

2016

**Ryan Uresk Harvey, Rocks Off, Inc. And Wild Cat Rentals, Inc.,
Plaintiffs/Appellants, vs. Ute Indian Tribe of the Uintah and Ouray
Reservation, Et Al., Defendants/Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

RYAN URESK HARVEY, ROCKS
OFF, INC. and WILD CAT RENTALS,
INC., Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

Appellate Case No.: 20160362-CA

**On Appeal from the Eighth District Court for Duchesne County – Roosevelt
Honorable Judge Samuel P. Chiara
Trial Case No. 130000009**

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ORAL ARGUMENT IS REQUESTED

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III. STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this case pursuant to Utah Code Ann. §78A-3-102(3)(j). The case was assigned to the Utah Court of Appeals pursuant to Utah Code Ann. §78A-103(2)(j).

IV. STATEMENT OF THE ISSUES PRESENTED

A. Did the trial court err in concluding that the Ute Indian Tribe of the Uintah and Ouray Reservation (“Tribe”) is a necessary and indispensable party as to causes of action which are state law claims brought against Tribal officials for *ultra vires* acts as well as other parties who are not affiliated with the Tribe, which occurred outside of Ute Tribal land and within the State of Utah?

The standard for review is an abuse of discretion standard. *See Seftel v. Capital City Bank*, 767 P.2d 941, 947 (Utah Ct. App. 1989). Although not necessary to preserve this issue, this issue was preserved in the trial court. R. 198-200, 203-217, 259-272.

B. Did the trial court err in not concluding that the state’s interests in promoting fair and competitive business activity free from unlawful interference from foreign powers, by protecting non-Indian state residents, who compose roughly 95% of the area population, state small businesses, and the oil and gas industry, which is the lifeblood of the local economy, outweigh the interests of the Tribe in regulating non-Indian business activities that occur within the state and outside of Ute Tribal land, the jurisdiction of the Tribe, and within the jurisdiction of the State of Utah?

This is a jurisdictional issue and the standard for review is under a correction of error standard. The trial court's ruling is given no deference. *Barton v. Barton*, 2001 UT App 199, ¶7, 29 P.3d 13. This issue was preserved in the trial court. R. 1483-1499.

C. Did the trial court err in granting the Utah R. of Civ. P. 12(b)(6) motions to dismiss filed by various defendants?

The standard for review is under a correction of error standard. The trial court's ruling is given no deference. *See St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991) (*cited authorities omitted*).

As it relates to the tort of extortion, the trial court found as a matter of law that the State of Utah does not recognize this cause of action. This issue of first impression presents a question of law and the trial court is given no deference. *Id.* These issues were preserved in the trial court. R. 664-685, 689-703.

D. Did the trial court err in concluding that the tribal officials are immune from suit, where the conduct complained of violates state law, occurred outside of Ute Tribal land within the State of Utah, and outside the jurisdiction of the Tribe?

This is a jurisdictional issue and the standard for review is under a correction of error standard. The trial court's ruling is given no deference. *Barton v. Barton*, 2001 UT App 199, ¶7. This issue was preserved in the trial court. R. 1151-1179.

E. Did the trial court err in finding that the Tribe did not waive sovereign immunity, by making a general appearance in state court and seeking affirmative relief from the state court beyond a dismissal on the grounds of jurisdiction?

The standard for review is under a correction of error standard and the trial court's ruling is given no deference. *State v. Reber*, 2007 UT 36, ¶8, 171 P.3d 406. This issue was preserved in the trial court. R. 1458-1465

F. Did the trial court err by not allowing supplemental pleadings, where Plaintiffs/Appellants sought leave to plead supplemental facts which did not occur until well after the complaint was drafted and during periods the action was stayed in state court?

A Utah R. of Civ. P. 15(d) motion is “addressed to the sound discretion of the court, and leave to serve a supplemental pleading ‘should be liberally granted unless good reason exists for denying leave.’” *Sw. Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F. Supp. 2d 1253, 1256, (D. Colo. 2003) (*quoted authority omitted*). “Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment.” *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). This issue was preserved in the trial court. R. 1469-1482.

V. STATEMENT OF STATUTES, ORDINANCES, RULES AND REGULATIONS

OF CENTRAL IMPORTANCE TO THE APPEAL

1. Utah R. of Civ. P. 19:

Joinder of persons needed for just adjudication.

See Aplt. Addendum Page 2

2. UTAH CONST. art. XII § 19 [Blacklisting forbidden]

Each person in Utah is free to obtain and enjoy employment whenever possible, and a person or corporation, or their agent,

servant, or employee may not maliciously interfere with any person from obtaining employment or enjoying employment already obtained from any other person or corporation.

3. UTAH CONST. art. XVI § 4 [Exchange of blacklists prohibited]

The exchange of black lists by railroad companies, or other corporations, associations or persons is prohibited.

VI. STATEMENT OF THE CASE

Plaintiffs filed suit in the trial court asserting several state law claims, including tortious interference with economic relations, extortion, unlawful restraint of trade, blacklisting and civil conspiracy against Defendants Cesspooch, LaRose and Wopsock, as well as other defendants, who were added in the amended complaint, including Newfield Exploration Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, L.C. Welding & Construction, Inc. Scamp Excavation, Inc., Huffman Enterprises, Inc., LaRose Construction Company, Inc., and D.Ray C. Enterprises, L.L.C. Plaintiffs' relief requested included a request for declaratory judgment that "the assertion of Tribal jurisdiction as a defense to Plaintiffs' claims is unavailing, as the Tribe lacks jurisdiction" over certain land categories set forth in the pleading.

On September 20, 2013, the Tribe removed the case to federal court. Following the filing of the removal notice, Plaintiffs filed a motion requesting remand to the state court. On July 1, 2014, the Federal District Court granted Plaintiffs' motion (the "Remand Order"). The Tribe appealed the Remand Order to the 10th Circuit Court of Appeals. By opinion entered August 13, 2015, the Remand Order was upheld. The trial

court granted motions to dismiss filed by various Defendants resulting in the dismissal of all of Plaintiffs' claims on May 12, 2016.

A. FACTS RELEVANT TO THE ISSUES ON APPEAL

1. Procedural Facts

The Verified Complaint for Declaratory and Injunctive Relief ("Original Complaint") was filed by Plaintiffs in this matter on April 5, 2013. R. 1-21. The Original Complaint identified four Defendants (collectively referred to as the "Initial Defendants"), the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe"), Dino Cesspooch, individually and as a Ute Tribal Employment Rights Office ("UTERO") Commissioner, Jackie LaRose, individually and as a UTERO Commissioner, and Sheila Wopsock, individually and as the UTERO Director. R. 1-21.

The complaint sought declaratory judgment with respect to the Tribe's and tribal official's exercise of authority over non-Indians in certain categories of land. R. 1-21. The complaint then alleged two state law causes of action, tortious interference with economic relations and extortion, against the tribal officials for their *ultra vires* actions which damaged Plaintiffs. R. 1-21.

On May 1, 2013, J. Preston Stieff filed an Entry of Special Appearance and a motion to dismiss the complaint on behalf of the Initial Defendants. R. 198-200, 203-217. The Initial Defendants asserted four basic arguments to support dismissal, including that the court lacked jurisdiction due to insufficient process and insufficient service of process, the court lacked subject matter jurisdiction in the absence of a valid waiver of sovereign immunity, the court lacked jurisdiction over necessary and indispensable

parties, and the court lacked jurisdiction because Plaintiffs failed to exhaust administrative remedies. R. 203-217.

The Initial Defendants requested that the state court interpret and make conclusions of law related to the issue of sovereign immunity. R. 203-217. This included requests that the state court analyze and interpret the waiver provisions of the UTERO Ordinance, and the Law and Order Code of the Ute Indian Tribe. R. 203-217. Affidavits were presented to the state court and it was requested that the state court dismiss the case based on the “facts and legal authorities” cited in the memorandum supporting the motion to dismiss. R. 218-220, 203-217.

The Initial Defendants also filed two motions requesting *pro hac vice* admission for two attorneys for the Tribe. R. 398-400, 405-407 and those motions were granted by respective orders on June 11, 2013. R. 419-422. On July 8, 2013, Patrick Boice filed his Notice of Substitution of Counsel, for Defendants Cesspooch, LaRose and Wopsock. R. 427-428.

Plaintiffs filed their motion requesting leave to amend the complaint on July 17, 2013. R. 431-435. The amended complaint (“Amended Complaint”) seeks a declaration that “the assertion of Tribal jurisdiction as a defense to Plaintiffs’ claims is unavailing, as the Tribe lacks jurisdiction” over certain land categories set forth in the amended complaint, and then asserts several state law claims, including tortious interference with economic relations, extortion, unlawful restraint of trade, blacklisting and civil conspiracy against Defendants Cesspooch, LaRose and Wopsock, as well as other Defendants, who were added in the Amended Complaint, including Newfield Exploration

Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, L.C. Welding & Construction, Inc., Scamp Excavation, Inc., Huffman Enterprises, Inc., LaRose Construction Company, Inc. and D.Ray C. Enterprises, L.L.C. R. 548-579.

Not all Defendants are implicated in each cause of action and no causes of action are asserted against the Tribe other than defensive declaratory relief nor are any damages sought from the Tribe pursuant to the Amended Complaint. R. 548-579. The sole relief sought respecting the Tribe is defensive declaratory relief that assertion of Tribal jurisdiction in certain land categories outside the jurisdiction of the Tribe does not defeat Plaintiffs' state law claims against the other parties. R. 548-579.

On July 22, 2013, the state court held the hearing on the Initial Defendants' Motion to Dismiss. The parties argued every element of the motion, including issues as to service, sovereign immunity, indispensable parties and exhaustion of administrative remedies. R. 198-200, 203-217. In terms of service, the Tribe argued, among other things, that service of process on the Tribe would need to be completed through the Ute Tribal Court, that all six (6) members of the Business Committee (the governing body of the Tribe) must be served, that the summons and complaint must be domesticated by the Ute Tribal Court and that the Ute Tribal Court must be petitioned to authorize service. R. 371-379.

The state court rendered a partial decision rejecting the Tribe's argument as to service requirements on the Tribe, by allowing service by mail on the Tribe and Defendant Wopsock. R. 508-507. Defendants Cesspooch and LaRose had already been personally served in May 2013.

The court also afforded all parties the opportunity to brief the issue of whether the Initial Defendants had made a general appearance rather than a special appearance by including items other than service issues in their motion to dismiss. The parties were allowed until August 2, 2013 to brief the issue. R. 508-511. Plaintiffs, the Tribe, and Defendants Cesspooch, LaRose and Wopsock subsequently briefed the issue and it was pending before the trial court at the time of the removal to federal court. R. 484-490, 493-495, 498-499. At the July hearing, the trial court then took the remaining issues under advisement.

The Initial Defendants did not oppose the motion to amend the complaint, and, on August 16, 2013, the state court entered its order permitting the amending of the complaint. R. 519-520. The Amended Complaint was served on Defendants, and returns were filed with the state court. R. 526-530, 533-536, 537-544, 582-603, 607-618, 622-625.

The Tribe filed a notice of removal on September 20, 2013. R. 629-636. Plaintiffs then filed a motion requesting remand to the state court. In granting remand, the federal court observed that “th[e] defendants . . . submitted and argued a nearly identical motion to dismiss in th[at] [c]ourt as the motion originally filed and argued before the state court.” R. 648-655. The court further opined, “Thus, it seems defendants held nothing back in an effort to dispose of the matter in the first instance before the state court.” R. 648-655.

Defendants appealed the Remand Order to the 10th Circuit Court of Appeals. Defendants also filed a motion in the state court to stay the action. On October 9, 2014,

the action was stayed by the trial court during the pendency of the appeal of the Remand Order. R. 738-742, 895-900. By opinion entered August 13, 2015, the Remand Order was upheld. R. 1031-1047. The trial court granted motions to dismiss filed by various defendants resulting in the dismissal of all of Plaintiffs' claims on March 28, 2016. R. 1757-1794.

2. Facts Pleaded in Amended Complaint

The Amended Complaint consists of 33 pages. The following is a summary of the facts alleged and assumed true for purposes of the Utah R. of Civ. P. 12 motions granted by the district court and relevant to the issues on appeal.

Plaintiffs are persons and corporations domiciled in and doing business in Duchesne and Uintah Counties. R. 549-550. Plaintiffs provide dirt, sand, and gravel products, and lease heavy equipment (the "Products"). R. 553-554. Plaintiffs' business activities do not require them to access or even pass through Ute Tribal land, with operations confined to fee land outside of Ute Tribal land as defined under *Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958 (1994). R. 553-554.

The Tribe is a federally recognized tribe with reservation lands located in Duchesne and Uintah Counties. Defendant Dino Cesspooch ("Commissioner Cesspooch" or "Cesspooch") is an appointed UTERO Commissioner, and is sued in his individual as well as his official capacity. R. 550. Defendant Jackie LaRose ("Commissioner LaRose" or "LaRose") is an appointed UTERO Commissioner, and is sued in his individual as well as his official capacity. R. 550. Defendant Sheila Wopsock ("Director Wopsock" or

“Wopsock”) is the appointed Director of the UTERO Commission, and is sued in her individual as well as her official capacity. R. 550.

Defendants, Newfield Production Company and Newfield Rocky Mountain, Inc. are Delaware corporations, Defendant Newfield RMI, LLC is a Delaware limited liability company, and Defendant Newfield Drilling Services Inc. is a Utah corporation, and all of these entities (referred to collectively herein as “Newfield”) are under common ownership and control, and are engaged in the exploration, development and production of crude oil, natural gas, and natural gas liquids with production regions, employees, operations, and doing business in Duchesne and Uintah Counties. R. 550-551.

Defendant L.C. Welding & Construction, Inc. (“L.C. Welding”) is a Utah corporation. R. 551. Defendant Scamp Excavation, Inc. (“Scamp”) is a Utah corporation. R. 551. Defendant Huffman Enterprises, Inc. (“Huffman”) is a Utah corporation. R. 551. Defendant LaRose Construction Company, Inc. (“LaRose Construction”) is a Utah corporation. R. 551. Defendant D.Ray C. Enterprises, L.L.C. (“D.Ray Enterprises”) is a Utah limited liability company. R. 552. All of these entities, like Newfield do business in Utah and are subject to jurisdiction in Utah. R. 550-552.

Duchesne and Uintah Counties are located in Utah’s Uintah Basin. R. 552. The major economic force of the Uintah Basin is the oil and gas industry. R. 552. A majority of the revenue earned by Plaintiffs is generated by providing the Products to oil and gas companies. R. 553.

There are approximately 54,000 residents of Uintah and Duchesne Counties. R. 552. The Uintah and Ouray Reservation of the Ute Indian Tribe is located within the

Uintah Basin. R. 552. There are approximately 3,000 enrolled members of the Tribe. R. 553.

Since in or about September 2012, Cesspooch has harassed, threatened, bullied, and intimidated Plaintiffs by threatening to utilize his position as a UTERO Commissioner to “shut down” Plaintiffs’ businesses if UTERO certification was not obtained. R. 554. Cesspooch’s threats subjected Plaintiffs to duress because oil and gas companies, including Newfield, have “. . . cooperated with and assisted Cesspooch by refusing work and to do business with companies similar to Plaintiffs’ . . .” effectively putting these companies out of business. R. 554.

Plaintiffs explained that their business operations were confined to private fee land and that they do not access or even travel through Ute Tribal land in their business operations. R. 554-555. Despite this, Cesspooch persisted in and escalated his threats, including threats to impound Plaintiffs’ heavy equipment that was located on private fee land, not within Ute Tribal land. R. 555. Under duress and in an effort to save their businesses, Plaintiffs obtained UTERO Certification in or about November 2012. R. 555-556.

Even after UTERO Certification was obtained, Cesspooch persisted in his threats. R. 556. Plaintiffs were accosted by Cesspooch at the China Star Restaurant located in Roosevelt, Utah. R. 556. Cesspooch claimed his signature on certification documents issued to Plaintiffs were no good and his signature had been forged. R. 556. At a later meeting at another restaurant in Roosevelt, Cesspooch did an about-face and informed Plaintiffs that their UTERO Certification was good. R. 557.

In February 2013, while Plaintiffs were traveling on Highway 40 in Roosevelt, they were forced to pull over by Cesspooch into a local business parking lot located within Roosevelt. R. 557-558. Cesspooch then attempted to extort Plaintiffs. R. 557-558.

A short time after Plaintiffs refused Cesspooch's extortionist demands, Director Wopsock sent correspondence accusing Plaintiffs of submitting false and inaccurate official tribal, state and federal documents. R. 558. On March 20, 2015, Wopsock demanded that all oil and gas companies cease doing business with Plaintiffs. R. 558. Wopsock's demands were not limited to Ute Tribal lands. R. 558.

Newfield cooperated and complied with Wopsock's directives and, by email dated March 22, 2013, informed Plaintiffs that it would no longer utilize their Products. R. 558. This was not limited to business conducted on Ute Tribal land, R. 558, and the situs of Plaintiffs' business operations is exclusively outside of Ute Tribal land. R. 554-555. Newfield has also refused to do business with any third party who utilizes Plaintiffs' Products. R. 559. Newfield has informed Plaintiffs that it will not do business with Plaintiffs or work with anyone who does business with Plaintiffs based on their cooperation with the UTERO officials.¹ R. 559. Newfield's cooperation with the unlawful and *ultra vires* actions of tribal officials in blacklisting and boycotting Plaintiffs is the direct and proximate cause of substantial damages to Plaintiffs. R. 559. Plaintiffs discussed this matter with Cesspooch who was unable to provide Plaintiffs with a single

¹ UTERO officials and tribal officials are used interchangeably throughout this brief.

reason why the UTERO officials terminated Plaintiffs' businesses, and had Plaintiffs blacklisted and boycotted by the local oil and gas industry. R. 559.

Cesspooch has threatened third parties that he would "shut down" their businesses if they leased any equipment from Plaintiffs. R. 560. Nelson Construction, Inc. informed Plaintiffs that Wopsock demanded that they not utilize Plaintiffs' rock crushing equipment that is located on private ground that is not on Ute Tribal land. R. 560.

UTERO officials have engaged in a pattern and practice of extorting money from area businesses by threatening to "shut down" their operations if the businesses do not pay the UTERO officials. R. 560. For example, Cesspooch, a convicted felon, has demanded 10% of area businesses' gross revenues in return for "keep[ing] them working and UTERO compliant." R. 560. UTERO officials dictate to oil and gas companies which contractors will be awarded bids and which contractors are not to be used. R. 561. These directives are not limited to work performed on Ute Tribal land, and have resulted in substantial harm to Plaintiffs' enterprises outside of Ute Tribal land. R. 562.

LaRose, at all relevant times, owned an interest in an oil & gas service company, LaRose Construction. R. 561. LaRose received bribes and work from Huffman, a competitor of Plaintiffs, in exchange for LaRose's abusing his position as a UTERO Commissioner and wrongfully diverting business from Plaintiffs to Huffman. R. 561. LaRose, L.C. Welding, and Scamp conspired to receive an economic interest in a sand and gravel pit located outside of tribal land which commenced operation after Plaintiffs were "shut down" by Wopsock, Cesspooch, and LaRose. R. 561. Wopsock, Cesspooch, and LaRose conspired to abuse their UTERO positions to destroy Plaintiffs' businesses in

an effort to eliminate competition and because Plaintiffs refused to pay Cesspooch's extortionist demands. R. 562. LaRose Construction and D.Ray Enterprises participated in the conspiracy and derived a substantial economic benefit by eliminating Plaintiffs as a competitor of the aforementioned sand and gravel pit. R. 571.

Defendants conspired together and acted with improper purpose and/or through improper means with said action exceeding the limits of the jurisdiction the Ute Tribe. R. 568. This was done to promote Defendants' own business interests resulting in injury to Plaintiffs. R. 568. Defendants intentionally and maliciously engaged in a conspiracy for the purpose of causing damage to Plaintiffs and obtained unlawful financial gain. R. 573. All acts and occurrences complained of in the Amended Complaint occurred on fee land outside of Ute Tribal land as defined under *Hagen v. Utah*, 510 U.S. 399 (1994). R. 562.

