CASE NO. 15-4170

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VANCE NORTON, et al.,

Plaintiffs/Appellees,

v.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al.,

Defendants/Appellants.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge Dee Benson
Case No. 2:15-cv-00300

APPELLANT'S OPENING BRIEF

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March 14, 2016

Oral Argument Requested

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The Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") and its Tribal officers and Tribal Court respectfully submit their opening brief.

STATEMENT OF RELATED CASES

At the present there are no related cases pending before the Tenth Circuit. Two months ago the Tenth Circuit issued a published decision in a related case, *Jones v. Norton*, 809 F.3d 564, 580 (10th Cir. 2015). The relationship of *Jones v. Norton* to the present case is explained *infra* under the Statement of the Case.

JURISDICTIONAL STATEMENT

This appeal is from a district court order granting a preliminary injunction to enjoin the Defendant-Appellants—the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, the Ute Indian Tribal Court, Debra Jones, Arden Post and the Estate of Todd R. Murray ("Tribal Appellants")—from prosecuting in the Ute Indian Tribal Court their claims related to the death of Ute tribal member Todd R. Murray, and also denying the Tribal Appellants' motions to dismiss the Plaintiffs-Appellees ("Tribal Court Defendants") federal complaint.[1]

The Tribal Court Defendants invoked federal jurisdiction under 28 U.S.C. §1331 (federal question), 28 U.S.C. §2201 (declaratory judgment), and 28 U.S.C.

[1] Appendix (App.) 125 (Tribal Court Defendants' Motion to Dismiss, Dkt. 23); App. 154 (Tribe and Business Committee's Motion to Dismiss, Dkt. 27); App. 629(Order denying Motions to Dismiss and granting Preliminary Injunction, Dkt. 57).

§2202 (further relief in declaratory judgment suits). The Tribal Appellants moved to dismiss the suit, contending the district court lacks subject matter jurisdiction because, *inter alia*, there is no Article III case or controversy; the Tribe itself and the Tribe's Tribal Court, and the Tribe's officers are immune from suit; and the Tribal Court Defendants have failed to exhaust their tribal court remedies.[2]

As discussed more fully in the Argument section below, the Tribal Appellants' complaint in the Ute Tribal Court raises issues regarding the Ute Tribe's rights to occupy and exercise sovereign control over its tribal lands, as well as the rights of individual tribal members to seek legal redress for tortious acts committed against them on tribal lands.[3] The Tribal Court itself must first address these questions of tribal law and jurisdiction before the federal court can assert jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (the evaluation of whether there is tribal court jurisdiction "should be conducted in the first instance in the Tribal Court itself"). While it is conceivable that a federal question may arise at a later date—once the Tribal Court Defendants have exhausted their Ute Court remedies—there is not currently a federal question or a justiciable case and controversy.[4] The district court's Order denying the Tribal Appellants' motions to dismiss and granting a preliminary

[2] App. 125 (Tribal Court's Motion to Dismiss, Doc 23).

[3] App. 125 (Tribal Court's Motion to Dismiss, Dkt. 23), and App. 34-67 (the Tribal Appellants complaint in the Ute Tribal Court).

[4] App. 125 (Tribal Court's Motion to Dismiss, Doc 23).

injunction was entered in the court docket on October 5, 2015.[5] The Tribal Appellants filed their notice of appeal from that order on November 4, 2015.[6] The time for appeal was 30 days from entry of the appealed order, and the appeal was therefore timely filed. Fed. R. App. Proc. 4(a)(1)(A).

The Tribal Appellants' appeal from the order denying their motions to dismiss and granting a preliminary injunction is an appealable order under 28 U.S.C. §1292(a)(1), and under the appellate court's inherent authority and obligation to determine federal court jurisdiction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The following issues are raised in this appeal:

1. Whether the district court erred in denying the Tribal Appellants' motion to dismiss this suit based on the lack of federal jurisdiction and tribal sovereign immunity from suit.
2. Whether the district court was required to dismiss or stay this matter because the Tribal Court Defendants have not exhausted tribal court remedies, or alternatively, whether the district court erred in entering a preliminary injunction.
3. Whether the district court erred by holding that the Tribe and its Business

[5] App. 629 (Dkt. 57) (Parenthetically the order is ostensibly dated October 2, 2015, however the order was not entered on the court docket until October 5, 2015).

[6] Aplt. App. at 637 (Notice of Appeal, Dkt. 58).

Committee were properly served with process and therefore could be preliminarily enjoined.

