

2017

Enervest, Ltd, Successor in Interest to (District Court Case No. 560800056) Bill Barrett Corp., Appellant, vs. :Tvnchael Carlson, Appellee.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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.

**BRIEF OF APPELLEES
UTE INDIAN TRIBE OF THE
UINTAH AND OURAY
RESERVATION; L.C. WELDING
& CONSTRUCTION, INC.; AND
HUFFMAN ENTERPRISES, INC.**

Court of Appeals No. 20160362-CA

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE
COUNTY – ROOSEVELT, THE HONORABLE SAMUEL P. CHIARA,
CASE NO. 130000009

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PARTIES

Plaintiffs/Appellants

Ryan Uresk Harvey, an individual.

Rocks Off, Inc., a Utah corporation.

Wild Cat Rental, Inc., a Utah corporation.

Defendants/Appellees

The Ute Indian Tribe of the Uintah and Ouray Reservation, a federally-recognized Indian tribe.

Dino Cesspooch, in his official capacity as UTERO Commissioner and in his individual capacity.

Jackie Larose, in his official capacity as UTERO Commissioner and in his individual capacity.

Sheila Wopsock, in her official capacity as UTERO Director and in her individual capacity.

Newfield Production Company, a Delaware corporation.

Newfield Rocky Mountain, Inc., a Delaware corporation.

Newfield RMI, LLC, a Delaware limited liability company.

Newfield Drilling Services, Inc., a Utah corporation.

L.C. Welding & Construction, Inc., a Utah corporation.

Scamp Excavation, Inc., a Utah corporation.

Huffman Enterprises, Inc., a Utah corporation.

LaRose Construction Company, Inc., a Utah corporation.

D. Ray C. Enterprises, L.L.C., a Utah Limited Liability Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... v

DESIGNATION OF THE PARTIES 1

STATEMENT OF THE JURISDICTION OF THE APPELLATE COURT 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES
AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE
OF APPEAL 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 5

SUMMARY OF ARGUMENTS 8

ARGUMENT..... 10

 I. The Tribe Is Immune from Suit Because It Did Not Waive Sovereign
 Immunity by Making a General Appearance or Otherwise..... 10

 II. The Trial Court Acted Within Its Discretion in Ruling that the Tribe
 Is a Necessary and Indispensable Party to this Action 16

 A. Plaintiffs Must Prove that the Trial Court Abused Its Discretion in
 Order to Have Its Decision Reversed 16

 B. U.R.C.P. 19 Governs Issues of Necessity and Indispensability of a
 Party and Requires that the Court to Perform a Three-Step Analysis .. 17

 C. The Trial Court Acted Within Its Discretion in Determining that
 the Tribe Is a Necessary Party to this Action 17

 D. The Trial Court Properly Determined that Joinder of the Tribe Is
 Not Feasible 22

 E. The Trial Court Acted Within Its Discretion in Determining that
 the Tribe Is an Indispensable Party 22

III.	Plaintiffs’ Balance of Interests Argument Should Be Rejected Because Plaintiffs Failed to Preserve the Issue and It Is Otherwise Flawed	30
A.	Plaintiffs Failed to Preserve the Issue on Appeal.....	30
B.	Plaintiffs’ Balance of Interests Argument Is Based on False Premises.....	32
IV.	The Trial Court Acted Within Its Sound Discretion in Denying Plaintiffs’ Motion to Supplement Their Pleadings Because the Motion Was Both Belated and Futile and Granting the Motion Would Have Unduly Prejudiced the Defendants	35
V.	With Respect to All Other Issues Raised by Plaintiffs on Appeal, the Tribe, L.C. Welding, and Huffman Enterprises Join in the Arguments Made by the Other Appellees	38
	CONCLUSION	38
	CERTIFICATE OF COMPLIANCE	39

TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>438 Main St. v. Easy Heat, Inc.</i> , 2004 UT 72, 99 P.3d 801	32
<i>Blauer v. Dep't of Workforce Servs.</i> , 2014 UT App 100, 331 P.3d 1.....	2
<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	26
<i>C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe</i> , 532 U.S. 411 (2001)	11
<i>Cowen & Co. v. Atlas Stock Transfer Co.</i> , 695 P.2d 109 (Utah 1984)	18
<i>Curtis v. Curtis</i> , 789 P.2d 717 (Utah Ct. App. 1990)	16
<i>Ex Parte Young</i> , 209 U.S. 123 (1908).....	21
<i>FMC v. Shoshone-Bannock Tribes</i> , 905 F.2d 1311 (9th Cir. 1990).....	27
<i>Frank v. U.S. West, Inc.</i> , 3 F.3d 1357 (10 th Cir. 1993)	35
<i>Friends of East Willits Valley v. County of Mendocino</i> , 123 Cal. Rptr. 2d 708 (Cal. Ct. App. 2002).....	12, 13
<i>Imperial Granite Co. v. Pala Band of Mission Indians</i> , 940 F.2d 1269 (9th Cir. 1991)	10
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987).....	27, 28
<i>Kiowa Tribe of Okla. v. Mfg. Techs, Inc.</i> , 523 U.S. 751 (1988)	10
<i>Landes v. Capital City Bank</i> , 795 P.2d 1127 (Utah 1990)	17, 18
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	26, 33, 34
<i>Mustang Prod. Co. v. Harrison</i> , 94 F.3d 1382 (10th Cir. 1996).....	27
<i>Nushake, Inc. v. State Comp. Ins. Fund</i> , No. CGC-05-441299, 2011 Cal. Super. LEXIS 319 (Cal. Super. Ct. April 29, 2011)	14, 15
<i>Puyallup Tribe v. Dep't of Game</i> , 433 U.S. 165 (1977)	10
<i>Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation</i> , 673 F.2d 315 (10th Cir. 1982)	10, 16

<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	11
<i>Seftel v. Capital City Bank</i> , 767 P.2d 941 (Utah Ct. App. 1989)	2, 18
<i>Sw. Nurseries, LLC v. Florists Mut. Ins.</i> , 266 F. Supp. 2d 1253 (D. Colo. 2003)	3, 35
<i>State ex rel. C.C. v. State</i> , 2013 UT 26, 301 P.3d 1000	2, 30, 32
<i>State v. Weaver</i> , 2005 UT 49, 122 P.3d 566	32
<i>Strate v. A-1 Contractors</i> , 520 U.S. 438 (1997)	29
<i>United States v. Oregon</i> , 657 F.2d 1009 (9th Cir. 1981)	13, 14
<i>United States v. United States Fid. & Guar. Co.</i> , 309 U.S. 506 (1940)	10
<i>Ute Dist. Corp. v. Ute Indian Tribe</i> , 149 F.3d 1260 (10th Cir. 1998)	11
<i>Walker v. United Parcel Serv., Inc.</i> , 240 F.3d 1268 (10th Cir. 2001)	3, 35
<i>White v. Jeppson</i> , 2014 UT App 90, 325 P.3d 888	2, 16
<i>White Mountain Apache Tribe v. Bracker</i> , 488 U.S. 136 (1980)	28
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	28
Rules:	
U.R.C.P. 12(b)(1)	11
U.R.C.P. 12(b)(7)	17, 30
U.R.C.P. 15(d)	4, 35
U.R.C.P. 19(a)	17
U.R.C.P. 19(b)	17, 22, 23
Utah R. App. P. 24(d)	1
Utah R. App. P. 24(f)(1)(A)	39
Utah R. App. P. 24(i)	38
Statute:	
Utah Code Ann. § 78A-4-103(2)(j)	1
Constitution:	
<i>Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation</i> , art. III, § 1 (1989)	5

Treatise:

7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1602 (1986) 18

Regulation:

25 C.F.R. § 83.2 5

Other Authorities:

Law and Order Code of the Ute Indian Tribe § 1-8-5 6

Ute Tribal Ordinance No. 10-002 ("UTERO Ordinance") 5, 6

DESIGNATION OF THE PARTIES

Pursuant to Utah R. App. P. 24(d), Appellees will use the following references in this brief. Ryan Harvey, Rocks Off, Inc., and Wildcat Rentals, Inc. will be referred to collectively as “Plaintiffs”. The Ute Indian Tribe of the Uintah and Ouray Reservation will be referred to as “Tribe”. Dino Cesspooch, Jackie LaRose, and Sheila Wopsock will be referred to collectively as “UTERO officials”. Newfield Production Company, Newfield Rocky Mountain, Inc., Newfield RMI, LLC, and Newfield Drilling Services, Inc. will be referred to collectively as “Newfield”. L.C. Welding & Construction, Inc. will be referred to as “L.C. Welding”; Huffman Enterprises, Inc. as “Huffman Enterprises”; Scamp Excavation, Inc. as “Scamp”; LaRose Construction Company, Inc. as “LaRose Construction”; and D. Ray C. Enterprises, L.L.C. as “D. Ray C.” The Appellees will be referred to collectively as “Defendants”.

