IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

SHIVWITS BAND OF PAIUTE INDIANS, and KANOSH BAND OF PAIUTE INDIANS, Plaintiffs, v. TAMRA BORCHARDT-SLAYTON, Defendant.	**FINDINGS OF FACT, CONCLUSIONS AND ORDER DENYING: (DKT. 22)MOTION TO DISMISS; (DKT. 29)MOTION TO SUBMIT SURREPLY IN OPPOSITION TO MOTION TO DISMISS; AND (DKT. 35) MOTION TO STRIKE PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY** Case No. 4:20-cv-00009 DN District Judge David Nuffer

Plaintiffs Shivwits Band of Paiute Indians and Kanosh Band of Paiute Indians (the Bands) filed this complaint on February 14, 2020.[1] On March 11, 2020, Defendant Tamra Borchardt-Slayton (Borchardt-Slayton) filed Defendant's Motion to Dismiss the complaint on multiple grounds.[2] During briefing on the motion to dismiss, the parties filed two related motions. The Bands filed a motion to submit a surreply brief,[3] and Borchardt-Slayton filed a motion to strike the Bands' submission of supplemental authority.[4]

For the reasons set forth below, all three motions are denied.

[1] Docket no. 2, filed February 14, 2020.

[2] Defendant's Motion to Dismiss and Memorandum in Support of Motion, docket no. 22, filed March 11, 2020. *See also* Plaintiffs' Response in Opposition to Motion to Dismiss, docket no. 26, filed April 8, 2020 and Defendant's Reply in Support of Motion to Dismiss, docket no. 28, filed April 21, 2020. The Bands were requested to submit a draft order (docket no. 38, filed October 26, 2020), which they did. Borchardt-Slayton objected to the order (docket no. 39, filed November 12, 2020) and the Bands responded (docket no. 40, filed October 16, 2020).

[3] Docket no. 29, filed May 20, 2020.

[4] Docket no. 35, filed August 31, 2020.

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OVERVIEW

The Plaintiff Bands are two of the five constituent bands of the Paiute Indian Tribe of Utah (PITU).[5] The Bands' complaint alleges that Borchardt-Slayton has taken multiple actions which are outside the scope of her authority and which violate federal law, including the Paiute Indian Tribe of Utah Restoration Act (Paiute Restoration Act).[6] These include Borchardt-Slayton unlawfully impeding representatives of the Bands from participating in the six-member governing body of the PITU; using PITU funds without authorization in an attempt to enforce her exclusion of the Bands from participating in Tribal governance; and taking other related actions to exclude the Bands from participating in PITU decision-making. The Bands seek

[5] Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs; 85 Fed. Reg. 5462, 5464 (Jan. 30, 2020).

[6] 94 Stat. 317.

prospective non-monetary relief and assert that the doctrine from *Ex Parte Young* applies to permit injunction against a tribal official's actions which are contrary to federal law.[7]

Borchardt-Slayton moves to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). She asserts the Bands must exhaust remedies in a federal administrative appeal and must exhaust remedies in a tribal court appeal. She further asserts that the United States and the PITU are indispensable parties to this suit, and that suit is barred by the Tribe's sovereign immunity.

STANDARD OF REVIEW—MOTION TO DISMISS

12(b)(6) Standard

Under *Bell Atlantic Corp. v. Twombly*[8] and *Ashcroft v. Iqbal,*[9] to withstand a motion to dismiss, a plaintiff must allege enough facts, "taken as true, to state a claim to relief that is plausible on its face."[10] A plaintiff must "offer specific factual allegations to support each claim"[11] and while a court must "accept as true all of the allegations contained in a complaint,"[12] this requirement is "inapplicable to legal conclusions."[13] The determination of plausibility will be a "context-specific task that requires the reviewing court to draw on its judicial experience

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[7] Docket no. 2, p. 31.

[8] 550 U.S. 544 (2007).

[9] 556 U.S. 662 (2009).

[10] *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 570).

[11] *Id.*, 656 F.3d at 1214.

[12] https://www.westlaw.com/Document/I839d12ced4a011e0bc27967e57e99458/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=da3.0*Id.* at 1214 (internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 677).