I. STATEMENT OF THE CASE

On April 1, 2007, Todd Rory Murray ("Todd Murray" or "Murray") was a 21- year-old enrolled member of the Ute Indian Tribe. Murray died that day after being shot in the back of his head, above and behind his left ear. Murray was a right-handed individual.

Murray was shot after being pursued at gun-point by two Utah State Highway Troopers, a Uintah County Sheriff's Deputy, and an off-duty Vernal City, Utah, police officer ("the shooting-involved officers"). The pursuit took place over tribal trust lands located more than 25 miles inside the northern boundary of the Tribe's Uintah and Ouray ("U&O") Reservation. The four shooting-involved officers had no criminal jurisdiction over Indians inside the U&O Reservation.[7] The officers also had no probable cause or reasonable suspicion to believe that Todd Murray had committed any crime; Murray had simply been a passenger in a car that was pursued by the Tribal Court Defendants for speeding.[8]

After the shooting, additional Utah state, county, and Vernal City law enforcement officers arrived on the scene. Acting in concert, through either an

[7] *See United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985) (none of the Indian tribes in Utah has consented to state jurisdiction over their Indian reservations).

[8] See Tribal Court Complaint, ¶¶ 24-66, App. 40-48, Dkt. 2-1.

express or implied agreement or understanding, the state, county and Vernal City law enforcement officers conspired to concoct, or to permit to be concocted, the shooting-involved officers' self-serving account that Todd Murray shot himself in the back of his head, above and behind his left ear. By and through their actions and/or inactions, described below, the state, county and Vernal City law enforcement officers became accessories after the fact to the wrongful death of Todd Murray, and accessories to the officers' conspiracy to cover-up the true facts of how Murray was killed. By and through their actions and/or inactions, each of the state, county, and Vernal City law enforcement officers involved in Todd Murray's wrongful death, and the conspiracy to cover-up the true facts of his death, caused "injury" to Todd Murray, to Murray's surviving family members, and to the Ute Indian Tribe.

Todd Murray's parents, Appellants Debra Jones and Arden Post and Murray's Estate filed suit in the Eighth Judicial District Court of the State of Utah, *Jones v. Norton*, case no. 090800340, alleging claims for both tort damages and infringement of Murray's federal civil rights under 42 U.S.C. § 1983.[9] That case was removed to the U.S. District Court for the District of Utah, and assigned case number 2:09-cv-00730.[10] In an Order and Memorandum Decision entered on March 7, 2014, the U.S. District Court granted summary judgment for the

[9] App. 69 (Exhibit A to Tribal Court Complaint).

[10] App. 71 (Exhibit B to Tribal Court Complaint).

Defendants on the civil rights claims. The Court, however, declined to exercise supplemental jurisdiction over the Appellants' tort claims, and dismissed the tort claims without prejudice.[11]

Thereafter, on March 5, 2015, Todd Murray's parents, the Murray Estate, and the Ute Indian Tribe filed suit against the Tribal Court Defendants in the Ute Indian Tribal Court, seeking damages for the tort claims that the U.S. District Court had previously dismissed without prejudice in *Jones v. Norton*.[12] On May 1, 2015, the Tribal Court Defendants filed a motion to dismiss the Tribal Court complaint. The Tribal Court Defendants' motion to dismiss remains pending at this time, with no action yet taken by the Tribal Court on the motion to dismiss.

Before the Tribal Court had the opportunity to fully evaluate the factual and legal bases for its own jurisdiction, the Tribal Court Defendants filed the underlying suit in the U.S. District Court, seeking a declaratory judgment that the Ute Tribal Court lacks jurisdiction over the tort claims, and asking the District Court to enjoin the Ute Indian Tribal Court and other Appellants from taking any further action in the Tribal Court case.[13] The Tribal Court Defendants have never served summons and a copy of their federal court complaint on Todd Murray's

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[11] App. 73 (March 7, 2014 Order of U.S. District Court in *Jones v. Norton*). *Jones v. Norton*, 3 F. Supp. 3d 1170, 1212-13 (D. Utah 2014), *aff'd Jones v. Norton*, 809 F.3d 564, 580 (10th Cir. 2015).

[12] App. 34-67 (Tribal Court Complaint).

[13] App. 15, Dkt. 2.

parents, or the Estate of Todd Murray.[14] In addition, the Tribe itself, and the Tribe's six-member governing body—its Business Committee—contend there has been no proper service of process.