STATEMENT OF THE JURISDICTION OF THE APPELLATE COURT

This Court has jurisdiction of this case pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the trial court correctly find that the Ute Indian Tribe had not waived its sovereign immunity by making a general appearance where (1) Plaintiffs failed to cite any Utah case law supporting their claim and the trial court found that Plaintiffs failed to cite any controlling or relevant cases from foreign jurisdictions; (2) the cases relied upon by Plaintiffs are distinguishable from the case at bar in critical ways; and (3) Utah law holds

that the general appearance doctrine applies only to personal jurisdiction whereas waiver of an Indian tribe's sovereign immunity is an issue of subject matter jurisdiction?

Appellate courts review issues of waiver of immunity for correctness. *Blauer v. Dep't of Workforce Servs.*, 2014 UT App 100, P 5, 331 P.3d 1, 3.

II. Did the trial court abuse its discretion in ruling that the Tribe is a necessary and indispensable party to this action where it found that (1) the Tribe has a critical interest in the outcome of this case and that a disposition in this case, in the Tribe's absence, would impair the Tribe's ability to protect that interest; (2) the Tribe's joinder is not feasible because it is immune from suit; and (3) the four factors to be considered in determining whether a party is indispensable all militated in favor of the conclusion that the Tribe is indispensable?

"[A] trial court's determination properly entered under Rule 19 will not be disturbed absent an abuse of discretion." *White v. Jeppson*, 2014 UT App 90, P 10, 325 P.3d 888, 891 (quoting *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989)).

III. Should this Court reject Plaintiffs' "balance of interests" argument where (1) Plaintiffs did not preserve the issue in the trial court; (2) the trial court refused to consider the issue because it had not been raised until after Defendants' motions to dismiss had been fully briefed and argued; and (3) Plaintiffs' argument is based upon false factual and legal premises?

An appellate court "will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review." *State ex rel. C.C. v. State*, 2013 UT 26, P 16, 301 P.3d 1000, 1004-05.

Because the trial court refused to consider this issue, this Court would be considering it for the first time, not on review.

IV. Did the trial court abuse its discretion in denying Plaintiffs' motion to file supplemental pleadings where the motion was belated and futile and allowing it would have unduly prejudiced Defendants?

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.'" *Sw. Nurseries, LLC v. Florists Mut. Ins.*, 266 F. Supp. 2d 1253, 1256 (D. Colo. 2003) (quoting *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001)).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS WHOSE INTERPRETATION IS
DETERMINATIVE OF APPEAL**

U.R.C.P. 19. This rule is set out verbatim in the Addendum to Appellants' Opening Brief.

STATEMENT OF THE CASE

This is a case in which Plaintiffs seek to have the Court interpret and restrict the application of the UTERO (or Ute Tribal Employment Rights Office) ordinance of the Ute Indian Tribe. The UTERO ordinance governs business activity, including activity by non-tribal members such as Plaintiffs, on tribal lands. Plaintiffs seek declaratory and injunctive relief against the Tribe and its governmental officers regarding the nature and extent of the Tribe's jurisdiction. Plaintiffs also seek monetary damages against the tribe's governmental officials and the non-tribal Defendants.

Plaintiffs commenced this case on April 5, 2013 by filing a Verified Complaint for Declaratory and Injunctive Relief against the Ute Indian Tribe of the Uintah and Ouray Reservation (“Tribe”), Dino Cesspooch, Jackie LaRose, and Sheila Wopsock (collectively, “UTERO officials”). (R. at 1). On May 1, 2013, the Tribe and the UTERO officials moved to dismiss the Verified Complaint on grounds of sovereign immunity and failure to join a necessary and indispensable party, among other grounds. (R. at 203).

On September 4, 2013, Plaintiffs filed their Amended Verified Complaint for Declaratory Relief, Injunctive Relief and Damages (“Amended Complaint”), naming the original Defendants plus all of the other Defendants who are now parties to the case. The Amended Complaint added additional claims for relief. (R. at 548).

All Defendants subsequently filed motions to dismiss the Amended Complaint. The Newfield Defendants did so on July 7, 2014 (R. at 664); the UTERO officials, in their individual capacities, along with LaRose Construction, and D. Ray C. on October 7, 2015 (R. at 1074); the Tribe, L.C. Welding, and Huffman Enterprises on December 16, 2015 (R. at 1314); and the UTERO officials, in their official capacities, joined in the Tribe’s dismissal motion on December 22, 2015 (R. at 1359).

The motions to dismiss were fully briefed and were heard at oral argument on January 29, 2016. (R. 1365).

On February 8, 2016, Plaintiffs filed a motion for leave to file a supplemental pleading pursuant to U.R.C.P. 15(d). (R. 1469). Defendants opposed the motion on grounds of untimeliness, undue prejudice, and futility. (R. 1618, 1641, 1659).

On March 28, 2016, the trial court issued four Rulings and Orders granting Defendants' motions to dismiss and denying Plaintiffs' Rule 15(d) motion. (R. 1757, 1775, 1784, 1790). Finally, on May 12, 2016, the court entered its Judgment dismissing Plaintiffs' claims. (R. at 2041). The Judgment is identical to the four Rulings and Orders in all material respects. Plaintiffs have appealed from the Rulings and Orders and the Judgment.

STATEMENT OF THE FACTS

In addition to the procedural facts set forth in the preceding section, the following facts are relevant to the appeal.

1. The Tribe is a federally recognized Indian tribe and is thereby entitled "to the immunities and privileges available to . . . federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.2. (*Mot. to Dismiss Am. Verified Compl. by Defs. Ute Indian Tribe, etc.* p. 2, ¶ 1) (R. at 1315).

2. The Business Committee is the governing body of the Tribe. *Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation*, art. III, § 1 (1989). (*Id.* at p. 2, ¶ 1) (R. at 1315). The Business Committee duly enacted Ordinance No. 10-002 ("UTERO Ordinance"). The UTERO Commission is a Commission created by the Business Committee of the Tribe under the UTERO Ordinance. UTERO Ord., Sec. 4.1 (*Id.*, Ex. A) (R. at 1329).

3. Among the purposes of the Tribe's UTERO Ordinance is the regulation of the Tribe's business activities and internal affairs. (*Id.*)

4. Pursuant to Section 1-8-5 of the Law and Order Code of the Ute Indian Tribe (“U.L.O.C.”), only the Business Committee may waive immunity by passing a resolution or ordinance that specifically refers to the express waiver. U.L.O.C. §1-8-5. (The Law and Order Code of the Ute Indian Tribe can be found in the National Indian Law Library at www.narf.org/nill/Codes/utecode.htm). (*Mot. to Dismiss Am. Verified Compl. by Defs. Ute Indian Tribe, etc.* at p. 3, ¶ 3) (R. at 1316).