3. Supplemental Facts

Plaintiffs sought to supplement the facts set forth in the Amended Complaint pursuant to Utah R. of Civ. P. 15(d). These allegations relate to events that occurred during the lengthy period the matter was stayed while on appeal to the 10th Circuit, and are summarized below.

Newfield demanded on numerous occasions that no subcontractors utilize the Plaintiffs' Products. R. 1476-1480. Newfield threatened that any subcontractors found utilizing Plaintiffs' Products would be prohibited from doing subcontract work for Newfield. R. 1476.

Plaintiffs' sand and gravel pits were located where the Products could be transported to Newfield oil and gas production locations for less than competitors, and,

after transferring a sand and gravel pit lease to a third party lessee, Newfield began purchasing products from that lessee. R. 1476-1477. UTERO officials and employees have continued to threaten and harass any third party seen leaving a sand and gravel pit operated by Plaintiffs, this harassment has taken place on county roads located non-Tribal land and threats include blacklisting any third party seen leaving Plaintiffs' sand and gravel pits. R. 1477. The threats are made regardless of whether the Products are to be used by oil and gas production companies or for private projects on non-Tribal land, county, city or state projects, and the threats and harassment have resulted in Plaintiffs losing sales. R. 1477-1478. For example, C&R Crane was blacklisted by UTERO officials, with the aid and cooperation of oil and gas production companies such as Newfield, after one of C&R Crane's employees was harassed and threatened by tribal officials after leaving one of Plaintiffs' pits. R. 1478.

Kaufusi Excavating, an excavation company, was not allowed to bid on work for Newfield after being blacklisted by UTERO Officials for leasing Plaintiffs' equipment. In a Newfield bid walk that occurred in December of 2015, the only companies allowed by Newfield to bid on the project were Defendants LaRose Construction, Huffman, and L.C. Welding. R. 1478. Defendants have been effective in eliminating competition. R. 1478-1479.

A private investigative firm commissioned by the Tribe submitted a report confirming that UTERO Officials, acting *ultra vires*, have made unlawful monetary demands on local small businesses, like Plaintiffs, catering to the oil and gas industry. R.

1479. Cesspooch and LaRose have obstructed investigations and some Defendants' files have been removed from the UTERO office. R. 1479.

On January 8, 2015, the Tribe sent UTERO demands to all employers "engaging in commercial or employment activity within the exterior boundaries of the Uintah and Ouray Reservation" that non-Indians must first be terminated if there is any reduction in the employer's workforce. R. 1480. This demand is made of companies, including Plaintiffs, that operate within exterior boundaries but outside of Ute Tribal land. R. 1480.

VII. SUMMARY OF ARGUMENTS

1. The Tribe is not a necessary or indispensable party as to lawsuits brought to enjoin *ultra vires* acts of tribal officials that violate state law and occur outside of Ute Tribal land. This matter involves tribal officials in extorting and blacklisting Plaintiffs, and engaging in other noncompetitive measures. It is not a critical interest of the Tribe to facilitate such acts, especially where those acts occur outside of Ute Tribal land. Indeed, attempting to regulate business activities which occur outside of Ute Tribal land has nothing to do with protecting the Tribe's self-governance, and these activities are clearly within the purview of local, state, and federal bodies, not the Tribe.

2. The State of Utah's interest in promoting fair and competitive business activity outweighs the interest of the Tribe in regulating non-Indian business activities that occur within the state, and outside of Ute Tribal land. Allowing tribal officials to regulate businesses outside of Ute Tribal land results in enterprises operating exclusively intrastate being subjected to regulatory control by a foreign power, and infringes upon the jurisdiction of the state.

3. The allegations set forth in the 32-page Amended Complaint provide sufficient notice to meet the elements of the tortious interference claim, including that Newfield assisted tribal officials in unlawfully boycotting and blacklisting Plaintiffs, and threatening to similarly blacklist third parties who chose to do business with Plaintiffs. The alleged purposes of this activity were to eliminate competitors of the official's own businesses or those of their benefactors and to retaliate against Plaintiffs for their refusal to be extorted. The unlawful threats would have been meaningless but for Newfield's assistance in enforcing them against Plaintiffs.

4. Utah's recognition of a cause of action for extortion is a matter of first impression. Currently, several causes of action exist for claims akin to extortion, including an individual's right to sue for losses caused by theft, and the Court should recognize a private cause of action for extortion.

5. The Amended Complaint is clear that the arrangement between tribal officials and Newfield was an unlawful restraint of trade, was not limited to Ute Tribal land, and included conduct against Plaintiffs as well as third parties. Plaintiffs allege *per se* violations of Utah antitrust laws, including unlawful boycotting and bid rigging, and the Amended Complaint is not only sufficient but detailed.

6. In rejecting the blacklisting claim, the trial court reasoned that Newfield followed the direction of UTERO by not using Plaintiffs for work completed on Tribal land. This finding misapprehends the facts alleged by Plaintiffs, which are that Plaintiffs' business operations are conducted exclusively outside of Tribal land. Moreover, Newfield

cooperated with UTERO officials in blacklisting Plaintiffs and third parties who were doing business with Plaintiffs.

7. The Amended Complaint alleges facts sufficient to establish the elements of civil conspiracy. As enumerated therein, UTERO officials asked Newfield to discontinue using Plaintiffs' Products or third-parties who utilized Plaintiffs' Products, and Newfield assisted tribal officials in committing their tortious and illegal activities.

8. Defendants D.Ray Enterprises and Larose Construction participated in the conspiracy in order to eliminate Plaintiffs as a competitor and to retaliate for Plaintiffs' refusal to be extorted. The state court has jurisdiction over these Defendants for their *ultra vires* acts in violation of state law, which occurred within the State of Utah and outside of Ute Tribal land.

9. Abundant precedent provides that tribal officials are liable in state court for damages for *ultra vires* acts even though a tribe may have sovereign immunity. The tribal officials' wrongful conduct outside of Ute Tribal land is beyond the jurisdiction and valid authority of the Ute Tribe, and, thus, the tribal officials have no immunity from suit.

10. While it is an issue of first impression in Utah, persuasive authority provides that when a tribe seeks affirmative relief from a state or federal court, the tribe waives sovereign immunity. In addition to invoking sovereign immunity on behalf of the Tribe, the Tribe sought dismissal of the entire case, contending the Tribe is a necessary and indispensable party, invited the trial court to interpret provisions of the UTERO Ordinance in consideration of exhaustion of administrative remedies, and filed for a stay.

The state court must necessarily have jurisdiction to grant the affirmative relief the Tribe requested, and the Tribe waived sovereign immunity.

11. Permitting Plaintiffs to file the supplemental pleading in this matter would not have caused undue delay or prejudice, and should have been granted by the trial court. This is especially true where the wrongs complained of are continuing and occurred during the lengthy period the action was stayed by the trial court, at Defendants' behest.

VIII. ARGUMENT

A. The trial court erred in concluding that the Tribe is a necessary and indispensable party, as to causes of action which are state law claims brought against Tribal officials for *ultra vires acts* as well as other parties who are not affiliated with the Tribe, which occurred outside of Ute Tribal land and within the State of Utah, leaving Plaintiffs with no recourse.

Utah R. of Civ. P. 19(a) requires the joinder of necessary parties. To determine whether a party is necessary, a court should consider the two general factors in rule 19(a). First, a party is necessary if in his absence complete relief cannot be accorded among those already parties. Utah R. Civ. P. 19(a) (1). Second, a party is necessary if he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990). "The burden of presenting specific facts and reasoning that lead to the conclusion that a party is a

necessary or indispensable party is on the party attempting to persuade the court that parties are necessary.” *Jennings Inv., LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶ 38, 208 P.3d 1077 (*cited authority omitted*).

In granting the Tribe’s motion to dismiss, the trial court found that the Tribe is a necessary and indispensable party under Utah R. of Civ. P. 19, opining, “The inquiry is whether the Tribe claims an interest relating to the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest.” R. 1767. The trial court found that the ability to issue the “directives” at issue is a “critical interest of the Tribe”. R. 1768.

The said directives are mandates that oil and gas production companies, including Newfield, refuse to do business with Plaintiffs, R. 558, even though Plaintiffs operate outside of Ute Tribal land and their Products are used outside of Ute Tribal land, R. 553-55, and, further, that Newfield refuse to do business with any third party doing business with Plaintiffs. R. 559. As reiterated throughout the Amended Complaint, not only do the business activities at issue take place outside of Ute Tribal land, *generally*, R. 548-579, but the purpose for the directives was to punish Plaintiffs for refusing to pay Tribal officials’ extortionist demands. R. 558, 569. Additionally, the directives are *not* limited to a prohibition against use of Plaintiffs’ Products on tribal ground. R. 553.

The trial court’s analysis that the regulated conduct occurred on Ute Tribal land conflicts with the facts set forth throughout the Amended Complaint. *Generally*, R. 548-579. The directives are a blanket blacklist/boycott of Plaintiffs regardless of the location where the Products may be used. It is not a “critical interest” of the Tribe to facilitate

Tribal officials' extortion of businesses that operate exclusively outside of Ute Tribal land or to regulate Products that are utilized outside of Ute Tribal land. Regulatory authority within the State of Utah and outside of Ute Tribal land falls under the purview of local, state, and, in some instances, federal regulatory bodies.

The trial court's holding is catastrophic to the interests of Plaintiffs and other business concerns providing products or services in the Uintah Basin. It shrouds tribal officials, acting *ultra vires*, and their co-conspirators with sovereign immunity, and allows them to continue to extort, threaten, harass, and damage, with impunity, every business which will not capitulate to their edicts, even though the businesses operate solely outside of Ute Tribal land. Further, if the Tribe were a necessary party for every action commenced against a tribal official, no action against a tribal official would be viable. This is contrary to well established precedent.

The UTERO officials are not entitled to immunity for actions undertaken that are beyond the jurisdiction of the Tribe. For purposes of the motions before the trial court, the facts that the officials acted outside the scope of the jurisdiction of the Ute Tribe must be assumed true. R. 562.

In *Puyallup Tribe v. Dep't of Game of the State of Washington*, 433 U.S. 165, 168-171, 97 S. Ct. 2616, 2619-2620 (1977), the Court held that a suit to enjoin violations of state law by individual tribal members is permissible and does not implicate sovereign immunity. The Court further suggested that this includes suits against tribal officials brought in state court. *Id.* at 171-173. Even though the defendants in *Puyallup Tribe*, *supra*, were not tribal officials, the Court cited it in finding a tribal governor not immune

from a suit seeking relief against enforcement of a tribal ordinance. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 1677 (1978).

Consistently, in *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Nation*, 498 U.S. 505, 514, 111 S. Ct. 905, 912 (1991), the Court stated, “In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State.”

An analysis on point is set forth in *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075 (9th Cir. 2013). In *Maxwell*, the court reasoned that tribal sovereign immunity derives from the same common law principles that shape state and federal sovereign immunity. *Id.* at 1087-88. A suit brought against individual officers in their individual capacities, as in the instant case, does not implicate sovereign immunity. *Id.*

More examples include holdings that sovereign immunity does not extend to tribal officials when acting outside their authority in violation of state law. *See Trump Hotels & Casino Resorts Dev. Co., LLC v. Rocow*, 2005 Conn. Super. LEXIS 1215 (Conn. Super. Ct. May 2, 2005). In *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 462, 1993 U.S. App. LEXIS 7698, ¶¶ 11-14 (8th Cir. 1993), the court held that sovereign immunity does not protect tribal officers acting beyond the scope of the authority the tribe was capable of bestowing on them. In the instant case,

Plaintiffs have alleged that the tribal officials are acting beyond the scope of the authority the Tribe is capable of bestowing, and in violation of state law. R. 562.

The trial court reasoned a “. . . determination by the Court that the UTERO officials’ act of sending the directive to Newfield was wrongful is potentially prejudicial to the Tribe.” R. 1768-1769. The trial court continued that this could be prejudicial to the Tribe’s ability to regulate its affairs, the Tribe could ban any person or company from doing business on Tribal ground for any reason, and the directives at issue could create a significant prejudice against a key interest in tribal self-governance. R. 1769. It is expressly clear from the allegations in the Amended Complaint that Plaintiffs do not do business on tribal ground and the directives at issue were not limited to a prohibition of utilizing the Plaintiffs’ Products on tribal ground but were a blanket blacklisting/boycotting of Plaintiffs. *Generally*, 548-579.

Further, the trial court could not conceive of any relief that would not prejudice the Tribe. R. 1769. Clearly, limiting relief to restraining conduct that is *ultra vires*, occurs outside of Ute Tribal land, and in violation of state law as set forth in the Amended Complaint would prejudice no legitimate interest of the Tribe.

In summary, the Tribe is not a necessary party as to lawsuits brought to enjoin *ultra vires* acts of tribal officials that violate state law and occur on state land outside of Ute Tribal land. Therefore, the Tribe is not a necessary party pursuant to Utah R. of Civ. P. 19(a).

If a party is not a necessary party, the inquiry stops and Utah R. of Civ. P. 19(b) need not be analyzed. However, the trial court also erroneously found that the Tribe is

an indispensable party under Utah R. of Civ. P. 19(b). “If the court finds that the party is necessary according to these criteria, rule 19 provides that the party shall be joined.

Thus, under the language of the rule, if the party is necessary and joinder is feasible, then joinder is mandatory. Nevertheless, failure to join generally is not considered to be a jurisdictional defect.” *Landes*, 795 P.2d at 1131.

The indispensability of a party is determined by examining, “(1) to what extent a judgment rendered in the [party’s] absence will prejudice [the party] or those already parties; (2) the likelihood of reducing or avoiding prejudice by protective measures or provisions in the judgment; (3) the adequacy of the judgment which might be entered in the [party’s] absence; and (4) the adequacy of the plaintiff’s remedy if the action is dismissed for nonjoinder.” *Mower v. Simpson*, 2012 UT App 149, ¶28, 278 P.3d 1076.

The reasons the Tribe would not suffer prejudice should a judgment be rendered have been addressed, *supra*, and will not be reiterated here. However, the trial court also reasoned that Newfield may be subject to, “inconsistent obligations” in State Court and before the Tribe. R. 1771. The trial court reasoned, “Because of the potential for inconsistent judgments between the state courts and the UTERO commission, Newfield is placed in the untenable position of operating in potential violation of inconsistent directives from courts of two jurisdictions.” R. 1772. Newfield may have to choose between complying with and aiding tribal officials in unlawful and *ultra vires* directives that violate state law causing damages to state residents, or comply with state law and risk sanctions before the Tribe. However, as set forth in the Amended Complaint, the business activities at issue occur outside of Ute Tribal land and within the State of Utah.

Further, the directives at issue resulted in an unlawful boycott of Plaintiffs' Products outside of Ute Tribal land and within the State of Utah.

Even though the situs of the acts and occurrences is outside of Ute Tribal land, the effect of the trial court's reasoning is that Newfield is absolutely immune from state law violations that occur within the state so long as Newfield is complying with a directive from a tribal official, even an unlawful and *ultra vires* directive. The state courts have a duty and obligation to protect state citizenry from violations of state law that occur within the state. The small business interests of state citizens whose business activities are outside of Ute Tribal land should not be subjugated to foreign powers simply because the foreign power may penalize a party for not following an *ultra vires* directive that damages a state resident on land located within the state and outside of Ute Tribal land. There is no justifiable reason that a state court should defer to the Tribe as it relates business activities that occur within the state and outside of Ute Tribal land.

As it relates to the adequacy of the judgment the trial court reasoned that, “. . . without injunctions against the Tribe and its UTERO officials. . .” Plaintiffs would have an inadequate remedy. R. 1769. The injunctions that Plaintiffs requested include that the tribal officials be restrained from interfering with or attempting to regulate Plaintiffs' business activities that occur within the state and outside of Ute Tribal land. R. 577. The tribal officials are subject to such injunctive relief. It is true that restraining the tribal officials also restrains the Tribe. However, when the injunction is limited to stopping state law violations that occur outside of Ute Tribal land, the Tribe has no legitimate

interest or complaint. Likewise, a monetary damage award entered against Newfield for state law violations is an adequate remedy for Plaintiffs.

As it relates to the adequacy of Plaintiffs' remedy if the action is dismissed for non-joinder, the trial court opined that Plaintiffs could have sought relief through Tribal Court or tribal administrative procedures. R. 1769-1770. The argument that administrative remedies must be exhausted is fundamentally flawed and the trial court fails to explain why Plaintiffs should subject themselves to a tribal forum when the business activities, acts, and occurrences complained of occurred exclusively within the state and outside of Ute Tribal land. In essence, the trial court determined it was appropriate that Plaintiffs subject themselves to tribal regulatory control to address business activities the situs of which is exclusively intrastate.

In *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493, 1981 U.S. LEXIS 9, 49 U.S.L.W. 4296 (1981), a decision authored by Justice Potter Stewart, the U.S. Supreme Court held that the treaties between the United States and the Crow Tribe establishing the Tribe's Montana reservation did not give the Crow Tribe authority to regulate non-Indian fishing on the Big Horn River, which flows through the heart of the Crow Tribe's reservation. The Court conceded the retention of certain inherent tribal powers, but denied that these went beyond "what is necessary to protect tribal self-government or to control internal relations." *Id.* at 564-65.

In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425, 109 S. Ct. 2994, 3005, 106 L. Ed. 2d 343, 1989 U.S. LEXIS 3288, 57 U.S.L.W. 4999 (1989), the Court, applying *Montana*, held that, except for isolated "land-

locked” tracts surrounded by tribal lands, tribes could not zone reservation fee land owned by nonmembers. A tribe’s general interest in regulating reservation land use could not, according to the Court, support its jurisdiction under the second *Montana* exception. *Id.* at 428. In the instant case, tribal officials are attempting to regulate business activity occurring on fee land located outside of Ute Tribal land. This is well beyond a *Montana* exception.

In *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S. Ct. 1404 (1997), the *Montana* rule assumed its modern form. The issue in *Strate* was tribal court jurisdiction over claims brought by tribal members against a nonmember arising from a motor vehicle accident on the Fort Berthold reservation. *Id.* at 442. First, the Court extended the *Montana* rule previously applied to tribal regulatory authority to a tribe’s adjudicatory authority, holding that the scope of a tribe’s adjudicatory authority could not exceed the scope of its regulatory authority. *Id.* at 453. Second, the Court effectively held that the exceptions to the general *Montana* rule really were not exceptions at all. *Id.* at 459. Conceding that “[r]ead in isolation, the *Montana* rule’s second exception can be misperceived,” the Court declared as the “key” to its proper application is the underlying principle that a tribe’s authority does not extend beyond what is necessary to protect tribal self-government or to control internal relations. *Id.*

Attempting to regulate business activity that occurs outside of Ute Tribal land has nothing to do with protecting tribal self-government or the ability to control internal relations. U.S. Supreme Court decisions make clear there is a presumption against tribal jurisdiction over nonmembers and, in the absence of congressional delegation, the burden

is on the Tribe to show that one of the *Montana* exceptions applies. The business activities at issue take place outside of Ute Tribal land. There is no *Montana* exception that would subject Plaintiffs to the Tribe's jurisdiction and any administrative remedies under tribal law. Plaintiffs should not have to subject themselves to a foreign jurisdiction to protect business operations that are exclusively intrastate, outside of Ute Tribal land, and well beyond the jurisdiction of the Tribe.

B. The trial court erred in not concluding that the state's interests in promoting fair and competitive business activity free from unlawful interference from foreign powers by protecting non-Indian state residents, who compose roughly 95% of the area population, state small businesses, and the oil and gas industry, which is the lifeblood of the local economy, outweigh the interests of the Tribe in regulating non-Indian business activities that occur within the state and outside of Ute Tribal land.

The recent trend of decisions from the Supreme Court requires that suits involving a non-Indian on privately owned land must be brought in state court. *See generally* Robert D. Probasco, *Indian Tribe, Civil Rights, and Federal Courts*, 7 Tex. Wesleyan L. Rev. 119 (2001) (explaining the jurisdictional rules applicable to Indians and non-Indians that depend upon land ownership).