The Tribal Appellants filed motions to dismiss the District Court Action based on tribal sovereign immunity, lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), failure to state a cause of action, Fed. R. Civ. P. 12(b)(6), failure to join an indispensable party, Fed. R. 12(b)(7), failure to first exhaust tribal court remedies, and lack of proper service of process.[15] The Tribal Court Defendants, in turn, filed a motion for preliminary injunction.[16] The District Court entered its Order that is the subject of this appeal, granting the Tribal Court Defendants' motion for preliminary injunction and denying Tribal Appellants' motions to dismiss.[17]

Tribal Appellants filed this present appeal on November 4, 2015 seeking a determination of whether the District Court erred in granting the preliminary injunction and in dismissing the Tribal Appellants' motions to dismiss.[18]

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[14] App. 640-657.

[15] App. 98, 154 (Tribe Appellants' Motions to Dismiss, Dkt. 12 and Dkt. 27).

[16] App. 161 (Appellees' Motion for Preliminary Injunction, Dkt. 32).

[17] App. 629 (Order Denying Defendants' Motions to Dismiss and Granting Plaintiffs' Motion for Preliminary Injunction, Dkt. 57).

[18] App. 637, Dkt. 58.

II. STANDARD OF REVIEW

This Court reviews a district court's injunction order to determine whether the district court abused its discretion or based its rulings on erroneous conclusions of law or clearly erroneous factual findings. *See, e.g., Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (the district court denied the Tribe's motion for preliminary injunction based on the district court's holding that the Tribe had failed to establish irreparable harm. This Court reversed, holding the Tribe had established irreparable harm). With regard to rulings on sovereign immunity, this Court conducts a *de novo* review of a district court's rejection of the tribal sovereign immunity defense. *Id*. at 1009-11; *see also Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 (10th Cir. 1998) (applying *de novo* standard of review to legal question of whether a party may assert immunity); *In re Mayes*, 294 B.R. 145, 147 (B.A.P 10th Cir.) ("the application of tribal sovereign immunity is a question of law subject to *de novo* review by this Court.").

III. SUMMARY OF THE ARGUMENT

The general rule is that a defendant in a tribal court suit must first exhaust tribal court remedies before the party can challenge tribal court jurisdiction in federal court. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. at 856 (the evaluation of whether tribal court jurisdiction exists "should be conducted in the first instance in the Tribal Court itself"). The Tribal Court

Defendants in this case admit that they have not exhausted tribal court remedies. Thus, the primary issue presented by this appeal is whether the Tribal Court Defendants' suit fits within one of the limited exceptions to the general rule that requires exhaustion of tribal court remedies. It is clear that it does not.

Where, as here, the acts giving rise to a cause of action occur on tribal trust lands within an Indian reservation, the Tribal Court retains plenary jurisdiction over non-members. It is undisputed that the tribal decedent, Todd Murray, had not committed any off-Reservation crime and the Tribal Court Defendants were not acting within the scope of their official authority when they committed the alleged torts.

Because the Tribal Court Defendants have not exhausted tribal court remedies, this Court lacks subject matter jurisdiction over this case. There is no federal question currently presented; there is no case or controversy; and there is no waiver of the Tribe's sovereign immunity from suit. The case must be dismissed, or in the alternative stayed until the Tribal Court Defendants exhaust Tribal Court remedies.

IV. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING THE TRIBAL APPELLANTS' MOTION TO DISMISS BASED ON THE LACK OF FEDERAL COURT JURISDICTION AND THE TRIBAL APPELLANTS' SOVEREIGN IMMUNITY FROM SUIT

The district court erred in ruling that tribal sovereign immunity does not bar

this federal lawsuit against the Tribe itself, the Ute Indian Tribal Court, and Tribal Court Chief Judge Reynolds. Tribal sovereign immunity is a matter of subject matter jurisdiction that is challenged through a motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. Rule 12(b)(1). Tribal sovereign immunity is not a discretionary doctrine that may be invoked remedially depending on the equities of a given situation; rather the issue of sovereign immunity presents a pure question of subject matter jurisdiction. Waivers of tribal sovereign immunity are strictly construed, and there is a strong presumption against them. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). This immunity is so powerful that federal courts have recognize that there can be no "waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm. v. Citizen Band of Potawatomi Indian Tribe*, 498 US. 505, 509 (1991). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's

waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citations omitted). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399 (1976)(quoting *United States v. King*, 395 U.S. 1, 4 (1969)); *Sac and Fox Nation v. Honorable Orvan J. Hanson, Jr.*, 47 F.3d 1061 (10th Cir. 1995).