5. Plaintiffs initially argued that the Tribe had waived sovereign immunity through the UTERO Ordinance, thereby allowing Plaintiffs to sue the Tribe and its officers in this action. (*E.g., Mem. in Opp’n to Mot. to Dismiss Am. Verified Compl. by Defs. Ute Indian Tribe, etc.* at p. 9, ¶ 27) (R. at 1375).

6. The trial court rejected Plaintiffs’ argument and held that the Tribe had not waived sovereign immunity through the UTERO Ordinance. (*Judg.* at p. 6, ¶ 7) (R. at 2046). Plaintiffs have not appealed this holding. (Appellants’ Opening Br.).

7. Pursuant to Section 11 of the UTERO Ordinance, the UTERO Commission and the Ute Tribal Court have exclusive jurisdiction to review and adjudicate grievances and actions regarding the UTERO Ordinance. The limited waiver provided under Section 13.3 of the UTERO Ordinance applies only to grievances and actions regarding the UTERO Ordinance. Therefore, the trial court is prohibited from asserting jurisdiction over any matters regarding the UTERO Ordinance. Plaintiffs have not filed a formal complaint with the UTERO Commission as provided under Section 11 of the UTERO Ordinance. (*Mot. to Dismiss Am. Verified Compl. by Defs. Ute Indian Tribe, etc.* at p. 3, ¶ 5) (R. at 1316).

8. The trial court held that, “If Plaintiffs’ claims are brought to enforce the UTERO Ordinance, those claims must have been brought in tribal court.” The court further held that, therefore, if Plaintiffs are seeking to enforce the UTERO Ordinance, “this Court lacks subject matter jurisdiction over the Tribe.” (*Judg.* at p. 6, ¶ 7) (R. at 2046). Plaintiffs have not appealed those holdings. (Appellants’ Opening Br.).

9. The Business Committee has not waived the Tribe’s sovereign immunity with respect to the subject matter of this action, nor has it consented to this action. (*Mot. to Dismiss Am. Verified Compl. by Defs. Ute Indian Tribe, etc.* at p. 4, ¶ 6) (R. at 1317).

10. The Business Committee has not waived the UTERO Commission’s sovereign immunity with regard to the subject matter of this action, nor has it consented to this action. (*Id.* at p. 4, ¶ 7) (R. at 1317).

11. The Business Committee has not waived the sovereign immunity of any officer of the Tribe or the UTERO Commission, nor has it consented to this action. (*Id.* at p. 4, ¶ 8) (R. at 1317).

12. Congress has not waived the Tribe’s sovereign immunity nor has Congress consented that the action be brought against the Tribe. (*Id.* at p. 4, ¶ 9) (R. at 1317).

13. For purposes of this appeal, Plaintiffs do not challenge any of the previous four facts. The sole basis for Plaintiffs appeal with respect to the issue of the Tribe’s sovereign immunity is the claim that the Tribe waived sovereign immunity by making a general appearance in the litigation. (Appellants’ Opening Br.).

14. Plaintiffs sought and obtained UTERO Certification in or about November 2012. (*Id.*, Statement of Facts Relevant to the Issues on Appeal, at p. 11.)

15. UTERO Director Sheila Wopsock sent a memorandum dated March 20, 2013, directed “To all Oil and Gas Companies”. The directive was sent pursuant to the UTERO Ordinance. (*Pls.’ Mem. in Supp. of Rule 65A(b) Ex Parte Mot. for T.R.O., Ex.*) (R. at 53).

SUMMARY OF ARGUMENTS

1. The trial court correctly ruled that the Tribe did not waive its sovereign immunity by making an alleged general appearance. There are no reported Utah cases holding that an Indian tribe can waive sovereign immunity in that way. Plaintiffs rely on three foreign cases, only one of which even mentions general appearance. The trial court correctly found that in addition to not being controlling those cases were unpersuasive, either because they were devoid of discussion and citation to authority or because they were based upon actions by tribes that are markedly different from the actions undertaken by the Tribe in this case. Additionally, Utah law holds that “general appearance” is a concept applicable to personal jurisdiction, not subject matter jurisdiction. Tribal sovereign immunity is an issue of subject matter jurisdiction. Therefore, the Tribe could not have waived its sovereign immunity by making a general appearance.

2. The trial court did not abuse its discretion in ruling that the Tribe is a necessary and indispensable party to this action. The court was within its discretion in finding that the Tribe is a necessary party because, for the court to decide the Plaintiffs’ claims, it would necessarily have to determine the scope of the Tribe’s right to issue directives such as the one about which Plaintiffs complain. The court went on to find that whether the Tribe and its officials may issue such directives “is a critical interest of the

Tribe.” Next, the court properly ruled that because it lacks subject matter jurisdiction owing to the Tribe’s sovereign immunity, the Tribe’s joinder is not feasible. Finally, the court was within its discretion in ruling that all four factors to be considered by the court lead to the conclusion that the Tribe is an indispensable party.

3. Plaintiffs’ “balance of interests” argument should be rejected by this Court, first, because Plaintiffs did not preserve the issue in the trial court. Following oral argument on Defendants’ motions to dismiss, Plaintiffs moved for leave to file an additional memorandum that included the balance of interests argument. The court denied the motion. Plaintiffs have not appealed the trial court’s denial of their motion for leave to file the memorandum. Instead, they present the balance of interests argument as if it had been allowed and considered by the trial court. This Court would therefore be the first to consider the unpreserved issue. Additionally, even if the issue had been properly preserved, the argument should be rejected because it is based upon erroneous factual and legal assumptions.

4. The trial court did not abuse its discretion in denying Plaintiffs’ motion for leave to file a supplemental pleading. The motion was filed several days after oral argument had been held on Defendants’ motions to dismiss the Amended Complaint. The court acted within its discretion in finding that the motion was untimely and that allowing it would unduly prejudice the Defendants by forcing them to begin anew with their dismissal motions. The court also found that the motion was futile because none of the new allegations the Plaintiffs sought to include would change the facts that the Tribe is

immune from suit because of its sovereign immunity and the Tribe is a necessary and indispensable party.

ARGUMENT

I. The Tribe Is Immune from Suit Because It Did Not Waive Sovereign Immunity by Making a General Appearance or Otherwise.

Plaintiffs contend that the Tribe waived sovereign immunity by making a general appearance in the trial court proceedings. This argument is baseless. Plaintiffs admit that there is no Utah law supporting their position, and they have cited only cases from foreign jurisdictions that are readily distinguishable from the case at bar.

Indian tribes are not subject to suit unless a tribe has waived its sovereign immunity or Congress has expressly authorized the action. *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751, 754 (1988). The issue of sovereign immunity is a matter of subject-matter jurisdiction. *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). The Supreme Court has described tribal immunity as a jurisdictional barrier to a court's exercise of judicial power. *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940). Tribal immunity applies to suits for declaratory and injunctive relief as well as those for damages, *e.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991), and the immunity extends to activities occurring both inside and outside of Indian country, *Kiowa Tribe*, 523 U.S. at 760 (noting that the Court did not distinguish between on- and off-reservation activity in *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-73 (1977)). While Tribes can waive sovereign immunity, a court cannot find waivers of tribal immunity by inference

or implication. Instead, to be enforceable a Tribe's waiver of immunity must be clear, explicit and unambiguous. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In determining the issue of waiver, a court cannot consider perceived inequities under the facts of the particular case. *Ute Dist. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

