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**UNITED STATES DISTRICT COURT**
**DISTRICT OF UTAH, CENTRAL DIVISION**

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| ANGELITA M. CHEGUP, et. al,<br><br>Plaintiffs<br><br>v.<br><br>UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al.,<br><br>Defendants. | **DEFENDANTS' SUPPLEMENTAL MEMORANDUM ON SECRETARIAL APPROVAL OF TRIBAL ORDINANCE**<br><br>Civil Case No. 2:19-cv-00286-BSJ<br><br>Judge Bruce S. Jenkins |

Pursuant to the Court's Order Regarding Secretarial Approval, entered August 26, 2022 (Dkt. 130), Defendants Ute Indian Tribe of the Uintah and Ouray Reservation; Tribal Business Committee for the Ute Indian Tribe of the Uintah and Ouray Reservation; Luke Duncan; Tony Small; Shaun Chapoose; Edred Secakuku; Ronald Wopsock; and Sal Wopsock ("Defendants") respectfully submit this Supplemental Memorandum on Secretarial Approval of Tribal Ordinance.

## BACKGROUND

At the conclusion of the July 12, 2022 evidentiary hearing on Tribal exhaustion issues, the Court ordered the parties to submit additional memoranda on the issue of Secretarial approval of Tribal Ordinance No. 14-004. Plaintiffs filed Plaintiffs' Brief Re: Secretarial Approval on July 18, 2022 (Dkt. 126). Defendants filed Defendants' Memorandum on Determination of Validity of Tribal Ordinance on August 15, 2022 (Dkt. 128). On August 18, 2022, Plaintiffs filed Plaintiffs' Reply Re: Secretarial Approval (Dkt. 129). The Court entered its Order Regarding Secretarial Approval on August 26, 2022 (Dkt. 130). This memorandum is submitted pursuant to the latter order.

As shown below, Supreme Court precedent mandates that the issue of interpretation of the Tribal ordinance and the issue of Tribal Court jurisdiction are issues that must be decided, in the first instance, by the Tribal Court. As also shown below, the Defendants fulfilled their obligations with respect to Secretarial review of the ordinance when the Tribal Business Committee submitted the enacted ordinance to the Superintendent of the Reservation. The Superintendent did not refuse to approve the ordinance and the Secretary of the Interior did not rescind it. Under the Ute Indian Tribe Constitution, therefore, the ordinance has gone into effect. Furthermore, it is Plaintiffs' burden to prove the alleged invalidity of the ordinance. They have failed to do so and have attempted to shift the burden of proof to the Defendants. Finally, even if Ordinance No. 14-004 were proved to be invalid, Plaintiffs can appeal their banishments by seeking habeas relief in Tribal Court pursuant to Rule 35 of the Ute Indian Rules of Civil Procedure. Plaintiffs have therefore failed to exhaust their tribal remedies.

## ARGUMENT

### I. It Is the Exclusive Responsibility of Tribal Courts to Determine the Validity of Tribal Laws Such as Ordinance No. 14-004, and Federal Courts Lack Jurisdiction to Decide that Issue.

"It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). The issue of whether the Tribal Court or this Court is to decide the validity of Ordinance No. 14-004 raises questions of federal jurisdiction. The Defendants therefore reassert their argument, detailed in Defendants' Memorandum on Determination of Validity of Tribal Ordinance (Dkt. 128), that it is the responsibility of the Ute Indian Tribal Courts, not the federal courts, to determine issues of the validity of Tribal ordinances. The Defendants refer the Court to the arguments and authorities cited in their previous memorandum. The Tenth Circuit has specifically held that federal courts exceed their jurisdiction when they purport to interpret matters of internal tribal law. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 135 (10th Cir. 1959) ("[N]either under the [United States] Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations.") The Court should therefore decline to decide this issue.

## II. By Responding to the Court's Request for Briefing of the Issue of Secretarial Approval, the Defendants Do Not Waive Their Right to Have the Issue Decided by the Tribal Courts.

The Defendants are addressing the issue of Secretarial approval of Ordinance No. 14-004 in compliance with the Court's order. The Defendants, however, specifically reserve the right to have the issue decided by the Ute Indian Tribal Courts and do not waive that right.

