No. 16-4175

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lynn D. Becker
Plaintiff, Counterclaim Defendant and Appellee
v.
Ute Indian Tribe of the Uintah and Ouray Reservation, et al
Defendants, Third-Party Plaintiffs, Counterclaimants and Appellants
v.
Honorable Judge Barry G. Lawrence,
Third-Party Defendant and Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
THE HONORABLE JUDGE CLARK WADDOUPS
NO. 2:16-CV-00958-CW

BRIEF OF APPELLEE LYNN D. BECKER

David K. Isom (Utah 4773)
ISOM LAW FIRM PLLC
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 209 7400

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STATEMENT OF PRIOR OR RELATED APPEALS

There are two related appeals: *Becker v. Ute Indian Tribe*, 770 F.3d 944 (10th Cir. 2014 and *Ute Indian Tribe v. Lawrence*, 16-4154.

JURISDICTIONAL STATEMENT

The district court had Section 1331 federal question jurisdiction to determine whether a tribal court had the power to compel a non-Indian to submit to the civil jurisdiction of the tribal court.[1] This Court has jurisdiction under 28 U.S.C. § 1291 because the district court certified under Fed. R. Civ. P. 54(b) that its dismissal of the action was a final order.[2] Becker does not dispute the timeliness of the appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does a federal district court have Section 1331 jurisdiction to determine whether a federally-recognized Indian tribe may bring a civil action in tribal court against a non-member of the tribe under a commercial agreement ("Agreement") where by the Agreement the tribe:

(1) waived any tribal sovereign immunity with respect to any judicial, administrative or arbitration proceeding regarding any dispute arising under

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1 *National Farmers Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

2 Appx 900.

the Agreement or relating to the interpretation, breach or enforcement of the Agreement;

(2) unequivocally submitted to the jurisdiction of the federal court or, if no federal jurisdiction, to the jurisdiction of the state court to adjudicate the dispute;

(3) agreed that, to the extent that the tribe could so provide, those federal or state courts would have original and exclusive jurisdiction of the dispute;

(4) waived any requirement of tribal law providing for tribal court jurisdiction of the dispute;

(5) waived any requirement that the dispute be brought in tribal court;

(6) waived any requirement that tribal court remedies be exhausted; and

(7) stipulated that the Agreement and all disputes arising under the Agreement would be subject to, governed by and construed in accordance with state law?

II. After years of litigation in state and federal court regarding an Agreement with an Indian tribe and its affiliates, is the non-Indian party to the Agreement required to exhaust tribal court remedies where tribe made the covenants summarized in the previous paragraph?

STATEMENT OF THE CASE

This appeal and the related federal, state and tribal court actions arise from Becker's claim that the Utes failed to make payments due to Becker required under the written Agreement executed in 2005. Under the Agreement, Becker provided services to the Utes related to the development of energy and mineral resources for several years for which he was to receive 2% of the net revenue ("2% Interest") distributed from Ute Energy, LLC, a Delaware limited liability company that Becker assisted in creating ("Ute Energy"), to Ute Holdings, LLC, a Delaware limited liability company owned originally by the tribe and non-Indians ("Ute Holdings").

When the Utes refused to pay Becker the amount of 2% Interest applicable to the distributions made in 2012, Becker brought an action in February 2013 in the United States District Court for the District of Utah in February 2013 ("First Federal Action") to collect the promised 2% of this distribution of net revenue. Becker brought the First Federal Action in the Utah federal district court pursuant to the following provisions of the Agreement (referred to jointly below as the "Waiver and Submission Provisions"):[3]

> **Article 21. Governing Law and Forum.** This Agreement and all disputes arising hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah. All disputes arising under or

3 Agreement pp. 8-9. Appx 41-42.

> relating to this Agreement shall be resolved in the United States District Court for the District of Utah.
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> **Article 23. Limited Waiver of Sovereign Immunity; Submission to Jurisdiction.** If any Legal Proceeding (definition follows) should arise between the Parties hereto, the Tribe agrees to a limited waiver of the defense of sovereign immunity, to the extent such defense may be available, in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. For purposes of this Agreement, a "Legal Proceeding" means any judicial, administrative, or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement…. The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding.
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> The Parties hereto unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts. The court or courts so designated shall have, to the extent that Parties can so provide, original and exclusive jurisdiction, concerning all such Legal Proceedings, and the Tribe waives any requirement of Tribal law stating that the Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.