In the Tribe's Motion to Dismiss Amended Verified Complaint and its supporting memoranda, the Tribe argued for dismissal pursuant to U.R.C.P. 12(b)(1) on the ground that the court lacked subject matter jurisdiction over the Tribe because the Tribe had not waived sovereign immunity. (*Mot. to Dismiss Am. Verified Compl.* at pp. 4-8) (R. at 1317-21); (*Reply Mem. Supporting Mot. to Dismiss Am. Verified Compl.* at pp. 2-4) (R. at 1410-12). In response, the Plaintiffs argued that the Tribe had waived sovereign immunity through the UTERO Ordinance and by making a general appearance. (*Judg.* at p. 5, ¶ 6) (R. at 2045)¹. The trial court ruled in favor of the Tribe on all waiver issues and concluded that it therefore lacked subject matter jurisdiction. (*Id.* at pp. 3-6, ¶¶ 4-7) (R. at 2043-46). Plaintiffs have not appealed any of the trial court's rulings regarding the Tribe's alleged waiver of sovereign immunity, except the issue of whether the Tribe waived it by making a general appearance. Therefore, if this Court upholds the trial court's ruling on that issue,

¹ As discussed in the above Statement of the Case, the trial court entered four Rulings and Orders on March 28, 2016, and entered its Judgment on May 12, 2016. The Judgment is identical to the four Rulings and Orders in all material respects. Plaintiffs have appealed from the Rulings and Orders and the Judgment. Because the Judgment is the trial court's final order, Defendants will refer to that document throughout this brief.

the trial court's dismissal of the action against the Tribe on sovereign immunity grounds must be upheld.

Prior to the January 29, 2016 hearing on Defendants' motions to dismiss the Amended Complaint, Plaintiffs had not offered any authority on the issue of the Tribe's alleged waiver of sovereign immunity through a general appearance. (*Id.* at pp. 6-7, ¶ 8) (R. at 2046-47). At oral argument, however, Plaintiffs' counsel argued this point and presented the court with three previously uncited cases. The court permitted introduction of the cases, but allowed Defendants the opportunity to address those cases in a supplemental response which Defendants filed on February 5, 2016. (*Id.*) (R. at 2041); (*Mem. in Resp. to Additional Cases Cited by Pls. at January 29, 2016 Hr'g*) (R. at 1458).

On February 8, 2016, Plaintiffs filed a Motion and Memorandum for Leave to Brief, for Clarification of Order, and Related Relief ("Motion for Leave to Brief") (R. at 1483). The Motion was filed several days after oral argument. (*Judg.* at p. 7, ¶ 9) (R. at 2047); District Court Clerk's Certificate and Index of Record on Appeal at p. 9.). The trial court pointed out the untimeliness of the motion, (*Judg.* at pp. 7-8, ¶ 9) (R. at 2047-48), but nevertheless considered "the cases belatedly cited by the Plaintiffs" (*Id.* at p. 8, ¶ 10) (R. at 2048). The court found that the cases were all distinguishable from the case at bar and failed to support Plaintiffs' argument. (*Id.* at pp. 8-10) (R. at 2048-50).

Plaintiffs have presented the same three cases on appeal. The trial court's analysis of the cases was correct and its ruling should be upheld.

In *Friends of East Willits Valley v. County of Mendocino*, 123 Cal. Rptr. 2d 708, 711 (Cal. Ct. App. 2002), the court stated as follows:

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

This case fails to support Plaintiffs' position, first, because it does not cite any authority and does not discuss what the tribe in that case did that led the court to conclude that it had made a general appearance. Absent any discussion or any citation of authority it is also impossible to determine whether California law regarding general appearances is consistent with Utah law. Accordingly, the trial court in the case at bar ruled that, "The California Court's decision is not controlling and because it contains no discussion and cites no authority, it cannot be persuasive." (*Judg.* at p. 9, ¶ 11) (R. at 2049). Additionally, the Tribe in *Friends of East Willits Valley* had expressly waived sovereign immunity by entering into a Tribal/County Agreement. *Friends of East Willits Valley*, 123 Cal. Rptr. 2d at 715. The trial court in the present case therefore found as follows: "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." (*Judg.* at p. 9, ¶ 11) (R. at 2049).

Plaintiffs' next case, *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), was decided upon facts critically different from those in the present action. In that case, the court held that the Yakima Tribe had waived its sovereign immunity when it intervened in the case to establish and protect its rights. *Id.* at 1014. "By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in the litigation between the intervener and the adverse party." *Id.* (internal quotation marks omitted). In the present case, in contrast, the Ute Tribe has not intervened but was

made a defendant by Plaintiffs. While the Yakima Tribe successfully sought to become a party to the *Oregon* case, the Ute Tribe is an unwilling party to this case and has done no more than attempt to have the case dismissed. Furthermore, the *Oregon* court did not base its holding exclusively upon the Yakima Tribe's intervention, but also held that the tribe had expressly consented to the suit by written agreement. *Id.* at 1015. The court does not say what relative weights it gave to the tribe's intervention and to its express consent to the suit. The latter ground is irrelevant to Plaintiffs' "general appearance" argument, and in any event the Ute Tribe did not consent to this suit in writing or otherwise.

The *Oregon* court did not discuss the issue of waiver of tribal sovereign immunity by general appearance, but limited its discussion to Rule 24 intervention by an Indian tribe. There is no basis for Plaintiffs' attempt to expand the application of *Oregon* beyond cases in which a tribe intervenes. The trial court in the present case correctly ruled that, "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." (*Judg.* at p. 10, ¶ 13) (R. at 2050).

Plaintiffs also rely on *Nushake, Inc. v. State Comp. Ins. Fund*, No. CGC-05-441299, 2011 Cal. Super. LEXIS 319, at *1 (Cal. Super. Ct. April 29, 2011). There, the court held that the tribe in question had waived sovereign immunity, but the court did not base its holding on a finding that the tribe made a general appearance. In fact, like *Oregon*, the case does not mention general appearances. Rather, the *Nushake* court held that the tribe had waived sovereign immunity by explicitly waiving it in multiple provisions of two settlement agreements. *Id.* at **35-40. The court further found that the tribe had waived

sovereign immunity when it “appeared before this Court seeking affirmative relief.” *Id.* at **40-41. As instances of the tribe’s seeking affirmative relief, the court said that the tribe had “initiated, directed and controlled the [plaintiff] against [the defendant]” and had “sought to enforce the settlement.” *Id.* at **40-42. *Nushake* then does not support the claim that a tribe may waive sovereign immunity through a general appearance, but stands for the view that a tribe may waive sovereign immunity by seeking certain types of affirmative relief including seeking to enforce settlement agreements in which it had explicitly waived sovereign immunity.

In the present case, the Tribe did not initiate the litigation or control the plaintiff, and did not seek to enforce any agreement or otherwise seek affirmative relief. Instead, the Tribe has been sued and has limited its efforts to the purely defensive measure of moving for dismissal based on lack of subject matter jurisdiction. *Nushake* says nothing to suggest that the Ute Tribe’s participation in this case is on a par with initiating and directing the litigation or seeking to enforce a settlement agreement in which sovereign immunity is expressly waived.

Of Plaintiffs’ three cases, only *Friends of East Willits Valley* mentions general appearance, and that case cited no authority. At most, therefore, Plaintiffs’ cases show that in some foreign jurisdictions certain kinds of conduct – initiating a lawsuit and directing and controlling the plaintiff throughout the litigation (*Nushake*); attempting to enforce a settlement agreement (*Nushake*); or intervening in a case (*Oregon*) – may result in a waiver of sovereign immunity. The Ute Tribe has engaged in none of those types of conduct.

