J. Preston Stieff (4764)
J. PRESTON STIEFF LAW OFFICES
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@StieffLaw.com

Attorney for Defendants Ute Indian Tribe of the Uintah and Ouray Reservation; Business Committee for the Ute Tribe of the Uintah and Ouray Reservation; Tribal Court for the Ute Tribe of the Uintah and Ouray Reservation; and William L. Reynolds

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GRANT CHARLES, in his official capacity as attorney for Roosevelt City, Utah, Plaintiff, v. UTE INDIAN TRIBE OF THE UINTAH and OURAY RESERVATION; BUSINESS COMMITTEE FOR THE UTE TRIBE OF THE UINTAH and OURAY RESERVATION; TRIBAL COURT FOR THE UTE TRIBE OF THE UINTAH and OURAY RESERVATION; WILLIAM L. REYNOLDS in his official capacity as Chief Judge of the Ute Tribal Court; and RICHITA HACKFORD, Defendants.	**MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF** Civil No. 2:17-CV-00321-DN

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COMES NOW, Defendants Ute Indian Tribe of the Uintah and Ouray Reservation; Business Committee for the Ute Tribe of the Uintah and Ouray Reservation; Tribal Court for the Ute Tribe of the Uintah and Ouray Reservation; and William L. Reynolds in his official capacity as Chief Judge of the Ute Tribal Court (collectively referred to herein as "Tribal Defendants"), through undersigned counsel, and move to dismiss the claims filed against them by Plaintiff Grant Charles for lack of a ripe case or controversy under Art. III of the U.S. Constitution, lack of subject matter jurisdiction, lack of personal jurisdiction, insufficient process and insufficient service of process. Tribal Defendants do not include Party-Defendant Richita Hackford.

I. RELIEF SOUGHT AND GROUNDS FOR THE MOTION

Tribal Defendants request that the claims against them be dismissed with prejudice. This Court lacks subject matter jurisdiction on grounds of (*i*) Indian tribal sovereign immunity; (*ii*) lack of federal question jurisdiction under 28 U.S.C. § 1331; (*iii*) lack of diversity jurisdiction under 28 U.S.C. § 1332; and (*iv*) failure to join a necessary and indispensable party. To begin with, there is no waiver of tribal sovereign immunity; secondly, the Plaintiff's request for declaratory relief does not raise a federal question; thirdly, the Tribal Defendants are not citizens of any state for purposes of diversity jurisdiction; and finally, the Plaintiff has failed to join the United States as a necessary and indispensable party. Accordingly, because there is no Article III jurisdiction and no statutory jurisdiction, this Court lacks jurisdiction and the claims against the Tribal Defendants must be dismissed with prejudice.

This Court lacks personal jurisdiction on the grounds of (*i*) insufficient process; and (*ii*) insufficient service of process. Tribal Defendants, the Ute Indian Tribe and the Business Committee of the Ute Indian Tribe were not properly served the Summons and Complaint in this

matter pursuant to the requirements of tribal law. Accordingly, this Court is without personal jurisdiction and the claims against the Tribal Defendants, the Ute Indian Tribe and the Business Committee must be dismissed with prejudice.

II. STATEMENT OF FACTS

1. The Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") is a federally recognized Indian tribe and is thereby entitled "to the immunities and privileges available to . . . federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.2.

2. The Business Committee is the governing body of the Ute Indian Tribe of the Uintah and Ouray Reservation. *Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation* ("Ute Const."), art. III, § 1 (1989).

3. The Business Committee consists of six (6) members, two (2) members duly elected from each of the three (3) bands of the Tribe. Ute Const., art. III, § 2.

4. The Ute Tribe established the Ute Tribal Court "to handle all matters of a judicial nature not specifically placed within the jurisdiction of some other judicial forum." Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation, Title I – General Provisions ("U.L.O.C."), §1-3-1(2) (2013). The Ute Court is "a court of general civil and criminal jurisdiction" and decisions of the Ute Court may be appealed to the Ute Indian Appellate Court. U.L.O.C., §1-3-1(1) and (2).