A suit is against the sovereign if "the judgment would expend itself on the public treasury or domain, or interfere with the public administration... or if the effect of the judgment would be "to restrain the government from action, or to compel it to act." *Coggeshall Develop. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989). Of course, there exist suits for specific relief against officers of the sovereign that are not suits against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). "However, to come within this 'special relief' exception a claimant must allege and prove that the officer has acted outside the scope of his authority." *Coggeshall*, 884 F.2d at 3 (citing *Larson*, 337 U.S. at 690).

The "facts" in the Tribal Court lawsuit at this very preliminary stage of the case are the facts that are alleged by the tribal court plaintiffs in their tribal court complaint, interpreted in the light most favorable to the tribal court plaintiffs.[19]

[19] *See* the Tribal Appellants' Tribal Court Complaint, App. 35-65

The Tribal Court complaint alleges that the Tribal Court Defendants, acting outside the scope of their official authority—and thus not acting on behalf of any government—came onto the Tribe's U&O Reservation. They did so without permission to enter upon the land. They then acted in concert to pursue Mr. Murray, with weapons drawn. One of them then shot Mr. Murray in the head at close range, or alternatively, the Tribal Court Defendants' gross negligence proximately caused Mr. Murray's death of Mr. Murray, and the Tribal Court Defendants then participated in a cover-up. They failed to preserve and destroyed evidence. They did not comply with their duty to provide medical intervention, and instead allowed Mr. Murray bleed out and die.

These are currently the facts, and under those facts, the person or people who proximately caused Murray's death are, *ipso facto*, not State or County actors. *E.g., Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *King v. Taylor*, 694 F.3d 650, 664 (6th Cir. 2012) ("we have little trouble concluding that if Taylor shot King while he was lying on his couch and not pointing a gun at the officers, Taylor violated King's clearly-established right to be free from deadly force. It has been clearly established in this circuit for some time that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others.")(internal punctuation omitted). All parties to this case understand that the Tribal Court defendants and their attorneys will assert that Mr. Murray killed himself. But for

current purposes, the presumed fact is exactly to the contrary, or alternatively, that the gross negligence of the Tribal Court Defendants' was the proximate cause of Murray's shooting death .

Similarly, those who participated in a cover-up of the cause of the death do not have immunity. *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). In *Stump v. Gates*, 1993 WL 33875 (10th Cir. 1993), the Tenth Circuit, in an unpublished decision, cited *Ryland* and *Bell* to hold that immunity does not apply to the cover-up of a homicide. Also relevant for current purposes, *Stump* applies the well-established rule that a court in the position of the Tribe's Court in the present matter is bound by the allegations of the complaint.

We emphasize that all that is before us are the allegations of the complaint, alleging deliberate action and conspiracy, which we must take as true. We believe that any reasonable officer would have known that if the conduct occurred as alleged by plaintiffs in this case, it would violate the constitutional rights of the decedent's parents and his children. *Stump v. Gates*, 1993 WL 33875 at *3.

Chief Judge Reynolds of the Ute Indian Tribal Court is within the protection of the Tribe's sovereign immunity. A lawsuit against officials acting within their official capacity is nothing more than a claim against the entity. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). Immunity from suit for a tribe also applies to tribal

officials. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir.1996); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002), *cert. den.*, 236 U.S. 939 (2002). Sovereign immunity even extends to "sub-entities or enterprises of a tribe." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1064 (N.D. Okla. 2007), *aff'd* 546 F.3d 1288 (10th Cir. 2008).

Tribal sovereign immunity extends to individual officers of a tribe named as parties:

> It is clear that a plaintiff may not avoid the operation of tribal immunity by suing tribal officials; "the interest in preserving the inherent right of self- government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself." Accordingly, a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities.... The general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual capacity suits arising of actions they took in their official capacities, as the district court held.... Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities – that is because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.

Native Am. Distrib., 546 F.3d at 1296 (footnote and citations omitted).

In this case, the Tribal Court Defendants have attempted to evade the Tribes' immunity by including claims against Ute Court Judge Reynolds in his official capacity. However, in the absence of any allegation of wrongdoing by Chief Judge

Reynolds—any allegation that Chief Judge Reynolds had acted in excess of the Tribal Court's jurisdiction or Judge Reynolds' authority as a Tribal Court judge—there simply is no basis for finding that Judge Reynolds is not cloaked with tribal and judicial immunity. Accordingly, the Tribal Court Defendants' pleading device of suing Judge Reynolds in his official capacity should be soundly rejected.