Finally, regardless of what Plaintiffs' cases may have held, it is clear that under Utah law the Tribe could not have waived sovereign immunity by making a general appearance. As noted above, the issue of sovereign immunity is a matter of *subject-matter* jurisdiction. *Ramey Constr. Co.*, 673 F.2d at 318. However, "[t]he doctrines of 'general' and 'special' appearance ... are associated with *personal* jurisdiction only." *Curtis v. Curtis*, 789 P.2d 717, 725 n.17 (Utah Ct. App. 1990) (emphasis added). The court explained as follows:

The crux of William's argument was that Lauralee waived her jurisdictional challenge by appearing and litigating the custody question in Mississippi. Though this might be a legitimate argument against a personal jurisdiction challenge, it is not against a subject matter jurisdiction challenge, and to entertain a dispute, a court must have jurisdiction over both the subject matter of the dispute and the individuals involved. If the court lacks either type of jurisdiction, it has no power to entertain the suit.

Id. at 726. Plaintiffs therefore cannot use the general appearance doctrine to avoid the trial court's lack of subject matter jurisdiction. The trial court correctly ruled that the cases cited by Plaintiffs fail to support their position and that the Tribe must therefore be dismissed for lack of subject matter jurisdiction.

II. The Trial Court Acted Within Its Discretion in Ruling that the Tribe Is a Necessary and Indispensable Party to this Action.

Plaintiffs also contend that the trial court erred in ruling that the Tribe is a necessary and indispensable party.

A. Plaintiffs Must Prove that the Trial Court Abused Its Discretion in Order to Have Its Decision Reversed.

"[A] trial court's determination properly entered under Rule 19 will not be disturbed absent an abuse of discretion." *White v. Jeppson*, 2014 UT App 90, P 10, 325 P.3d 888, 891 (quoting *Seftel v. Capital City Bank*, 767 P.2d 941, 944 (Utah Ct. App. 1989)).

As shown below, the trial court acted within its discretion in dismissing the Amended Complaint pursuant to U.R.C.P. 12(b)(7) because (1) the Tribe is immune from suit for the reasons discussed in Section I above; and (2) the Tribe is a necessary and indispensable party to this action under U.R.C.P. 19.

B. U.R.C.P. 19 Governs Issues of Necessity and Indispensability of a Party and Requires that the Court Perform a Three-Step Analysis.

Under Rule 19, the trial court must first determine whether a party is necessary. U.R.C.P. 19(a); *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990). If the party is necessary, the court must next consider whether joinder of the necessary party is feasible. U.R.C.P. 19(a); *Landes*, 795 P.2d at 1130–31, 1132. If so, the necessary party “shall be joined.” U.R.C.P. 19(a). If, on the other hand, the court finds it unfeasible to join the necessary party, the court must address the indispensability of the party under Rule 19(b) and decide whether the action should proceed or be dismissed. U.R.C.P. 19(b); *Landes*, 795 P.2d at 1130.

C. The Trial Court Acted Within Its Discretion in Determining that the Tribe Is a Necessary Party to this Action.

Rule 19(a) deals with the factors to be considered in determining whether a party is a necessary party and provides in pertinent part as follows:

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.

U.R.C.P. 19(a); *see also Cowen & Co. v. Atlas Stock Transfer Co.*, 695 P.2d 109, 114 (Utah 1984) (“[A] necessary party is one whose presence is required for a full and fair determination of his rights as well as of the rights of the other parties to the suit.”). The underlying purpose of Rule 19 requiring joinder of necessary parties is “to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.” *Landes*, 795 P.2d at 1130 (quoting 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1602, at 21 (1986)).

Applying Rule 19(a), the trial court found that, “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.” (*Judg.* at pp. 12, ¶ 20) (R. at 2052). “Paragraphs 11, 12, 13, and 14 of Plaintiffs’ prayer for relief in the Amended Verified Complaint requests [sic] that the Court enjoin the Ute Tribe and UTERO officials from actions that interfere with Plaintiffs’ ability to conduct business.” (*Id.* at pp. 12-13, ¶ 20) (R. at 2052-53).

The court then ruled that to determine whether the tribe is a necessary party within the meaning of Rule 19, “[t]he 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.” (*Id.* at p.13, ¶ 21) (R. at 2053).

Applying that standard, the trial court determined that the Tribe is a necessary party to the action. It reasoned as follows:

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 project that interest. Therefore, the Tribe is a necessary party to this action.

(*Id.* at pp. 13-14, ¶ 22) (R. at 2053-54).

In contending that the trial court abused its discretion in reaching this conclusion, Plaintiffs first argue that, "The trial court's analysis that the regulated conduct occurred on the Ute Tribal land conflicts with the facts set forth throughout the Amended Complaint." (Appellants' Opening Br. at p. 20). As shown by the language of the *Judgment* quoted above, however, the trial court made no such assumption and did not find that the conduct at issue occurred on tribal lands. On the contrary, the trial court specifically recognized that Plaintiffs were alleging that the Tribe and some of its officials were attempting to

regulate conduct occurring off tribal land and that Plaintiffs sought injunctive relief against the Tribe and the officials on that basis. (*Judg.* at pp. 12-14, ¶¶ 20, 22) (R. at 2052-54). Based on that finding, the trial court ruled that, in order to decide whether to issue the requested injunctions, the court would necessarily have to determine the scope of the Tribe's power to issue directives such as the one about which Plaintiffs complain. The court found that whether the Tribe and its officials may issue such directives "is a critical interest of the Tribe." (*Id.* at p. 14, ¶ 22) (R. at 2054). The court therefore correctly recognized that in determining whether the Tribe is a necessary party the issue is not whether the directive purported to regulate parties' activities off tribal lands, but whether the Tribe has an interest in the determination of the scope and enforceability of its directives that are designed to regulate tribal business relationships. The court found that the Tribe has a critical interest in that regard and that a disposition in this case, in the Tribe's absence, might impair the Tribe's ability to protect that interest. (*Id.*)

Plaintiffs next argue that the trial court abused its discretion because its ruling is "catastrophic" to Plaintiffs' business interests and those of others in the area. (Appellants' Opening Br. at p. 21). Be that as it may, it has nothing to do with whether the Tribe is a necessary party to this action under the standard set forth in Rule 19(a). Plaintiffs also contend that "if the Tribe were a necessary party for every action brought against a tribal official, no action against a tribal official would be viable." (*Id.*) Again, that issue is irrelevant because the trial court was not asked to decide that question but only the question whether, under the facts of this case, the Tribe was a necessary party to the case.

Plaintiffs' argument is also misguided because, contrary to Plaintiffs' implicit premise, state courts are not the only courts. In fact, as applied generally, tribal law issues are simply not judiciable in state courts. They are instead, in most fact scenarios tribal court issues, and secondarily and only narrowly federal court issues. The present matter fits squarely within that general rule, and Plaintiffs' assertion that if the state court lacks jurisdiction, there would be no jurisdiction, is legally and factually incorrect. As they do throughout their brief, Plaintiffs here fail to recognize that they are relying on doctrines that only apply to litigation against tribes in federal courts. Here, Plaintiffs are attempting to apply *Ex Parte Young*, 209 U.S. 123 (1908) (federal court jurisdiction over claims for prospective non-monetary relief against state officers), by analogy to suits against tribal officers. Even if we assumed that were proper (and the Tribe's position is that it is not), it would only be proper in a federal court, as part of a suit, as discussed in more detail below. The current claims would plainly be outside the limited scope of *Ex Parte Young* in any case as they are not limited to prospective injunctive relief.

Plaintiffs next maintain that the UTERO officials are not entitled to immunity for actions undertaken that are beyond the jurisdiction of the Tribe. (*Appellants' Opening Br.* at pp. 21-23). This argument is misplaced because it does not bear upon the issue of whether the Tribe is a necessary party. The essence of Plaintiffs' argument is that "a suit to enjoin violations of state law by individual tribal members is permissible and does not implicate sovereign immunity", (*id.* at p. 21), and "sovereign immunity does not extend to tribal officials when acting outside their authority in violation of state law (*id.* at p. 22)." Plaintiffs' shift of their discussion to questions of sovereign immunity and suits against

individual tribal members may be relevant to the issue whether the UTERO officials are immune in this case, but it is irrelevant to the criteria for determining whether the Tribe is a necessary party under a Rule 19(a) analysis. Even if it is true that that a plaintiff may file suit against an individual tribal member without implicating sovereign immunity in some cases, that fact says nothing about whether the criteria for deciding whether the Tribe is a necessary party are satisfied in *this* case. Here, the trial court correctly determined that the Rule 19(a) criteria are satisfied and that the Tribe is therefore a necessary party.