5. Honorable William L. Reynolds is the duly appointed acting Chief Judge of the Tribal Court of the Tribe.

6. Pursuant to Section 1-8-5 of the Law and Order Code of the Ute Indian Tribe, *only the Business Committee may waive immunity* by passing a resolution or ordinance that specifically includes an express waiver. U.L.O.C. §1-8-5 (emphasis added). The Tribe's sovereign immunity extends to its officers and employees arising from the performance of their official duties. *Id.*

7. The Business Committee has not waived the Tribe's sovereign immunity, nor has it consented to this action.

8. The Business Committee has not waived the Business Committee's sovereign immunity, nor has it consented to this action.

9. Congress has not waived the Tribe's sovereign immunity, nor has Congress consented that the action be brought against the Tribe.

10. The Business Committee has not waived the Tribal Court's sovereign immunity, nor has it consented to this action.

11. The Business Committee has not waived the Honorable William L. Reynolds' sovereign immunity, nor has it consented to this action.

12. Congress has not waived the Tribal Court's sovereign immunity nor has Congress consented that the action be brought against the Tribal Court.

13. This federal court suit relates to a suit filed in the Ute Court on August 31, 2016, entitled: *Hackford v. Clark Allred and Grant Charles* [Dkt. 2], which has been assigned to Tribal Court Judge Terry Pechota. Ex. 1-2. Notably, Charles knows that the matter is assigned to Judge Pechota, *id.*, but Judge Pechota is not a named party to this action and therefore could not be bound by a decision. Further Judge Reynolds has not taken any action in the Ute Court suit and therefore cannot be sued in this matter. *Id.*

14. As under the law applicable in this Court, the Tribal Court is required to receive such complaints, Ute R. Civ. Proc. 2, and then follow applicable procedural rules designed to provide due process of law to the parties.

15. The parties listed as defendants in the Ute Court suit filed a motion to dismiss the Ute Court suit pursuant to Rule 7(b) of the Ute Indian Rules of Civil Procedure (analogous to Rule 12(b) of the Federal Rules of Civil Procedure).

16. On April 17, 2017, a hearing was held before Tribal Court Judge Terry Pechota on the motion to dismiss. Defendant Clark Allred participated in the hearing in person. Defendant Grant Charles and his co-counsel, Jesse Trentadue participated telephonically. Judge Pechota did not rule on the pending motion to dismiss and instead allowed additional briefing. The case is currently pending a decision from Judge Pechota.

17. The Plaintiff asserts that the Tribal Court is a "federal actor" and therefore, must apply the U.S. Constitution in its proceedings in the *Hackford* case. However, the Plaintiff has failed to join the United States as a necessary and indispensable party.

18. The Tribe and its Business Committee have not been properly served with the *Complaint for Declaratory and Injunctive Relief* [Dkt. 2] in accordance with tribal law.

19. The Return of Service presented to the Court as proof of service for the Ute Indian Tribe and the Business Committee of the Ute Indian Tribe was personally served by Alyssa Warren Murray, with the Wasatch Constables located in Ogden, Utah, without effectuating service through the Tribal Court in accordance with tribal law. *Summons Returned Executed by Grant Charles as to Ute Indian Tribe of the Uintah and Ouray Reservation* [Dkt. 9], and *Summons Returned Executed by Grant Charles as to Business Committee for the Ute Tribe of the Uintah and Ouray*

Reservation [Dkt. 12]. Alyssa Warren Murray and Wasatch Constables were not licensed to do any business within the Ute Reservation and were not authorized to effectuate service on the Uintah and Ouray Reservation and were on notice that their actions therefore constituted trespass. *Norton v. Ute Indian Tribe*, case 2:15-cv-0300, Dkts. 15-21;27;27-1;27-2.

20. The Return of Service presented to the Court as proof of service upon the Ute Indian Tribe and the Business Committee of the Ute Indian Tribe were also served on Shaun Chapoose, Chairman of the Tribe. *Summons Returned Executed by Grant Charles as to Ute Indian Tribe of the Uintah and Ouray Reservation* [Dkt. 9], and *Summons Returned Executed by Grant Charles as to Business Committee for the Ute Tribe of the Uintah and Ouray Reservation* [Dkt. 12]. However, as Charles knew prior to filing the *Complaint*, *e.g.*, *Wopsock v. Dalton*, D. Utah case 2:12-cv-0570, Dkt. 136, *Norton*, case 2:15-cv-0300, Dkts. 15-21;27;27-1;27-2, the Tribe's law requires that for service on the Tribe, a plaintiff must service all six (6) members of the Business Committee. The other five (5) members of the Business Committee were not served.