In *Montana, supra*, the Supreme Court held that tribes lack regulatory jurisdiction except where, "necessary to protect tribal self-government or to control internal relations". 450 U.S. at 561. The narrow exceptions, inapplicable to the case at bar, are as to those entering consensual relationships with the tribe or if the conduct threatens or has

some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. In the instant case the Tribe lacks jurisdiction. The parties include Indians and non-Indians, the conduct occurred outside of Ute Tribal land, and no exception is applicable that would provide the Tribe with jurisdiction.

However, a state may regulate activities on Indian reservations when it has a sufficient interest. For example, states have jurisdiction to tax the output of mines and oil wells of any lessee of Indian lands. *See* 25 U.S.C. § 398c (1927). In *Hagen, supra*, the Supreme Court found the reservation was diminished and considered the following factors: (1) The area is predominately populated by non-Indians; (2) A finding that the land remains Indian Country seriously burdens the administration of state and local governments; (3) The State of Utah has exercised jurisdiction over the lands open to non-Indian settlement from the time the reservation was opened; and (4) That a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area. 510 U.S. at 420-21.

Assuming for argument purposes this were a case of concurrent jurisdiction, the Court would balance the interests of protecting the vast majority of the area's population and the lifeblood of the local economy from the conduct set forth in the Alleged Complaint. Not only does the Tribe lack jurisdiction based upon the situs of the conduct in question, balancing the interests involved strongly favors state jurisdiction. Uintah Basin residents who have spent a lifetime, and in some cases generations, developing small business interests should not be under the constant threat of having business operations shut down overnight because they refuse to be extorted by a tribal official

acting *ultra vires* and in violation of state law. Especially, where the situs is outside of Ute Tribal land.

C. The Trial Court Erred in Granting Defendants' Motions to Dismiss

1. Overview and Legal Standard

The alternative bases for the trial court's dismissal will be addressed in this section. There is considerable overlap between Defendants' respective motions and common legal standards of review. The general standard of review applicable is set forth below. Any issue with a different standard will be expressly addressed in the subsection as applicable.

Fed. R. of Civ. P. 8(a)2 (2010) requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (*quoted authority and citations omitted*), the Court instructed that Rule 8 does not require "detailed factual allegations," and then stated:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement" but it asks for more than a sheer possibility that a defendant has acted unlawfully.

The Court then pointed out that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether those facts plausibly give rise to an entitlement to relief." *Id.* at 679.

A Utah R. of Civ. P. 12(b)(6) defense is a challenge to Plaintiffs' right to relief based on facts Plaintiffs have alleged. *See Russell v. Standard Corp.*, 898 P.2d 263, 264, 1995 Utah LEXIS 43, 2 (Utah 1995). A court reviews a Rule 12(b)(6) motion to determine whether Plaintiffs would be entitled to relief under any state of facts which could be proved in support of its claims. *See Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 109, 1990 Utah App. LEXIS 66, 5 (Utah Ct. App. 1990). The court must accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in the light most favorable to the plaintiff. *See Alvarez v. Galetka*, 933 P.2d 987, 989, 1997 Utah LEXIS 22, 5 (Utah 1997).

2. Tortious Interference with Economic Relations

The elements of a claim for tortious interference with economic relations include, “(1) that the defendant intentionally interfered with the plaintiff’s existing or potential or existing economic relations, (2) for an improper purpose or by improper means, (3) causing injury to plaintiff.” *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 1982 Utah LEXIS 1130, 30 (Utah 1982).

The trial court found that the factual allegations against Newfield failed to provide Newfield “. . . fair notice of the actions complained of.” R. 1779. In addition to the Amended Complaint, the trial court also considered a March 20, 2013 letter from tribal officials. R. 1778. The relevant portions of the March 20, 2013, letter considered by the trial court include, “Any use of these businesses and individuals [Plaintiffs] by an employer doing work on the Reservation after receipt of this Notice may result in the assessment of penalties and/or sanctions against such employer to the fullest extent of the

law.” R. 000053. Notably, this directive is not limited to use of the Plaintiffs on Ute Tribal land but is rather a blanket boycott/blacklist of Plaintiffs regardless of the situs of the business activity.

As it relates to fair notice of the actions complained of the allegations of the Amended Complaint are that: (1) Newfield agreed to cooperate with the tribal officials *ultra vires* directive and boycott Plaintiffs; (2) Newfield refused to work with any third party that does business with Plaintiffs; (3) Newfield intentionally interfered with Plaintiffs existing and potential relations; (4) Newfield acted with an improper purpose and/or through improper means in aid of the tribal officials; (5) Newfield did so to promote its own business interests; and (6) these actions are the direct and proximate cause of injury to Plaintiffs. R 558-559, 567-568. Contrary to the trial court’s finding, the facts set forth in the Amended Complaint allege that Newfield not only agreed to join in the boycott and blacklisting of Plaintiffs, but that Newfield threatened to boycott any third party who conducted business with Plaintiffs. *Id.*

Moreover, Utah courts have ruled that in commercial settings a court should look to improper means and have said that “improper means is shown when the plaintiff proves that the defendant’s means of interference were contrary to statutory, regulatory, or common law” *U.P.C., Inc. v. R.O.A. Gen., Inc.*, 1999 UT App. 303, ¶49, 990 P.2d 945 (*quoted authority omitted*). Improper means can include violence, threats and violating established standards of the trade or profession. *St. Benedicts Dev. Co. v. St. Benedicts Hosp.*, 811 P.2d 194, 201, 1991 Utah LEXIS 36, 22 (Utah 1991) ((*quoting Top*

Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 210 n.11, 582 P.2d 1365, 1371 n.11 (1978)).

The Amended Complaint sets forth substantial and detailed facts concerning improper means in relationship to Newfield. The UTERO officials desired to regulate businesses outside of Ute Tribal land, and the UTERO Commissioners sought payment of bribes and to extort area small businesses. *Generally*, 548-579. The UTERO Commissioners, in an attempt to force Plaintiffs to pay them bribes and to comply with the UTERO ordinance outside of Ute Tribal land, threatened Plaintiffs that they would put them out of business. *Id.* To accomplish that illegal activity, the UTERO Commissioners blacklisted and boycotted Plaintiffs. *Id.* Newfield assisted the UTERO Commissioners in that illegal activity, participating in the boycott, and refusing to use Plaintiffs' Products and also refusing to use the services of anyone who did business with Plaintiffs, as requested by the UTERO Commissioners. *Id.* The boycott and blacklisting, as well as the extortionist demands, are unlawful. *Id.* But for Newfield's cooperation and aid the unlawful threats of tribal officials would be empty. *Id.* These activities constitute improper means on the part of Newfield. The elements of the tort of unlawful interference with prospective economic advantage have been properly pled.

3. Extortion

Newfield argued and the trial court agreed that Utah does not recognize a cause of action for extortion. R. 1779-1780. This is an issue of first impression and the trial court failed to support its position with any meaningful analysis. The cases cited by Newfield in support of its position before the trial court, however, are not dispositive on that

assertion. *Jensen v. America 's Wholesale Lender*, 2010 U.S. Dist. LEXIS 67777, 2010 WL 2720745 (D. Utah 2010), involved *pro se* litigants, and the court's holding consists of a conclusory ruling, devoid of any legal analysis. The report and recommendation in *Whipple v. Utah*, No. 2: I O-cv-81 1 DAK, 201 1 WL 4368568 (D. Utah Aug. 25, 2011) (*unreported*) does not analyze the issue, but simply asserts that there is no civil cause of action in Utah for theft.

Utah has, however, allowed for civil relief in such circumstances. *See e.g. Hill v. Estate of Allred*, 2009 UT 28, 216 P.3d 929; *Alta Indus. LTD v. Hurst*, 846 P.2d 1282, 1290 (Utah 1993); *Bonnie & Hyde Inc. v. Lynch*, 2013 UT App. 153, 305 P.3d 196. Extortion is a theft crime in Utah. *See Utah Code Ann. § 76-6-406* (1973). In Utah, individuals have a right to seek recovery when they have been subjected to a theft in its many varieties. *See e.g. Hill*, 2009 UT 28; *Alta Indus.*, 846 P.2d at 1290.

Extortion has also been recognized as a tort cause of action in some states. In California, it is sometimes referred to as duress or economic duress. *See Crosstalk Productions Inc. v. Jacobsen*, 65 Cal. App. 4th 631, 645 (1998) (*quoted authority omitted*), stating that the elements are threats to business or property “sufficiently coercive to cause a reasonably prudent person to be faced with no reasonable alternative but to ‘succumb’” to the threat. Utah has adopted a cause of action in contract law that allows the voiding of a contract for economic duress. *Avco Fin. Servs., Inc v. Johnson*, 596 P.2d 658, 660 (Utah 1979). Counsel was unable to locate any decision directly addressing whether Utah recognizes extortion or duress as a tort. However, Utah has

recognized an individual's right to sue personally for losses caused by theft and there is no reason that right should not include extortion.

In the instant case the demands for extortion and threats put Plaintiffs under extreme duress. These threats were particularly alarming to Plaintiffs who were aware of similarly situated businesses that were shut down by tribal officials if the businesses refused to be extorted. These threats cut directly to the viability of area businesses and the ability of area residents to earn a livelihood.

4. Utah Antitrust Act

The trial court found that “[t]he Plaintiffs offer no facts alleging that Newfield and the other Defendants had a meeting of the minds to boycott Plaintiffs’ business. All that is alleged is UTERO informed Newfield that the Rocks Off was no longer allowed to conduct business on tribal land, and Newfield relayed the message to the Plaintiffs explaining that Newfield was not going to do business with Plaintiffs due to the UTERO notice. The Plaintiffs’ claim merely recites the elements of an antitrust claim.” R. 1780.

The facts in the Amended Complaint directly conflict with the trial court’s finding. The Amended Complaint is expressly clear that Plaintiffs do not conduct business on tribal land and Plaintiffs do not even have to pass through tribal land in conducting Plaintiffs’ business activities. R. 554-555. The tribal officials demand was not limited to Ute Tribal land but a general boycott of Plaintiffs’ businesses. Further, Newfield facilitated the boycott by demanding all third parties it does business with to boycott Plaintiffs in furtherance of the “. . . unlawful UTERO blacklist and boycott of Plaintiffs.” R. 559.

Utah Code Ann. § 76-10-3101 (2013) provides that “[t]he purpose of [the Utah Antitrust Act] is . . . to encourage free and open competition . . . by prohibiting . . . unfair trade practices, combinations, and conspiracies in restraint of trade. . . .” The statute is to be interpreted in light of the strong public policy disfavoring anti-competitive practices.” *Summit Water Distrib. v. Summit County*, 2005 UT 73, ¶29, 123 P.2d 437 (citing *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978)), and the provisions of the statute are to be broadly construed. *Evans v. State*, 963 P.2d 177, 185, 1998 Utah LEXIS 37, 25-26 (Utah 1998).

Plaintiffs’ Fifth Cause of Action alleges that Defendants, including Newfield, entered into contracts, agreements or conspiracies to place unlawful restraints on trade or commerce, and that they were involved in an unlawful boycott of Plaintiffs. R. 569-572. Newfield argued before the trial court that there is no contract, combination or conspiracy. “[N]o formal agreement is necessary to constitute an unlawful conspiracy,” and . . . ‘business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.’” *Brixen & Christopher Architects v. State*, 2001 UT App 210, ¶35, 29 P.3d 650 (*quoted authority omitted*). The conspiracy may be vertical or horizontal. *Id.* at ¶¶ 36-39.

The factual allegations are that the UTERO Commissioners sent a letter to Newfield asking it to boycott Plaintiffs and not purchase Products from Plaintiffs or from anyone who obtained Products from Plaintiffs. R. 558-559. The UTERO Commissioners further asked Newfield to purchase those Products from entities in which the UTERO

Commissioners owned an interest, such as Larose Construction, or from whom they were receiving bribes or kickbacks, such as Huffman. R. 569-572.

The UTERO Commissioners intended to put Plaintiffs out of business through the unlawful boycott. R. 571. Newfield expressly agreed to that request in written communications sent to Plaintiffs and ceased purchasing Products from Plaintiffs. R. 558-559. In addition, Newfield demanded that third party businesses participate on the boycott. R. 558-559. Such action manifests an agreement, contract, combination or conspiracy.

Newfield's argument before the trial court, and the trial court's finding that the Amended Complaint does not allege any facts of the agreement, ignores the factual allegations in paragraphs 18 thru 96 of the Amended Complaint, including allegations that the UTERO Commissioners intended to shut down Plaintiffs' business, that, on March 20, 2013, Newfield was told not to utilize Plaintiffs' Products, that, on March 22, 2013, Newfield agreed with that unlawful boycott request and informed Plaintiffs it would no longer utilize Plaintiffs' Products and that it would also not use any business that utilized Plaintiffs' Products. R. 552-562. Newfield agreed to and did cooperate with the tribal officials in this boycott to put Plaintiffs out of business and to enhance the businesses in which the tribal officials had an interest or from whom they were receiving bribes. R. 552-562, 568-571. Plaintiffs also alleged bid rigging. Specifically, ". . . that UTERO officials dictate to oil and gas companies which contractors will be awarded bids and which contractors are not to be used." R. 561. This bid rigging is not limited to Ute

Tribal land and as set forth in the amended complaint the conduct complained of occurs outside of Ute Tribal land. R. 562.

The present case is not unlike *State v. Thompson*, 751 P.2d 805 (Ut. Ct. App. 1988), *rev'd on other grounds*, 810 P.2d 415 (Utah 1991), where a security officer accepted monies to exclude other security guard service providers from successfully bidding on the Utah Power and Light contract. Here Newfield, while not taking a bribe, but wanting to ensure work from the Tribe, agreed to prevent Plaintiffs and others from receiving orders from Newfield for Products, so that those orders went to entities in which the UTERO Commissioners had an interest or which were bribing the UTERO Commissioners.

Plaintiffs must also show that the “alleged concerted action imposes an unreasonable restraint on trade.” The Fifth Cause of Action is based on the Utah Antitrust Act. Under Utah law, “[s]ome activities in restraint of trade ‘have such a predictable and pernicious anti-competitive effect, and such limited potential for pro-competitive benefit, that they are deemed unlawful *per se*.’” *Brixen*, 2001 UT App 210 ¶41, (*quoted authority omitted*); *See also* Utah Code Ann. §76-10-3112 (2013) (identifying “price fixing, bid rigging, agreeing among competitors to divide customers or territories, or . . . engaging in a group boycott with specific intent of eliminating competition” as *per se* violations).

Notably, in *Thompson, supra*, the court observed that *per se* violations of a group boycott under Utah statute could be interpreted more broadly than under federal law, 751 P.2d at 813, stating that “[a]lthough the coercive pressure was applied vertically, the

stifling of competition was horizontal. A conspiracy to form a group boycott was therefore established.” *Id.* at 814 (*cited authority omitted*).

The actions of Newfield and the UTERO Commissioners amount to an illegal boycott, bid rigging and/or restraint of trade, clearly harming the local oil and gas industry by increasing production costs (valid market) in the Uintah Basin and the public that pays for that activity as it damages the local economic activity by hurting all businesses operating in the local oil and gas industry, which is the lifeblood of the local economy. The Amended Complaint alleges that Newfield and the UTERO officials conspired to eliminate Plaintiffs as competitors, diverted work from Plaintiffs in exchange for bribes from Plaintiffs’ competitors, diverted work to competitors in which tribal officials had an interest and illegally boycotted Plaintiffs. R. 568-571. These allegations not only plead sufficient circumstances under the rule of reason analysis, but Plaintiffs have pled *per se* violations of state law including unlawful boycotting and bid rigging. R. 552-562, 568-571.

5. Blacklisting

In an analysis consisting of a single paragraph, the trial court found that, “The facts allege that Newfield followed the direction of UTERO by not using Plaintiff for work completed on tribal land because the Plaintiff was no longer licensed to do work on tribal land.” R. 1781. This finding directly conflicts with the facts set forth in the Amended Complaint. R. 548-579. This demonstrates a fundamental misunderstanding of the trial court in that work done on tribal land and Plaintiffs working on tribal land was never alleged in the Amended Complaint and is not at issue. *See* R. 562. Plaintiffs’

Amended Complaint alleges the contrary. R. 562. Specifically, that Plaintiffs' business operations are conducted outside of tribal land and Plaintiffs do not work on tribal land. R. 553-555.

Before the trial court, Newfield asserted that Utah does not recognize a cause of action for blacklisting, relying on *Richards Irr. Co. v. Karren*, 880 P.2d 6 (Utah Ct. App. 1994). In that case, the Utah Court of Appeals held that the version of Section 19, Article XII, of the Utah Constitution, in effect at that time, did not create a private cause of action, because Section 19 instructed that the legislature would provide for enforcement and that the legislature had provided criminal sanctions in Utah Code Ann. §§ 34-24-1 and 34-24-2. However, the court, in rendering its decision, noted that its decision was premised upon the constitutional provision "in force at the time," and that "the last sentence [of Section 19] was stricken by constitutional amendment effective on January 1, 1993." *Id.* at 10, n.2. Indeed, the amendment removed the language that the legislature would provide a remedy for a constitutional violation. Moreover, in 2013, Utah Code Ann. §§ 34-24-1 and 34-24-2, were themselves repealed.

The floor debate on the issue of the repeal of §§ 34-24-1 and 34-24-1 is elucidating on the issue of a civil cause of action for blacklisting. Senator Daniel Thatcher, the bill's sponsor, contended there was no need for the criminal statute as he could not find a case of its being prosecuted, and that blacklisting was already covered by civil law, stating, among other things, that "where causing financial harm to another person is covered under civil law which really is a more appropriate place for this to be handled" and "the current practice is to handle all of this under civil law." Recording of

Utah Senate Floor Debates, S.B. 142, 60th Leg., Gen. Sess. (Feb. 4, 2013). Senator John Valentine, speaking in favor of the bill, agreed that no criminal repercussions for blacklisting were needed, averring, “I have seen lots of cases brought in the civil [court] . . . , where this cause of action is widely recognized, [and] is widely proceeded upon by attorneys,” and “there’s an adequate remedy in . . . civil matters to sue for damages and for injunctive relief.” *Id.* Senator Thatcher then, in summation, emphasized, “The act of stopping someone who has done no wrong from getting another job is a deplorable act, it is a shameful act, and it is an act where the person wronged should have the opportunity to sue for redress of grief, which is the current practice. I am not proposing that blacklisting . . . is appropriate.” *Id.* In short, both senators strenuously argued the criminal provisions of the repealed sections were unnecessary as the baneful act of blacklisting could be addressed in civil court, as Plaintiffs seek to do in this matter.

Of note, in 2012, many years after the decision cited by Newfield and even before the repeal of the aforesaid statutory provisions, in *Brock v. Herbert*, 2012 U.S. Dist. LEXIS 42041, ¶ 7, 2012 WL 1029355 (D. Utah 2012), the court recognized the possibility of blacklisting claims, stating “Utah courts have given little guidance on the scope and applicability of these provisions, referring to Utah Const. Art. XII §19 and XVI §4, in cases like the one currently before the court. Novel questions of state law should be decided by state courts.”

Newfield also argued before the trial court that there was no allegation of an exchange of blacklists, but this ignores the facts alleged in the Amended Complaint. The UTERO Commissioners blacklisted Plaintiffs and told Newfield not to use them or their

services or the services of those utilizing Plaintiffs' services, even though Plaintiffs' operate outside of Ute Tribal land. Newfield agreed to cooperate with the UTERO officials, and, in fact, did take that illegal action. Newfield also refused to do business with parties who were doing business with Plaintiffs. This clearly interfered with Plaintiffs' employment, ability to earn a livelihood, and such is a violation of Articles Utah Const. Art. XII §19 and XVI §4

6. Civil Conspiracy

The trial court, in an analysis consisting of a brief paragraph, found as relevant to this appeal, "The Plaintiffs' Amended Verified Complaint does not allege any facts concerning an underlying tort. Nor have the Plaintiffs alleged any facts showing Newfield and the other Defendants came to a meeting of the minds to commit an unlawful act against Plaintiffs." R. 1782. For the reasons set forth *supra*, the trial court's finding directly conflicts with or ignores the allegations set forth in the Amended Complaint.