D. The Trial Court Properly Determined that Joinder of the Tribe Is Not Feasible.

Moving to the next step in the Rule 19 procedure, the trial court determined that because the court lacked subject matter jurisdiction based on the Tribe's sovereign immunity, joinder of the Tribe was not feasible. (*Judg.* at p. 14, ¶ 23) (R. at 2054). This conclusion is indisputable. The court therefore took the final step of determining whether the Tribe is indispensable under U.R.C.P. 19(b).

E. The Trial Court Acted Within Its Discretion in Determining that the Tribe Is an Indispensable Party.

Rule 19(b) provides as follows:

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.

U.R.C.P. 19(b).

Applying the Rule 19(b) factors, the trial court first determined that a judgment entered in the Tribe's absence "clearly implicates a probability of prejudice to the Tribe." (*Judg.* at p. 15, ¶ 24) (R. at 2055). The court noted that the Plaintiffs sought injunctions that would prohibit the Tribe's officials from sending certain types of letters designed to regulate the Tribe's business activities. (*Id.*) The court reasoned that such an injunction could prejudice the Tribe's ability to regulate its affairs. "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." (*Id.*).

With regard to this factor, Plaintiffs state merely that the reasons they claim the Tribe would not suffer prejudice have been discussed earlier in its brief. (Appellants' Opening Br. at p. 24). Although this point is vague, Plaintiffs are apparently claiming that the activity they seek to enjoin is limited to the UTERO officials' activity that was allegedly beyond the scope of their authority under the UTERO Ordinance, as well as the Tribe's activity that Plaintiffs allege was beyond the jurisdiction of the Tribe. Plaintiffs state, for example, "The UTERO officials are not entitled to immunity for actions undertaken that are beyond the jurisdiction of the Tribe." (*Id.* at p. 21). Plaintiffs seem to contend that

granting the relief they are requesting would not prejudice the Tribe were it absent from the case.

This contention is spurious because none of Plaintiffs' claims can be decided without an interpretation of the UTERO Ordinance and a determination of the Tribe's jurisdiction. For example, any claim that UTERO officials were acting outside the scope of their official duties under the UTERO Ordinance requires an interpretation of the Ordinance. Any claim that the Tribe or others were seeking to regulate activities lying outside the Tribe's regulatory authority requires a determination of the limits of the Tribe's jurisdiction. Under Rule 19(b), the Tribe is an indispensable party to such litigation. Determining what actions are "unlawful" and "outside the Tribe's jurisdiction" necessarily entails a judicial determination of the extent of the Tribe's jurisdiction. The court could possibly conclude that a party acted outside the scope of his tribal authority and beyond tribal jurisdiction without deciding where such authority and jurisdiction end. The Tribe would clearly be prejudiced by an interpretation of its UTERO Ordinance and a determination of the extent of the Tribe's jurisdiction that were made in the Tribe's absence.

With regard to the second factor relevant to indispensability, the court ruled that none of the parties had suggested how the court could shape the relief or enter protective provisions in the judgment that would lessen or avoid prejudice to the Tribe. The court added that it could conceive of none either. (*Judg.* at pp. 15-16, ¶ 25) (*R.* at 2055-56). Plaintiffs do not challenge this conclusion on appeal.

As to the third factor, the trial court held that the Tribe and the UTERO officials are the key figures in this action, and that a judgment against the other Defendants, without injunctions against the Tribe and its UTERO officials as demanded by Plaintiffs would be an inadequate remedy. (*Id.* at p.16, ¶ 26) (R. at 2056).

In their discussion of this point Plaintiffs acknowledge that they have requested injunctions restraining the UTERO officials from engaging in certain activities and that enjoining tribal officials also amounts to enjoining the Tribe. (Appellants' Opening Br. at p. 25.) Plaintiffs contend, however, that if the court issued an injunction that was limited to prohibiting the Tribe and its officials from violating state law, the Tribe would have no legitimate interest affected. Plaintiffs apparently conclude on this basis that the Tribe is not indispensable. (*Id.* at pp. 25-26). This argument is confusing because it seems to amount to the claim that the Tribe could have injunctive relief entered against it in its absence, and that in that case the Tribe would have no interest affected. The contention is self-contradictory and should be rejected. Plaintiffs also contend that a monetary judgment could be entered against Newfield and that would be an adequate remedy. Plaintiffs do not explain, however, how the court could award monetary damages against Newfield without interpreting the UTERO Ordinance and determining the extent of the Tribe's jurisdiction; and such determinations would clearly implicate the Tribe's interests.

With regard to the final Rule 19(b) factor, the trial court found that the Plaintiffs had a forum available in which to address their claims other than state court. "Plaintiffs could have raised their claims through tribal administrative procedures and perhaps in the Tribal Court." (*Judg.* at p.16, ¶ 27) (R. at 2056). Plaintiffs' argue that the trial court abused

its discretion because they believe they should not have been required to exhaust their administrative remedies in the tribal system. (Appellants' Opening Br. at p. 25). Plaintiffs' contention misses the point. The trial court merely found that the Plaintiffs had another forum available. It said nothing about the need to exhaust administrative remedies. In fact, the Court expressly declined to decide that issue. (*Judg.* at p.11, ¶¶ 15-16) (R. at 2051).

Plaintiffs cite three cases in support of their argument that they need not exhaust administrative remedies. Again, these cases are irrelevant to the issue on appeal, namely, whether the trial court abused its discretion in finding that the Plaintiffs had an alternate forum available if the state court case were dismissed for failing to join an indispensable party. Because the trial court expressly declined to address the exhaustion of remedies issue and because Plaintiffs' cases all relate to that issue, the trial court did not consider them. (*See id.*).

Additionally, the cases fail to support Plaintiffs' position.

Plaintiffs cite *Montana v. United States*, 450 U.S. 544 (1981), as holding that the Crow Tribe did not have authority to regulate non-Indian fishing on the Big Horn River which flows through the Crow Reservation. Plaintiffs also cite *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), as holding that except for isolated "land-locked" tracts surrounded by tribal lands, tribes could not zone reservation fee land owned by nonmembers. (Appellants' Opening Br. at pp. 26-27). These cases go to the issue of whether the tribes have jurisdiction over non-tribal members in certain factual situations. They say nothing about whether Plaintiffs would have a forum other than state court available to them if the Tribe were found to be indispensable. Those

cases were not Rule 19 cases and do not establish that the Ute Tribe is not an indispensable party here.

Plaintiffs' attempt to rely upon the "*Montana* test" is yet another example of their confusing the very limited state court jurisdiction related to Indian law issues with the broader federal court limitations. This Court might not need to look further than to note that all of the cases Plaintiffs seek to rely upon are cases proceeding in federal courts, not state courts.

As it relates to state court jurisdiction over issues involving tribes, the applicable legal tests are "Infringement" and "Preemption," not the *Montana* test. *Montana*, combined with the federal case law on exhaustion of tribal court remedies, e.g. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987), and the case law requiring that the factual record for review of tribal court actions must be created in the tribal court, e.g., *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313 (9th Cir. 1990); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), create a complex set of rules used to divide up decision making between tribal courts and federal courts. Infringement and preemption, on the other hand, generally hold that the state courts need to stay out of such disputes, because federal law generally preempts state court jurisdiction over tribes and because a state court would infringe on tribal rights if it were to do what Plaintiffs here are asking this Court to do.