21. Party-Defendant Richita Hackford does not represent the Ute Indian Tribe, the Business Committee, the Tribal Court or the Honorable William L. Reynolds in any capacity.

22. Tribal Defendants disclaim any and all arguments asserted to this Court by Party-Defendant Richita Hackford.

III. STANDARD OF REVIEW

A. Lack of Subject Matter Jurisdiction.

A court's first obligation is to determine whether it has subject matter jurisdiction. "The fundamental and initial inquiry of a court is always to determine its own jurisdictional authority

over the subject matter of the claims asserted." *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987).

In reviewing a Fed. R. Civ. P 12(b)(1) substantive challenge to subject matter jurisdiction, "a district court *may not* presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (citations omitted; emphasis added). Piercing the pleadings is particularly appropriate in considering governmental immunity. *Id.* "When subject matter jurisdiction is challenged, the court presumes lack of subject matter jurisdiction until the plaintiff proves otherwise." *Alleman v. United States*, 372 F. Supp. 2d 1212, 1225 (D. Or. 2005) (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)).

1. **Factual Standard of Review.**

In *Holt v. United States*, the Tenth Circuit categorized Rule 12(b)(1) motions into one of two categories: either a "facial attack on the complaint's allegations as to subject matter jurisdiction" (i.e., a facial challenge) or "a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter depends" (i.e., a factual challenge). *Holt v. United States*, 46 F.3d 1000, 1002-1003 (10th Cir. 1995). Thus, when the defense of tribal sovereign immunity is asserted, a court "may rely on evidence outside the pleadings in resolving the issue of tribal sovereign immunity without converting the motion to one for summary judgment." *Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056 (N.D. Okla. 2007).

In *Native American Distributing*, the district court applied *Holt* and concluded that if the tribal defendant provides materials outside of the pleadings when litigating tribal sovereignty, the motion to dismiss is considered a factual attack, meaning that "a district court may not presume the truthfulness of the complaint's factual allegations." *Holt*, 46 F.3d at 1003. "Instead, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rules 12(b)(1)." *Native American Distributing*, 491 F. Supp. 2d at 1061 (citing *Holt*, 46 F.3d at 1003) (internal citations omitted). "In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion." *Id*.

2. **Facial Standard of Review.**

In contrast to a factual challenge, a facial challenge to subject-matter jurisdiction simply looks to the four corners of the complaint in determining whether the plaintiff's allegations are sufficient, if taken as true. *Paper, Allied-Industrial, Chemical and Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). In this case, Tribal Defendants challenge both the existence of subject-matter jurisdiction (i.e., a factual challenge), and the sufficiency of the pleading of subject-matter jurisdiction (i.e., a facial challenge).

B. Lack of Personal Jurisdiction.

In order to confer upon a federal court personal jurisdiction over a defendant, among other requirements, the procedural requirement for proper service of a summons must first be satisfied. *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). For service of process to be effective to confer personal jurisdiction, it must satisfy both due process and the applicable statutory requirements. *Campbell v. Bartlett*, 975 F.2d 1569, 1574-75 (10th Cir. 1992).

Where there is ineffective service of process, the court must dismiss defendant for lack of jurisdiction. *Omni Capital*, 484 U.S. at 110-111. Plaintiff bears the burden of proving that he properly completed service. *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 161 F.3d 314, 319 (5th Cir. 1998).

IV. ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction in the Absence of a Valid Waiver of Sovereign Immunity, Lack of Federal Question Jurisdiction and Lack of Diversity Jurisdiction.

This Court lacks subject-matter jurisdiction over this case on multiple grounds. First, Tribal Defendants have sovereign immunity against all claims for relief because there has been no waiver of the Tribe's sovereign immunity.[1] Second, despite Plaintiff's asserted questions of federal law, there is no federal question jurisdiction for determining whether or not the Tribal Court has jurisdiction over Plaintiff in the Tribal Court action as requested by Plaintiff in the *Complaint for Declaratory and Injunctive Relief* ("*Complaint"*) [Dkt. 2] as the Tribal Court has not taken any action with respect to the cases cited in Plaintiff's *Complaint*. Finally, there is no diversity jurisdiction because Indian tribes are not citizens of any state and the individually named Tribal Defendants are not citizens of any state other than the state of Utah.