The trial court's finding ignores the provisions of the Amended Complaint that contain the allegations with respect to the torts of interference with prospective economic advantage, extortion, blacklisting and antitrust. These allegations, as stated in the Amended Complaint, are incorporated into each successive claim.

The Amended Complaint alleges that the UTERO Commissioners communicated with Newfield and asked for its support in the commission of these torts by refusing to continue to use Plaintiffs' Products. Newfield agreed with the UTERO Commissioners (meeting of the minds) to assist the UTERO Commission in committing these torts and

illegal activity. Newfield then complied with the request and stopped using Plaintiffs' Products, and Newfield also refused to use third-party service providers that utilized Plaintiffs' Products.

Civil conspiracy requires (1) combination of two or more persons (in this case Newfield and the UTERO Commissioners), (2) object to be accomplished (put Plaintiffs out of business and enhance selected competitors), (3) a meeting of the minds on the course of action (UTERO Commissioners asked Newfield to participate in the illegal boycott and not buy services and products from Plaintiffs or those purchasing Products from Plaintiffs and Newfield agreed), (4) one or more unlawful acts (illegal boycott and restraint of trade, extortion, blacklisting) and (5) damages. *See Alta Industries LTD v. Hurst*, 846 P.2d 1282, n. 17, 1993 Utah LEXIS 37, 205 Utah Adv. Rep. 5 (Utah 1993) (listing the elements of civil conspiracy).

7. Claims against D.Ray Enterprises and LaRose Construction

The trial court's factual analysis of the 12(b)(6) motion made by D.Ray Enterprises and Larose Construction consists of two sentences. These two sentences read, "The Amended Verified Complaint only alleges facts regarding the individual Defendants' actions as individuals and as government officials of the Tribe. Consequently, the Plaintiffs have failed to state a claim upon which relief can be granted against these two corporate Defendants." R. 1785.

The allegations set forth in the Amended Complaint relevant to these corporate defendants are as follows. That LaRose, as on owner of Larose Construction, receives bribes and work from Huffman, a competitor of Plaintiffs, in exchange for LaRose

abusing his position as a tribal officer and wrongfully diverting business from Plaintiffs to Huffman. R. 561. Further, that LaRose, L.C. Welding, and Scamp conspired to receive an economic interest in a competing gravel pit located on “. . . private fee land which commenced operations immediately after Plaintiffs operations were shut down by Director Wopsock.” R. 571. Cesspooch owns an interest in an oil & gas service company D.Ray Enterprises. R. 562. Cesspooch, LaRose, and Director Wopsock conspired to abuse their UTERO positions to eliminate Plaintiffs as a competitor. R. 571. In addition, these tribal officials conspired to abuse their positions to destroy Plaintiffs’ businesses for refusing to be extorted by Cesspooch. R. 571. That LaRose Construction and D.Ray Enterprises “. . . participate in the conspiracy and derived a substantial economic benefit from the Conspiring Defendants’ unlawful restraint of trade and commerce.” R. 571.

Plaintiffs also alleged that the trial court, “. . . has jurisdiction over the tribal officials based on the tribal officials’ violation of state law, the acts complained of by the tribal officials are *ultra vires*, and the unlawful and unauthorized conduct has caused and continues to cause substantial and irreparable harm to non-Indian Plaintiffs business activities on private fee land that is not Indian Country or reservation. . .” R. 562.

It is difficult to understand why the trial court failed to consider these factual allegations set forth in the Amended Complaint in dismissing the action as it relates to LaRose Construction and D.Ray Enterprises. Plaintiffs expressly and clearly alleged that these companies engaged in the conspiracy for the express purpose of eliminating Plaintiffs as a competitor and because Plaintiffs refused to be extorted. Further, the location of this wrongful conduct was outside of Ute Tribal land.

D. The trial court erred in concluding that the tribal officials are immune from suit when the conduct complained of violates state law, occurred outside of Ute Tribal land, within the State of Utah and outside the jurisdiction of the Tribe.

In dismissing the action against the tribal officials the trial court found that, “The Plaintiffs allege that the UTERO officials acted beyond the scope of the authority given them to regulate business on tribal land.” R. 1787. Plaintiffs alleged nothing of the sort in the Amended Complaint. In fact, Plaintiffs allege exactly the opposite.

What Plaintiffs allege in the Amended Complaint is that, “This Court has jurisdiction over the tribal officials based on the tribal officials violations of state law, the acts complained of by the tribal officials are *ultra vires*, and the unlawful and unauthorized conduct has caused and continues to cause substantial and irreparable harm to non-Indian Plaintiffs’ business activities on private fee land that is not Indian Country or reservation as defined under 18 U.S.C. § 1151 and *Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958 (1994).” R. 562. This allegation and theme is repeated throughout the Amended Complaint. *Generally*, 548-579. Therefore, the trial court’s statements that the situs of the acts at issue is Ute Tribal land directly diverges from the facts alleged throughout the Amended Complaint. *Id.* Further, the tribal officials are sued in their individual as well as their official capacities. Accordingly, the trial court’s analysis misses the mark.

The trial court found that the Tribe was the “real party in interest” in dismissing this action as to the tribal officials. R. 1787. However, precedent makes clear that tribal officers are liable for damages for *ultra vires* acts. In *Oklahoma Tax Comm’n*, 498 U.S.

at 514, the Court stated, “we have never held that individual agents or officers of a tribe are not liable for damage in actions brought by the State.” This statement was made even though the Court recognized that there was “. . . no doubt that sovereign immunity. . .” barred the “. . . most efficient remedy. . .” which would have been a suit against the tribe. *Id.*

As explained by the D.C. Circuit, “There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . . [W]here the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . .” *Vann v. Kempthorne*, 534 F.3d 741, 750, 383 U.S. App. D.C. 14, 23, 2008 U.S. App. LEXIS 16561 (D.C. Cir. 2008) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949)). As alleged in the instant case, the actions of the tribal officials are not only beyond the scope of the UTERO ordinance but also beyond the scope of the jurisdiction of the Tribe itself which infringes upon the jurisdiction of the State of Utah. R. 562.

The Ninth Circuit has held that tribal officials enjoy immunity only to the extent of the tribe’s valid authority. *Burlington Northern Railroad Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 902 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1991), *overruled on other grounds by Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). In the instant case, Tribe officials are engaged in wrongful conduct outside of Ute Tribal land that damages non-Indian state residents and small businesses. This is beyond the Tribe’s jurisdiction and “valid authority” making *Burlington* on point. The holding that tribal officials lack immunity for conduct beyond

the jurisdiction of the tribe has been followed by many circuits. *See Baker Electric Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1471-72 (8th Cir. 1994); *see also Wisconsin v. Baker*, 698 F.2d 1323, 1333 (8th Cir. 1983), *cert. denied*, 463 U.S. 1207 (1983); *see also Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006 (*en banc* , *cert. denied*, 549 U.S. 1053 (2006).

In all of these cases, it could be argued that the tribe is the real party in interest. However, when the allegation is that tribal officials have acted beyond the scope of the authority the tribe is capable of bestowing, such as in the instant case, there is no immunity for the tribal officials. The trial court's dismissal on the grounds that the Tribe is the real party in interest runs afoul of well-reasoned precedent of the circuit courts.

E. The Tribe Waived Sovereign Immunity

On August 2, 2013, the parties submitted briefing to the trial court on the issue of whether the Tribe made a general appearance in this action. A determination of that issue was not made by the trial court at the time of the January 29, 2016 hearing on the motions to dismiss at issue in the instant appeal. On January 29, 2016, Plaintiffs provided the Court and opposing counsel with cases holding that sovereign immunity is waived if an Indian Tribe makes a general appearance in a state court action. This issue is an issue of first impression and a question of law.

In *Friends of East Willits Valley v. Cnty of Mendocino*, 101 Cal. App. 4th 191, 197, 202, 123 Cal. Rptr. 2d 708, 2002 Cal. App. LEXIS 4509, 2002 Cal. Daily Op. Service 7488, 2002 Daily Journal DAR 9380 (Cal. Ct. App. 1st Dist. 2002), the court

cited with approval a prior unpublished opinion that concluded that because an Indian Tribe made a general appearance in a state court action it waived its sovereign immunity.

In *United States v. Oregon*, 657 F.2d 1009, 1015, 1981 U.S. App. LEXIS 17888 (9th Cir. 1981), the court held that a tribe, by intervening in a lawsuit, assumed the risk that its position would not be accepted and thereby waived sovereign immunity in the proceeding. The court reasoned, “Here, the Tribe intervened to establish and protect its treaty fishing rights; a basic assumption of that action was that there would be fish to protect. Had the original decree found the species to be in jeopardy, and enjoined all parties from future fishing in order to conserve the species, the Yakimas could not have then claimed immunity from such an action. Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit.” *Id.* at 1014.

A California trial court cited the above decisions when it found that a Tribe waived sovereign immunity when it appeared before the court and sought affirmative relief. *See Nushake, Inc. v. State Compensation Insurance Fund*, CGC-05-441299.

The general principle of the cases cited, *supra*, is that if a tribe seeks affirmative relief from a state court, or federal court, the tribe has waived sovereign immunity. This principle is consistent with *Barlow v. Capps*, 821 P.2d 465, 467 (Utah App. 1991), holding that when a defendant seeks affirmative relief from a Court, the defendant has submitted himself to that court’s jurisdiction.

In the instant case, the Tribe has sought affirmative relief from the trial court that necessarily entails a concession that this Court has jurisdiction over this action. For example, the Tribe argued before the trial court that not only should the case be dismissed

because the Tribe has sovereign immunity, but the Court should dismiss the action as to the remaining defendants because the Tribe is a necessary and indispensable party. Consequently, the Tribe has gone beyond seeking dismissal based on sovereign immunity grounds, it has sought affirmative relief on behalf of other defendants, in addition to the Tribe, and moved for a dismissal of the action as to these defendants as well.

The Tribe has also requested that this Court interpret certain provisions of the UTERO Ordinance and tribal law in consideration of the issues of waiver of sovereign immunity and dismissal on the grounds of exhaustion of administrative remedies. To dismiss on these grounds, the Court must have jurisdiction. By moving to dismiss on these grounds, the Tribe has waived immunity and conceded jurisdiction by requesting relief that necessitates that the trial court exercise jurisdiction. The Tribe could have limited its motion to dismissing the action as to the Tribe on the grounds of sovereign immunity. However, the Tribe, on multiple occasions, has sought affirmative relief from the state court on grounds that concede jurisdiction. Plaintiffs seek leave to submit briefing on this issue.

F. The Trial Court Erred in Denying Plaintiffs Motion to Supplement

Utah R. of Civ. P. 15(d) provides:

(d) Supplemental pleadings. -- Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the

adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

“The court’s standard for exercising discretion on a motion to supplement is the same as that for disposing of a motion to amend under Rule 15(a)[2].” *First Savings Bank v. U.S. Bancorp*, 184 F.R.D. 363, 368 (D. Kan. 1998) (*quoted authority and citations omitted*). In considering motions to amend pleadings, primary considerations are whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage. *Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1359 (Utah Ct. App. 1990) (*quoted authority and citations omitted*).

Rule 15(d) provides that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d). A Rule 15(d) motion is “addressed to the sound discretion of the court, and leave to serve a supplemental pleading ‘should be liberally granted unless good reason exists for denying leave.’” *Sw. Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F. Supp. 2d 1253, 1256 (D. Colo. 2003) (*quoting Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001)). “Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment.” *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). Despite the passage of time, this case is in its infancy and allowing leave to supplement will not prejudice any party.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the trial court's decision in its entirety and remand the case back to trial court.

DATED this 28th day of September, 2016.

JOHN D. HANCOCK LAW GROUP, PLLC

/s/ John D. Hancock

John D. Hancock, Esq. (#10435)

Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Utah Rule of Appellate Procedure Rule 24 (f)(1)(c), I hereby certify that this Brief complies with the type-volume limitations pursuant to Utah R. App. P. 24(f)(1) as this Brief contains 13,934 words, exclusive of the items set forth in Utah R. App. P. 24(f)(1)(B).

This Brief complies with the typeface requirements of Utah R. App. P. 27(b) as this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 version 16.0.7167.2040 in font size 13 and style Times New Roman.

DATED this 28th day of September, 2016.

John D. Hancock, Esq.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I caused two copies of a true and correct copy of the Appellant's Opening Brief to be served via U.S.P.S in a sealed envelope with first class postage prepaid this 28th day of September, 2016 to the following:

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ADDENDUM
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IN THE UTAH COURT OF APPEALS
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

RYAN URESK HARVEY, ROCKS OFF,
INC. and WILD CAT RENTALS, INC.,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

Appellate Case No.: 20160362-CA

**On Appeal from the Eighth District Court for Duchesne County – Roosevelt
Honorable Judge Samuel P. Chiara
Trial Case No. 130000009**

APPELLANTS ADDENDUM TO OPENING BRIEF

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Rule 19. Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions. This rule is subject to the provisions of Rule [23](#).

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT, STATE OF UTAH

Ryan Uresk Harvey, et al.,

Plaintiffs,

vs.

Ute Indian Tribe of the Uintah and Ouray
Reservation, et al.,

Defendants.

RULING AND ORDER

Case No. 130000009

Judge SAMUEL P. CHIARA

This matter is before the Court on the Motion to Dismiss Amended Verified Complaint filed by the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), LC. Welding & Construction, Inc., and Huffman Enterprises, Inc.

The Defendants are divided into three groups, each represented by different counsel. The Defendants making this Motion include the Tribe of the Uintah and Ouray Reservation ("Tribe"), L.C. Welding & Construction, Inc., and Huffman Enterprises, Inc. Mr. J. Preston Stieff represents these Defendants. The Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose, in their individual capacities, and as representatives of the Ute Indian Tribe, and LaRose Construction Company, Inc., and D.Ray C. Enterprises, L.L.C., are represented by Mr. Joel T. Zenger. Defendants Newfield Production Company, Newfield Rocky Moutains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc., are represented by Mr. Christopher R.Hogle. The Plaintiffs are represented by counsel, Mr. John Hancock, Mr. Clark Allred and Mr. Brad

Brotherson.

The portion of this motion seeking dismissal on the grounds that the Tribe is an indispensable party is joined by all of the defendants.

The Court heard oral argument on this Motion and on the motions of the other Defendants on January 29, 2016. Oral argument was provided from all of the parties on each of the Motions. The issues were taken under advisement. After careful review of the pleadings, the arguments, and the relevant case law, the Court is prepared to rule on the issues.

The Defendants move the Court to dismiss the Plaintiffs' Verified Complaint pursuant to Rule 12(b)(1) and 12(b)(7) of the Utah Rules of Civil Procedure. The Defendants argue this Court lacks subject matter jurisdiction because the Tribe enjoys sovereign immunity. Additionally, the Defendants argue that the Verified Complaint should be dismissed as to all Defendants because the Tribe is a necessary and indispensable party pursuant to Rule 19.

I. Subject Matter Jurisdiction.

Sovereign immunity is a jurisdictional issue. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). An Indian tribe is immune from suit unless the tribe has waived its immunity or Congress authorized the suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1988). In order to waive tribal sovereign immunity Congress must unequivocally express its intent to do so, or the tribe must clearly waive immunity. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); see also *Santa Clara v. Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc. v.*

Department of Game of State of Wash., 433 U.S. 165, 172 (1977).

The Ute Indian Tribe's Law and Order Code describes the extent of the Tribe's sovereign immunity and the circumstances in which the tribe's sovereign immunity may be waived.

Section 1-8-5 states:

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. The UTERO Ordinance does waive sovereign immunity in certain circumstances. Section 13.3, of the UTERO Ordinance states:

The Tribe hereby agrees to waive its sovereign immunity for the sole and limited purpose of enforcement of the terms of this Ordinance. This waiver is expressly limited to injunctive and declaratory relief with respect to the enforcement of the terms of this Ordinance and does not include monetary damages. This limited waiver is not, and should not be construed as a blanket waiver of the Tribe's sovereign immunity. Under no circumstances shall the tribal funds of the Tribal Treasury be subject to any award for damages.

UTERO Ord., Sec. 13.3. The waiver is limited to enforcement of the UTERO Ordinance only, and is not a blanket waiver, or waiver for any other purpose. The Tenth Circuit Court of Appeals recently interpreted this section of the UTERO Ordinance and held:

Under the terms of that ordinance, the Tribe has indeed 'agree[d] to waive its sovereign immunity.' But the ordinance explains that this 'waiver is not, and should not be construed as a blanket waiver of the Tribe's sovereign immunity.' Instead, the waiver exists 'for the sole and limited purpose of enforcement of the terms of [the] Ordinance'

Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 790 F.3d 1000, 1010 (10th Cir. 2015)(quoting UTERO Ordinance). The Court further explained:

[E]ven assuming without granting that the defendants' counterclaims could somehow

be described as an effort to ‘enforce’ the ordinance – itself a seriously questionable notion – the ordinance is enforceable only before tribal courts and the Tribe’s UTERO Commission. Nowhere does the waiver permit other parties to hale the Tribe before a nontribal tribunal and this court enjoys no authority to rewrite for the defendants the waiver the Tribe has written for itself.

Id.

The Plaintiffs argue the Tribe has waived sovereign immunity by the UTERO Code Section 13.3. Consequently, the Plaintiff argues that a suit against the Tribe can be maintained. The Plaintiffs further argue that the basis for their Verified Complaint, is the allegation that the Defendants have acted outside the scope of UTERO and attempted to conduct illegal and unlawful activities outside of the boundaries of the Reservation. The Plaintiffs argue the Defendants acted ultra vires and their claims do not implicate the UTERO code but are actionable state tort, statutory, and constitutional claims. The Plaintiffs argue that they are not bound to prosecute their claims in tribal court or the before the UTERO Commission.

Whether the Plaintiff is attempting to enforce terms of the UTERO Ordinance or not, the result is the same: dismissal against the Tribe for lack of subject matter jurisdiction. If the Plaintiffs’ claims against the Tribe are not brought pursuant to the UTERO Ordinance, then sovereign immunity applies barring the claims because there has been no clear and express waiver of sovereign immunity outside of the terms of the UTERO Ordinance. If Plaintiffs’ claims are brought to enforce the UTERO Ordinance, those claims must have been brought in tribal court. The waiver of sovereign immunity in the UTERO Ordinance explains it is “for the sole and limited purpose of enforcement of the terms of [the] Ordinance.” UTERO Ord., Sec. 13.3. The waiver “is not, and should not be construed as a blanket waiver of the Tribe’s sovereign immunity.” *Id.* However, as explained by the Tenth Circuit, according to the UTERO

Ordinance, the claims can only be brought before the tribal court and the Tribe's UTERO Commission. Under either scenario, this Court lacks subject matter jurisdiction over the Tribe.

Additionally, the Plaintiffs argue the Tribe waived sovereign immunity by making a general appearance in this litigation. Plaintiffs' memorandum contained no authority for this position but referenced the argument contained in a memorandum filed by them on May 15, 2013. That memorandum also appears devoid of any legal authority for the proposition that a tribe waives sovereign immunity by making a general appearance in a case. At oral argument, Plaintiffs counsel argued that the tribe had made a general appearance in this case by seeking a dismissal of the entire case for failure to join an indispensable party. Counsel then provided the Court with three cases that allegedly support the position. Those cases had not been cited during briefing and were objected to by defense counsel. The Court allowed the cases in an effort to include all applicable legal authority to assist it in deciding a complicated case. The Court authorized defense counsel to file a supplemental response to the three cases provided by Plaintiffs. Defendants submitted the supplemental response as allowed by the Court on February 5, 2016.