## III. Plaintiffs Have Failed to Meet Their Burden of Proving Lack of Secretarial Review.

Petitioners must exhaust tribal remedies before seeking habeas relief under the Indian Civil Rights Act. *Chegup v. Ute Indian Tribe of the Uintah and Ouray Reservation,* 28 F.4th 1051, 1060 (10th Cir. 2022). As discussed more fully in Defendants' June 13, 2022 Supplemental Memorandum on Tribal Exhaustion at p.6 (Dkt. 115), the *Chegup* court recognized certain limited exceptions to the tribal exhaustion requirement. *Chegup*, at 1061. The court cautioned, however, as follows: "While these exceptions are meaningful, they are applied narrowly. Our court has taken a strict view of the tribal exhaustion rule. *We have required a party invoking any of these exceptions to make a substantial showing of eligibility*." *Id*. (citations, internal quotation marks, and alterations omitted) (emphasis added). It is therefore Plaintiffs' burden to prove an exception to the tribal exhaustion requirement. In an effort to prove such an exception, Plaintiffs have challenged the validity of Ordinance No. 14-004. Under *Chegup*, it is Plaintiffs' burden to

prove the ordinance is invalid. Plaintiffs' attempt to shift the burden to Defendants to prove that the ordinance *is* valid is impermissible under *Chegup*.

Plaintiffs have failed to meet their burden. First, Plaintiffs are wrong about what is required of the Defendants. Plaintiffs rely upon Article VI, Section 1(i) of the Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah ("Constitution"). A copy of the Constitution is attached hereto as *Exhibit A*. Plaintiffs erroneously claim that Section 1(i) requires that the ordinance receive the *approval* of the Secretary of the Interior. (*Pls' Br. Re: Secretarial Approval* at 4) (Dkt. 126). In reality, Section 1(i) provides that the ordinance "shall be subject to *review* by the Secretary of the Interior." *Constitution,* Art. VI, Sec. 1(i) (emphasis added). This distinction between approval and review is important for the reasons explained below.

The manner of review of Tribal ordinances is governed by Article VI, Section 2 of the Constitution which provides as follows:

> Sec. 2. Manner of review. Any resolution or ordinance which by the terms of this Constitution is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation who shall, within ten (10) days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the Tribal Business Committee of such action; provided that if the Superintendent shall refuse to approve any resolution or ordinance submitted to him within ten (10) days after its enactment, he shall advise the Tribal Business Committee of his reasons therefore, and the committee, if such reasons appear to be insufficient may refer it together with the Superintendent's objections to the Secretary of the Interior, who may pass upon same and either approve or disapprove it within ninety (90) days from its enactment.

*Constitution,* Art. VI, Sec. 2. Pursuant to this section, the Tribal Business Committee satisfies its entire obligation regarding Secretarial review when it submits an enacted ordinance to the Superintendent of the Reservation. All other responsibilities regarding approval or disapproval of the ordinance belong to the Superintendent and the Secretary and are outside the hands of the Defendants. The Superintendent has ten days from receipt of the enacted ordinance to approve or disapprove the ordinance. If the Superintendent *refuses* to approve the ordinance within those ten days, he must so advise the Business Committee. *Id.* Article VI, Section 2 also provides the Secretary with the authority to rescind the ordinance and notify the Business Committee of his action within 90 days from the date of enactment. *Id.* Neither the Superintendent nor the Secretary are required to give the Business Committee notice of their *approval* of the ordinance. In the absence of timely notice of disapproval from either the Superintendent or the Secretary, the ordinance goes into effect as of the date of enactment. *Id.* In this case, Ordinance No. 14-004 was submitted to the Superintendent. The Superintendent did not give notice of refusal to approve, nor did the Secretary notify the Business Committee of recission of the ordinance, and the time for such notifications has now passed. Pursuant to the Constitution, therefore, the ordinance took effect as of the date of its enactment.