[1] The Tribe's judicial officers also have judicial immunity. Charles appears to be attempting to evade that immunity by knowingly failing to name the judicial officer who is assigned to the case. Tribal Defendants' position is that this pleading subterfuge is ineffective because judicial immunity would still apply and/or because the requested remedies cannot be granted because the Ute Judge who is exercising judicial power is not a party to this case.

1. **Factual Attack: Subject-Matter Jurisdiction Does Not Exist Because the Ute Indian Tribe's Sovereign Immunity Bars the Plaintiff's Complaint.**

As a matter of law, Indian tribes are not subject to suit unless a tribe has waived its sovereign immunity or Congress has expressly authorized the action. *Kiowa Tribe of Oklahoma v. Manuf. Techs., Inc.*, 523 U.S. 751, 754 (1988). The issue of sovereign immunity is jurisdictional. *Ramey Construction Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g., Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). While Tribes can waive sovereign immunity, a court cannot find waivers of tribal immunity by inference or implication. Instead, to be enforceable a Tribe's waiver of immunity must be clear, explicit and unambiguous. *E.g., C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In determining the issue of waiver, a court cannot consider perceived inequities under the facts of the particular case. *Ute Dist. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

a) <u>The Court Must Decide Tribal Sovereign Immunity by Reference to Ute Tribal Law.</u>

"Tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. 751, 756. As such, "state law has no bearing on who has the authority to waive the Tribe's sovereign Immunity." *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, 2011 WL 4001088 at 6, Case No. C10-995RAJ at p. 10 ¶ 17 (W. D. Wash. 2011). However, as discussed in *Pilchuck*, this Court is required to apply Ute Tribal law in determining whether there has been a waiver of sovereign immunity. The court in *Pilchuck* noted that federal

courts have readily deferred to tribal law, at least where tribal law provides explicit rules regarding sovereign immunity waivers, citing to *Memphis Biofuels, LLC v. Chickasaw Indian Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009), and *Sanderline v. Seminole Tribe*, 243 F.3d 1282, 1288 (11th Cir. 2001). *Pilchuck* concluded that "where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions." *Pilchuck*, at p. 11 ¶ 9-10. Unlike the tribe in *Pilchuck*, the Ute Tribe has a Law and Order Code that clearly delineates the procedure by which the Tribe's immunity is waived. Therefore, this Court should refer to Ute tribal law in determining whether there has been a waiver of the Tribe's sovereign immunity.

b) The Ute Tribal Business Committee Must Clearly and Unequivocally Waive Tribal Sovereign Immunity.

The Ute Indian Tribe's Law and Order Code explicitly describes the specific process that must be followed in order to effectuate a waiver of the Tribe's sovereign immunity. Section 1-8-5 provides:

> Except as required by federal law, or the Constitution and Bylaws of the Ute Indian Tribe, or as specifically waived by a resolution or ordinance of the Business Committee specifically referring to such, the Ute Indian Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

U.L.O.C. §1-8-5. Therefore, under Tribal law, only the Ute Tribal Business Committee may waive immunity by passing a resolution or ordinance that specifically provides an express waiver. The Tribe's sovereign immunity also extends to its officers and employees arising from the performance of their official duties. No resolution or ordinance waiving sovereign immunity exists to subject Tribal Defendants to suit in this action. Thus, Plaintiff has failed to meet the burden of proving an express, unequivocal waiver of sovereign immunity. *Kokkonen*, 511 U.S. 375 (1994).

As a result, the Court lacks subject-matter jurisdiction and must dismiss Plaintiff's *Complaint* with prejudice.

2. **Facial Attack: The Plaintiff Fails to Sufficiently Plead a Proper Basis for Federal Subject-Matter Jurisdiction.**

When a party is only making a facial attack on the complaint, the complaint must be dismissed under Rule 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by an jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus. v. Tinnerman*, 626 F. Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court must accept well-pleaded factual allegations as true and must construe them in the light most favorable to the non-moving party. *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007). A federal court is presumed to lack subject-matter jurisdiction until the plaintiff establishes otherwise. *Kokkonen*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, the plaintiff bears the burden of proving the existence of subject-matter jurisdiction. Here, Plaintiff has not met the burden and has not provided any evidence to support a finding of subject-matter jurisdiction.