On February 8, 2016, Plaintiffs filed a motion requesting that the Court grant leave to allow full briefing of the issue of whether the Tribe's sovereign immunity was waived by making a general appearance. It is a mystery to this Court why Plaintiffs believe they should be allowed more argument on this point. The Tribe asked for dismissal of the case on the grounds of sovereign immunity in its motion. The Plaintiffs filed a twenty-page memorandum in response that included an argument that the Tribe had made a general appearance in this case and that it had waived sovereign immunity. Then, at oral argument Plaintiffs argued that same point and

the Court allowed Plaintiffs to present case law that they had not been provided in briefing. Obviously, Plaintiffs knew waiver of sovereign immunity in any of its iterations was at issue or they would not have appeared at oral arguments armed with case law on that point. The fact that Plaintiffs failed to fully brief their defenses to the primary issue raised by the Tribe in its motion for dismissal is inexplicable. There is no confusion on this point. The Tribe claims it is immune from suit in state court. The defense to this claim is waiver of immunity. Waiver potentially occurs in a number of ways. Any of the potential ways by which Plaintiff claims the Tribe waived its immunity must be raised by Plaintiff. Procedurally, arguments are not made by a series of separate memoranda. Rather, all of a responding party's arguments on a point are expected to be made in a single responsive pleading. There is only one reason why any further briefing was allowed by the Court following oral argument. Namely, that Plaintiffs attempted to introduce case law during oral argument that had not previously been briefed. It was only appropriate that Defendants be given the opportunity to address case law not previously disclosed before the Court made its ruling. That necessary briefing opens no new doors to Plaintiffs.

Nevertheless, the Court has reviewed the cases belatedly cited by the Plaintiffs for the proposition that a tribe waives sovereign immunity by making a general appearance in a case and a discussion of each is had below. The Court first notes that subject matter jurisdiction can be raised at any time. *Barnard v. Wasserman*, 855 P.2d 243, 247-48 (Utah 1993) ("This court has made clear that challenges to subject matter jurisdiction may be raised at any time and cannot be waived by the parties.").

In *Friends of East Willits Valley v. County of Mendocino*, 123 Cal. Rptr. 2d 708, 711 (Cal. Ct. App. 2002), under the heading of "[b]ackground" the court stated:

In a prior unpublished decision we rejected initial challenges to trial court jurisdiction over the Tribe, concluding that because the Tribe has made a general appearance, it waived its sovereign immunity.

Additionally, in the “[d]iscussion” section of the ruling, the court stated:

Indeed, the Tribe waived sovereign immunity previously when it made a general appearance in this case. It also expressly waived sovereign immunity in connection with enforcement of the Tribal/County Agreement.

Id. at 715. Notably, the statement by the Court that the Tribe had waived its sovereign immunity by making a general appearance in the case cites no legal authority for that position. Thus, without further explanation, that statement carries no weight. The California Court’s decision is not controlling and because it contains no discussion and cites no authority, it cannot be persuasive. It is conceivable that the Tribe expressly waived immunity in its pleadings when it appeared in the case, or perhaps, it sought some affirmative relief. However, because the prior case is unpublished and because the published case offers no authority nor explanation for the assertion, the case is of no assistance to this Court’s determination of the issue. Further, the Tribe in *Friends of East Willits Valley* expressly waived its sovereign immunity when it entered into a specific tribal/county agreement that was at issue in the lawsuit. Thus, in the face of an express waiver contained in the written agreement, it is difficult to determine how much consideration was given to the issue of waiver by general appearance or whether the two were one in the same in that instance.

Next, the Plaintiffs cite *Nushake, Inc. v. State Comp. Ins. Fund*, No. CGC-05-441299, 2011 Cal. Super. LEXIS 319, at *1 (Cal. Super. Ct. April 29, 2011). In *Nushake*, the court held that the tribe waived sovereign immunity by directly and unequivocally

consenting to enforcement of the settlement agreement in California State Court.. *Id.* at **35-40. *Nushake*'s holding, therefore, is unhelpful in this case because the Ute Tribe has not similarly consented to enforcement of any agreement here at issue in Utah State Court.

Finally, the Plaintiffs cite *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). In *Oregon*, the Yakima Tribe moved to intervene in a lawsuit under Federal Rule of Civil Procedure 24(a)(2). The *Oregon* Court held that because the tribe had intervened in the case it had assumed the status of an original party and was fully bound by all future court orders. *See, id.* at 1014. The holding in *Oregon* is logical because one who intervenes in a case is seeking to pursue a claim or to defend a particular position voluntarily. An intervenor is identical to an original plaintiff. Plaintiffs and intervenors are in any particular case because they consent to be in the case. Whether a plaintiff or intervenor, they affirmatively sought to be a party. Were the Ute Tribe to bring an action in state court as a plaintiff, or were it to intervene, an argument that it had waived immunity could easily be made. The Ute Tribe in the present case did not voluntarily intervene, rather, it is an involuntary defendant in the action. Thus, the holding in *Oregon* has no bearing on this Court's decision.

The Ute Tribe has only sought to have this case dismissed against it based on its sovereign immunity. Additionally the Tribe has asked the case not go forward against any defendant because the Tribe claims to be a necessary and indispensable party. The facts of this case do not parallel any of the cases the Plaintiffs have cited in support of their argument that sovereign immunity can be waived by a general appearance. Nor do

the cases cited by the Plaintiffs support the conclusion that a general appearance waives the sovereign immunity of a tribe.

II. Failure to Exhaust Administrative Remedies.

Next, the Defendants argue in the alternative, that the Plaintiffs' Verified Complaint should be dismissed for failure to exhaust administrative remedies. The UTERO Ordinance requires the Plaintiffs to file a written complaint with the UTERO Commission prior to filing suit. The Defendants argue the Plaintiffs failed to do this prior to filing the Verified Complaint.

The Court will not decide this issue. The Court has already granted the Tribe's Motion to Dismiss, making this issue moot. Because this Court does not have jurisdiction over the Tribe, whether or not the Plaintiff adhered to the requirements of the UTERO Ordinance in bringing their claims is of no consequence to this Court. This Court would not have jurisdiction over the Tribe even if the Plaintiffs had exhausted their administrative remedies. Additionally, the tribal court, if necessary, is better situated to determine if the Plaintiffs followed their procedures under the UTERO Ordinance.

III. Necessary and Indispensable Party.

Finally, the Defendants argue the entire Verified Complaint must be dismissed as to all defendants pursuant to Rule 12(b)(7) because the Tribe is immune from suit and is a necessary and indispensable party under Rule 19.

Determining joinder of a party under rule 19 requires the court to potentially make a three step analysis. First, the court must determine whether a party is necessary. *Grand*

County v. Rogers, 44 P.3d 734, 740 (Utah 2002). Next, the court must determine that joinder of the necessary party is feasible. *Id.* at 741. Finally, if the party is necessary and joinder is not feasible, the court must determine whether the party is indispensable. *Id.*

Rule 19(a) of the Utah Rules of Civil Procedure states in part that a party is necessary if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

“The basic purpose of rule 19 is ‘to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.’”

Landes v. City Capital Bank, 795 P.2d 1127, 1130 (Utah 1990); quoting 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* §1602, at 21 (1986).

The Plaintiffs generally allege the Ute Tribe and the Tribe’s governmental representatives have acted beyond the authority of the UTERO Ordinance and have committed torts against the Plaintiffs. The Plaintiffs insist that their claims do not rely on the UTERO Ordinance but are simple state tort, statutory, and constitutional law claims. The Plaintiffs claim the individual tribal representatives acted in their official capacities, although ultra vires, to commit wrongful acts against the Plaintiffs. Paragraphs 11, 12, 13, and 14 of Plaintiffs’ prayer for relief in the Amended Verified Complaint requests that the Court enjoin the Ute Tribe and UTERO officials from actions that interfere with Plaintiffs’ abilities to conduct business. Paragraph 11 asks the Court to enjoin the Tribe

and UTERO officials from regulating Plaintiffs' business activities in a manner that exceeds tribal authority. Paragraph 12 asks for an injunction against wrongful interference with Plaintiffs' relationships with oil and gas companies. In part, paragraph 13 seeks to enjoin retaliation against Plaintiffs. And paragraph 14 seeks to enjoin retaliation against oil and gas companies that do business with Plaintiffs.

The Court must first determine whether the Tribe is a necessary party within the meaning of U.R.C.P. 19. The inquiry is whether the Tribe claims an interest relating to the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest.

Any substantive analysis of the Plaintiffs' tort claims against UTERO officials would require the Court to make specific determinations regarding the ability of the Tribe to regulate tribal business relationships. For example, Plaintiffs' Amended Complaint alleges that UTERO officials told Defendant Newfield that if Newfield utilized Plaintiffs' products or services, Newfield would be penalized and/or sanctioned to the fullest extent of tribal law. Plaintiffs characterize the Tribe's action in sending the communication as threatening, intimidating, retaliating, wrongful, etc. In order for the Court enjoin UTERO officials, and thereby enjoin the Tribe, from "wrongfully interfering in Plaintiffs' relationship with oil and gas companies," the Court would necessarily be required to determine whether the Tribe and its officials have authority to give such a directive to Newfield and/or to other oil and gas companies. In essence, the question is whether the Tribe, through its officials, may tell a company that the company may be precluded from operating on tribal lands if that company continues to engage in business with a particular

individual or company. It seems apparent that a determination about whether the Tribe and its officials may issue directives relating to oil companies' business activities, such as the directive alleged to have been issued in this case, is a critical interest of the Tribe. Further, injunctions against UTERO officials prohibiting them from issuing such directives effectively serves as an injunction against the Tribe from issuing those directives. The Court finds that such a disposition in this case, in the Tribe's absence, may as a practical matter impair or impede the Tribe's ability to protect that interest. Therefore, the Tribe is a necessary party to this action.

However, as outlined above, this Court lacks subject matter jurisdiction over the Tribe, making joinder not feasible. Therefore, Rule 19(b) applies, and the Court must determine whether the Tribe is indispensable. Rule 19(b) states:

If a person described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In determining whether a judgment rendered in the Tribe's absence might be prejudicial to the Tribe, the discussion above clearly implicates a probability of prejudice to the Tribe. Plaintiffs seek injunctions that would require the Tribe's officials to cease sending letters to oil and gas companies telling the companies that they face sanctions under the UTERO Ordinance if they continue to utilize Plaintiffs' products and services. A determination by the Court that the UTERO officials' act of sending the directive to

Newfield was wrongful is potentially prejudicial to the Tribe. An injunction against tribal officials is effectively an injunction against the Tribe. Such an injunction might limit the Tribe's ability to issue directives it deems necessary under the UTERO Ordinance and could be prejudicial to the Tribe's ability to regulate its affairs. Potentially, depending upon the Tribe's interpretations of its own laws, the Tribe could ban any person or company from doing business on Tribal ground for any reason. A judgment rendered by this Court in the Tribe's absence that purports to limit the Tribe's ability to sanction or exclude businesses from Tribal property for the reasons stated in the alleged communication in this case creates a significant potential for prejudice against a key interest in tribal self-governance.

Next, none of the parties have suggested how the Court could shape the relief or enter protective provisions in the judgment that would lessen or avoid the prejudice described above. Neither can the Court conceive of any. Nearly all of the Plaintiffs' requests for relief ask for injunctions against the Tribe and UTERO officials. Conceptually, the Court cannot see how it could grant any version of the relief requested that would not prejudice the Tribe.

Further, the Tribe and the UTERO officials are the key figures in this action. It is their alleged actions that constitute Plaintiffs' primary contention of wrongdoing. A judgment against the other Defendants, without the injunctions against the Tribe and its UTERO officials as demanded by Plaintiffs would seem to be an inadequate remedy.

Finally, the Plaintiffs have another forum to address their claims other than in the State Court. Plaintiffs could have raised their claims through tribal administrative

procedures and perhaps in the Tribal Court. The Plaintiffs argue that the Tribal Court is not neutral or fair. The Court sees such an allegation, without any factual basis, no differently than if Plaintiffs claimed the State's district or justice courts were inherently biased against a particular class of parties.

The case contains claims which directly involve the Tribe's interests. The Tribe is immune from suit, and resolving the claims without the Tribe's presence would impair their ability to protect that interest. Consequently, the Tribe is a necessary and indispensable party to this action.

Defendant Newfield has also sought dismissal for failure to join an indispensable party and that motion is best addressed here. Although similar, the necessary and indispensable analysis with regard to Newfield does merit some additional discussion. Rule 19 states that a party is a necessary party if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The question then becomes whether a disposition of this action in the absence of the Tribe would leave Newfield subject to a substantial risk of inconsistent obligations by reason of the Tribe's claimed interest. The Tribe's claimed interest is its ability to regulate business activity on tribal lands. That ability to regulate business activity might include issuing directives to oil and gas companies and imposing sanctions on companies for not abiding by the Tribe's directives. One potential disposition of this action is that

the Court find Newfield liable for one or more of the causes of action claimed by Plaintiffs and grant damages against Newfield. Simultaneously, because the Court has no subject matter jurisdiction over the Tribe to restrain the Tribe from any action relating to the directives it sends to oil and gas companies relating to business activities on tribal lands, and because the Court has no subject matter jurisdiction to control the other means the Tribe uses to enforce its directives, Newfield could become subject to inconsistent obligations in State Court and before the UTERO Commission. If Newfield fails to abide by the directives of UTERO in an effort to avoid state legal claims that may be brought by Plaintiffs, Newfield may be subject to sanctions imposed by the Tribe. Likewise, if Newfield follows the directives of UTERO in an effort to maintain its status with the Tribe, to continue its ability to operate on tribal lands, and to avoid tribal sanctions, Newfield may very conceivably be subject to further civil sanctions in State Court.

Thus, disposition of this case in the Tribe's absence may leave Newfield subject to a substantial risk of incurring inconsistent obligations. In this context, the Tribe is a necessary party to the action.

Whether the Tribe is an indispensable party from Newfield's perspective also merits additional discussion. Again, Rule 19(b) requires the Court to consider: (1) to what extent a judgment rendered in the Tribe's absence might be prejudicial to Newfield; (2) the extent to which the prejudice can be lessened or avoided; (3) whether a judgment rendered in the Tribe's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

As discussed above, a judgment rendered in the Tribe's absence has significant

potential to prejudice Newfield. A money judgment against Newfield is not simply a single judgment. In the Tribe's absence, Newfield could potentially be faced with a decision to risk further judgments in state court, face sanctions with the UTERO commission, or cease its operations relating to tribal lands altogether. Because of the potential for inconsistent judgments between the state courts and the UTERO commission, Newfield is placed in the untenable position of operating in potential violation of inconsistent directives from courts of two jurisdictions.

The Court has been offered no solution to lessen or avoid this potential prejudice and, again, cannot conceive of any manner by which it could create a ruling that would solve the potential prejudice potentially caused by Newfield being subject to conflicting and inconsistent orders from this Court and from the UTERO Commission.

Factors relating to the indispensable status of a party numbered 3 and 4 are no different in the context of Newfield's position than they are in regard to the Tribe's position and need not be reiterated here. Consequently, the Tribe is a necessary and indispensable party to this action.

Based upon the foregoing:

1. The Plaintiffs' Motion for Leave to Brief, for Clarification of Order, and Related Relief is denied.
2. The Tribe's motion to dismiss the Tribe for lack of subject matter jurisdiction is granted.
3. The Tribe's Motion to dismiss for failure to join an indispensable party is granted.

4. Newfield's Motion to dismiss for failure to join an indispensable party is granted.

Dated this 28 day of March, 2016.

BY THE COURT:

Samuel Chiara

SAMUEL P. CHIARA
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130000009 by the method and on the date specified.

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03/29/2016

/s/ KELLY SNOW

Date: _____

Deputy Court Clerk

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT, STATE OF UTAH

Ryan Uresk Harvey, et al.,

Plaintiffs,

vs.

Ute Indian Tribe of the Uintah and Ouray
Reservation, et al.,

Defendants.

RULING AND ORDER

Case No. 130000009

Judge SAMUEL P. CHIARA

This matter is before the Court on the Defendants' Motion to Dismiss Amended Verified Complaint.

The Defendants are divided into three groups, each represented by different counsel. The Defendants making this Motion include Newfield Production Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. ("Newfield"). Mr. Christopher R. Hogle represents these Defendants. The Defendants Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), L.C. Welding & Construction, Inc., and Huffman Enterprises, Inc., are represented by Mr. J. Preston Stieff. The Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose, in their individual capacities, and as representatives of the Ute Indian Tribe, and LaRose Construction Company, Inc., and D. Ray C. Enterprises, L.L.C., are represented by Mr. Joel T. Zenger. The Plaintiffs are represented by counsel, Mr. John Hancock, Mr. Clark Allred, and Mr. Brad Brotherson.

The Court heard oral argument on this Motion, and on motions of the other Defendants, on January 29, 2016. Oral argument was provided from all of the parties on each of the Motions. The issues were taken under advisement. After careful review of the pleadings, the arguments, and the relevant case law, the Court is prepared to rule on the issues.

Initially, the Court notes that based on the Ruling and Order on the Ute Tribe's Motion to Dismiss, this matter is also dismissed against the Newfield Defendants. The Court found that the Ute Tribe was a necessary and indispensable party to this action. However, the Ute Tribe is immune from suit. Consequently, the matter cannot be maintained against Newfield either. The Court adopts that decision here. While that decision makes the additional arguments moot, the Court will address the additional arguments as an alternative basis to dismiss the Amended Verified Complaint.

The Defendants move the Court to dismiss the Plaintiffs' Verified Complaint pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. The Rule 12(b)(6) defense is a challenge to the plaintiff's right to relief based on the facts the plaintiff has alleged in the complaint. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

The court reviews a Rule 12(b)(6) motion to determine whether the plaintiff would be entitled to relief under any state of facts which could be proved in support of its claims. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107 (Utah Ct. App. 1990). The court must "accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in the light most favorable to the plaintiff." *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997).

"[T]o support a claim for relief, a plaintiff 'must have alleged sufficient facts . . . to

satisfy each element' of a claim." *Tomlinson v. NCR Corp.*, 2013 UT App 26, ¶ 16, 296 P.3d 760 (quoting *MBNA Am. Bank N.A. v. Goodman*, 2006 UT App 276, ¶ 6, 140 P.3d 589. "[W]hen the pleader complains of conduct described by . . . general terms . . . , the allegation of the conclusion is not sufficient; the pleading must describe the nature or substance of the acts or words complained of." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982). "[G]eneral accusations in the nature of conclusions . . . will not stand up against a motion to dismiss." *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962); *Utah Steel & Iron Co. v. Bosch*, 475 P.2d 1019, 1020 (Utah 1970).

The Plaintiffs allege that the Newfield Defendants have conspired with the other Defendants to boycott or blacklist the Plaintiffs' business. The Plaintiffs claim the Newfield Defendants are liable for tortious interference with economic relations, extortion, unlawful restraint of trade, blacklisting, and civil conspiracy. The factual allegations the Plaintiffs rely on to support their claims against Newfield are made in paragraphs 70-74 in the Amended Verified Complaint, which states:

70. Since the March 20, 2013, threats by Director Wopsock, the oil and gas companies, including Newfield, have refused to allow any business who leases Plaintiffs' equipment or utilizes Plaintiffs' Products to provide services.

71. By email dated March 22, 2013, Newfield informed Ryan that it would not be utilizing Plaintiffs' products or services per the direction of the "UTERO committee,"

72. Newfield's and other oil and gas companies' cooperation with the unlawful and ultra vires actions of tribal officials empowers said officials and is the direct and proximate cause of damages to Plaintiffs.

73. Since March 2013, Plaintiffs' have lost approximately \$80,000.00 per day in revenues as the result of Newfield and other oil and gas companies cooperating in the unlawful UTERO blacklist and boycott of Plaintiffs.

74. Ryan has been contacted by oil and gas companies, including Newfield, and told that they cannot do business with Plaintiffs or work with anyone that does business with Plaintiffs based on their cooperation with and support of the UTERO officials.