Upon entry to the United States, Utah agreed to a constitutional structure which placed most power over Indian tribes in the hands of the federal government and beyond the reach of the state. The Supreme Court of the United States has recognized that this

federal power over most Indian affairs creates two distinct barriers – infringement and preemption – to an exercise of state court jurisdiction over Indians and Indian tribes:

The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by Tribal members. They are related, however, in two important ways. The right of Tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important “back-drop” . . . against which vague or ambiguous federal enactments must always be measured.

White Mountain Apache Tribe v. Bracker, 488 U.S. 136, 145 (1980).

Infringement refers to the original sovereignty of Indian tribes apart from the recognition of that sovereignty by the federal government. The test focuses on the fact that the exercise of state authority can "unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 142. Thus, if an exercise of state court jurisdiction intrudes on tribal self-government, it is precluded as a matter of federal law. *Williams v. Lee*, 358 U.S. 217 (1959).

One of the primary ways that state courts violate federal law by infringing on tribes is by the state court purporting to review whether a tribal forum would have jurisdiction. Because tribal law-applying fora play a vital role in tribal self-government, *Iowa Mut. Ins. Co.*, 480 U.S. at 15, where a state court adjudicates a controversy within the province of a tribal court or other non-judicial law applying institution, state court jurisdiction infringes upon tribal sovereignty and is therefore, as a matter of supreme federal law, state jurisdiction is prohibited. *Williams*, 358 U.S. 217.

Plaintiffs also cite *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In that case, a non-tribal member plaintiff² sued non-tribal member defendants in tribal court for injuries received in a traffic accident on a state highway that traversed tribal land. *Id.* at 442-43. The Supreme Court held that the tribal court lacked jurisdiction over the parties in that action. Plaintiffs cite this case as holding, first, that the *Montana* rule that previously applied to tribal regulatory authority was to be extended to the tribe's adjudicatory authority and that the scope of a tribe's adjudicatory authority could not exceed the scope of its regulatory authority. This extension of the *Montana* rule is irrelevant here because it has nothing to do with the issue of whether the tribal administrative and judicial systems were available to Plaintiffs as an alternative to state court. Plaintiffs do not challenge the trial court's finding that the tribal systems *were* available to them.

Plaintiffs also cite *Strate* for its holding that a tribe's authority does not extend beyond what is necessary to protect tribal self-government or to control internal relations. Again, this point is not relevant to the issue whether the Tribe is an indispensable party to this case. Even assuming *arguendo* that Plaintiffs were not *required* to exhaust their UTERO administrative remedies or file their case in Ute Tribal Court in the first instance (as noted, the trial court expressly declined to consider this issue), it does not follow that the administrative and tribal court remedies are not available to them. Plaintiffs do not argue that such remedies are not available to them, but only that they should not have to pursue those remedies.

² Plaintiffs erroneously claim that the action was brought by tribal members. (Appellants' Opening Br. at p. 27).

Plaintiffs' argument and the cases they cite thus go to the question whether they must exhaust tribal administrative remedies, rather than to the issue of whether Plaintiffs would have an adequate remedy if the action is dismissed for nonjoinder. The trial court did not abuse its discretion when it determined that the Tribe cannot be sued in state court and that the Plaintiffs would have an adequate remedy through the tribal administrative and court systems. The fact that the Plaintiffs would prefer pursuing their claims in state court is irrelevant to the issue at hand.

All four of the Rule 19(b) factors favor dismissal of the Amended Complaint. The trial court therefore did not abuse its discretion in dismissing the Amended Complaint pursuant to U.R.C.P. 12(b)(7).

III. Plaintiffs' Balance of Interests Argument Should Be Rejected Because Plaintiffs Failed to Preserve the Issue and It Is Otherwise Flawed.

Plaintiffs also argue that the trial court erred in dismissing the case because, they contend, the court should have balanced the interest of the state against the interests of the Tribe and allowed the case to proceed in state court. (Appellants' Opening Br. at pp. 28-30). The argument fails for several reasons.

A. Plaintiffs Failed to Preserve the Issue on Appeal.

Utah appellate courts will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review. *State ex rel. C.C. v. State*, 2013 UT 26, P 16, 301 P.3d 1000, 1004-05. Plaintiffs claim that the balance of interests issue was preserved in the trial court through their Motion and Memorandum for Leave to Brief, for Clarification of Order, and Related Relief ("Motion for Leave to Brief"), R. at 1483-

99. (Appellants' Opening Br. at pp. 1-2, Statement of the Issues Presented "B"). The Motion for Leave to Brief was filed on February 8, 2016. (*Judg.* at p. 7, ¶ 9) (R. at 2047); District Court Clerk's Certificate and Index of Record on Appeal at p. 9). That was several days after the court heard oral argument on the Defendants' dismissal motions. (*Judg.* at p. 2) (R. at 2042). Because Plaintiffs' Motion for Leave to Brief was untimely, the district court denied it. (*Id.* at pp. 7, 19, ¶¶ 9, 36) (R. at 2047, 2059). As its reasons for denying the motion, the court said as follows: "It is a mystery to this Court why Plaintiffs believe they should be allowed more argument on this point. ... 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." (*Id.* at pp. 7-8, ¶ 9) (R. at 2047-48). Plaintiffs' balance of interests argument was raised for the first and only time in their Motion for Leave to Brief.

It is important to keep in mind that Plaintiffs have not appealed the trial court's denial of their Motion for Leave to Brief. Instead, they have sought to appeal one of the issues – the issue raised by their balance of interest argument – that was contained in their Motion for Leave to Brief. Because the trial court denied the Motion for Leave to Brief, the proposed additional argument was not put before the trial court. The Defendants were not permitted to file memoranda in opposition to the argument, and the court did not consider it. Therefore, this Court's focus should not be on the issue of whether the trial court properly denied the Motion for Leave to Brief, but on the balance of interest argument itself, and the Court should first determine whether that issue was preserved in the trial court.

It was not preserved. In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the court has an opportunity to rule on that issue. *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, P 51, 99 P.3d 801, 813. In order for the trial court to be able to do so, the issue must be raised in a timely fashion. *Id.* Here, the trial court found that the issue of balance of interests was not raised in a timely fashion, and the court therefore did not consider it. The balance of interests issue was therefore not properly put before the trial court and was not preserved for appeal.

This Court cannot consider the argument here for the first time. "[W]e have recognized [only] three instances in which an appellate court may address an issue for the first time on appeal." *State ex rel. C.C.*, 2013 UT 26, P 17, 301 P.3d 1000, 1005 (quoting *State v. Weaver*, 2005 UT 49, P 18, 122 P.3d 566). These include "(1) where the appellant establishes that the trial court committed 'plain error'; (2) where 'exceptional circumstances' exist; or (3) in some situations, where a claim of ineffective assistance of counsel is raised on appeal." *Id.* Further, appellate courts are "procedurally barred" from considering any of these three instances if the party fails to allege them in its opening brief. *Id.* (quoting *Weaver*, 2005 UT 49, P 19). Plaintiffs have failed to allege any of these instances, and this Court should therefore not consider them. The Court should therefore refuse to consider the balance of interests argument because it was not preserved for appeal.

B. Plaintiffs' Balance of Interests Argument Is Based on False Premises.

Even if Plaintiffs' argument had been preserved in the trial court, this Court should reject it because it rests on a number of false assumptions. For example, Plaintiffs predicate their argument on the contention that their claims involve exclusively non-Indians on

privately owned land. (Appellants' Opening Br. at p. 28). Plaintiffs' Amended Complaint, however, seeks declaratory and injunctive relief against the Tribe and its governmental officials, in addition to monetary relief against the UTERO officials and the private companies. Each of Plaintiffs' claims seeks relief against either the Tribe or its officials. (*Am. Verified Compl.*) (R. at 548-79). Those claims in general assert that the Tribe's government representatives have acted beyond the authority of the UTERO Ordinance and have committed torts against the Plaintiffs. (*Id.*; *Judg.* at p. 12, ¶ 20 (R. at 2052)). Deciding the claims for declaratory and injunctive relief and the tort claims therefore requires an interpretation of the UTERO Ordinance and a determination of the extent of the Tribe's jurisdiction. This case therefore involves something far different and of greater interest to the Tribe than a suit involving non-Indians on privately owned land.