3. **There Is No Federal Question Jurisdiction.**

Article III, Section 2 of the U.S. Constitution limits federal court jurisdiction to cases "arising under" the Constitution and laws of the United States. Federal question jurisdiction only exists if federal law is a direct element in the plaintiff's claim; it is not enough for federal law to

be implicated indirectly or peripherally. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)).

In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985), the Supreme Court held that the question of whether tribal courts have jurisdiction over non-Indians in civil cases should *first* be addressed in tribal court. The Supreme Court reasoned:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

Id. at 856-57. The law of the Tenth Circuit is that a federal court should not hear a challenge to tribal court jurisdiction until tribal court remedies have been exhausted. *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. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987).

The Tribal Court has yet to address the issues raised in the case the Plaintiff has cited in the *Complaint.* Plaintiff has not provided the Ute Court system with the opportunity to determine whether or not it has jurisdiction to proceed with the case before it. Rather, Plaintiff is attempting to circumvent the process by seeking federal court review before allowing the Ute Court to address the issue of jurisdiction and hear the matters asserted in the tribal court case at issue in this case. As stated in *National Farmers*, *Tillett*, and *Superior Oil*, jurisdictional arguments should first be heard in tribal court before the federal court can assert jurisdiction. Plaintiff cannot simply assert that he is not subject to the Tribal Court's jurisdiction; rather, he must actually seek adjudication

of this issue in Tribal Court and allow the Tribal Court the opportunity to address this issue. *Bank of Okla. v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1169-1170 (10th Cir. 1992). It is premature for this Court to step in at this time to evaluate the question of whether the Tribal Court does in fact have jurisdiction over the Plaintiff if the Tribal Court has not taken any action. The Tribal Court must be given an opportunity to evaluate the factual and legal bases for the Tribal Court's jurisdiction.

In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201 et al., does not confer federal question jurisdiction. *E.g., Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 n. 32 (1983); *see also Okla. City Assocs. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 793 (10th Cir. 1991). Because there is no federal question jurisdiction under 28 U.S.C. § 1331, the Court must dismiss the Plaintiff's *Complaint* with prejudice.

4. **There Is No Diversity Jurisdiction.**

It is not enough to simply cite to 28 U.S.C. §1332 to establish diversity jurisdiction. For purposes of diversity jurisdiction, Indian tribes are not citizens of any state. *Gaines v. Ski Apache,* 8 F.3d 726, 729 (10th Cir. 1993) (no diversity jurisdiction when there was no evidence that defendant entity was corporation separate from the Mescalero Apache Tribe). Therefore, Plaintiff's *Complaint* must be dismissed because there is no diversity jurisdiction under 28 U.S.C. § 1332.

B. The Court Lacks Jurisdiction Because The Case Is Not Ripe for Review.

Article III of the Constitution limits the jurisdiction of federal courts to "cases and controversies," requiring that cases be "ripe" for adjudication. It is a constitutional limitation on

the power of federal courts, not just a statutory limitation as contained in 28 U.S.C. §§ 1331 and 1332. *E.g.*, *New Mexicans for Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995) (stating that the ripeness inquiry "bears on the court's subject matter jurisdiction under the case or controversy clause of Article III of the Constitution).

This case is not ripe for review. Designed to avoid "premature adjudication," ripeness is a justiciability doctrine that both implements Article III's case-or-controversy requirement and reflects additional, prudential considerations that require the federal courts to refrain from premature intervention in a nascent legal dispute. *Nat'l Park Hospitability Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967)). Even in its prudential form, ripeness is a doctrine that the Court may invoke on its own initiative, regardless of whether it has been raised and decided below. *Id.*

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (The purpose of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.")) Where the likelihood of harm is speculative, the Supreme Court has found cases unripe. *E.g., Nat'l Park Hospitability Ass'n,* 538 U.S. at 811; *Reno v. Catholic Social Servs., Inc.*, 509 US. 43, 59 n. 20 (1993); *Poe v. Ullman*, 367 U.S. 497, 508 (1961). It cautions courts against adjudicating "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 580-81 (1974). And if "no irremediable adverse consequences flow from requiring a later

challenge," judicial intervention may be premature. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