The Plaintiffs also submitted attachments to a Motion for Temporary Restraining Order which was filed at the same time as the original Complaint. The attachments concern communications that UTERO had with Newfield concerning Rocks Off, and Newfield's notification to Plaintiff that Newfield would no longer be utilizing the Plaintiff on jobs. The parties referenced these attachments in the subsequent motions. Although foundation was never provided for the documents, none of the parties objected to the attachments on an evidentiary basis. Nor did any of the parties oppose the Court's consideration of the attachments in conjunction with deciding the Motions.

The March 20, 2013, UTERO letter notified Newfield that the access permit for Rocks Off, Inc. – Ryan Harvey had been revoked. The letter indicated that companies doing business on the reservation may be penalized or sanctioned for using Rocks Off, Inc. – Ryan Harvey. In response to the letter, a representative of Newfield notified Ryan Harvey by email that Newfield would not be using Rocks Off, Inc., due to the UTERO directive.

The facts set forth in the Plaintiffs' Amended Verified Complaint establish, at most, that Newfield was notified by UTERO that Rocks Off's access permit had been revoked and were no longer authorized to conduct work on tribal land, and that Newfield followed that directive by no longer utilizing Rocks Off for work on tribal land. Those minimal factual allegations fail to support the various claims the Plaintiffs set forth. The facts do not support a finding that Newfield and the other Defendants came to a meeting of the minds to harm the Plaintiffs'

business. The facts do not support a claim that Newfield agreed to assist in harming the Plaintiffs' business. The complaint must give the defendant "fair notice of the nature and basis or grounds of the claim. . . ." *Zoumadakis v. Uintah Basin Med. Ctr.*, 2005 UT App 325, ¶ 2, 122 P.3d 891. The factual allegations made against Newfield fail to provide adequate notice of the actions complained of. For that reason, and for the reasons listed below, the Defendant Newfield's Motion to Dismiss is granted.

I. Tortious Interference with Economic Relations.

The elements of a claim for tortious interference with economic relations include "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). The Plaintiffs allege that the Defendants "have intentionally interfered with the Plaintiffs' existing and potential economic relations." (Am. Compl., at ¶ 117.). The Plaintiffs do not provide any explanation of the Defendants' actions or facts to support their claim. "[G]eneral accusations in the nature of conclusions . . . will not stand up against a motion to dismiss." *Heathman*, 13 Utah 2d at 268, 372 P.2d at 991. The allegations are insufficient to provide the Defendants fair notice of the actions complained of. Therefore, the Plaintiffs' Third Claim for Relief against Newfield is dismissed.

II. Extortion.

Utah does not recognize a civil claim for extortion. See *Jensen v. America's Wholesale Lender*, Case No. 1:09-cv-169 TS, 2010 WL 2720745 (D. Utah July 8, 2010)(unpublished); see also *Whipple v. State of Utah*, Case No. 2:10-cv-811 DAK, 2011 WL 4368568 *17 (D. Utah

Aug. 25, 2011)(Report and Recommendation)(unpublished)(“Thus, because a private right of action does not exist in Utah for theft and theft by extortion, the court recommends that Plaintiff’s third cause of action [for “extortion”] be dismissed.”). Consequently, the Plaintiffs’ Fourth Claim for Relief for extortion is dismissed.

III. Antitrust Claim.

The Plaintiffs allege in their Fifth Claim for Relief that the Defendants conspired with the other Defendants in violation of Utah’s Antitrust Act and the Utah Const. Art. XII, § 20. The Utah Antitrust Act explicitly adopts and follows interpretations of federal antitrust laws. See § 76-10-3118. A violation of the Sherman Act “requires that there be a contract, combination . . . or conspiracy . . . ; [i]ndependent action is not proscribed.” Section 76-10-3104 of the Utah Antitrust Act requires that “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal.” A claim for violation of the antitrust laws requires pleading facts showing a concerted effort among the defendants. In Utah, the facts must support “a ‘meeting of the minds’ on a common ‘object or course of action.’” *Tomlinson*, 2013 UT App 26 at ¶ 19 (quoting *Petersen v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶ 12, 42 P.3d 1253).

The Plaintiffs offer no facts alleging that Newfield and the other Defendants had a meeting of the minds to boycott the Plaintiffs’ business. All that is alleged is UTERO informed Newfield that the Rocks Off was no longer allowed to conduct business on tribal land, and Newfield relayed the message to the Plaintiffs explaining that Newfield was not going to do business with Plaintiffs due to the UTERO notice. The Plaintiffs’ claim merely recites the elements of an antitrust claim. “[A] complaint is subject to dismissal where it does little more

than recite the relevant antitrust laws” and “the use of antitrust buzz words does not supply the factual circumstances necessary to support conclusory allegations.” *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006). The Plaintiffs’ Fifth Claim for Relief against Newfield is dismissed.

V. Blacklisting

The Plaintiffs’ claim for blacklisting is derived from Article XII § 19 and Article XVI § 4 of the Utah Constitution. Article XII § 19 provides:

Each person in Utah is free to obtain and enjoy employment whenever possible and a person or corporation, or their agent, servant, or employee may not maliciously interfere with any person from obtaining employment or enjoying employment from any other person or corporation.

Article XVI § 4 states:

The exchange of black lists by railroad companies, or other corporations, associations or persons is prohibited.

The Plaintiffs Amended Verified Complaint fails to allege facts concerning the exchange of blacklists, or malicious interference with Plaintiffs’ employment, on the part of Newfield. The plead facts allege Newfield received an email from UTERO concerning Rocks Off, and in compliance with the UTERO Ordinance governing work done on tribal grounds, Newfield no longer used Rocks Off as a contractor or subcontractor. The facts allege that Newfield followed the direction of UTERO by not using the Plaintiff for work completed on tribal land because the Plaintiff was no longer licensed to do work on tribal land. The Plaintiffs’ cause of action for blacklisting is dismissed.

IV. Civil Conspiracy


A civil conspiracy claim requires “(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or

more unlawful, overt acts, and (5) damages as a proximate result thereof.” *Estrada v. Mendoza*, 2012 UT App 82, ¶ 13, 275 P.3d 1024, 1029. A civil conspiracy claim also “requires as one its essential elements, underlying tort,” and “a plaintiff is obligated to plead the existence of such a tort.” *Id.* The Plaintiffs Amended Verified Complaint does not allege any facts concerning an underlying tort. Nor have the Plaintiffs alleged any facts showing Newfield and the other Defendants came to a meeting of the minds to commit an unlawful act against the Plaintiffs. Therefore, the Plaintiffs Seventh Claim for Relief is dismissed.


The Newfield Defendants’ Motion to Dismiss is granted.

Dated this 28 day of March, 2016.

BY THE COURT:



SAMUEL P. CHIARA, District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130000009 by the method and on the date specified.

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03/29/2016

/s/ KELLY SNOW

Date: _____

Deputy Court Clerk

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT, STATE OF UTAH

Ryan Uresk Harvey, et al.,

Plaintiffs,

vs.

Ute Indian Tribe of the Uintah and Ouray
Reservation, et al.,

Defendants.

RULING AND ORDER

Case No. 130000009

Judge SAMUEL P. CHIARA

This matter is before the Court on the Defendants' Motion to Dismiss or in the Alternative Partial Motion to Dismiss Plaintiffs' Amended Verified Complaint.

The Defendants are divided into three groups, each represented by different counsel. The Defendants making this Motion include D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose, ("individual Defendants") in their individual capacities, and as representatives of the Ute Indian Tribe, and LaRose Construction Company, Inc., and D.Ray C. Enterprises, L.L.C. These Defendants are represented by Mr. Joel T. Zenger. The Defendants Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), L.C. Welding & Construction, Inc., and Huffman Enterprises, Inc., are represented by Mr. J. Preston Stieff. Defendants Newfield Production Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc., are represented by Mr. Christopher R.Hogle. The Plaintiffs are represented by counsel, Mr. John Hancock, Mr. Clark Allred, and Mr. Brad Brotherson.

The Court heard oral argument on this Motion, and on the motions of the other Defendants, on January 29, 2016. Oral argument was provided from all of the parties on each of the Motions. The issues were taken under advisement. After careful review of the pleadings, the arguments, and the relevant case law, the Court is prepared to rule on the issues.

The individual Defendants offer many of the same arguments made by the Tribe in their Motion to Dismiss. The Court adopts the Ruling and Order on the Tribe's Motion to Dismiss in as far as the two Motions overlap. Specifically, the Court finds that the Tribe is a necessary and indispensable party which is immune from suit. Consequently, the case is dismissed for that reason, as well as the additional reasons listed below. The Court's Ruling and Order here will address the arguments the individual Defendants offer that differ from the Tribe's.

I. D. Ray C. Enterprises and LaRose Construction.

The Plaintiffs have asserted claims against D. Ray C. Enterprises and LaRose Construction, apart from the claims made against the businesses' owners, Defendants Dino Ray Cesspooch and Jackie LaRose. "To support a claim for relief, a plaintiff 'must have alleged sufficient facts . . . to satisfy each element' of a claim." *Tomlinson v. NCR Corp.*, 296 P.3d 760 (Utah App. 2013) superseded on other grounds 2014 UT 53, 345 P.2d 523 (Utah 2014)(quoting *MBNA Am. Bank N.A. v. Goodman*, 140 P.3d 589, 591 (Utah App. 2006)). The Plaintiffs' Amended Verified Complaint does not assert any facts supporting the claims made against these two corporate Defendants. The Amended Verified Complaint only alleges facts regarding the individual Defendants' actions as individuals and as government officials of the Tribe. Consequently, the Plaintiffs have failed to state a claim upon which relief can be granted against these two corporate Defendants. The Amended Verified Complaint is dismissed pursuant to

Rule 12(b)(6) for the Defendants D. Ray C. Enterprises and LaRose Construction.

II. Dino Ray Cesspooch, Jackie LaRose, and Sheila Wopsock.

The next issue is whether suit can be maintained against the individual Defendants, or if sovereign immunity bars the suit. The Plaintiffs' claims are brought against the individual Defendants both in their individual capacity and in their capacity as governmental officials of the Tribe. The Defendants argue sovereign immunity applies to them as government officials of the Tribe. The Plaintiffs argue that sovereign immunity does not apply because the actions taken by the officials were outside the scope of their governmental authority.

The Ute Tribe's sovereign immunity does not apply to the individual Defendants acting in their individual capacities. See *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 173, 97 S. Ct. 2616, 2621 (1977)("[t]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction."). In *Maxwell v. Cty. of San Diego*, the 9th Circuit considered whether paramedics employed by the Viejas Band's fire department were immune from suit for actions committed by the paramedics in their individual capacities. 708 F.3d 1075, 1089 (9th Cir. 2013). The court held sovereign immunity did not bar the suit against the paramedics individually because the tribe was not the real party in interest, and money damages would not be paid from the tribal treasury. *Id.*

The determining factor in deciding whether a tribe's sovereign immunity extends to the tribe's government officials is whether the sovereign "is the real, substantial party in interest." *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001). Whether a tribe is the real party in interest is decided by looking at the relief sought. *Id.* "[T]he general rule is that relief sought

nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 S.Ct. 900 (1984). Conversely, sovereign immunity does not bar the suit if the relief sought is only against the individual tribal officer personally. *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240 (10th cir. 2008).

Here, the relief sought by the Plaintiffs indicates that the Ute Tribe is the real party in interest. The Plaintiffs seek declaratory relief against the Tribe, UTERO, and the UTERO officials. The Plaintiffs request the Court issue a declaratory order limiting the Tribe, UTERO, and UTERO officials from regulating private business activities of non-Indians outside of the tribal land. This type of relief directly involves the Tribe, not the individual Defendants personally. The Plaintiffs also seek injunctive relief prohibiting the Tribe, UTERO, and UTERO officials, from acting in a way which interferes with the Plaintiffs’ business. Again, this type of relief only applies to the Tribe and the Tribe’s officials and not the individual Defendants. The relief Plaintiffs are seeking is against the Tribe. Therefore, the Tribe is the real party in interest and sovereign immunity also applies to the individual Defendants.

Even assuming that the individual Defendants are being sued in their individual capacities, and the Plaintiffs were not seeking damages from the Tribe, the case must still be dismissed. The Plaintiffs allege that the UTERO officials acted beyond the scope of authority given them to regulate business on tribal land. The authority given to the UTERO officials to regulate business in their jurisdiction derives from the UTERO Ordinance. Whether the UTERO officials exceeded the scope of authority given to them by the UTERO Ordinance necessarily requires examining and interpreting the UTERO Ordinance. Interpreting tribal laws is outside

the scope of a state district court's general jurisdiction. "Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co. v. LaPlante*, 107 S.Ct. 971, 977 (1987).

The Defendants' Motion to Dismiss is granted. The claims asserted against Defendants D. Ray C. Enterprises and LaRose Construction are dismissed pursuant to Rule 12(b)(6). The claims asserted against the individual Defendants are dismissed pursuant Rule 12(b)(1).

Dated this 28 day of March, 2016.

BY THE COURT:

A handwritten signature in cursive script, reading "Samuel Chiara", is written over a horizontal line.

SAMUEL P. CHIARA, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 130000009 by the method and on the date specified.

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03/29/2016

/s/ KELLY SNOW

Date: _____

Deputy Court Clerk

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT, STATE OF UTAH

Ryan Uresk Harvey, et al.,

Plaintiffs,

vs.

Ute Indian Tribe of the Uintah and Ouray
Reservation, et al.,

Defendants.

RULING AND ORDER

Case No. 130000009

Judge SAMUEL P. CHIARA

This matter is before the Court on the Plaintiffs' Motion to File Supplemental Pleadings.

The Plaintiffs request to be allowed to supplement their pleadings to include events which have taken place since the inception of this lawsuit. The Plaintiffs make this request pursuant to Rule 15(d) of the Utah Rules of Civil Procedure, which states in part:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

A rule 15(d) motion is "addressed to the sound discretion of the court, and leave to serve a supplemental pleading 'should be liberally granted unless good reason exists for denying leave, such as prejudice to the defendants.'" *Southwest Nurseries, LLC v. Florists Mutual Insurance, Inc.*, 266 F.Supp. 2s 1253, 1256 (D.Colo. 2003)(quoting *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001)). "Refusing leave to amend is generally only justified upon a

showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment.” *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

The Plaintiffs’ Motion is a clear attempt to bolster their chances of surviving the various motions to dismiss filed by the Defendants. The three motions made by the Defendants have been fully briefed and submitted for decision. The Court heard oral argument on all of the motions on January 29, 2016. Based on the extensive briefing in those motions, it is apparent that the parties spent a considerable amount of time and effort producing them. The Court also spent a considerable amount of time and effort researching and reviewing the arguments. The Defendants’ motions were also pending for an extended period of time. The Defendants including the UTERO officials made their first motion to dismiss on May 1, 2013. The Newfield Defendants made their motion to dismiss on July 7, 2014. The Ute Tribe made their motion on December 16, 2015. Attempting to insert new factual allegations into the pleadings after the passage of this amount of time, after the effort to produce the motions, and hold oral argument, would be unjust.

The Defendants would be unduly prejudiced by allowing the pleadings to be amended in effort to defeat their motions to dismiss. The Plaintiffs initiated this lawsuit nearly three years ago. The Defendants have been waiting nearly that long to have their motions considered. Requiring the Defendants to remake their motions, and to wait longer to have the motions resolved, would be unjust. The Plaintiffs had an opportunity to draft their complaint as they saw fit. The Plaintiffs were given an additional opportunity to amend their complaint on September 4, 2013. The Plaintiffs literally had years to amend their pleadings in light of the Defendants’

motions. Allowing the Plaintiffs an additional opportunity to defeat the pending motions is not allowed by rules regarding motion pleading, and would be an unjust result.

Nevertheless, the Plaintiffs' Motion is moot. The Court granted the Defendants' motions, dismissing this matter in its entirety. The Court provided various reasons for dismissing the matter, including the fact that the Ute Tribe was a necessary and indispensable party to this action. Sovereign immunity applies to the Ute Tribe. Therefore, the lawsuit cannot be maintained in a state district court. Furthermore, this lawsuit requires this Court to analyze and interpret the Ute Tribe's UTERO ordinance. A state district court does not have jurisdiction over a sovereign, nor can it interpret the laws of the sovereign. None of the factual allegations offered by the Plaintiffs changes that result. Even if the Court were to allow the Plaintiffs the opportunity to amend their pleadings, the outcome would be the same. The matter would be dismissed.

Additionally, the Plaintiffs' Motion does not explain how the various factual allegations are relevant, or how they apply to the claims. The Motion is simply a list of the factual allegations the Plaintiffs allege have occurred since the inception of this action. The Plaintiffs suggest that the Court examine the factual allegations and determine which ones may be relevant in deciding the motions to dismiss. The Court declines the Plaintiffs' invitation. The Plaintiffs' responsibility is to offer the facts and explain how they apply to the claims, and to the arguments made.

The Plaintiffs' Motion to File Supplemental Pleadings is denied.

Dated this 28 day of March, 2016.

130000009 - Ruling & Order

BY THE COURT:



SAMUEL P. CHIARA, District Court Judge



CERTIFICATE OF NOTIFICATION

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03/29/2016

/s/ KELLY SNOW

Date: _____

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Huffman Enterprises, Inc.*

IN THE EIGHTH JUDICIAL DISTRICT COURT
FOR DUCHESNE COUNTY – ROOSEVELT
STATE OF UTAH

RYAN URESK HARVEY, et al.

Plaintiffs,

JUDGMENT

vs.

Case No. 130000009

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

Judge Samuel P. Chiara

Defendants.

This matter came before the Court on the following five motions: (1) the Motion to Dismiss Amended Verified Complaint filed by the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), LC. Welding & Construction, Inc., and Huffman Enterprises, Inc.; (2) the Motion to Dismiss Amended Verified Complaint filed by Defendants Newfield Production Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. ("Newfield"); (3) the Motion to Dismiss or in the Alternative Partial Motion to Dismiss Plaintiffs' Amended Verified Complaint filed

by Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose (“individual Defendants”), in their individual capacities, and as representatives of the Ute Indian Tribe, and LaRose Construction Company, Inc., and D. Ray C. Enterprises, L.L.C.; (4) the Plaintiffs’ Motion for Leave to Brief, for Clarification of Order, and Related Relief; and (5) the Plaintiffs’ Motion to File Supplemental Pleadings.

The Defendants are divided into three groups, each represented by different counsel. Defendants Ute Indian Tribe of the Uintah and Ouray Reservation (“Tribe”), L.C. Welding & Construction, Inc., and Huffman Enterprises, Inc. are represented by Mr. J. Preston Stieff. Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose, in their individual capacities, and LaRose Construction Company, Inc., and D. Ray C. Enterprises, L.L.C., are represented by Mr. Daniel S. Press and Mr. Craig H. Howe. Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose, in their official capacities, are represented by Mr. Patrick S. Boice. Defendants Newfield Production Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc., are represented by Mr. Christopher R. Hogle. The Plaintiffs are represented by counsel, Mr. John Hancock, Mr. Clark Allred and Mr. Brad Brotherson.

The Court heard oral argument on the three dismissal motions on January 29, 2016. Oral argument was provided from all of the parties on each of the Motions. The issues were taken under advisement. Pursuant to U.R.C.P. 52(a), after careful review of the pleadings, the arguments, and the relevant case law, the Court entered four Rulings and Orders on March 28, 2016. The Rulings and Orders having fully resolved this matter, the Court is now prepared to enter its final judgment.

The Court having considered the pleadings and arguments of the parties, and the relevant case law, and having entered its Rulings and Orders, and being otherwise fully advised, it is hereby **ORDERED, ADJUDGED AND DECREED:**

**I. Dismissal Motion of Defendants Ute Indian Tribe
of the Uintah and Ouray Reservation, LC Welding & Construction,
and Huffman Enterprises, Inc.**

- 1.This matter came before the Court on the Motion to Dismiss Amended Verified Complaint filed by the Ute Indian Tribe of the Uintah and Ouray Reservation (“Tribe”), LC. Welding & Construction, Inc., and Huffman Enterprises, Inc.
- 2.The portion of this motion seeking dismissal on the grounds that the Tribe is an indispensable party is joined by all of the defendants.
- 3.The Defendants move the Court to dismiss the Plaintiffs’ Verified Complaint pursuant to Rule 12(b)(1) and 12(b)(7) of the Utah Rules of Civil Procedure. The Defendants argue this Court lacks subject matter jurisdiction because the Tribe enjoys sovereign immunity. Additionally, the Defendants argue that the Verified Complaint should be dismissed as to all Defendants because the Tribe is a necessary and indispensable party pursuant to Rule 19.