Though Becker alleged several federal issues in the First Federal Action, Judge Dee Benson dismissed the First Federal Action for lack of Section 1331 federal question subject matter jurisdiction, holding that, because Becker's contract claims were based solely upon state law, the federal issues were only "peripherally

implicated," and did not sustain federal question jurisdiction.[4] This Court affirmed the dismissal of the First Federal Action for lack of Section 1331 jurisdiction.[5]

The Utes did not assert in the First Federal Action that the tribal court could or must adjudicate the dispute.

Becker then brought his claims in the Third District Court for the State of Utah ("State Court Action") pursuant to the provisions of the Agreement that if, and only if the U.S. District Court for the District of Utah, and appellate courts therefrom, also lack jurisdiction over such case, the Utes unequivocally submit to the jurisdiction of "any court of competent jurisdiction" and associated appellate courts.[6]

The Utes agreed that, if federal jurisdiction of the dispute turned out to be lacking, the state court would have "original and exclusive jurisdiction, concerning all such Legal Proceedings…."[7]

The parties further agreed that, under all circumstances, the tribal court would lack any power to adjudicate the dispute. For example, the Utes "waive[d] any requirement of Tribal law stating that Tribal courts have exclusive original

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4 *Becker v. Ute Indian Tribe,* 2013 U.S. Dist. LEXIS 160325, *3 (D. Utah, Nov. 5, 2013).
5 *Becker v. Ute Indian Tribe,* 770 F.3d 944 (10th Cir. 2014).
6 Agreement, Article 23. Appx 41-42.
7 Agreement Article 23. Appx 42.

jurisdiction over all matters involving the Tribe…."[8] The Utes "waive[d] any requirement that such Legal Proceedings be brought in Tribal Court…."[9] The Utes further waived "any requirement … that Tribal remedies be exhausted."[10] Finally, the Utes agreed that [t]his Agreement and all disputes hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah."[11]

The Utes moved to dismiss the State Court Action, asserting that the Utes' waiver of sovereign immunity was ineffective, that the state court was not a "court of competent jurisdiction" within the meaning of the Agreement, and that the state court lacked jurisdiction. Judge Lawrence rejected these arguments and denied the Utes' motion to dismiss. Judge Lawrence held that the Ute's waiver of sovereign immunity in the Agreement was clear, express and effective.[12] Judge Lawrence further ruled that the state court had jurisdiction by the Utes' consent to the adjudication of contractual disputes in any court of competent jurisdiction.[13] The State Court Action is still pending, with a discovery cutoff of December 31, 2016.

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8 Id.
9 Id.
10 Id.
11 Id.
12 Order Denying Motion to Dismiss. Appx 48-50.
13 Id.

Again, the Utes did not assert in the State Court Action that the tribal court could or must adjudicate the dispute.

With the State Court Action pending, and facing a motion for terminating sanctions for refusing the state court's order to produce documents, the Utes filed a new action in the Utah federal district court in mid-2016 in Utah ("Second Federal Action") against Becker and Judge Lawrence, seeking to restrain and enjoin the State Court Action and asserting civil rights claims against Judge Lawrence.[14] U.S. District Judge Robert Shelby on August 16, 2016 denied the motion for temporary restraining order and preliminary injunction, and dismissed the Second Federal Action for lack of Section 1331 jurisdiction.

Again, the Utes did not assert in the Second Federal Action that the tribal court could or must adjudicate the dispute.

Two days after Judge Shelby's August 16, 2016 order dismissing the Second Federal Action, the Utes filed an action in the Ute tribal court action asserting tribal court jurisdiction for the first time ("Tribal Court Action"). The Utes sought in the Tribal Court Action a declaration that the Agreement is void and that the waiver of sovereign immunity was ineffective, even though these issues were currently before

14 The Second Federal Action is the basis for the companion appeal pending in this Court, 16-4254.

the state court and had been in active state and federal litigation for 42 months when the Utes filed the Tribal Court Action.

Becker immediately sought a temporary restraining order and preliminary injunction in the State Court to restrain the Utes from pursuing the Tribal Court Action. The State Court denied Becker's motion on the premise that state courts lack the power to issue such an order.

The next day, Becker filed an action in the Utah federal district court ("Third Federal Action") seeking to restrain and enjoin the Utes from pursuing the Tribal Court Action. Judge Clark Waddoups issued the temporary restraining order and then the preliminary injunction. This is the Utes' appeal of Judge Waddoups' preliminary injunction and order of dismissal which Judge Waddoups certified as a final order under Rule 54(b).

STANDARD OF REVIEW

The Utes did not state a standard of review.