B. BECAUSE THE TRIBAL COURT DEFENDANTS HAVE NOT EXHAUSTED TRIBAL COURT REMEDIES, THE DISTRICT COURT ERRED IN NOT DISMISSING OR STAYING THE FEDERAL LAWSUIT BASED AND IN ISSUING A PRELIMINARY INJUNCTION TO ENJOIN THE TRIBAL COURT SUIT

The district court erred in concluding that this case falls within one of the limited exceptions to the requirement of exhaustion of tribal court remedies, and based on that error, the district court erred in determining that the Tribal Court lacks jurisdiction over this case, and in enjoining proceedings in the Tribal Court suit on that basis.[20] The factual predicate—that Tribal Court Defendants have not exhausted tribal court remedies—is not disputed in this case. If exhaustion is required, then clearly there is no case or controversy presented, no federal question, and no waiver of the Tribe's sovereign immunity from suit. The pivotal issue is therefore whether exhaustion is required.

In order to promote tribal self-government and principles of comity, the Supreme Court has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction. *National*

[20] App. 629-36 (District Court Order, Dkt. 57).

Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985). Not only is exhaustion of tribal court remedies mandated by Supreme Court precedent, but it is also dictated by the clear weight of authority from the Tenth Circuit Court of Appeals. In fact, the Tenth Circuit concluded that *National Farmers Union* and *LaPlante* "established an inflexible bar to considering the merits of a petition by the federal court, and therefore requiring that a petition be dismissed when it appears that there has been a failure to exhaust [tribal remedies]," *Smith v. Moffet*, 947 F.2d 442, 445 (10th Cir.1991). *See National Farmers Union*, 471 U.S. 845; *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). The "requirement of exhaustion of tribal remedies is not discretionary, it is mandatory." *Crawford v. Genuine Parts, Co.*, 947 F.2d 1405 (9th Cir. 1991). *See also Tillett v. Lujan*, 931 F.2d 636, 640-41 (10th Cir. 1991); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328-29 (10th Cir. 1986). The Supreme Court has defined exhaustion of tribal court remedies to include appellate review within the tribal court system. *LaPlante*, 480 U.S. at 17.

In its Order, the district court opines that the Supreme Court's tribal court exhaustion requirement has several exceptions and that this case falls under the following two exceptions: (1) no federal grant provides for tribal governance of the nonmember conduct here pursuant to *Montana*, and (2) it is also otherwise clear that the tribal court lacks jurisdiction pursuant to *Hicks*, citing *Burrell v. Armijo*,

456 F.3d 1159 (10th Cir. 2006); *Montana v. United States*, 450 U.S. 544 (1981); and *Nevada v. Hicks*, 533 U.S. 353 (2001).[21]

These exceptions to the exhaustion requirement do not apply because the facts alleged in the Tribal Court Complaint implicate issues related to tribal sovereignty and to the safety and welfare of the Tribe's tribal members. *Nat'l Farmers Union*, 471 U.S. at 856 (Because a federal court's exercise of jurisdiction over matters relating to reservation affairs can impair the authority of tribal courts, the Supreme Court has concluded that, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself).

The Tenth Circuit has announced: "We have taken a strict view of the tribal exhaustion rule and have held that 'federal courts should abstain when a suit sufficiently implicates Indian sovereignty or other important interests.'" *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1507 (10th Cir. 1997), citing *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542 (10th Cir.1995). The tribal court exhaustion requirement applies even in cases where tribal court jurisdiction is not clearly established by the tribal court complaint. Instead, in cases where even a "colorable question" of tribal court jurisdiction exists, the federal court must abstain and require the federal court plaintiff to exhaust Tribal

[21] App. at 631-34 (District Court Order, Dkt. 57)

Court remedies. *Stock West Corp. v. Taylor*, 964 F.2d 912, 920-21 (9th Cir. 1992).

The first federal appellate court to reach the issue, the Ninth Circuit, explained that "[T]he *Farmers Union* Court contemplated that tribal courts would develop the factual record in order to serve the 'orderly administration of justice in the federal court.'" *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990). All federal courts that have reached the issue, including the Tenth Circuit Court, have adopted the Ninth Circuit's analysis on this issue of law. *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (citing *FMC*); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996)(citing *FMC*).

Here, there is no "Tribal Court determination of its own jurisdiction" to review, and therefore there is not yet a federal question to present and no case or controversy. Disputes arising on the reservation, as this one did, that raise questions of tribal law and jurisdiction, as this one does, must first be addressed in the tribal court. *United States v. Tsosie*, 92 F.3d 1037, 1044 (10th Cir. 1996); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986).

1. Under *Montana v. United States* the Ute Indian Tribal Court has jurisdiction over claims arising from the conduct of the Tribal Court Defendants on Tribal Lands.