[13] *Id.* at 1214 (internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 679).

and common sense."[14] Therefore, "in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable."[15]

12(b)(1) Standard

Plaintiff moved to dismiss under 12(b)(1). A motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) may take one of two forms. A facial attack looks only to the factual allegations of the complaint in challenging the court's jurisdiction. A factual attack goes beyond the factual allegations of the complaint and presents evidence in the form of affidavits or otherwise to challenge the court's jurisdiction.[16]

Borchardt-Slayton's motion should be analyzed as a facial challenge to the pleadings. Borchardt-Slayton does not provide any affidavit or other document challenging the allegations contained in the complaint. It is clear that she plans to argue and provide evidence that she did not act outside the scope of her authority, causing the claim against her under *Ex Parte Young* to fail, but at this stage the allegations of facts that she acted outside the scope of her authority are the basis for evaluating the complaint.[17] The same standard which applies to a motion to dismiss for failure to state a claim upon which relief can be granted applies when reviewing a facial attack on the pleadings.[18]

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[14] *Id.* at 1214.

[15] https://www.westlaw.com/Document/I839d12ced4a011e0bc27967e57e99458/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=da3.0&fragmentIdentifier=co_pp_sp_506_1214*Id.*

[16] *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010)

[17] *E.g., Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

[18] *Muscogee (Creek) Nation*, 611 F.3d at 1227.

FACTUAL SETTING

For purposes of resolving the pending Motion to Dismiss and related motions, the following factual setting is drawn from statutes, the complaint, and tribal documents which are not in dispute:

1. The PITU presently comprises five Bands of Southern Paiute people, including the Shivwits Band of Paiutes and the Kanosh Band of Paiutes. Prior to 1954, however, the Shivwits and Kanosh Bands were recognized as separate "tribes" for purposes of federal law, each having their own Constitutions approved by the Secretary of Interior pursuant to the Indian Reorganization Act.[19]

2. In 1954 the United States terminated its trust relationship with the Plaintiff Bands and with other Bands of Southern Paiute Indians.[20]

3. In 1980, through the Paiute Restoration Act, the United States Congress restored each of the five Bands to the status that each Band had prior to termination, restoring the federal trust relationship to each of the five Bands[21] and making the Bands eligible for federal programs and services again.[22]

4. In the Paiute Restoration Act, Congress allowed for the five Bands to create an Interim Council for purposes of implementing the Restoration Act, made up of one

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[19] *E.g.*, Constitution and By-Laws of the Shivwits Band of Paiute Indians of the Shivwits Reservation, approved March 21, 1940; Constitution and By-Laws of the Kanosh Band of Paiute Indians of the Kanosh Indian Community, approved December 2, 1942; 26 Stat. 989-1005; 45 Stat. 1161; 49 Stat. 393; 50 Stat. 239-240; 68 Stat. 1099.

[20] 68 Stat. 1099.

[21] 94 Stat. 317, Section 3(a) ("The Federal trust relationship is restored to the Shivwits, Kanosh Bands…").

[22] 94 Stat. 317, Section 3(a) ("The tribe and the members of the tribe shall be eligible for all Federal services and benefits furnished to federally recognized Indian tribes"; "eligibility of the tribe and its members for such Federal services and benefits shall become effective upon enactment of this Act."); Section 2(1) ("The term "tribe" means the Cedar City, Shivwits, Kanosh, Koosharem, and Indian Peaks Bands of Paiute Indians.").

representative from each of the five Bands.[23] Although the interim council could last no longer than six months under the terms of the Restoration Act,[24] the five Bands adopted a joint Constitution a year after the Restoration Act wherein the Bands chose to continue working together on certain joint governance matters.[25] The Constitution established the Tribal Council of the Paiute Indian Tribe of Utah through which the five Paiute Bands now jointly govern on defined matters.[26]

5. Prior to the Tribal Constitution that was approved by the Secretary of Interior on October 8, 1981, the PITU did not exist as a stand-alone Tribe and had not been a federally recognized Indian Tribe on the list of federally recognized tribes.[27]

6. The PITU Tribal Council is comprised of one member from each of the five Bands of the PITU. The PITU Council elects one of its five members as the Chair, and the Band whose member is selected as the Chair selects a second member, so that the Council comprises six members.[28]

7. Borchardt-Slayton was selected as the Chair of the PITU Council, and her mother was then selected as the sixth member of the PITU Council.[29]

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[23] 94 Stat. 319, Section 5(a).