This Court affirms the grant of a preliminary injunction unless the injunction constitutes an abuse of discretion by the district court.[15] The district court's fact

15 *E.g., Fish v. Kobach,* 2016 U.S. App. LEXIS 18784, *25 (10th Cir., Oct. 19, 2016).

findings are reviewed for clear error and its conclusions of law are reviewed de novo.[16] All issues on this appeal are reviewed under these standards.

The following shows that the district court did not abuse its discretion in entering a preliminary injunction against the brazen forum shopping that the Utes are attempting here.

SUMMARY OF THE ARGUMENT

The Utes ignore the Waiver and Submission Provisions of the Agreement – the very provisions in which the parties to the Agreement addressed and rejected all of the assertions that the Utes proffer in this appeal. The Utes ignore repeated and plain authorities, including multiple clear mandates of this Court, that the scope of tribal court jurisdiction of matters like this is a federal issue creating federal jurisdiction for a federal court to enjoin Indians tribes from pursuing tribal court litigation that they agreed not to pursue.

I. District Court Jurisdiction: The district court had Section 1331 federal question subject matter jurisdiction to determine whether the Utes could bring a civil action against a non-member of the tribe under a commercial agreement that waived tribal court jurisdiction and exhaustion, prohibited the parties from suing in tribal

16 Id.

court, waived the application of all tribal laws, and required that all disputes under the commercial contract must be brought in federal or state courts.

II. Federal Power to Enjoin Parties from Pursuing Tribal Court Action: The Utes make only half an argument: they concede that the only reason that the tribal court could have jurisdiction over Becker is because he entered into the Agreement with the Utes. But they then ignore the plain provisions of the Agreement that provide in every way imaginable that the tribal court has no power or jurisdiction over any dispute under the Agreement. The federal court clearly had the power here to enjoin the Utes from pursuing the Tribal Court Action.

III. Dismissal of the Utes' Civil Rights Claims. As to the Utes' argument that the district court erred in dismissing their claim under 42 U.S.C. § 1983, Becker joins in and incorporates by this reference the argument of the Honorable Judge Lawrence regarding this issue.

ARGUMENT

Every one of the Utes' arguments is prohibited by the provisions of the Agreement pursuant to which the Utes clearly waived tribal law and tribal court jurisdiction and exhaustion, waived tribal sovereign immunity, and agreed that any dispute under the Agreement would be governed by state law applied by a federal or state court.

The dispositive principle of this appeal is that a tribal court does not have jurisdiction over a dispute between an Indian tribe and a nonmember where the only possible basis for jurisdiction is a commercial agreement that prohibits such jurisdiction.

I. The Scope of the Tribal Court's Jurisdiction Is Governed by Federal Law and "Arises Under" Federal Law, Creating Section 1331 Jurisdiction

The whole fulcrum of the Utes' appeal is wrong. The Utes argue that a federal court has no subject matter jurisdiction to determine a tribal court's power to adjudicate disputes under a commercial agreement that specifically prohibits such jurisdiction. The Utes further argue that only tribal law, not federal law, applies to determine the scope of the power of a tribal court to adjudicate a dispute under the Agreement.

These arguments lack any support, and are contrary to all applicable law, including the United States Supreme Court's dispositive pronouncement that the "question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."[17]

17 *National Farmers Insurance Companies v. Crow Tribe of Indians,* 471 U.S. 845, 852 (1985).

This Court has likewise repeatedly held that "[t]he scope of a tribal court's jurisdiction is a federal question over which federal district courts have jurisdiction."[18]

Indeed, on the appeal of the First Federal Action by Becker, this Court held that the federal issues that Becker had asserted in the First Federal Action were only "barriers" to the effectuation of the Agreement governed by state law, and therefore did not create Section 1331 jurisdiction. This Court suggested there, however, that there would have been federal jurisdiction had the Utes asserted in the First Federal Action the right to tribal court adjudication that generated the Third Federal Action.[19]

II. A Federal Court May Enjoin Tribal Parties from Pursuing a Civil Action in Tribal Court Under a Commercial Agreement Between an Indian Tribe and a Nonmember that Prohibits Tribal Court Litigation

The Utes do not dispute the general rules that Indian tribal courts are not courts of general jurisdiction, that Indian tribal courts have only that limited jurisdiction allowed by federal law, and, in general, that tribal courts have no jurisdiction over

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18 *Kerr-McGee Corp. v. Farley,* 11 F.3d 1498, 1501 (10th Cir. 1997). Accord *Thlopthlocco Tribal Town v. Stidham,* 762 F.3d 1226, 1233-35 (10th Cir. 2014).