In his own filings in this Court, Plaintiff itself notes that he expects the Ute Court will dismiss the case against him. While he appeals to bias to conjecture that the reason and process by which the Tribe's Court will dismiss the claims stems from the Tribe and its judges being corrupt, this Court cannot make its decisions based upon Plaintiff's despicable conjecture. In fact this Court should sanction Plaintiff for violating attorney ethics by making unfounded allegations against judicial officers. In any case. Plaintiff himself anticipates that the Tribe's Court will dismiss, and he has no ripe claim for review by this Court.

As the Tribal Court has not considered the arguments presented in the case cited in the *Complaint*, the outcome of the Tribal Court case may not occur as Plaintiff anticipates or may not occur at all, and the likelihood of harm is speculative. The claims Plaintiff asserts in the *Complaint* are therefore not ripe for review by this Court and therefore, the Plaintiff's *Complaint* must be dismissed with prejudice.

C. Second Claim for Relief of the Complaint Must be Dismissed for Multiple Independent Reasons.

In the Second Claim for Relief of their Complaint, Plaintiff alleges that the Ute Tribal Court and its personnel are "federal actors." Plaintiff then goes on to assert that this Court should therefore issue a declaratory judgement regarding the process due and other unspecified procedural or substantive rules for the Ute Tribal Court proceedings to come. That claim must be dismissed for multiple independent reasons.

Most simply, it must be dismissed because the United States would be a necessary and indispensable party to the claim. The United States is an indispensable party if, "in equity and

good conscience," the court should not allow the action to proceed in its absence. Fed. R. Civ. P. 19(b). The courts balance four factors in making the indispensability determination: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Kescoli v. Babbitt*, 101 F.3d 1304, 1310-1311 (9th Cir. 1996). "If the necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Kescoli*, 101 F.3d at 1311.

The United States has a large, and likely the largest, interest at stake on a claim that tribal court judges and employees are federal actors. If the Tribe's judges are federal actors, then the United States is most certainly an indispensable party to the Plaintiff's cause of action. *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945). While a court can permit a party to amend a complaint to attempt to add an indispensable party, here any attempt to amend would be futile because the United States has sovereign immunity. Dismissal of the Second Claim for Relief for failure to join an indispensable party is therefore appropriate. *E.g., Rosales v. United States*, 2007 WL 4233060 (S.D. Calif. 2007) (dismissing without leave to amend where an immune party is indispensable).

Second, this Court simply does not have the legal authority to supervise a tribal court on any issue other than jurisdictional decisions, *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996), or in a habeas corpus petition based upon the Indian Civil Rights Act. 25 U.S.C. § 1302. Tribal Courts are not federal courts, but are instead courts of a separate sovereign, exercising the powers of that separate sovereign. *United States v. Lara*, 541 U.S. 193 (2004).

Third, based upon the law discussed in detail above, there is no case or controversy, and therefore no jurisdiction over the Second Claim for Relief of the Complaint. Plaintiff has not yet litigated in the Tribe's Court regarding the argument made in the Second Claim for Relief of the Complaint. Plaintiff does not claim and cannot claim that the Tribe's Court has denied him any right that he claims exists. The Tribe's Court will consider any arguments Plaintiff wants to make on the issue, and then will, presumptively, make the correct decision. *Iowa Mut. Ins.*, 480 U.S. at 18-19 (tribal courts are presumed to be fair and impartial.) Until the Tribe's Court has issued a decision on the allegations raised in the *Hackford* case, there cannot possibly be a federal question.

Fourth, even when this Court has supervisory authority under the Indian Civil Rights Act, Congress did not go nearly as far as Plaintiff seeks, and this Court must abide by Congress' determination, not Plaintiff's wishes. *Iowa Mutual*, 480 U.S. at 18-19. Congress chose not to require tribes to abide by all parts of the federal Constitution's bill of rights, and it permitted tribal courts to define the process due within the Tribal Court system. This Court cannot hold otherwise.

