only declaratory and

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[59] *MacArthur v. San Juan County,* 497 F.3d 1057 (10th Cir. 2007).

[60] *Brown v. United States Postal Service*, 338 Fed. Appx. 438, 440 (5th Cir. 2009)(unpublished).

[61] *See MacArthur v. San Juan County*, 309 F.3d 1216, 1225(10th Cir. 2002) (Recognizing a "federal right" to be protected against the unlawful exercise of tribal court judicial power).

[62] *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).

prospective injunctive relief with respect to both the scope of Tribal Court Defendants' jurisdiction and authority over them, and the enforcement of the rights guaranteed to the Uintah/Vernal Plaintiffs under the United States Constitution, Tribal sovereign immunity is not applicable. If the law were otherwise, there could never be federal court review of the jurisdiction and authority asserted by tribal governments over non-members and/or tribal government's deprivation of the civil rights of non-members. Since federal courts are specifically charged with the review of a tribal government's authority in these circumstances, there is obviously no tribal immunity applicable to such actions,[63] which both the District Court and Tenth Circuit made clear in *Crowe*.[64]

In *Crowe*, a law firm brought an action against a judge of the Muscogee Creek Nation District Court for declaratory and injunctive relief challenging that Court's jurisdiction over the firm with respect to a dispute over attorneys' fees, and the firm further sought a preliminary injunction to stop the tribal court proceedings pending resolution by the federal court of the Muscogee Creek Nation Tribal Court's jurisdiction. The tribal court judge responded with a *Motion to Dismiss* on the basis of sovereign immunity and judicial immunity, which the District

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[63] *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"); *Hicks*, 533 U.S. at 353; *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); *Arizona Public Service Co. v. Aspaas*, 77 F. 3d 1128, 1133-334 (9th Cir. 1995). *Cf.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)(Sovereign immunity is obviously no impediment to enforcing civil rights cases against states).

[64] 609 F. Supp. 2d 1211 (N.D. Okl. 2009).

Court denied: (1) because the *Ex Parte Young Doctrine* applied to Indian tribes thereby enabling federal courts to enjoin a tribe's violations of federal rights;[65] and (2) because judicial immunity is not a bar to "prospective injunctive relief against a judicial officer acting in [his or] her official capacity."[66] On appeal, the Tenth Circuit affirmed the District Court holding that the Muscogee Creek Nation Tribal Court had no jurisdiction over the law firm, and that because of the *Ex Parte Young Doctrine*, sovereign immunity and *judicial immunity* did not shield either the Muscogee Tribes or tribal judge from suits to enjoin violations of federal law.[67]

THERE IS A CASE OR CONTROVERSY

Tribal Court Defendants claim that there is no actionable case or controversy because the Uintah/Vernal Plaintiffs "do not claim and cannot claim that the Tribe's Court has denied them any right they claim exists."[68] But a case or controversy exists when there is a threat of harm, it is not required that the Uintah/Vernal Plaintiffs actually suffer the harm. In order to meet the case or controversy requirement, is only necessary that there is a substantial likelihood that the Uintah/Vernal Plaintiffs will suffer injury in the future,[69] which they undoubtedly will if the *Re-*

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[65] *Id.* at pp. 1219-1220.

[66] *Id.* at 1216. (Quoting from *Pullman v. Allen*, 466 U.S. 522, 541-42 (1984).

[67] *Crowe*, 640 F.3d 1140, 1153-56 (10th Cir. 2001). *See also 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 relief against tribal officers allegedly acting in violation of federal law).

[68] Doc. 23, p. 20.

[69] *See Malowney v. Fed. Collection Deposit Group*, 193 F.3d 1342, 1346(11th Cir. 1999); *Facio v. Jones*, 929 F.2d 541.545 (10th Cir. 1991).

filed Murray Action is allowed to proceed in the Ute Tribal Court.