[24] *Id*.

[25] Constitution of the Paiute Indian Tribe of Utah, approved by Secretary of Interior on October 8, 1981.

[26] *Id.*, Article IV, Section 1.

[27] Docket no. 2, ¶¶33-34.

[28] PITU Constitution, Article IV, Section 1(a)(b)(c).

[29] Docket no. 2, ¶¶152-155.

8. The PITU Constitution provides that the PITU Council can only take action at a meeting at which a quorum is present, and a quorum is a majority of the members of the PITU Council—so a quorum of the Tribal Council is four Tribal Council members.[30]

9. Prior to March 11, 2019, PITU Council members became concerned that legal counsel for the PITU were taking actions that were not authorized by the PITU, that PITU's legal counsel was only providing information about its actions to Borchardt-Slayton, that legal counsel was obtaining PITU funds for alleged legal services that had not been authorized by the PITU, and that Borchardt-Slayton was having legal counsel take action to benefit her contrary to the interests of the PITU.[31]

10. At meetings at which a quorum of the PITU Tribal Council was present on March 11, and April 1, 2019, the PITU Tribal Council authorized resolutions which placed procedural and substantive limits on the use of legal counsel. These included barring legal counsel from taking direction from anyone other than the PITU Tribal Council and requiring a written resolution of the PITU Tribal Council before any legal work was undertaken.[32]

11. Borchardt-Slayton refused to comply with the resolutions regarding use of legal counsel and refused to provide information to the Bands regarding actions of legal counsel.[33]

12. At a meeting at which a quorum of the PITU Tribal Council was present April 1, 2019, the PITU Council approved resolutions recognizing a complaint for removal of Borchardt-

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[30] PITU Const., Article X, Section 1(b)(3).

[31] Docket no. 2, ¶¶95-98.

[32] Docket no. 2, ¶¶ 99-102.

[33] Docket no. 2, ¶102. Paragraph 102 is pled on information and belief and includes the supporting allegation that documentary proof would be within the control of Borchardt-Slayton and not available to Plaintiff Bands. *See also* Complaint, §V. D. While Borchardt-Slayton includes numerous documents in her response brief, she does not include any resolutions or other documents which dispute the claim that she is acting outside the scope of her authority. The truth of paragraph 102 of the complaint is assumed as fact for current purposes.

Slayton from the PITU Tribal Council and authorizing review of the same by an outside investigator. A majority of the Bands' representatives to the PITU Tribal Council voted in favor of that Resolution.[34]

13. After receiving notice of Resolution 2019-21, Borchardt-Slayton drafted and submitted complaints against the Bands' representatives serving on the PITU Tribal Council.[35]

14. Without providing notice to the Bands' elected representatives, Borchardt-Slayton conducted a meeting with one or more other PITU Council members. At that meeting, Borchardt-Slayton approved her complaints against the Bands' representatives on the PITU Council.[36] The Bands allege that her actions were without proper PITU Tribal Council approval and were therefore ultra vires.

15. On June 11, 2019, Borchardt-Slayton , her mother (Jeanine Borchardt), and one other member of the PITU Council, representing bands that collectively have about 19% of the members of the PITU, met. Members of Plaintiff Bands are approximately 50% of the members of the PITU.[37]

16. During that meeting, Borchardt-Slayton signed documents in which she purported to remove the Plaintiff Bands' representatives from the PITU Tribal Council. Those documents were not actions of the PITU Tribal Council because no quorum was present at that meeting. Those documents were not PITU Tribal Council actions because the documents showed that some of the grounds for removal of the Bands' representatives were not supported by any PITU

[34] PITU Resolution 2019-22.

[35] Docket no. 26-1 at 25-26.

[36] Docket no. 2, ¶139

[37] Docket no. 2, ¶40.

