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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.

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION and REQUEST FOR EXPEDITED HEARING

Case No. 2:15-cv-00300

Judge: Dee Benson

ORAL ARGUMENT REQUESTED

Vance Norton, Gary Jensen, Keith Campbell, Anthoney Byron, Bevan Watkins, and Troy Slaugh (collectively "Uintah/Vernal Plaintiffs") hereby submit this *Reply Memorandum* in further support of their *Motion for Preliminary Injunction*.[1]

INTRODUCTION

It is noteworthy that out of all of the Tribal Defendants, only the Ute Tribal Court appears to have responded to the *Motion for Preliminary Injunction*.[2] It is likewise noteworthy that whereas the Uintah/Vernal Plaintiffs supported their *Motion for Preliminary Injunction* with 15 paragraphs of facts, the Ute Tribal Court apparently does not contest those facts since it submitted no admissible evidence to contradict them. Instead, the Ute Tribal Court opposes the *Motion for Preliminary Injunction* by referring the Court to the arguments submitted by the various Tribal Defendants in their respective *Motions to Dismiss,*[3] which is odd since many of the arguments put forward for dismissal as to the Ute Tribe and Ute Business Committee do not apply to either the Tribal Court or to Tribal Court Judge Reynolds.

The Ute Tribe and Business Committee's *Motion to Dismiss,* for example, challenges the sufficiency of the service of process upon them. Specifically, these Defendants contend that they must be served with process in accordance with Ute Tribal Law, and by someone authorized by the Ute Tribe to serve them. The Ute Tribe and Business Committee structure this argument by claiming that the Ute Tribe is a sovereign government that pre-dates the United

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[1] *Motion for Preliminary Injunction*, Doc. 32.

[2] *See Response to Motion for Preliminary Injunction*, Doc. 39.

[3] *See Response to Motion for Preliminary Injunction*, Doc. 39, p. 2.

States. What these defendants do not recognize, however, is that the Ute Tribe is only a "quasi-sovereign,"[4] and that within the United States there are but two sovereigns: the Federal government and State governments, including within the latter counties and cities.[5] These defendants also do not recognize that in a federal question case, it is federal civil procedure that applies and not tribal civil procedure.[6] Similarly, the Ute Tribal Court ignores the fact that not only was it properly served, but that it entered an appearance and moved to dismiss, which waives any claim that service was defective.[7]

Moreover, in its *Response to Motion For Preliminary Injunction*, the Ute Tribal Court makes clear that it is relying upon the arguments made in support of its *Motion to Dismiss*:

> Nearly all of Plaintiffs' motion for an injunction duplicates arguments which Plaintiffs made in response to the Tribal Court's Motion to Dismiss the case. The Tribal Court has provided this Court with a thorough reply to those arguments, showing that Plaintiffs arguments are without any merit. As shown therein, Plaintiffs have not met the requirement that they exhaust Tribal Court remedies, and this Court lacks jurisdiction over this case for multiple reasons.[8]

The Ute Tribal Court, however, ignores the fact that the Uintah/Vernal Plaintiffs submitted a

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[4] *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

[5] *Id.* at 211.

[6] *See Benney v. Pipes*, 799 F2d 489, 493 (9th Cir. 1986)("In a federal question case . . ., federal procedural law indisputably controls").

[7] *See Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990); *Benney*, 799 F.2d at 492.

[8] *Response,* Doc. 39, p. 2.

Memorandum in opposition to the *Motion to Dismiss,* which contained a thorough and correct statement of the law with respect to exhaustion and jurisdiction,[9] but none of the Defendants have contested or even addressed that statement of the law by way of a *Reply Memorandum*.[10] That said, Uintah/Vernal Defendants will briefly respond to the Ute Tribal Court's exhaustion and jurisdictional arguments.