The district court generalizes the specific holding in *Montana*, which discusses the power of a Tribe to regulate non-Indian activities on land owned in

fee by non-Indians within the reservation. *Montana v. United States*, 450 U.S. 544, 557 (1981). A critical distinction between the case at bar and the *Montana* case is that the land in question in *Montana* was no longer owned by the Tribe and the Indians had already accommodated themselves to the State regulation of those fee lands. Thus, the *Montana* Court found that the Tribe had not retained inherent tribal sovereignty over those lands that would permit the Tribe to regulate non-Indian conduct on those lands. *Id*. at 564. However, the Supreme Court upheld and "readily" agreed with the Ninth Circuit's other holding in *Montana*, that the Tribe may regulate nonmembers on land belonging to the Tribe, e.g. tribal trust land. *Id*. at 557.

Where, as here, the actionable conduct occur on tribal trust lands within the reservation, the Tribal Court retains plenary jurisdiction over non-members. *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. 316, 328 (2008).[22] Under *Montana*, tribal courts have the following indisputable jurisdiction over non-Indians, even on fee lands owned by non-Indians:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on

[22] The Tribal Court complaint specifically alleges that the lands where Murray was pursued at gun-point and shot to death are tribal trust lands. App. 42, ¶ 32.

> the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66.

Indeed, the Ute Indian Tribe's federally-approved Constitution expressly provides that the Tribe's governing body has the following powers: "To exclude from the territory or the Uintah and Ouray Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior," Ute Const. Art. VI, §1(i); "To promulgate and enforce ordinances . . . providing for the maintenance of law and order," Ute Const. Art. VI, § 1(k); and "To safeguard and promote the peace, safety, morals and general welfare of the Ute Indian Tribe of the Uintah and Ouray Reservation by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting nonmembers of the Reservation shall be subject to review by the Secretary of the Interior." Ute Const. Art. VI, §1(l).[23]

The district court erred in construing *Nevada v. Hicks*, 533 U.S. 353 (2001) as a radical new limitation on tribal court jurisdiction because the U. S. Supreme Court has already rejected that very same expansive interpretation of *Hicks*. *Plains*

[23] The Tribe asks the Tenth Circuit to take judicial notice of the Tribe's Constitution which is posted online at the Native Indian Law Library, http://www.narf.org/nill/constitutions/ute_uintah_ouray/index.html (last visited on 3/14/2016).

Commerce, 554 U.S. at 333-336. In *Hicks*, the Supreme Court announced that, contrary to the prevailing understanding of most commentators and authorities, there is no absolute rule that tribal courts have civil jurisdiction over actions on tribal land. *Hicks* referred to the status of the land as only one factor in a multi-factor test that must to be applied to determine whether a tribal court has jurisdiction over non-Indians. This removal of the previously understood bright line rule created uncertainty, but the Supreme Court's decision in *Plains Commerce Bank* removed much of that uncertainty. In *Plains Commerce Bank*, the Supreme Court clarified that although the status of the land is a factor that can be outweighed by other factors, the United States' ownership of land in trust for an Indian tribe is a very substantial factor—so substantial that it is a very rare case where the tribal trust status of tribal lands can be outweighed by any other factor.

In *Plains Commerce Bank* the respondent asserted the federal courts should consider status of the land as a relatively unimportant factor when it decides whether a tribal court has jurisdiction. The Supreme Court, however, rejected that argument in clear, express terms. The Court referred to tribal jurisdiction over tribally-owned lands as "plenary," and noted that this plenary jurisdiction is lost when the land is transferred out of tribal ownership and converted to fee simple. *Id*. at 328. The Supreme Court next analyzed, at length, its own numerous cases which show "the critical importance of land status" to the jurisdictional analysis.

Id. at 338. As the Court discussed, those cases establish that tribal courts almost always have jurisdiction over conduct that occurs on tribally-owned lands, but usually lack jurisdiction over activities by non-members on non-Indian owned fee lands. *Id*. at 332-333 (discussing its prior precedents permitting tribal taxation of activities on tribally owned land but preventing most tribal taxation of activities on non-Indian owned land.)

As described in *Plains Commerce Bank*, a tribe has jurisdiction over contract disputes arising on tribally-owned lands, *Williams*, 358 U.S. 217; the "'traditional and undisputed power to exclude persons' from tribally-owned lands," *Plains Commerce*, at 327-28 (quoting *Duro*, 495 U.S. at 696); the power to tax conduct on tribally-owned lands, the power enforce tribal license requirements related to conduct on tribally-owned lands; and the power to manage tribally-owned lands. These examples of tribal powers over tribally-owned lands—particularly the power to exclude non-members—provides ample basis for the Tribe and tribal courts to exercise adjudicatory jurisdiction over suits for torts committed during a trespass on tribal lands.