Tribal Council members and others that were supported by only one or two PITU Tribal Council members. In no cases were the actions approved by a majority of the PITU Tribal Council.[38]

17. Borchardt-Slayton 's ultra vires actions, as alleged in Section V of the Bands' complaint, included:

a. She prohibited the Bands' elected representatives from participating in the PITU government.

b. She interfered with and refused to recognize the results of the Bands' elections of members to the PITU Tribal Council.

c. She barred the PITU from providing notice of meetings and notice of PITU actions to the Bands' representatives.

d. Without PITU authorization, she employed legal counsel to defend her ultra vires actions and directed legal counsel to claim to represent the PITU, with knowledge that the PITU had not properly authorized the representation.

e. Without PITU authorization, she provided tribal funds to legal counsel that she was unlawfully using.

f. She took action against the Bands and their elected representatives which were retaliatory for the Bands' actions seeking to secure their rights to participate in the PITU government.

[38] Docket no. 2, ¶153.

Federal Administrative Appeals

18. There are two administrative appeals filed by the Shivwits Band which are currently pending before the United States Bureau of Indian Affairs. The United States is the respondent in those appeals, and the PITU is an intervenor/respondent.[39]

19. The primary issue in the administrative appeals is whether or not the Shivwits Band is eligible under the Indian Reorganization Act or the Indian Self Determination and Education Assistance Act to participate in the related programs and services of the federal government, as contemplated by Congress' action to restore the Bands under the Paiute Restoration Act. The appeals also include claims based upon federal denial of a contract with the Shivwits Band.

20. The ultra vires actions alleged by the Bands in their complaint in this matter are not at issue in the pending federal administrative appeals.

PITU Tribal Court Appeal

21. At the time the Bands filed this case, there was an appeal pending in a PITU forum (the PITU Court). In its complaint, the Band alleged that the PITU Court was an ad hoc entity which Borchardt-Slayton created through actions outside the scope of her authority, and that she instructed to hear only one case.

22. After briefing was completed in this matter, the PITU Court issued a final ruling on the case before it, and therefore at the time that this order is being issued, there is no pending PITU case, and no PITU Court.[40]

[39] *Shivwits Band of Paiute Indians v. Bowker*, IBIA case 20-2016, *Shivwits Band of Paiute Indians v. Director, Phoenix Area Office, Indian Health Service*, IBIA case 20-017.

[40] Borchardt-Slayton created the PITU Court solely to hear the one case. That case is now concluded.

23. The Bands prevailed in the PITU Court. The PITU Court held that the Bands' representatives on the Tribal Council were unlawfully removed by Borchardt-Slayton and the Tribal Council, in violation of Tribal law.[41]

DISCUSSION & CONCLUSIONS OF LAW

Motion to Dismiss

A. Exhaustion of BIA Administrative Remedies in Distinct Matters is not Required

The Bands have two administrative appeals pending before the Interior Board of Indian Appeals.[42] Borchardt-Slayton asserts that this court cannot hear this case until those administrative appeals are decided.

Borchardt-Slayton would have to establish two elements to stay this case pending completion of those administrative appeals. First, she would have to show that the Bands, plaintiffs in this case, are challenging the administrative decision that is under review in the administrative appeals. Second, she must point to a federal statute or agency rule which requires this court to stay its hand.[43]

Borchardt-Slayton has not met her burden on either element.

The parties agree that a central issue in the administrative appeals is a legal question: whether Congress' action in the Paiute Restoration Act to restore the Bands' legal status and the trust responsibility of the federal government to the Bands and make them eligible for federal programs and services, means that the Shivwits Band has actionable rights under the Indian Reorganization Act and the Indian Self-Determination and Education Assistance Act. The BIA

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[41] *Paiute Indian Tribe of Utah Tribal Council v. Carmen Clark, Corrina Bow, and Delvern Pikyavit*, APP-2019-01 (PITU Ct. App, 2020); Docket 34-1.

[42] *Shivwits Band of Paiute Indians v. Bowker*, IBIA case 20-2016, *Shivwits Band of Paiute Indians v. Director, Phoenix Area Office, Indian Health Service*, IBIA case 20-017.

[43] Coosewoon v. Meridian Oil Co., 25 F.3d 920, 924 (10th Cir. 1994).

decisions subject of the administrative appeals did determine that the individual Bands do not have access to federal programs independent from the PITU. But that part of the BIA decision is not at issue in this case.

The allegations in the current case are made regardless of the Bands' status as independently "federally recognized" as that term is used in the Federally Recognized Tribes Act,[44] federal law, including the federal Constitution, PITU Restoration Act, Indian Civil Rights Act, or Indian Reorganization Act, and the Tribal Constitution[45] (which incorporates express protections from the Indian Civil Rights Act[46]). The Bands assert that they have rights to participate in the PITU governing body.[47] They assert that Borchardt-Slayton is violating those rights, and Borchardt-Slayton denies that she has taken actions which violate those rights.

