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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**CENTRAL DIVISION**

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**OKLEVUEHA EARTHWALKS NATIVE  
AMERICAN CHURCH OF UTAH, INC.,  
et al.,**

**Plaintiffs,**

**vs.**

**KAY BRYSON, et al.**

**Defendants.**

**ORDER**

Case No. 2:05CV383DAK

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This matter is before the court on Defendant Jeffrey Vernon Merkey's Motion for Partial Summary Judgment, Plaintiff's Motion to Stay Proceedings, and Defendants Utah County, Kay Bryson, David Wayment, Jeff Robinson, and Robert Riding's Motion to Dismiss. The court does not believe that oral argument would significantly aid in its determination of these motions. Therefore, the court will decide the motions based on the written submissions of the parties. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties, and the law and facts relevant to the motions. Now being fully advised, the court enters the following order.

**BACKGROUND**

This is a federal civil rights action brought pursuant to 42 U.S.C. § 1983 and § 1988. Plaintiffs seek damages incurred in relation to state criminal actions brought against them by

several of the defendants. Plaintiffs include a Native American church located in Utah County and its leaders James and Linda Mooney, who were prosecuted in state court for the use of peyote. The defendants include the Utah County Attorney, a Utah County Deputy Attorney, detectives employed with Utah County, and certain individuals. Defendant Jeffrey Merkey is an individual residing in the State of Utah. Plaintiffs allege that Merkey conspired with and acted in concert with the other named Defendants to deprive Plaintiffs of their constitutionally protected rights.

Plaintiffs' Complaint alleges seven claims for relief: 1) Redress for Defendants' deprivation of Plaintiffs' rights to freely associate and freely exercise their fundamental religious beliefs and practices guaranteed to Plaintiffs' under the First and Fourteenth Amendments; 2) Redress for Defendants' deprivation of Plaintiffs' rights against arbitrary governmental action and to equal protection of the law guaranteed to Plaintiffs under the Fourteenth Amendment; 3) Redress for Defendants' deprivation of Plaintiffs' Fourteenth Amendment rights not to be deprived of property without due process of law; 4) Redress for Defendants' deprivation of Plaintiffs' privacy guaranteed by the First and Fourteenth Amendments; 5) Redress for Defendants' deprivation of Plaintiffs' Fourth Amendment right against unlawful searches and seizures; 6) Redress for the Defendants' deprivation of Plaintiffs' rights to freely associate for religious purposes and to freely exercise their fundamental religious beliefs and practices guaranteed to Plaintiffs' by the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc; and 7) Injunctive relief restraining the Defendants from further deprivations of Plaintiff's federal constitutional rights.

### **DISCUSSION**

Defendant Merkey brought a Motion for Partial Summary Judgment requesting dismissal of all the causes of actions asserted against him. Plaintiff's opposed Merkey's motion and asked

for a stay of these proceedings pending the criminal action pending against Plaintiffs in this court, case number 2:05cr410TS. Defendants Utah County, Kay Bryson, David Wayment, Jeff Robinson, and Robert Riding's ("Utah County Defendants") then filed a Motion to Dismiss based on Plaintiffs' failure to serve the Complaint within 120 days.

**Defendant Jeffrey Merkey's Motion for Partial Summary Judgment**

Although the parties have not addressed the issue of jurisdiction, the court must first determine whether it has subject matter over the dispute.<sup>1</sup> This court has subject matter jurisdiction over § 1983 civil rights actions pursuant to 28 U.S.C. § 1343. To establish subject matter jurisdiction under 28 U.S.C. § 1343, the plaintiff must show that the defendant acted "under color of any state law." *See* 28 U.S.C. § 1343(3). To satisfy the state action requirement, "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982) (holding that a private party did not act under color of state law in a prejudgment attachment of the debtor's property if the creditor acted contrary to state policy); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (explaining that private action supports a § 1983 claim only if it "may be fairly treated as that of the State itself"); *Pino v. Higgs*, 75 F.3d 1461, 1465 (10th Cir.1996) (noting that private action must be "fairly attributable to the state").