EXHAUSTION OF TRIBAL COURT REMEDIES

In its *Motion to Dismiss*, the Ute Tribal Court argues 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, the Ute Tribal Court claimed that exhaustion of tribal court remedies was a jurisdictional prerequisite to this Court's ability to consider the question of the Ute Tribal Court's jurisdiction. According to the Ute Tribal Court, "[b]ecause they [Uintah/Vernal Plaintiffs] have not exhausted tribal court remedies, this Court lacks subject matter jurisdiction over this case."[11] 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 jurisdiction.[12] More importantly, in a case on point decided over 15 years ago, *Nevada v. Hicks*,[13]

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[9] *Memorandum Opposing Motion to Dismiss*, Doc. 33.

[10] Because Defendants never responded to those arguments, these points of law are conceded. *See U.S. v. Garcia*, 52 F.Supp.2d 1239, 1253 (D. Kan. 1999); *Super Film of America v. UCB Films*, 219 F.R.D. 649, 660 (D. Kan. 2004); *Hinsdale v. City of Liberal, Kansas*, 19 Fed. Appx. 749, 768, 2001 WL 980781 (10th Cir. 2001).

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

[12] *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).

[13] 533 U.S. 353(2001).

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 rights and common-law tort claims being asserted against state officials by a tribal member.[14] According to the *Hicks* Court, "'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.'"[15] Consequently, with respect to exhaustion requirement asserted by the Ute Tribal Court in the present 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."[16]

To make that point very clear, the *Hicks* Court went on to state 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**

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[14] 533 U.S. at 355.

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

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

in either State or Federal Court, but not in Tribal Court."[17]

The Tenth Circuit has likewise stated that exhaustion of tribal court remedies is only required when the tribal court has jurisdiction. The case ruled upon was *Crowe & Dunlevey, P.C. v. Stidham*,[18] 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*,[19] 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."[20]

The Tenth Circuit, in *Crowe*, concluded that neither exception to the general presumption against tribal court jurisdiction applied. Hence, exhaustion of tribal court remedies

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[17] *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; *Strate v. A-1 Contractors,* 520 U.S. 438, 454 91981); *Naranjo v. Ricketts*, 696 F.2d 83, 86(10th Cir. 1982). 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).

[18] 640 F.3d 1140, (10th Cir. 2011).

[19] 450 U.S. 544(1981).

[20] 640 F.3d at 1153-54(Quoting from *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

did not apply.[21] 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 firm, 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."[22] Based upon this Tenth Circuit and Supreme Court precedent, the Ute Tribal Court has no basis for asserting that it has the jurisdiction to hear and decide the *Re-filed Murray Action*, which 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 likewise entitled to immunity because, in *MacArthur v. San Juan County,*[23] 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 was subsequently affirmed by the United States Court of Appeals for the Tenth Circuit.[24] And, "immunity means immunity from suit, not simply immunity from liability."[25]

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[21] *See id.* at 1153. In support of its exhaustion argument, the Ute Tribal Court relies upon Tenth Circuit precedent involving disputes between a tribal member and his or her tribe, which are matters over which the tribal court would have original jurisdiction, yet neglects 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).

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

[23] 391 F. Supp. 2d 895, 1037 (D. Utah 2005).

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

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

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.

In response, the Ute Tribal Court argues that state law has no applicability within the Ute Reservation. The Ute Tribal Court does so on the basis of the holding in *California v. Cabazon Band of Mission Indians,*[26] and without any discussion of that case and how it supposedly applies to the instant case. That is not surprising, because *Cabazon* is inapplicable. It is inapplicable because in that case the Supreme Court held that California's statutes regulating bingo did not apply to the tribe's on-reservation bingo activities. Whereas in the present case, the Tenth Circuit has ruled that State and/or County officials are immune from suit in a tribal court, which is certainly understandable given the Supreme Court's observation in *Hicks* that "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]'"[27] thus "'permitting damages suits against governmental officials [in a tribal court] 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.'"[28] With respect to the issues before this Court, *Hicks* makes clear that "State sovereignty does not end at a reservation's borders," and that it is now clear that an Indian reservation is considered to

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[26] 480 U.S. 202 (1987).