Resolution of the pending administrative matters is not required for this case to proceed because this case addresses distinct issues and facts. The pending administrative appeals before the Interior Board of Indian Appeals do not call for the administrative law judge to determine if Borchardt-Slayton acted outside the scope of her duties in violation of federal law.

B. Exhaustion of Tribal Court Remedies is Inapplicable or Moot

At the time the parties filed their memoranda on this motion, there was a pending case in the PITU Tribal Court of Appeals. That case raised a non-jurisdictional question of whether this

[44] *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5464 (Jan. 30, 2020).

[45] PITU Constitution, Article I, Section 2 (governmental powers of the PITU must be exercised consistent with applicable federal law); Article V, Section 3 ("the tribal council shall exercise its powers consistent with the limitations imposed by [] Federal law.").

[46] PITU Constitution, Article XIII, Section 2 and Section 4.

[47] PITU Constitution, Article IV, Section 1; Article VIII, Section 2(g).

Court should proceed with this case prior to completion of that PITU court case.[48] After briefing was completed on the motion to dismiss this case, the PITU Court issued its final decision on the matter pending in that Court.[49]

The Tribal Court decision, which has not been appealed by PITU or Borchardt-Slayton, concluded that Tribal Court proceeding and renders moot Borchardt-Slayton's arguments about exhaustion of Tribal court remedies. Even if the exhaustion doctrine could arguably apply in theory, it cannot apply now because the Tribal Court matter has been finally resolved, and the Tribal Council limited that court's authority to hear only that single case. In any event, the Tribal Court decision did not address whether Borchardt-Slayton violated federal law on the same points raised in this case.

Borchardt-Slayton is now asking to dismiss a complaint alleging violations of federal law which the Tribal Court, even if it were organized, lacks authority to adjudicate. Exhaustion of Tribal Court remedies cannot bar this case. Accordingly, this case will not be dismissed due to any lack of exhaustion of Tribal Court remedies.

C. The Tribe and the United States are Not Necessary or Indispensable Parties

Borchardt-Slayton asserts that both the PITU and the United States are necessary, indispensable, and unjoinable parties, and that therefore this case should be dismissed under Federal Rule of Civil Procedure 19.

[48] *E.g., Thlopthlocoo Tribal Town v. Stidham*, 762 F.3d 1226 (10th Cir. 2014) (holding that if exhaustion of tribal court remedies is required, the district court has jurisdiction, and that abating the action pending exhaustion is preferrable to dismissal).

[49] The parties properly submitted the PITU Court decision to this Court as supplemental authority. Docket nos. 33 and 34.

"When applying Rule 19, a district court must first determine whether the absent party is necessary to the lawsuit, and if so, whether joinder of the party would be feasible."[50]

Federal Rule of Civil Procedure 19(a)(1) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

As the movant, Borchardt-Slayton bears the burden to establish both elements, but she has established neither.

Borchardt-Slayton argues that both the United States and the PITU are necessary parties because, she claims, the Bands are seeking to challenge the BIA's administrative decision that the Shivwits Band is not a federally recognized tribe. That argument fails for the same reason her argument for exhaustion of federal administrative remedies fails, as discussed above. The Bands are challenging ultra vires actions of Borchardt-Slayton, and do not challenge a decision by the Bureau of Indian Affairs.

Independently, Borchardt-Slayton's argument that the PITU is a necessary and indispensable party fails because it is contrary to the Tenth Circuit's case law which permits claims against tribal officers in their official capacity, applying *Ex Parte Young* to tribal officers.[51] This Tenth Circuit precedent controls.

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[50] *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999).

[51] *E.g., Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1236 (10th Cir. 2014) ("Rule 19 poses no obstacle when a plaintiff has sued tribal officer instead of the tribe itself because of a claim against the tribe's officer in his official

Under *Ex Parte Young* and *Thlopthlocco Tribal Town*, a federal court in the Tenth Circuit can issue an order requiring a tribal officer sued in his or her official capacity to conform conduct to federal law. Such an order would accord relief among the existing parties, and the PITU would not have an interest in allowing its officer to continue to act in violation of federal law. The PITU, therefore, need not be a party to such a suit. Significantly, PITU has not filed a motion to intervene or a motion to dismiss. PITU has not formally expressed any interest in joining the litigation either. Borchardt-Slayton cannot on her own assert the position of the PITU.