D. The Court Lacks Personal Jurisdiction due to Insufficient Process and Insufficient Service of Process.

The Court lacks personal jurisdiction over the Ute Indian Tribe and the Business Committee because there has been no service of process on such Tribal Defendants and insufficient service of process by an individual not authorized to enter upon the Uintah and Ouray Reservation to effectuate service of process.

1. There Has Been No Service of Process on the Tribal Defendants.

a) Service of Process Requirements for Serving the Ute Indian Tribe and Business Committee of the Ute Indian Tribe.

Service of process on the Ute Indian Tribe and the Business Committee of the Ute Indian Tribe must be served on all six (6) members of the Business Committee. Service of one member of the Business Committee does not constitute proper service. Ordinance No. 87-04 (Nov. 16, 1987). *See also* Fed. R. Civ. Proc. 4 (no federal law provision for service upon Indian Tribes).

The Return of Service forms presented to the Court as proof of service upon the Business Committee of the Ute Indian Tribe and the Ute Indian Tribe were served on Shaun Chapoose, Chairman of the Tribe. *Summons Returned Executed by Grant Charles as to Ute Indian Tribe of the Uintah and Ouray Reservation* [Dkt. 9], and *Summons Returned Executed by Grant Charles as to Business Committee for the Ute Tribe of the Uintah and Ouray Reservation* [Dkt. 12]. The other five (5) members of the Business Committee were not served.

Although personal service was made, it was made by Alyssa Warren Murray[2], an individual whom knowingly lacked the authority to enter onto the Uintah and Ouray Reservation and lacked the authority to effectuate service of a summons on the Reservation. *Summons Returned Executed by Grant Charles as to Ute Indian Tribe of the Uintah and Ouray Reservation* [Dkt. 9], and *Summons Returned Executed by Grant Charles as to Business Committee for the Ute Tribe of the Uintah and Ouray Reservation* [Dkt. 12]. Under Ute tribal law, custom and usage, a summons must be issued by the Tribal Court. Similar to the domestication of a court order, the summons

[2] Alyssa Warren Murray is fully aware of the process she must follow to effectuate service of process on the Uintah and Ouray Reservation. She was notified of her unlawful trespass when she attempted to effectuate service of process on the Business Committee in *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation, et al.*, Case No. 2:15-CV-00300-DB, Dkt. 27.

and complaint in this case should have been filed with a petition requesting service of process in the Tribal Court and could not have been served unless the Tribal Court authorized such service upon Shaun Chapoose on the Uintah and Ouray Reservation.

As the Ute Indian Tribe and Business Committee were not properly served and the process server did not comply with the requirements of tribal law to effectuate proper service of process on the Uintah and Ouray Reservation, proof of service of the Ute Indian Tribe and the Business Committee are insufficient for purposes of establishing personal jurisdiction. Therefore, Plaintiff has not met the burden of establishing personal jurisdiction.

V. CONCLUSION

Based on the facts and legal authorities cited herein, there is no waiver of tribal sovereign immunity in this case. There is also no federal question jurisdiction under 28 U.S.C. § 1331, nor diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff has not met the burden of establishing subject-matter jurisdiction. Plaintiff has also failed to join a necessary and indispensable party.

Based on the facts and legal authorities cited herein, Plaintiff did not comply with the requirements of service of process on the Ute Indian Tribe and the Business Committee under tribal law. There is proof of insufficient process and insufficient service of process. Plaintiff has not met the burden of establishing personal jurisdiction.

WHEREFORE, the Tribal Defendants' respectfully request that this honorable Court dismiss the claims against them with prejudice under Federal Rule 12(b)(1), (2), (4), (5), and (7).

Dated this 19th day of May, 2017.

J. PRESTON STIEFF LAW OFFICES

/s/ J. Preston Stieff
J. Preston Stieff

Attorney for Tribal Defendants

CERTIFICATE OF SERVICE

I certify that on the 19th day of May, 2017, I caused a true and correct copy of the foregoing **MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF** to be served electronically through the courts electronic filing system which will send notification of such filing to the following:

Jesse C. Trentadue
Britton R. Butterfield
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, UT 84111
Attorneys for Plaintiff

and to be served by first-class U.S. Mail, postage prepaid, upon the following:

Richita Hackford
820 E. 300 N. (113-10)
Roosevelt, UT 84066
Defendant

/s/ J. Preston Stieff