Thus, an actual case or controversy exists because the Uintah/Vernal Defendants have not only alleged that proceeding in the Ute Tribal Court on the *Re-filed Murray Action* will deprive them of their right of due process, but the Tribal Court Defendants are on record as stating that the Uintah/Vernal Plaintiffs will not receive the due process to which they are entitled under the United States Constitution; the Uintah/Vernal Plaintiffs are, by law, immune from suit in the Ute Tribal Court which immunity will be lost if they are forced to proceed in that forum; and the Uintah/Vernal Plaintiffs have a "federal right to be protected against the unlawful exercise of tribal court judicial power." [70] There is obviously a case or controversy.

THE UNITED STATES IS NEITHER A NECESSARY NOR INDISPENSABLE PARTY

A necessary party or indispensable party is a person or entity: (1) in whose absence, the court cannot accord complete relief among existing parties; or (2) that person claims an interest related to the subject of the action and is so situated that disposing of the action in that persons's absence may, as a practical matter, impair or impede their ability to protect that interest, or leave an existing party subject to a substantial risk or incurring double, multiple or otherwise inconsistent obligations because of the interest.[71] The Tribal Court Defendants contend that the United States is a necessary and indispensable party with respect to the Uintah/Vernal Plaintiff's *Second Claim For Relief*, which seeks to impose upon the Ute Tribal Court the duty to provide

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[70] *See MacArthur*, 309 F.3d at 1225.

[71] *Fed. R. Civ. P.* 19(a)(1).

the Uintah/Vernal Plaintiffs with the rights to which they are entitled under the United States Constitution.

Tribal court Defendants argue that if they are "federal actors," then *Mine Safety Appliance Co. v. Forrestal,*[72] requires joinder of the United States. However, the *Mine Safety* case has no applicability to the instant case. The *Mine Safety* case involved joinder of the United States when the suit was against a federal official; whereas Tribal Court Defendants are not federal officials, merely federal actors, and that is a huge distinction. A "federal official" is an officer of the United States, which Tribal Court Defendants are not; whereas a "federal actor" is a person so aligned with and supported by the federal government that his, her or its actions can fairly be said to be those of the government so as to impose constitutional limitations upon their conduct and/or activities.[73]

Within the context of the present case, this means that the Tribal Court Defendants cannot deprive the Uintah/Vernal Plaintiffs of the rights to which they entitled under the United States Constitution and/or under federal law. Thus, the United States is not a necessary or indispensable party because this Court can enjoin the Tribal Court Defendants' from depriving the Uintah/Vernal Plaintiffs of their constitutional and federal rights,[74] even in the absence of the United States from this litigation; and such an injunction has no impact upon the federal

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[72] 326 U.S. 371 (1945).

[73] *See Evans v. Norton*, 382 U.S. 296, 299 (1966).

[74] *Crowe*, 609 F. Supp. 2d at 1219-1220.

government. Simply put, the Court can accord the Uintah/Vernal Plaintiffs all of the relief to which they are entitled by an order directed to the Tribal Court Defendants.[75]

INJUNCTIVE RELIEF DOES NOT INVOLVE OR REQUIRE IMPROPER OVERSIGHT OF THE UTE TRIBAL COURT

Tribal Court Defendants argue that the injunctive relief sought by in the *Second Claim for Relief* is beyond this Court's authority. But that is not so. The relief requested is for an order enjoining the Tribal Court Defendants from violating the Uintah/Vernal Plaintiffs' constitutional rights, including the right to due process in accordance with federal law, and the Tenth Circuit has already determined in the *Crowe* case that because the *Ex Parte Young Doctrine* applies to Indian tribes federal courts can enjoin a tribe's violation of federal rights.

CONCLUSION

For there reasons stated above, Tribal Court Defendants' *Motion to Dismiss* should be denied.

Dated this 19th day of June, 2015.

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[75] Similarly, in *Crowe* the tribal court judge argued that the Muscogee Judiciary was an indispensable party to that litigation, which the Tenth Circuit rejected because the issue of indispensability was not a jurisdictional question. The *Crowe* Court went on to state that even if the Muscogee Judiciary was an indispensable party, it would still have the authority to proceed and to settle the issue of jurisdiction. 640 F.3d at 1149.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2015, I electronically filed the foregoing **UINTAH/VERNAL PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT TRIBAL COURT AND TRIBAL COURT JUDGE'S MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1), 12(B)(6), AND 12(B)(7)** 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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