It is Plaintiffs' burden to prove the invalidity of Ordinance No. 14-004, and they have failed to do so. First, Defendants have shown that they satisfied all requirements for Secretarial review and that the ordinance has taken effect and is valid. Second, Plaintiffs have not presented evidence sufficient to permit the Court to rule that the

ordinance is invalid. The only evidence submitted by Plaintiffs is a copy of the ordinance that has not been signed by the Superintendent. That document proves nothing. It is the version of the ordinance submitted to the Superintendent after its enactment. As explained, the Business Committee has received no communication from the Superintendent or Secretary since submission of the ordinance to the Superintendent, and the ordinance has gone into effect. The document offered by Plaintiffs does not, therefore, prove lack of Secretarial review. Plaintiffs have failed to meet their burden of proving the invalidity of the ordinance, and their contention that they are excused from exhausting tribal remedies on that basis must be rejected.

## IV. Plaintiffs Could Have Appealed Their Banishments to the Tribal Court and Could Have Presented Their Claim of the Invalidity of Ordinance No. 14-004 There.

The Tenth Circuit found that the Plaintiffs in this case *did* have available appellate remedies in Tribal Court. In fact, the court held that Tribal law granted the Tribal Court "*exclusive* authority to hear appeals from orders of exclusion and/or removal after a hearing has been held thereon before the Ute Business Committee." *Id*. at 1061 (emphasis added). As demonstrated in Defendants' Supplemental Memorandum on Tribal Exhaustion (Dkt. 115), Plaintiffs were therefore required to appeal to the Tribal Court before filing the present action. Plaintiffs have never explained why they failed to file an appeal after they obtained counsel but before filing this case. Had Plaintiffs done so, the Tribal Court could have ruled on the validity of Ordinance No. 14-004 and could have decided whether it had jurisdiction to consider the appeal. Allowing the Tribal Court to have done that would have comported with the Supreme Court's requirement that the

determination of tribal court jurisdiction must be decided in the first instance by the tribal court itself. "Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction'" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)). "That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *National Farmers Union*, at 856. Additionally, "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id.* "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. The questions of the validity of the Tribal ordinance and of Tribal Court jurisdiction should therefore have been raised in an appeal to the Tribal Court before they were raised here.

## V. Even If Ordinance No. 14-004 Were Invalid, Plaintiffs Have Another Avenue of Appeal Under Rule 35 of the Ute Indian Rules of Civil Procedure.

Ordinance No. 14-004 is not the only Tribal remedy available to Plaintiffs. Rule 35 of the Ute Indian Rules of Civil Procedure, a copy of which is attached hereto as *Exhibit B*, grants individuals the right to seek habeas corpus relief "whenever it appears to the court that any person is unjustly imprisoned or otherwise restrained of his liberty." Ute Indian

Rules of Civil Procedure, Rule 35(b). The Rules are publicly available and posted online at https://narf.org/nill/codes/ute_uintah_ouray/utebodyt2.html. Therefore, even if Ordinance No. 14-004 *were* invalid, the Plaintiffs have the right to seek Tribal remedies for their banishment under Rule 35. Regardless of the validity of the ordinance, therefore, Plaintiffs had tribal remedies they failed to exhaust.

## CONCLUSION

The two issues raised by the Court's request for briefing – the issue of the validity of Ordinance No. 14-004 and the issue of the Tribal Court's jurisdiction – are issues the Supreme Court has said must, in the first instance, be decided by the Tribal Court. Additionally, the Defendants have satisfied all their obligations with regard to Secretarial review of Ordinance No. 14-004, and the ordinance has gone into effect. It is Plaintiffs' burden to prove the alleged invalidity of the ordinance, and they have failed to present sufficient evidence to allow the Court to make that determination. Finally, even if the ordinance were invalid, Plaintiffs have another avenue of appeal open to them through Rule 35 of the Ute Indian Rules of Civil Procedure. Plaintiffs have therefore failed to carry their burden of proving they were exempt from exhausting their tribal remedies.

DATED this 6th day of September, 2022.

J. PRESTON STIEFF LAW OFFICES, LLC

*/s/ J. Preston Stieff*
J. Preston Stieff
*Attorney for Defendants*

**CERTIFICATE OF SERVICE**

I certify that on the 6th day of September, 2022, I caused a true and correct copy of the foregoing **DEFENDANTS' SUPPLEMENTAL MEMORANDUM ON SECRETARIAL APPROVAL OF TRIBAL ORDINANCE** to be filed electronically with the Court which will send notification of such filing to all parties of record.

*/s/ J. Preston Stieff*
J. Preston Stieff