19 *Becker v. Ute Indian Tribe,* 770 F.3d 944, 949 n. 2 (10th Cir. 2014) quoting *National Farmers Insurance Companies. V. Crow Tribe of Indians,* 471 U.S. 845, 851 (1985).

civil actions between a nonmember and the tribe.[20] Rather, the Utes rely upon the *Montana v. U.S.*[21] "commercial contract" exception to these general rules -- namely that tribal courts may exercise civil tribal court jurisdiction over a nonmember who enters into a commercial contract with a tribe. The Utes stop here and argue that because Becker entered into an "employment"[22] or independent contractor agreement with the Utes, the tribal court has jurisdiction over Becker, and a federal court cannot adjudicate any Agreement-related matter because Becker has failed to exhaust tribal court remedies.

The Utes ignore the well-recognized principles that can be characterized as either exceptions to or limitations upon the *Montana* "commercial contract" exception to the general principle that tribal courts lack jurisdiction to adjudicate civil disputes with non-Indians. But these crystalline principles clearly apply here: a commercial contract cannot create tribal court jurisdiction, or require tribal court

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20 *Montana v. U.S.,* 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); *Strate v. A-1 Contractors,* 520 U.S. 438, 445-46 (1997); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1150-51 (10th Cir. 2011).

21 *Montana v. U.S.,* 450 U.S. 544, 566 (1981).

22 The Agreement is clearly what its title indicates – an "Independent Contractor Agreement. Appx 34. The Utes do not clarify why they now insist that the Agreement is an employment agreement and not an independent contractor agreement, since none of the authorities cited appears to hang anything on this distinction. In the State Court Action, the Utes asserted that Becker was an "Independent Consultant." Appx 641.

exhaustion, of civil actions arising under the contract if the contract itself clearly prohibits or excludes such jurisdiction.

Here, the Agreement that the Utes claim as the sole basis for tribal court jurisdiction prohibits tribal court jurisdiction. For example, the Waiver and Submission Provisions of the Agreement clearly provide that the tribal court cannot exercise any jurisdiction here because "[a]ll disputes arising under or relating to this Agreement shall be resolved in the United States District Court for the District of Utah" and the Utes "unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts lack jurisdiction over such case, to any court of competent jurisdiction…."[23] The Utes waived sovereign immunity for all such proceedings and "specifically surrender[ed] [their] sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies" in those federal and state courts.[24]

Not only did the Utes clearly agree that state and federal courts could adjudicate Agreement disputes, the Utes also plainly agreed that the Ute tribal court could not adjudicate any such disputes. The Utes "waive[d] any requirement of

23 Agreement Articles 21 & 23. Appx 41-42.
24 Id.

Tribal law stating that the Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waive[d] any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted."[25]

The Utes argue, again with no support, that all of these provisions must be ignored and that tribal court jurisdiction is allowed and required in the face of the Agreement provisions that are so exquisitely to the contrary. This argument is wrong as a matter of sheer economics and policy, and as a matter of law.

As to economics and policy, the Utes' argument, if adopted nationwide, would destroy the ability of Indian tribes to enter into necessary and beneficial commercial contracts with nonmembers of the tribes, seriously wounding self-determination, self-government and the ability for tribes to create socio-economic opportunities for themselves. Requiring as a matter of law that contracting parties must abide the adjudication of a tribal court even when the parties expressly agree, as a condition of the transaction, to no tribal court adjudication, would cast a pall over non-Indian contracting with Indian tribes.

As to law, courts have recognized this reality and have consistently held that Indian tribes and the parties who enter into commercial contracts with such tribes are free to agree not to litigate in tribal court, and can rely upon that agreement in

25 Agreement Article 23. Appx 41-42.

order to have access to non-tribal courts. None of the authorities that the Utes cite holds that tribal law applies, or that a tribal court has jurisdiction, or that tribal court exhaustion is required, where the parties have clearly waived tribal law, tribal court jurisdiction and tribal court exhaustion. Such waivers are consistently honored.

Tribal exhaustion is a rule of comity, not jurisdiction, and should be viewed in the context of the presumption against tribal jurisdiction over non-Indians.[26] Exhaustion is subject to the following exceptions, among others: (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where it is clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay; and (3) where the tribal court action is patently violative of express jurisdictional prohibitions.[27]

All three of these exceptions apply here. For example, the fact that the Utes failed to assert the right to tribal court adjudication until 42 months after the litigation began, especially where the assertion of such a right would likely have resulted in federal question jurisdiction of all issues in the First Federal Action, demonstrates the Utes' bad faith and their desire to harass Becker by delay and by trying to exhaust Becker's financial resources needed to pursue the litigation. In addition, it is difficult

26 *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1150 (10th Cir. 2011).
27 *Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir. 2006).

to imagine how any parties to a commercial agreement between Indians and non-Indians could more clearly prohibit tribal court jurisdiction than was done here by language drafted by the Utes' counsel.