Again citing *Montana v. United States*, 450 U.S. 544 (1981), Plaintiffs also maintain that the present case, which is wholly predicated upon an interpretation of the Tribe's powers under the UTERO Ordinance, is not a case involving questions of what is "necessary to protect tribal self-government or to control internal relations." As the trial court recognized, however, a judgment rendered in the Tribe's absence "that purports to limit the Tribe's ability to sanction or exclude businesses from Tribal property ... creates a significant potential for prejudice against a key interest in tribal self-governance." (*Judg.* at p. 15, ¶ 24) (R. at 2055).

Plaintiffs next argue that "a state may regulate activities on Indian reservations when it has a sufficient interest." (Appellants' Opening Br. at p. 29). The point of this argument is unclear. On the one hand, Plaintiffs have repeatedly maintained that they are not trying

to regulate tribal activities on Indian lands. Nor is any state attempting to do so through this action. On the other hand, if Plaintiffs' point is that they should be allowed to bring this action in state court because they *are* seeking to regulate activity on Ute tribal lands, then the Tribe has a compelling interest in the outcome of the litigation, and this contradicts Plaintiffs' previous argument that this is not a case in which the Tribe needs to be involved "to protect tribal self-government or to control internal relations."

All of the preceding arguments set forth by Plaintiffs in this section of their brief are repetitions of their arguments for why they believe that the Tribe is not a necessary and indispensable party. They do not implicate a need to balance interests. In their final argument in this section, however, Plaintiffs say that if this were a case of concurrent jurisdiction, then the balance of interests would favor allowing the case to proceed in state court. Again, this point is hypothetical and irrelevant to any of the issues on appeal. The trial court's findings that the Tribe is immune from suit because it has not waived sovereign immunity and that the Tribe is an indispensable party mean that the case cannot proceed in state court. No issue of concurrent jurisdiction has been raised on appeal, and the balance of interests is irrelevant.

The point of this entire section of Appellants' Opening Brief is confusing. If, as the trial court held, the Tribe has not waived sovereign immunity and the court lacks subject matter jurisdiction, and if the Tribe is a necessary and indispensable party, then how various interests balance is irrelevant to the appeal because, even assuming *arguendo* that Plaintiffs are correct in their assessment of various interests, that fact cannot overcome the trial court's lack of subject matter jurisdiction or the indispensability of the Tribe.

IV. The Trial Court Acted Within Its Sound Discretion in Denying Plaintiffs' Motion to Supplement Their Pleadings Because the Motion Was Both Belated and Futile and Granting the Motion Would Have Unduly Prejudiced the Defendants.

Plaintiffs maintain that the trial court erred in denying their Motion to File Supplemental Pleading that they filed pursuant to U.R.C.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, such as prejudice to defendants.’” *Sw. Nurseries, LLC v. Florists Mut. Ins.*, 266 F. Supp. 2d 1253, 1256 (D. Colo. 2003) (quoting *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001)). Denying leave to amend may be “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).

Applying this standard, the trial court denied Plaintiffs' motion for several reasons. The court ruled that the motion was “a clear attempt to bolster their chances of surviving the various motions to dismiss filed by the Defendants.” (*Judg.* at pp. 31-32, ¶ 64) (R. at 2071-72). The court heard oral argument on the dismissal motions of January 29, 2016. Plaintiffs' motion was not filed until February 8, 2016. The court pointed out that the Defendants had spent considerable time preparing their motions and that the court itself had spent considerable time researching and reviewing the arguments. It added that the Defendants' motions had been pending for an extended period of time. The court ruled that, “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.” (*Id.* at p. 32, ¶ 64) (R. at 2072).

The trial court also found that the Defendants would be unduly prejudiced by allowing the pleadings to be amended in an effort to defeat the motions to dismiss. The court observed that Plaintiffs had initiated the lawsuit almost three years earlier and that the Defendants had 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.” (*Id.* at p. 32, ¶ 65) (R. at 2072). The court therefore denied the Plaintiffs an additional opportunity to defeat the Defendants’ motions.

The court also ruled that the Plaintiffs’ motion was moot. Pursuant to its Judgment, the court had dismissed the case in its entirety on several grounds, including the fact that the Tribe was immune from suit because of its sovereign immunity and because the Tribe was a necessary and indispensable party to the action. Additionally, the court found that the lawsuit required the court to interpret the Tribe’s UTERO Ordinance. “A state district court does not have jurisdiction over a sovereign, nor can it interpret the laws of the sovereign.” (*Id.* at p. 33, ¶ 66) (R. at 2073). On those bases, the court concluded as follows:

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.

(*Id.*).

Finally, the court found that the Plaintiffs failed to explain how the various factual allegations included in the proposed supplemental pleading were relevant to Plaintiffs’ claims. The Plaintiffs had suggested that the trial court examine the factual allegations and

determine which ones might be relevant to the motions to dismiss. The court declined Plaintiffs' invitation, ruling that it was Plaintiffs' responsibility to explain how the facts applied to the claims and the arguments. (*Id.* at p. 33, ¶ 67) (R. at 2073).

As against all that, Plaintiffs make a one-sentence argument, stating that, "Despite the passage of time, this case is in its infancy and allowing leave to supplement will not prejudice any party." (Appellants' Opening Br. at p. 50). Plaintiffs do not challenge the standard applied by the court and do not say why they believe the court abused its discretion.

Plaintiffs are clearly wrong in asserting that this case is in its infancy. As the trial court pointed out, Defendants' dismissal motions had been pending for years, extensive briefing had taken place, and oral argument had been held. Plaintiffs are also wrong in asserting, without argument, that allowing them to supplement their pleadings at this late date would not prejudice the Defendants. To require the Defendants to begin anew, file new motions to dismiss and supporting memoranda, and participate in another oral argument, would prejudice the Defendants.

Furthermore, even if the Defendants were not prejudiced by having to start over with a new pleading, the outcome would, as the court ruled, be the same. Even if the Plaintiffs were allowed to supplement their pleading, the Tribe would still enjoy sovereign immunity and would be a necessary and indispensable party to the action. Defendants' attempt to avoid dismissal of their claims through a supplemental pleading would therefore be futile.

There is no basis for Plaintiffs' contention that the trial court abused its discretion in denying their motion to file a supplemental pleading, and the court's ruling should be upheld.

V. With Respect to All Other Issues Raised by Plaintiffs on Appeal, the Tribe, L.C. Welding, and Huffman Enterprises Join in the Arguments Made by the Other Appellees.

Pursuant to Utah R. App. P. 24(i), the Tribe, L.C. Welding, and Huffman Enterprises join in the arguments made by the other Appellees with respect to all other arguments presented by Plaintiffs in Appellants' Opening Brief.

CONCLUSION

For the reasons set forth above, the *Judgment* should be affirmed.

DATED THIS 30th day of November, 2016.

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/s/ J. Preston Stieff

J. Preston Stieff

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RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

Appellees' counsel certifies that this brief complies with the type-volume limitation set forth in Utah R. App. P. 24(f)(1)(A) in that it contains 11,122 words as determined by the use of Microsoft Office Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **BRIEF OF THE APPELLEES UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION; L.C. WELDING & CONSTRUCTION, INC.; AND HUFFMAN ENTERPRISES, INC.** to be mailed, postage prepaid, via first-class mail, this 30th day of November, 2016 to the following:

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