The status of land as tribal trust lands, or non-Indian fee, is almost always determinative of tribal court jurisdiction. *Hicks*, 533 U.S. at 359-60; *Plains Commerce Bank*, 554 U.S. at 333. Yet in this case the district court failed to consider, much less make any factual findings, related to the tribal trust status of

the lands where the Tribal Court Defendants pursued Todd Murray at gunpoint—a pursuit that culminated in Murray's shooting death on those same tribal trust lands.

The Ute Indian Tribal Court must be afforded the opportunity to determine its own jurisdiction and no court should exercise jurisdiction until the parties have first exhausted their Tribal remedies. *Kaul v. Wahquahboshkuk*, 838 F. Supp. 515, 516 (D. Kan. 1993) (The rule of "tribal exhaustion" requires that this action be dismissed so the issue of jurisdiction may properly be decided in the tribal court).

In this case, the Tribal Court Complaint alleges that the Tribal Court Defendants committed a tort against a tribal member on tribally-owned lands while acting outside the course and scope of their employment. The Tribal Court would have proper jurisdiction over torts committed by a non-Indian against a tribal member on tribal land within the Uintah and Ouray Indian Reservation. *National Farmers Union*, 471 U.S. at 855-56 (In a tort suit by a tribal member against a school district and its insurer, the Supreme Court held that the examination of the existence and extent of a tribal court's jurisdiction should be conducted in the first instance in the Tribal Court itself.)

"If deference is called for, the district court may not relieve the parties from exhausting tribal remedies." *Crawford v. Genuine Auto Parts, Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992). One of the fundamental ways that tribes differ from the surrounding society is land tenure and rights. The

underlying Tribal Court case raises issues regarding the Tribe's sovereign authority over tribally-owned lands, and even more difficult for a non-tribal court, the rights of individual tribal members to undisturbed possession of tribal lands and to seek legal redress for torts committed against them on tribal lands. While there is not an exact analogy in Anglo law, Mr. Murray was on land in which he had an indivisible right to occupy free from interference. This Court should welcome the Tribal Court's analysis of the issue under Ute tribal law and the federal courts should stay their hands and not step in prematurely to determine the Tribal Court's jurisdiction over tort claims arising from the Tribal Court Defendants' actions on the Tribe's tribalky-owned lands. *E.g.*, *Tsosie*, 92 F.3d at 1044.

2. *Nevada v. Hicks* does not provide an exception to the exhaustion requirement applicable to the facts that are alleged in this case under the Tribal Appellants' Tribal Court Complaint.

Nevada v. Hicks is legally and factually distinguishable from this case at bar, and therefore, the district court's reliance on *Hicks* was in error. 533 U.S. 353 (2001). The decedent, Todd Murray, was the passenger—not the driver—of the vehicle that was being pursued for an alleged off-reservation speeding offense. This means that the Tribal Court Defendants were not pursuing Murray for the commission of an off-reservation crime.[24] In fact, the extra-jurisdictional armed pursuit and subsequent torts committed against Mr. Murray occurred *after* the

[24] App. 43-44, ¶¶ 40-42.

Tribal Court Defendants had already apprehended the driver of the vehicle. This is an important factual distinction between this case and *Hicks* because it means that the police pursuit of Mr. Murray occurred *after* the completion of any official duties the Tribal Court Defendants undertook in relation to the alleged off-reservation speeding violation.[25]

The primary issue decided in *Hicks* was whether the Tribal Court could exercise jurisdiction over a civil suit against state policer officers who were acting within the scope of their State authority by executing State process on a reservation related to an off-reservation crime. 533 U.S. 353. Justice Scalia noted that jurisdiction over acts on tribal lands are almost always within a tribal court's jurisdiction, but he said *Hicks* was the rare case (and in fact the only Supreme Court case) where land status is not dispositive of Tribal Court jurisdiction. *Hicks* is unique based on its facts because the Court decided that case under its specific facts: the Tribe's very substantial interest over non-fee land had to be balanced against "the State's interest in pursuing off-reservation violations of its law" and execution of State process related to the off-reservation violation. *Id*. at 370 (emphasis added). Those factors—factors that controversially and barely tipped the scales in favor of the State in *Hicks*—do not exist, or apply, here.

Mr. Murray did not commit any off-Reservation violation. The off-

[25] *Id*.