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

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

be part of the territory of the State.[29] Consequently, "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land. . . ."[30] There is, therefore, a legitimate basis for imposing upon tribal court's the State law with respect to the immunity enjoyed by the Uintah/Vernal Plaintiffs, especially when tribal sovereign immunity is claimed by the Ute Tribal Court.

SUBJECT MATTER JURISDICTION EXISTS

Subject matter jurisdiction exists because the issues before this Court raise substantial federal questions both as to the scope of the Ute Tribal Court's jurisdiction and/or lawful authority over the Uintah/Vernal Plaintiffs,[31] 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 them.[32] Nevertheless, the Ute Tribal Court

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

[30] *Id.* at 362. The Ute Tribal Court cites to *Bank of Okla. V. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992), as requiring exhaustion of tribal court remedies whenever a non-Indian alleges incompetence or bad faith on the part of the tribal court as the basis for federal court review. That is a misreading of *Bank of Okal*. by the Ute Tribal Court. The holding in that case is that allegations of incompetence or bias on the part of the tribal court are not, standing alone, sufficient reasons to overcome the need to exhaust tribal court remedies; whereas Uintah/Vernal Plaintiffs' basis for not having to exhaust tribal court remedies is Tenth Circuit and Supreme Court precedent to the effect that the Ute Tribal Court has no jurisdiction over them.

[31] *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).

[32] *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).

asserts that subject matter jurisdiction does not exist because it is entitled to tribal sovereign immunity. But sovereign immunity does not apply in this instance.

When, as in the instant case, the Uintah/Vernal Plaintiffs are not seeking monetary damages but only declaratory and prospective injunctive relief with respect to both the scope of Ute Tribal Court's 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,[33] which both the District Court and Tenth Circuit made clear in *Crowe*,[34] when they held: (1) that the *Ex Parte Young Doctrine* applied to Indian tribes thereby enabling federal courts to enjoin a tribe's violations of federal rights;[35] and (2) that neither sovereign immunity nor judicial immunity was a bar to "prospective

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[33] *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 not an impediment to enforcing civil rights cases against states).

[34] 609 F. Supp. 2d 1211 (N.D. Okl. 2009).

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

injunctive relief against a judicial officer acting in [his or] her official capacity."[36]

THERE IS A CASE OR CONTROVERSY

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,[37] which they undoubtedly will if the *Re-filed Murray Action* is allowed to proceed in the Ute Tribal Court. The right of immunity, for example, will be taken from them if the Uintah/Vernal Plaintiffs if they are forced to defend against the *Re-filed Murray Action*, as will be their "federal right" to be protected against the unlawful exercise of tribal court judicial power. Another substantial injury that will be inflicted upon Uintah/Vernal Plaintiffs will be the loss of their constitutional right of due process if the *Re-filed Murray Action* proceeds in Tribal Court because Tribal Defendants are on record stating that the Uintah/Vernal Plaintiffs will not receive the due process that they are entitled to under the United States Constitution.[38]

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

[37] *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).

[38] The deprivation of a constitutional right is, as a matter of law, both substantial and irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373(1976). And even more so when those depriving one of the right are immune from monetary damages. *See Crowe,* 609 F. Supp. 2d at 1223. *Accord Kan. Health Care Ass'n v. Kan. Dep't of Social & Rehab Serv.*, 31 F.3d 1536, 1543 (10th Cir. 1994)(Agreeing with the District Court's finding that plaintiff's injury was irreparable when defendant is immune from monetary damages).

CONCLUSION

A preliminary injunction should issue enjoining prosecution of the *Re-filed Murray Action* until this Court can decide the matter of the Ute Tribal Court's jurisdiction over the Uintah/Vernal Plaintiffs. Uintah/Vernal Plaintiffs' *Motion for Preliminary Injunction* should likewise be set for an expedited hearing.

Dated this 20th day of July 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2015, I electronically filed the foregoing **REPLY MEMORANDUM** 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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