A. Subject Matter Jurisdiction

- 4.Sovereign immunity is a jurisdictional issue. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). An Indian tribe is immune from suit unless the tribe has waived its immunity or Congress authorized the suit. *Kiowa Tribe of Oklahoma v. Manufacturing*

Technologies, Inc., 523 U.S. 751, 754 (1988). In order to waive tribal sovereign immunity Congress must unequivocally express its intent to do so, or the tribe must clearly waive immunity. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); see also *Santa Clara v. Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). “Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.” *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 172 (1977).

5. The Ute Indian Tribe’s Law and Order Code describes the extent of the Tribe’s sovereign immunity and the circumstances in which the Tribe’s sovereign immunity may be waived. Section 1-8-5 states:

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. Section 1-8-5. The UTERO Ordinance does waive sovereign immunity in certain circumstances. Section 13.3 of the UTERO Ordinance states:

The Tribe “hereby agrees to waive its sovereign immunity for the sole and limited purpose of enforcement of the terms of this Ordinance. This waiver is expressly limited to injunctive and declaratory relief with respect to the enforcement of the terms of this Ordinance and does not include monetary damages. This limited waiver is not, and should not be construed as a blanket waiver of the Tribe’s sovereign immunity. Under no circumstances shall the tribal funds of the Tribal Treasury be subject to any award for damages.

UTERO Ord., Sec. 13.3. The waiver is limited to enforcement of the UTERO Ordinance

only, and is not a blanket waiver, or waiver for any other purpose. The Tenth Circuit Court of Appeals recently interpreted this section of the UTERO Ordinance and held:

Under the terms of that ordinance, the Tribe has indeed ‘agree[d] to waive its sovereign immunity.’ But the ordinance explains that this ‘waiver is not, and should not be construed as a blanket waiver of the Tribe’s sovereign immunity.’ Instead, the waiver exists ‘for the sole and limited purpose of enforcement of the terms of [the] Ordinance’

Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah, 790 F.3d 1000, 1010 (10th Cir. 2015) (quoting UTERO Ordinance). The Court further explained:

[E]ven assuming without granting that the defendants’ counterclaims could somehow be described as an effort to ‘enforce’ the ordinance - itself a seriously questionable notion - the ordinance is enforceable only before tribal courts and the Tribe’s UTERO Commission. Nowhere does the waiver permit other parties to hale the Tribe before a nontribal tribunal and this court enjoys no authority to rewrite for the defendants the waiver the Tribe has written for itself.

Id.

6.The Plaintiffs argue the Tribe has waived sovereign immunity by the UTERO Code Section 13.3. Consequently, the Plaintiffs argue that a suit against the Tribe can be maintained. The Plaintiffs further argue that the basis for their Verified Complaint is the allegation that the Defendants have acted outside the scope of UTERO and attempted to conduct illegal and unlawful activities outside of the boundaries of the Reservation. The Plaintiffs argue the Defendants acted ultra vires and their claims do not implicate the UTERO Code but are actionable state tort, statutory, and constitutional claims. The Plaintiffs argue that they are not bound to prosecute their claims in tribal court or the before the UTERO Commission.

7. Whether Plaintiff is attempting to enforce terms of the UTERO Ordinance or not, the result is the same: dismissal against the Tribe for lack of subject matter jurisdiction. If the Plaintiffs' claims against the Tribe are not brought pursuant to the UTERO Ordinance, then sovereign immunity applies barring the claims because there has been no clear and express waiver of sovereign immunity outside of the terms of the UTERO Ordinance. If Plaintiffs' claims are brought to enforce the UTERO Ordinance, those claims must have been brought in tribal court. The waiver of sovereign immunity in the UTERO Ordinance explains it is "for the sole and limited purpose of enforcement of the terms of [the] Ordinance." UTERO Ord., Sec. 13.3. The waiver "is not, and should not be construed as a blanket waiver of the Tribe's sovereign immunity." *Id.* However, as explained by the Tenth Circuit, according to the UTERO Ordinance, the claims can only be brought before the tribal court and the Tribe's UTERO Commission. Under either scenario, this Court lacks subject matter jurisdiction over the Tribe.

8. Additionally, the Plaintiffs argue the Tribe waived sovereign immunity by making a general appearance in this litigation. Plaintiffs' memorandum contained no authority for this position but referenced the argument contained in a memorandum filed by them on May 15, 2013. That memorandum also appears devoid of any legal authority for the proposition that a tribe waives sovereign immunity by making a general appearance in a case. At oral argument, Plaintiffs' counsel argued that the Tribe had made a general appearance in this case by seeking a dismissal of the entire case for failure to join an indispensable party.

Counsel then provided the Court with three cases that allegedly support the position. Those cases had not been cited during briefing and were objected to by defense counsel. The Court allowed the cases in an effort to include all applicable legal authority to assist it in deciding a complicated case. The Court authorized defense counsel to file a supplemental response to the three cases provided by Plaintiffs. Defendants submitted the supplemental response as allowed by the Court on February 5, 2016.

9. On February 8, 2016, Plaintiffs filed a motion requesting that the Court grant leave to allow full briefing of the issue of whether the Tribe's sovereign immunity was waived by making a general appearance. It is a mystery to this Court why Plaintiffs believe they should be allowed more argument on this point. The Tribe asked for dismissal of the case on the grounds of sovereign immunity in its motion. The Plaintiffs filed a twenty-page memorandum in response that included an argument that the Tribe had made a general appearance in this case and that it had waived sovereign immunity. Then, at oral argument Plaintiffs argued that same point and the Court allowed Plaintiffs to present case law that had not been provided in briefing. Obviously, Plaintiffs knew waiver of sovereign immunity in any of its iterations was at issue or they would not have appeared at oral arguments armed with case law on that point. The fact that Plaintiffs failed to fully brief their defenses to the primary issue raised by the Tribe in its motion for dismissal is inexplicable. There is no confusion on this point. The Tribe claims it is immune from suit in state court. The defense to this claim is waiver of

immunity. Waiver potentially occurs in a number of ways. Any of the potential ways by which Plaintiff claims the Tribe waived its immunity must be raised by Plaintiff. Procedurally, arguments are not made by a series of separate memoranda. Rather, all of a responding party's arguments on a point are expected to be made in a single responsive pleading. There is only one reason why any further briefing was allowed by the Court following oral argument. Namely, that Plaintiffs attempted to introduce case law during oral argument that had not previously been briefed. It was only appropriate that Defendants be given the opportunity to address case law not previously disclosed before the Court made its ruling. That necessary briefing opens no new doors to Plaintiffs.

10. Nevertheless, the Court has reviewed the cases belatedly cited by the Plaintiffs for the proposition that a tribe waives sovereign immunity by making a general appearance in a case and a discussion of each is had below. The Court first notes that subject matter jurisdiction can be raised at any time: *Barnard v. Wasserman*, 855 P.2d 243, 247-48 (Utah 1993) ("This court has made clear that challenges to subject matter jurisdiction may be raised at any time and cannot be waived by the parties.").

11. In *Friends of East Willits Valley v. County of Mendocino*, 123 Cal. Rptr. 2d 708, 711 (Cal. Ct. App. 2002), under the heading of "[b]ackground" the court stated:

In a prior unpublished decision we rejected initial challenges to trial court jurisdiction over the Tribe, concluding that because the Tribe has made a general appearance, it waived its sovereign immunity.

Additionally, in the “[d]iscussion” section of the ruling, the court stated:

Indeed, the Tribe waived sovereign immunity previously when it made a general appearance in this case. It also expressly waived sovereign immunity in connection with enforcement of the Tribal/County Agreement.

Id. at 715. Notably, the statement by the Court that the Tribe had waived its sovereign immunity by making a general appearance in the case cites no legal authority for that position. Thus, without further explanation, that statement carries no weight. The California Court’s decision is not controlling and because it contains no discussion and cites no authority, it cannot be persuasive. It is conceivable that the Tribe expressly waived immunity in its pleadings when it appeared in the case, or perhaps, it sought some affirmative relief. However, because the prior case is unpublished and because the published case offers no authority nor explanation for the assertion, the case is of no assistance to this Court’s determination of the issue. Further, the Tribe in *Friends of East Willits Valley* expressly waived its sovereign immunity when it entered into a specific tribal/county agreement that was at issue in the lawsuit. Thus, in the face of an express waiver contained in the written agreement, it is difficult to determine how much consideration was given to the issue of waiver by general appearance or whether the two were one in the same in that instance.

12.Next, the Plaintiffs cite *Nushake, Inc. v. State Comp. Ins. Fund*, No. CGC-05-441299, 2011 Cal. Super. LEXIS 319, at *1 (Cal. Super. Ct. April 29, 2011). In *Nushake*, the court held that the tribe waived sovereign immunity by directly and unequivocally consenting to enforcement of the settlement agreement in California State Court. *Id.* at **35-40. *Nushake*’s holding, therefore, is unhelpful

in this case because the Ute Tribe has not similarly consented to enforcement of any agreement here at issue in Utah State Court.

13.Finally, the Plaintiffs cite *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). In *Oregon*, the Yakima Tribe moved to intervene in a lawsuit under Federal Rule of Civil Procedure 24(a)(2). The *Oregon* Court held that because the tribe had intervened in the case it had assumed the status of an original party and was fully bound by all future court orders. See, *id.* at 1014. The holding in *Oregon* is logical because one who intervenes in a case is seeking to pursue a claim or to defend a particular position voluntarily. An intervenor is identical to an original plaintiff. Plaintiffs and intervenors are in any particular case because they consent to be in the case. Whether a plaintiff or intervenor, they affirmatively sought to be a party. Were the Ute Tribe to bring an action in state court as a plaintiff, or were it to intervene, an argument that it had waived immunity could easily be made. The Ute Tribe in the present case did not voluntarily intervene, rather, it is an involuntary defendant in the action. Thus, the holding in *Oregon* has no bearing on this Court's decision.

14.The Ute Tribe has only sought to have this case dismissed against it based on its sovereign immunity. Additionally the Tribe has asked the case not go forward against any defendant because the Tribe claims to be a necessary and indispensable party. The facts of this case do not parallel any of the cases the Plaintiffs have cited in support of their argument that sovereign immunity can be waived by a general appearance. Nor do the cases cited by the Plaintiffs support

the conclusion that a general appearance waives the sovereign immunity of a tribe.

B. Failure to Exhaust Administrative Remedies

15. Next, the Defendants argue in the alternative, that the Plaintiffs' Verified Complaint should be dismissed for failure to exhaust administrative remedies. The UTERO Ordinance requires the Plaintiffs to file a written complaint with the UTERO Commission prior to filing suit. The Defendants argue the Plaintiffs failed to do this prior to filing the Verified Complaint.

16. The Court will not decide this issue. The Court has already granted the Tribe's Motion to Dismiss, making this issue moot. Because this Court does not have jurisdiction over the Tribe, whether or not the Plaintiff adhered to the requirements of the UTERO Ordinance in bringing their claims is of no consequence to this Court. This Court would not have jurisdiction over the Tribe even if the Plaintiffs had exhausted their administrative remedies. Additionally, the tribal court, if necessary, is better situated to determine if the Plaintiffs followed their procedures under the UTERO Ordinance.

C. Necessary and Indispensable Party

17. Finally, the Defendants argue the entire Verified Complaint must be dismissed as to all defendants pursuant to Rule 12(b)(7) because the Tribe is immune from suit and is a necessary and indispensable party under Rule 19.

18. Determining joinder of a party under rule 19 requires the court to potentially

make a three step analysts. First, the court must determine whether a party is necessary. *Grand County v. Rogers*, 44 P.3d 734, 740 (Utah 2002). Next, the court must determine that joinder of the necessary party is feasible. *Id.* at 741. Finally, if the party is necessary and joinder is not feasible, the court must determine whether the party is indispensable. *Id.*

19. Rule 19(a) of the Utah Rules of Civil Procedure states in part that a party is necessary if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

“The basic purpose of rule 19 is ‘to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.’” *Landes v. City Capital Bank*, 795 P.2d 1127, 1130 (Utah 1990); *quoting* 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* Section 1602, at 21 (1986).

20. The Plaintiffs generally allege the Ute Tribe and the Tribe’s governmental representatives have acted beyond the authority of the UTERO Ordinance and have committed torts against the Plaintiffs. The Plaintiffs insist that their claims do not rely on the UTERO Ordinance but are simple state tort, statutory, and constitutional law claims. The Plaintiffs claim the individual tribal representatives acted in their official capacities, although ultra vires, to commit wrongful acts against the Plaintiffs. Paragraphs 11, 12, 13, and 14 of Plaintiffs’ prayer for relief

in the Amended Verified Complaint requests that the Court enjoin the Ute Tribe and UTERO officials from actions that interfere with Plaintiffs' abilities to conduct business. Paragraph 11 asks the Court to enjoin the Tribe and UTERO officials from regulating Plaintiffs' business activities in a manner that exceeds tribal authority. Paragraph 12 asks for an injunction against wrongful interference with Plaintiffs' relationships with oil and gas companies. In part, paragraph 13 seeks to enjoin retaliation against Plaintiffs. And paragraph 14 seeks to enjoin retaliation against oil and gas companies that do business with Plaintiffs.

21. The Court must first determine whether the Tribe is a necessary party within the meaning of U.R.C.P. 19. The inquiry is whether the Tribe claims an interest relating to the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest.

22. Any substantive analysis of the Plaintiffs' tort claims against UTERO officials would require the Court to make specific determinations regarding the ability of the Tribe to regulate tribal business relationships. For example, Plaintiffs' Amended Complaint alleges that UTERO officials told Defendant Newfield that if Newfield utilized Plaintiffs' products or services, Newfield would be penalized and/or sanctioned to the fullest extent of tribal law. Plaintiffs characterize the Tribe's action in sending the communication as threatening, intimidating, retaliating, and wrongful, etc. In order for the Court to enjoin UTERO officials, and thereby enjoin the Tribe, from "wrongfully interfering in Plaintiffs' relationship

with oil and gas companies,” the Court would necessarily be required to determine whether the Tribe and its officials have authority to give such a directive to Newfield and/or to other oil and gas companies. In essence, the question is whether the Tribe, through its officials, may tell a company that the company may be precluded from operating on tribal lands if that company continues to engage in business with a particular individual or company. It seems apparent that a determination about whether the Tribe and its officials may issue directives relating to oil companies’ business activities, such as the directive alleged to have been issued in this case, is a critical interest of the Tribe. Further, injunctions against UTERO officials prohibiting them from issuing such directives effectively serves as an injunction against the Tribe from issuing those directives. The Court finds that such a disposition in this case, in the Tribe’s absence, may as a practical matter impair or impede the Tribe’s ability to protect that interest. Therefore, the Tribe is a necessary party to this action.

23. However, as outlined above, this Court lacks subject matter jurisdiction over the Tribe, making joinder not feasible. Therefore, Rule 19(b) applies, and the Court must determine whether the Tribe is indispensable. Rule 19(b) states:

If a person described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

24. In determining whether a judgment rendered in the Tribe's absence might be prejudicial to the Tribe, the discussion above clearly implicates a probability of prejudice to the Tribe. Plaintiffs seek injunctions that would require the Tribe's officials to cease sending letters to oil and gas companies telling the companies that they face sanctions under the UTERO Ordinance if they continue to utilize Plaintiffs' products and services. A determination by the Court that the UTERO officials' act of sending the directive to Newfield was wrongful is potentially prejudicial to the Tribe. An injunction against tribal officials is effectively an injunction against the Tribe. Such an injunction might limit the Tribe's ability to issue directives it deems necessary under the UTERO Ordinance and could be prejudicial to the Tribe's ability to regulate its affairs. Potentially, depending upon the Tribe's interpretations of its own laws, the Tribe could ban any person or company from doing business on Tribal ground for any reason. A judgment rendered by this Court in the Tribe's absence that purports to limit the Tribe's ability to sanction or exclude businesses from Tribal property for the reasons stated in the alleged communication in this case creates a significant potential for prejudice against a key interest in tribal self-governance.

25. Next, none of the parties have suggested how the Court could shape the relief or enter protective provisions in the judgment that would lessen or avoid the prejudice described above. Neither can the Court conceive of any. Nearly all of the Plaintiffs' requests for relief ask for injunctions against the Tribe and UTERO officials. Conceptually, the Court cannot see how it could grant any version of

the relief requested that would not prejudice the Tribe.

26.Further, the Tribe and the UTERO officials are the key figures in this action. It is their alleged actions that constitute Plaintiffs' primary contention of wrongdoing. A judgment against the other Defendants, without the injunctions against the Tribe and its UTERO officials as demanded by Plaintiffs would seem to be an inadequate remedy.

27.Finally, the Plaintiffs have another forum to address their claims other than in the State Court. Plaintiffs could have raised their claims through tribal administrative procedures and perhaps in the Tribal Court. The Plaintiffs argue that the Tribal Court is not neutral or fair. The Court sees such an allegation, without any factual basis, no differently than if Plaintiffs claimed the State's district or justice courts were inherently biased against a particular class of parties.

28.The case contains claims which directly involve the Tribe's interests. The Tribe is immune from suit, and resolving the claims without the Tribe's presence would impair their ability to protect that interest. Consequently, the Tribe is a necessary and indispensable party to this action.

29.Defendant Newfield has also sought dismissal for failure to join an indispensable party and that motion is best addressed here. Although similar, the necessary and indispensable analysis with regard to Newfield does merit some additional discussion. Rule 19 states that a party is a necessary party if "he claims an interest relating to the subject of the action and is so situated that

the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.”

30. The question then becomes whether a disposition of this action in the absence of the Tribe would leave Newfield subject to a substantial risk of inconsistent obligations by reason of the Tribe’s claimed interest. The Tribe’s claimed interest is its ability to regulate business activity on tribal lands. That ability to regulate business activity might include issuing directives to oil and gas companies and imposing sanctions on companies for not abiding by the Tribe’s directives. One potential disposition of this action is that the Court find Newfield liable for one or more of the causes of action claimed by Plaintiffs and grant damages against Newfield. Simultaneously, because the Court has no subject matter jurisdiction over the Tribe to restrain the Tribe from any action relating to the directives it sends to oil and gas companies relating to business activities on tribal lands, and because the Court has no subject matter jurisdiction to control the other means the Tribe uses to enforce its directives, Newfield could become subject to inconsistent obligations in State Court and before the UTERO Commission. If Newfield fails to abide by the directives of UTERO in an effort to avoid state legal claims that may be brought by Plaintiffs, Newfield may be subject to sanctions imposed by the Tribe. Likewise, if Newfield follows the directives of UTERO in an effort to maintain its status with the Tribe, to continue its ability to operate on tribal lands, and to avoid tribal sanctions, Newfield may

very conceivably be subject to further civil sanctions in State Court.

31. Thus, disposition of this case in the Tribe's absence may leave Newfield subject to a substantial risk of incurring inconsistent obligations. In this context, the Tribe is a necessary party to the action.

32. Whether the Tribe is an indispensable party from Newfield's perspective also merits additional discussion. Again, Rule 19(b) requires the Court to consider: (1) to what extent a judgment rendered in the Tribe's absence might be prejudicial to Newfield; (2) the extent to which the prejudice can be lessened or avoided; (3) whether a judgment rendered in the Tribe's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

33. As discussed above, a judgment rendered in the Tribe's absence has significant potential to prejudice Newfield. A money judgment against Newfield is not simply a single judgment. In the Tribe's absence, Newfield could potentially be faced with a decision to risk further judgments in state court, face sanctions with the UTERO Commission, or cease its operations relating to tribal lands altogether. Because of the potential for inconsistent judgments between the state courts and the UTERO Commission, Newfield is placed in the untenable position of operating in potential violation of inconsistent directives from courts of two jurisdictions.