Although typically "[t]he only proper defendants in a Section 1983 claim are those who

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<sup>1</sup> The court notes that there is no indication in the file that Merkey was ever served the Complaint. The court normally would not proceed in a case when there is no indication that a party has been properly served. However, because the parties have briefed the motion, the court will address whether it has subject matter jurisdiction over the claims asserted against Merkey.

represent the state in some capacity,” *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 595 (10th Cir.1999), a plaintiff may assert the necessary state action for § 1983 by implicating state officials in a conspiracy with private defendants. The Tenth Circuit noted in *Dixon v. Lawton*, 898 F.2d 1443, 1449 n.6 (10th Cir.1990), that “[a] § 1983 conspiracy claim may arise when a private actor conspires with state actor to deprive a person of a constitutional right under color of state law.” *Id.* at 1449. In order to prevail on such a claim, “a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient.” *Id.*; *Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir.1990).

In pleading conspiracy, a plaintiff must allege “specific facts showing agreement and concerted action among [the alleged co-conspirators].” *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir.1994). “Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim.” *Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir.1989). Thus, a plaintiff fails to state a claim for conspiracy absent specific facts showing a “meeting of the minds” among the alleged co-conspirators. *See Hunt*, 17 F.3d at 1268.

In this case, Plaintiffs’ Complaint does not mention Merkey by name once in its statement of the facts or claims for relief. After being named as an individual acting in concert with the county officials in the “Parties” section of Plaintiffs’ complaint there are no specific allegations as to Merkey or his involvement with county officials. There are simply no allegations or facts in the Complaint identifying Merkey’s conduct or relationship to the state criminal matter. Therefore, Plaintiffs have failed to plead facts sufficient to allege that Merkey was a state actor, that he has acted together with or has obtained significant aid from state officials, or that his conduct is otherwise chargeable to the State. Accordingly, this court does not have subject matter jurisdiction over the claims to the extent that they are asserted against Merkey. Therefore, the

court dismisses the claims without prejudice.

**Plaintiff's Motion to Stay and the Utah County Defendants' Motion to Dismiss**

Because the court has dismissed the claims to the extent that they are asserted against Merkey, the court must now decide whether to stay the remaining portion of the case. Based on the Utah County Defendant's motion to dismiss and the court's docket, there is no evidence that any of the remaining Defendants were ever served with the Complaint. The Complaint was filed on April 27, 2005. Under Rule 4 of the Federal Rules of Civil Procedure, Plaintiffs had 120 days, or until August 25, 2005, to serve the Defendants. Plaintiffs have not sought an extension of the 120 days to serve Defendants or provided good cause for failing to serve Defendants. In fact, Plaintiffs' have filed a motion to stay the proceedings, which indicates that they have no intention to pursue the case at this time. The court finds no basis for Plaintiffs' requested stay. This litigation relates to damages incurred as a result of a state prosecution of Plaintiffs which is separate and independent of the pending federal case against Plaintiffs. Therefore, Plaintiffs' request for a stay of the proceedings is denied.

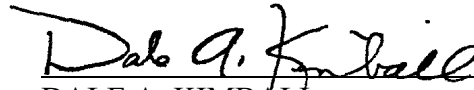
With respect to the Utah County Defendants' motion to dismiss, Rule 4(m) requires Plaintiffs to provide good cause for their failure to serve the Complaint within the time prescribed. Although Plaintiffs' opposition to the Utah County Defendants' motion to dismiss was due September 15, 2005, Plaintiffs have not filed an opposition as of the date of this Order. Because Plaintiffs have not provided good cause for their failure to serve the Complaint within the time prescribed by Rule 4, the court grants the Utah County Defendants' motion to dismiss the Complaint without prejudice.

**CONCLUSION**

Based on the above reasoning, Plaintiffs' Complaint is dismissed without prejudice.

Defendant Merkey's Motion for Partial Summary Judgment is MOOT. Plaintiff's Motion to Stay Proceedings is DENIED. And, the Utah County Defendants' Motion to Dismiss is GRANTED.

DATED this 20th day of September, 2005.

  
DALE A. KIMBALL  
United States District Judge