Reservation speeding violation committed by the driver had ended once the Tribal Court Defendants had arrested the driver. The subsequent armed pursuit of the fleeing passenger, Murray, was not an attempt to execute state process related to an off-reservation violation and the Tribal Court Defendants were not acting within the scope of their authority in pursuing Murray.

Additionally, the Tribal Court in *Hicks* had issued its jurisdictional decision before the ruling was challenged in federal court. This meant the Tribal Court in *Hicks* was afforded the opportunity to create a sufficient factual record for the federal court to later review, and the Tribal Court in *Hicks* was allowed to provide its own analysis of its jurisdictional. That has not happened yet in this case. Like the Tribal Court in *Hicks*, the Ute Tribe's Court must be afforded the opportunity to create the necessary record.

Lastly, based on the record developed by the *Hicks* tribal court, the Supreme Court could conclude that the officers were acting within the scope of their authority. *Id*. In the present matter, the facts for purposes of this pre-exhaustion review are those alleged in the Tribal Court Complaint, and under those facts the Tribal Court Defendants were simply not government actors.[26] In contrast to *Hicks*, in this case there is no substantial state interest that counterweighs tribal court jurisdiction over acts committed on tribal lands, twenty-five miles inside the

[26] App. 43-47, ¶¶ 34-62.

Tribe's northern boundary.

C. THE DISTRICT COURT ERRED IN HOLDING THAT THE TRIBE AND ITS BUSINESS COMMITTEE AND TRIBAL OFFICERS WERE PROPERLY SERVED WITH PROCESS AND THEREFORE COULD BE PRELIMINARILY ENJOINED

The district court made the succinct declaration that the Ute Indian Tribe and its six-member governing body (the Tribal Business Committee) were served in accordance with the Federal Rules of Civil Procedure and thus were properly served with process.[27] The district court, however, failed to address all of the issues that the Tribe raised in its challenge to service of process.[28]

Rule 4 of the Federal Rule of Civil Procedure 4 provides the method of service for most types of entities; however, Rule 4 does not include a section addressing service upon Indian Tribes. To effectuate service on the Tribe or its Business Committee, the Tribe's Law and Order Code requires that service be effected on all six Business Committee members by a person who is lawfully authorized. The Tribal Court Defendants chose to have a person who is not authorized trespass onto the Tribe's land and "serve process" on some Business Committee members, former Business Committee members, or future Business Committee members.[29] It appears that the process server intentionally and

[27] App. 634-35.

[28] *Id*.

[29] *See* App. 154-60, the Tribe and Tribal Business Committee's Motion to Dismiss, Dkt. 27.

disrespectfully trespassed at and around the time of the inauguration festivities for the Tribe's incoming Business Committee members on May 11, 2015.

This then created a servicing fiasco. The trespasser "served" Mr. Chapoose as a Business Committee member and on behalf of the Tribe at 9:50 a.m., before Mr. Chapoose was actually sworn into office (and thus while he was not a tribal officer).[30] The trespasser served Mr. Chimburas at 11:00 a.m., after his term of office had expired and his successor had been sworn into office.[31] There is no declaration of service currently on file for some of the other Business Committee members. The Tribal Court Defendants did not validly serve the Tribe or its Business Committee, and the complaint against them therefore should have been dismissed.

CONCLUSION

Under controlling Supreme Court and Tenth Circuit precedent, the Ute Indian Tribal Court must be afforded the opportunity to rule on its own jurisdiction, and the Tribal Court Defendants must be required to first exhaust their tribal remedies before challenging the Tribal Court's jurisdiction in federal court. Accordingly, the Tribal Appellants respectfully request that this Court dismiss the Tribal Court Defendants' federal complaint, or alternatively, order that the federal court stay its hand pending the Tribal Court's determination of its jurisdiction. In

[30] App. 647 (Dkt. 16).

[31] App. 648 (Dkt 17).

addition, the Tribal Appellants respectfully request that this Court reverse and vacate the district court's issuance of a preliminary injunction based on the district court's erroneous ruling that the Tribal Court Defendants are not required to first exhaust their tribal remedies.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the obvious significance of this case to the Ute Indian Tribe. Further, given the complexity of the legal issues, the Tribal Appellants believe that the parties and the Court will both benefit from oral argument.

Dated this 14th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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As required by Fed. R. J.A. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 6,895 words.

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I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF AND APPENDIX VOLUMES I - IV**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sunbelt Vipre Enterprise version 6.2.5.1, dated 8/19/2015, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Debra A. Foulk*
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2016, a copy of this **APPELLANT'S OPENING BRIEF AND APPENDIX VOLUMES I - IV**, were served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

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