34. The Court has been offered no solution to lessen or avoid this potential prejudice and, again, cannot conceive of any manner by which it could create a

ruling that would solve the potential prejudice potentially caused by Newfield being subject to conflicting and inconsistent orders from this Court and from the UTERO Commission.

35. Factors relating to the indispensable status of a party numbered 3 and 4 are no different in the context of Newfield's position than they are in regard to the Tribe's position and need not be reiterated here. Consequently, the Tribe is a necessary and indispensable party to this action.

36. Based upon the foregoing:

- 1) The Plaintiffs' Motion for Leave to Brief, for Clarification of Order, and Related Relief is denied.
- 2) The Tribe's motion to dismiss the Tribe for lack of subject matter jurisdiction is granted.
- 3) The Tribe's Motion to dismiss for failure to join an indispensable party is granted.
- 4) Newfield's Motion to dismiss for failure to join an indispensable party is granted.

II. Dismissal Motion of Newfield Defendants

37. This matter also came before the Court on the Motion to Dismiss Amended Verified Complaint filed by Defendants Newfield Production Company, Newfield Rocky Mountains, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. ("Newfield").

38. Initially, the Court notes that based on the Court's decision on the Ute Tribe's

Motion to Dismiss, this matter is also dismissed against the Newfield Defendants. The Court found that the Ute Tribe was a necessary and indispensable party to this action. However, the Ute Tribe is immune from suit. Consequently, the matter cannot be maintained against Newfield either. The Court adopts that decision here. While that decision makes the additional arguments moot, the Court will address the additional arguments as an alternative basis to dismiss the Amended Verified Complaint.

39. The Defendants move the Court to dismiss the Plaintiffs' Verified Complaint pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. The Rule 12(b)(6) defense is a challenge to the plaintiffs right to relief based on the facts the plaintiff has alleged in the complaint. *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995).

40. The court reviews a Rule 12(b)(6) motion to determine whether the plaintiff would be entitled to relief under any state of facts which could be proved in support of its claims. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107 (Utah Ct. App. 1990). The court must "accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in the light most favorable to the plaintiff." *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997).

41. "[T]o support a claim for relief, a plaintiff 'must have alleged sufficient facts . . . to satisfy each element' of a claim." *Tomlinson v. NCR Corp.*, 2013 UT App 26, paragraph 16, 296 P.3d 760 (quoting *MBNA Am. Bank N.A. v. Goodman*, 2006

UT App 276, paragraph 6, 140 P.3d 589). “[W]hen the pleader complains of conduct described by . . . general terms . . . the allegation of the conclusion is not sufficient; the pleading must describe the nature or substance of the acts or words complained of.” *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982). “[G]eneral accusations in the nature of conclusions . . . will not stand up against a motion to dismiss.” *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962); *Utah Steel & Iron Co. v. Bosch*, 475 P.2d 1019, 1020 (Utah 1970).

42. The Plaintiffs allege that the Newfield Defendants have conspired with the other Defendants to boycott or blacklist the Plaintiffs’ business. The Plaintiffs claim the Newfield Defendants are liable for tortious interference with economic relations, extortion, unlawful restraint of trade, blacklisting, and civil conspiracy. The factual allegations the Plaintiffs rely on to support their claims against Newfield are made in paragraphs 70-74 in the Amended Verified Complaint, which states:

70. Since the March 20, 2013, threats by Director Wopsock, the oil and gas companies, including Newfield, have refused to allow any business who leases Plaintiffs’ equipment or utilizes Plaintiffs’ Products to provide services.

71. By email dated March 22, 2013, Newfield informed Ryan that it would not be utilizing Plaintiffs’ products or services per the direction of the “UTERO committee.”

72. Newfield’s and other oil and gas companies’ cooperation with the unlawful and ultra vires actions of tribal officials empowers said officials and is the direct and proximate cause of damages to Plaintiffs.

73. Since March 2013, Plaintiffs’ have lost approximately \$80,000.00 per day in revenues the result of Newfield and other oil and gas companies cooperating in the unlawful UTERO blacklist and boycott of Plaintiffs.

74. Ryan has been contacted by oil and gas companies, including Newfield, and told that they cannot do business with Plaintiffs or work with anyone that does business with Plaintiffs based on their cooperation with and support of the UTERO officials.

43. The Plaintiffs also submitted attachments to a Motion for Temporary Restraining Order which was filed at the same time as the original Complaint. The attachments concern communications that UTERO had with Newfield concerning Rocks Off, and Newfield's notification to Plaintiff that Newfield would no longer be utilizing the Plaintiff on jobs. The parties referenced these attachments in the subsequent motions. Although foundation was never provided for the documents, none of the parties objected to the attachments on an evidentiary basis. Nor did any of the parties oppose the Court's consideration of the attachments in conjunction with deciding the Motions.

44. The March 20, 2013, UTERO letter notified Newfield that the access permit for Rocks Off, Inc. – Ryan Harvey had been revoked. The letter indicated that companies doing business on the reservation may be penalized or sanctioned for using Rocks Off, Inc. – Ryan Harvey. In response to the letter, a representative of Newfield notified Ryan Harvey by email that Newfield would not be using Rocks Off, Inc., due to the UTERO directive.

45. The facts set forth in the Plaintiffs' Amended Verified Complaint establish, at most, that Newfield was notified by UTERO that Rocks Off's access permit had been revoked and were no longer authorized to conduct work on tribal land, and that Newfield followed that directive by no longer utilizing Rocks Off for work on

tribal land. Those minimal factual allegations fail to support the various claims the Plaintiffs set forth. The facts do not support a finding that Newfield and the other Defendants came to a meeting of the minds to harm the Plaintiffs' business. The facts do not support a claim that Newfield agreed to assist in harming the Plaintiffs' business. The complaint must give the defendant "fair notice of the nature and basis or grounds of the claim" *Zoumadakis v. Uintah Basin Med. Ctr.*, 2005 UT App 325, paragraph 2, 122 P.3d 891. The factual allegations made against Newfield fail to provide adequate notice of the actions complained of. For that reason, and for the reasons listed below, the Defendant Newfield's Motion to Dismiss is granted.

A. Tortious Interference with Economic Relations

46. The elements of a claim for tortious interference with economic relations include "(1) that the defendant intentionally interfered with the plaintiffs' existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). The Plaintiffs allege that the Defendants "have intentionally interfered with the Plaintiffs' existing and potential economic relations." (Am. Compl., at paragraph 117.). The Plaintiffs do not provide any explanation of the Defendants' actions or facts to support their claim. "[G]eneral accusations in the nature of conclusions . . . will not stand up against a motion to dismiss." *Heathman*, 13 Utah 2d at 268, 372 P.2d at 991. The allegations are insufficient to provide the Defendants fair notice of the actions complained of.

Therefore, the Plaintiffs' Third Claim for Relief against Newfield is dismissed.

B. Extortion

47. Utah does not recognize a civil claim for extortion. See *Jensen v. America's Wholesale Lender*, Case No. 1:09-cv-169 TS, 2010 WL 2720745 (D. Utah July 8, 2010) (unpublished); see also *Whipple v. State of Utah*, Case No. 2:10-cv-811 DAK, 2011 WL 4368568 *17 (D. Utah Aug. 25, 2011) (Report and Recommendation) (unpublished) ("Thus, because a private right of action does not exist in Utah for theft and theft by extortion, the court recommends that Plaintiff's third cause of action [for "extortion"] be dismissed."). Consequently, the Plaintiffs' Fourth Claim for Relief for extortion is dismissed.

C. Antitrust Claim

48. The Plaintiffs allege in their Fifth Claim for Relief that the Defendants conspired with the other Defendants in violation of Utah's Antitrust Act and the Utah Const. Art. XII, Section 20. The Utah Antitrust Act explicitly adopts and follows interpretations of federal antitrust laws. See Section 76-10-3118. A violation of the Sherman Act "requires that there be a contract, combination . . . or conspiracy . . . ; [i]ndependent action is not proscribed." Section 76-10-3104 of the Utah Antitrust Act requires that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal." A claim for violation of the antitrust laws requires pleading facts showing a concerted effort among the defendants. In

Utah, the facts must support “a ‘meeting of the minds’ on a common ‘object or course of action.’” *Tomlinson*, 2013 UT App 26 at paragraph 19 (quoting *Petersen v. Delta Air Lines, Inc.*, 2002 UT App 56, paragraph 12, 42 P.3d 1253.

49. The Plaintiffs offer no facts alleging that Newfield and the other Defendants had a meeting of the minds to boycott the Plaintiffs’ business. All that is alleged is UTERO informed Newfield that Rocks Off was no longer allowed to conduct business on tribal land, and Newfield relayed the message to the Plaintiffs explaining that Newfield was not going to do business with Plaintiffs due to the UTERO notice. The Plaintiffs’ claim merely recites the elements of an antitrust claim. “[A] complaint is subject to dismissal where it does little more than recite the relevant antitrust laws” and “the use of antitrust buzz words does not supply the factual circumstances necessary to support conclusory allegations.” *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006). The Plaintiffs’ Fifth Claim for Relief against Newfield is dismissed.

D. Blacklisting

50. The Plaintiffs’ claim for blacklisting is derived from Article XII Section 19 and Article XVI Section 4 of the Utah Constitution. Article XII Section 19 provides:

Each person in Utah is free to obtain and enjoy employment whenever possible and a person or corporation, or their agent, servant, or employee may not maliciously interfere with any person from obtaining employment or enjoying employment from any other person or corporation.

Article XVI Section 4 states:

The exchange of black lists by railroad companies, or other corporations, associations or persons is prohibited.

The Plaintiffs Amended Verified Complaint fails to allege facts concerning the exchange of blacklists, or malicious interference with Plaintiffs' employment, on the part of Newfield. The pled facts allege Newfield received an email from UTERO concerning Rocks Off, and in compliance with the UTERO Ordinance governing work done on tribal grounds, Newfield no longer used Rock Off as a contractor or subcontractor. The facts allege that Newfield followed the direction of UTERO by not using the Plaintiff for work completed on tribal land because the Plaintiff was no longer licensed to do work on tribal land. The Plaintiffs' cause of action for blacklisting is dismissed.

E. Civil Conspiracy

51. A civil conspiracy claim requires "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." *Estrada v. Mendoza*, 2012 UT App 82, paragraph 13, 275 P.3d 1024, 1029. A civil conspiracy claim also "requires as one its essential elements, underlying tort," and "a plaintiff is obligated to plead the existence of such a tort." *Id.* The Plaintiffs' Amended Verified Complaint does not allege any facts concerning an underlying tort. Nor have the Plaintiffs alleged any facts showing Newfield and the other Defendants came to a meeting of the minds to commit an unlawful act against the Plaintiffs. Therefore, the Plaintiffs' Seventh Claim for Relief is dismissed.

52. The Newfield Defendants' Motion to Dismiss is granted.

III. Dismissal Motion of Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose, LaRose Construction Company, Inc., and D. Ray C. Enterprises, L.L.C.

53. This matter also came before the Court on the Defendants' Motion to Dismiss or in the Alternative Partial Motion to Dismiss Plaintiffs' Amended Verified Complaint filed by Defendants D. Ray Cesspooch, Sheila Wopsock, and Jackie LaRose ("individual Defendants"), in their individual capacities, and as representatives of the Ute Indian Tribe, and LaRose Construction Company, Inc., and D. Ray C. Enterprises, L.L.C.

54. The individual Defendants offer many of the same arguments made by the Tribe in their Motion to Dismiss. The Court adopts its decision on the Tribe's Motion to Dismiss in as far as the two Motions overlap. Specifically, the Court finds that the Tribe is a necessary and indispensable party which is immune from suit. Consequently, the case is dismissed for that reason, as well as the additional reasons listed below. The Court's decision here will address the arguments the individual Defendants offer that differ from the Tribe's.

A. D. Ray C. Enterprises and LaRose Construction

55. The Plaintiffs have asserted claims against D. Ray C. Enterprises and LaRose Construction, apart from the claims made against the businesses' owners, Defendants Dino Ray Cesspooch and Jackie LaRose. "To support a claim for relief, a plaintiff 'must have alleged sufficient facts . . . to satisfy each element' of a claim." *Tomlinson v. NCR Corp.*, 296 P.3d 760 (Utah App. 2013), *superseded on other grounds*, 2014 UT 53, 345 P.2d 523 (Utah 2014) (quoting *MBNA Am.*

Bank N.A. v. Goodman, 140 P.3d 589, 591 (Utah App. 2006)). The Plaintiffs' Amended Verified Complaint does not assert any facts supporting the claims made against these two corporate Defendants. The Amended Verified Complaint only alleges facts regarding the individual Defendants' actions as individuals and as government officials of the Tribe. Consequently, the Plaintiffs have failed to state a claim upon which relief can be granted against these two corporate Defendants. The Amended Verified Complaint is dismissed pursuant to Rule 12(b)(6) for the Defendants D. Ray C. Enterprises and LaRose Construction.

B. Dino Ray Cesspooch, Jackie LaRose, and Sheila Wopsock

56.The next issue is whether suit can be maintained against the individual Defendants, or if sovereign immunity bars the suit. The Plaintiffs' claims are brought against the individual Defendants both in their individual capacity and in their capacity as governmental officials of the Tribe. The Defendants argue sovereign immunity applies to them as government officials of the Tribe. The Plaintiffs argue that sovereign immunity does not apply because the actions taken by the officials were outside the scope of their governmental authority.

57.The Ute Tribe's sovereign immunity does not apply to the individual Defendants acting in their individual capacities. See *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 173, 97 S. Ct. 2616, 2621 (1977) ("[t]he successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual

defendants over whom it properly obtained personal jurisdiction.”). In *Maxwell v. Cty. of San Diego*, the 9th Circuit considered whether paramedics employed by the Viejas Band’s fire department were immune from suit for actions committed by the paramedics in their individual capacities. 708 F.3d 1075, 1089 (9th Cir. 2013). The court held sovereign immunity did not bar the suit against the paramedics individually because the tribe was not the real party in interest, and money damages would not be paid from the tribal treasury. *Id.*

58.The determining factor in deciding whether a tribe’s sovereign immunity extends to the tribe’s government officials is whether the sovereign “is the real, substantial party in interest.” *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001). Whether a tribe is the real party in interest is decided by looking at the relief sought. *Id.* “[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 S.Ct. 900 (1984). Conversely, sovereign immunity does not bar the suit if the relief sought is only against the individual tribal officer personally. *Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240 (1999).

59.Here, the relief sought by the Plaintiffs indicates that the Ute Tribe is the real party in interest. The Plaintiffs seek declaratory relief against the Tribe, UTERO, and the UTERO officials. The Plaintiffs request the Court issue a declaratory order limiting the Tribe, UTERO, and UTERO officials from regulating private business activities of non-Indians outside of the tribal land. This type of relief

directly involves the Tribe, not the individual Defendants personally. The Plaintiffs also seek injunctive relief prohibiting the Tribe, UTERO, and UTERO officials, from acting in a way which interferes with the Plaintiffs' business. Again, this type of relief only applies to the Tribe and the Tribe's officials and not the individual Defendants. The relief Plaintiffs are seeking is against the Tribe. Therefore, the Tribe is the real party in interest and sovereign immunity also applies to the individual Defendants.

60. Even assuming that the individual Defendants are being sued in their individual capacities, and the Plaintiffs were not seeking damages from the Tribe, the case must still be dismissed. The Plaintiffs allege that the UTERO officials acted beyond the scope of authority given them to regulate business on tribal land. The authority given to the UTERO officials to regulate business in their jurisdiction derives from the UTERO Ordinance. Whether the UTERO officials exceeded the scope of authority given to them by the UTERO Ordinance necessarily requires examining and interpreting the UTERO Ordinance. Interpreting tribal laws is outside the scope of a state district court's general jurisdiction. "Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co. v. LaPlante*, 107 S.Ct. 971, 977 (1987).

61. The Defendants' Motion to Dismiss is granted. The claims asserted against Defendants D. Ray C. Enterprises and LaRose Construction are dismissed

pursuant to Rule 12(b)(6). The claims asserted against the individual Defendants are dismissed pursuant Rule 12(b)(l).

IV. Plaintiffs' Motion to File Supplemental Pleadings

62.This matter also came before the Court on the Plaintiffs' Motion to File Supplemental Pleadings.

63.The Plaintiffs request to be allowed to supplement their pleadings to include events which have taken place since the inception of this lawsuit. The Plaintiffs make this request pursuant to Rule 15(d) of the Utah Rules of Civil Procedure, which states in part:

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

A rule 15(d) motion is “addressed to the sound discretion of the court, and leave to serve a supplemental pleading ‘should be liberally granted unless good reason exists for denying leave, such as prejudice to defendants.’” *Southwest Nurseries, LLC v. Florists Mutual Insurance, Inc.*, 266 F. Supp. 2d 1253, 1256 (D. Colo. 2003) (quoting *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001)). “Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment.” *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

64.The Plaintiffs' Motion is a clear attempt to bolster their chances of surviving

the various motions to dismiss filed by the Defendants. The three motions made by the Defendants have been fully briefed and submitted for decision. The Court heard oral argument on all of the motions on January 29, 2016. Based on the extensive briefing in those motions, it is apparent that the parties spent a considerable amount of time and effort producing them. The Court also spent a considerable amount of time and effort researching and reviewing the arguments. The Defendants' motions were also pending for an extended period of time. The Defendants including the UTERO officials made their first motion to dismiss on May 1, 2013. The Newfield Defendants made their motion to dismiss on July 7, 2014. The Ute Tribe made their motion on December 16, 2015. Attempting to insert new factual allegations into the pleadings after the passage of this amount of time, after the effort to produce the motions, and hold oral argument, would be unjust.

65. The Defendants would be unduly prejudiced by allowing the pleadings to be amended in effort to defeat their motions to dismiss. The Plaintiffs initiated this lawsuit nearly three years ago. The Defendants have been waiting nearly that long to have their motions considered. Requiring the Defendants to remake their motions, and to wait longer to have the motions resolved, would be unjust. The Plaintiffs had an opportunity to draft their complaint as they saw fit. The Plaintiffs were given an additional opportunity to amend their complaint on September 4, 2013. The Plaintiffs literally had years to amend their pleadings in light of the Defendants' motions. Allowing the Plaintiffs an additional opportunity to defeat

the pending motions is not allowed by rules regarding motion pleading, and would be an unjust result.

66.Nevertheless, the Plaintiffs' Motion is moot. The Court granted the Defendants' motions, dismissing this matter in its entirety. The Court provided various reasons for dismissing the matter, including the fact that the Ute Tribe was a necessary and indispensable party to this action. Sovereign immunity applies to the Ute Tribe. Therefore, the lawsuit cannot be maintained in a state district court. Furthermore, this lawsuit requires this Court to analyze and interpret the Ute Tribe's UTERO ordinance. A state district court does not have jurisdiction over a sovereign, nor can it interpret the laws of the sovereign. None of the factual allegations offered by the Plaintiffs changes that result. Even if the Court were to allow the Plaintiffs the opportunity to amend their pleadings, the outcome would be the same. The matter would be dismissed.

67.Additionally, the Plaintiffs' Motion does not explain how the various factual allegations are relevant, or how they apply to the claims. The Motion is simply a list of the factual allegations the Plaintiffs allege have occurred since the inception of this action. The Plaintiffs suggest that the Court examine the factual allegations and determine which ones may be relevant in deciding the motions to dismiss. The Court declines the Plaintiffs' invitation. The Plaintiffs' responsibility is to offer the facts and explain how they apply to the claims, and to the arguments made.

68.The Plaintiffs' Motion to File Supplemental Pleadings is denied.

WHEREFORE, the Amended Verified Complaint and all claims raised therein are hereby dismissed with prejudice.

[Signature of Court appears at top of first page.]

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing proposed **JUDGMENT** to be electronically served this 19th day of April, 2016 upon the following:

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