Because the PITU is not a necessary party, it is not necessary to separately analyze whether PITU is an indispensable party. It is not indispensable because it is not even a necessary party.[52]

D. Borchardt-Slayton is Not, At This Stage, Immune from Suit Due to Sovereign Immunity

Borchardt-Slayton claims that "[b]ecause Plaintiffs have not established that [she] has acted outside the scope of her authority or otherwise violated federal law, [she] is entitled to tribal sovereign immunity . . . ."[53] Her position depends on her factual assertion, unable to be resolved on a motion to dismiss, that "[the Bands' allegations relate to conduct well within [her] official capacity and authority as the PITU Tribal Chairperson."[54] This defense may be resolved on summary judgment or at trial but not here.

E. Conclusion on Motion to Dismiss

To the extent Borchardt-Slayton has made any other arguments not specifically addressed above, they require no additional analysis because they do not impact these findings and conclusions. Borchardt-Slayton's remaining arguments are rejected.

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capacity was 'one and the same in an *Ex parte Young* suit for declaratory and injunctive relief.'"); *Vann v. U.S. Dep't of the Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012).

[52] *Davis*, 192 F.3d at 958.

[53] Motion to Dismiss at 22.

[54] *Id.* at 21.

Borchardt-Slayton shall therefore answer the complaint filed by the Shivwits Band of Paiutes and the Kanosh Band of Paiutes.

The Motion to File Surreply is Denied

After Borchardt-Slayton filed her reply in support of her motion to dismiss, the Bands filed a motion to file a surreply brief.[55] Our court rules provide for an opening brief, a response brief, and a reply brief.[56] Surreplies are only permitted by court order. The surreply is unnecessary and the motion will be denied.

The Motion to Strike is Denied

In their briefs on the motion to dismiss, the parties discussed whether this case was required to be abated pending completion of a pending PITU Court matter. On August 20, 2020, the PITU Court issued its final decision in that matter.[57] As discussed above, the issuance of that decision was relevant to the pending motion to dismiss or stay this case. Borchardt-Slayton filed a notice of supplemental authority attaching the decision on August 21, 2020,[58] and the Bands filed a responsive notice of supplemental authority attaching the decision on August 28, 2020.[59] Borchardt-Slayton moved to strike the Bands' notice of supplemental authority, primarily asserting[60] that the Band's supplemental authority contained argument, in violation of DUCivR 7-1(b)(4). That rule provides that a party's notice of supplemental authority "must state, without

[55] Docket no. 29, filed May 20, 2020.

[56] DUCivR 7-1.

[57] *Paiute Indian Tribe of Utah Tribal Council v. Clark*, docket no. 34-1.

[58] Docket no. 33, filed August 21, 2020.

[59] Docket no. 34, filed August 28, 2020.

[60] Borchardt-Slayton also asserted that she did not have an opportunity to respond to the Bands' notice of supplemental authority. This argument is rejected. DUCivR 7-1 expressly provides a party with an opportunity to respond. Borchardt-Slayton could have filed a response, but chose not to do so, and her own notice of supplemental authority adequately explained her position.

argument, the reasons for the supplemental citation." There is no bright line between "reasons," context, and "argument."[61] Here, the supplemental authority substantially impacted the longest legal discussion in the Band's briefs. The motion to strike will be denied.

[61] *Cf.* Comments to 2002 amendments to Fed. R. App. Proc. 28(j) (noting the "difficulty of distinguishing" arguments from statements of reasons for submitting supplemental authority).

ORDER

Based upon the findings of fact and conclusions of law discussed above,

IT IS HEREBY ORDERED:

1. Borchardt-Slayton's motion to dismiss, docket no. 22, is DENIED.

2. The Bands' motion to file a surreply, docket no. 29, is DENIED.

3. Borchardt-Slayton's motion to strike, docket no. 35, is DENIED.

Dated January 6, 2021.

BY THE COURT:

David Nuffer
United States District Judge