The issues presented here are like those in *Stifel, Nicholaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians.*[28] There, an Indian tribe entered into commercial contracts with non-Indians to sell bonds to finance and build a casino and hotel ("Contracts") on Indian lands in Wisconsin. After more than three years of litigation in state and federal court of issues under the Contracts, the Indian tribe brought an action in tribal court seeking a declaration that the bonds at issue in the state and federal cases were invalid under federal and tribal law. As here, the non-tribal parties sought a preliminary injunction in federal court to preclude the tribal parties from pursuing the tribal court action.

The tribal parties argued that the non-tribal parties had failed to exhaust tribal court remedies. The Seventh Circuit held that exhaustion was a doctrine of comity, and that the evaluation of the exhaustion requirement was fact-sensitive. Relying on facts similar to the facts here, the Seventh Circuit upheld that district court's injunction against the tribal parties' pursuing the tribal court action.

As here, the Contracts included (1) waivers of sovereign immunity by the

28 807 F.3d 184 (7th Cir. 2015)

tribal parties; (2) forum selection clauses designating the Wisconsin federal court – or alternatively, if federal jurisdiction was determined to be lacking – the Wisconsin state courts, as the exclusive forum for disputes about the Contracts; and (3) choice-of-law clauses designating Wisconsin state law as the law governing the Contracts.

Unlike here, the Contracts in *Stifel* did not include an express waiver of any duty to exhaust tribal court remedies. There, the court implied a waiver of the tribal court exhaustion, whereas here the waiver need not be implied because it is express, affirmative, and crystal clear.[29]

The Seventh Circuit held that to ignore the tribe's agreement that the Contracts could be litigated in state and federal courts would not serve the policies the U.S. Supreme Court opinions of *Iowa Mutual* and *National Farmers,*[30] citing with approval the Seventh Circuit's rationale in a previous Seventh Circuit decision[31] that "[t]o refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination."[32]

The Seventh Circuit rejected the tribal parties' argument that, because the

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29 807 F.3d at 198-99 (a forum selection clause selecting federal and state courts effects a waiver of the tribal court exhaustion duty).
30 807 F.3d at 196.
31 *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 815 (7th Cir. 1993).
32 *Stifel*, 807 F.3d at 196.

Contracts were procured by fraud, tribal court litigation was necessary to determine whether the forum selection provisions were valid. The Seventh Circuit held that the forum selection clauses were severable from the agreement and were not affected by the alleged fraud.[33] Here, the Agreement contains a severability provision mandating that the invalidity of any provision does not invalidate the validity of any other provision.[34] Thus, the fraud claim here does not affect the validity of the Waiver and Submission Provisions, including waiver of tribal law, tribal court jurisdiction and exhaustion.

As should this Court, the Seventh Circuit rejected tribal arguments that the actions raised significant issues under tribal law that could only be resolved in tribal court.[35]

As should this Court, the Seventh Circuit held that all of the requirements for a preliminary injunction had been met, and enjoined the tribal parties from pursuing the tribal action.

The tribal court has no valid role in these matters, and the order enjoining them from pursuing the Tribal Court Action is wise and proper.

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33 *Stifel*, 807 F.3d at 199.
34 Agreement Article 24. Appx 42.
35 *Stifel*, 807 F.3d at 197.

CONCLUSION

Appellee Lynn Becker respectfully requests that the Court affirm the preliminary injunction and judgment of dismissal, and remand the action to the district court for the award of attorney fees.[36]

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 24, Becker requests oral argument.

Date: December 5, 2016

ISOM LAW FIRM PLLC

299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 209 7400

By: /s/David K. Isom

David K. Isom (Utah 4773)

Attorney for Plaintiff-Appellant
Lynn D. Becker

36 The Agreement requires the Utes to pay Becker's attorney fees. Article 14A. Appx 39.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains less than 5,000 words. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14 point font.

/s/ David K. Isom

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CERTIFICATE OF SERVICE

I certify that the foregoing Appellee's Brief was served upon all parties by ECF this 5th day of December, 2016.

I hereby certify that seven paper copies of the foregoing Appellee's Brief were delivered to a courier service for overnight delivery addressed as follows: Clerk of the Court, Byron White U.S. Courthouse, 1823 Stout Street, Denver, Colorado 80257-1823.

/s/ David K. Isom