Case No. 16-4154

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH, a federally recognized Indian tribe and federally chartered corporation, et al.,

Plaintiffs - Appellants,

v.

HONORABLE BARRY G. LAWRENCE, District Judge, Utah Third Judicial District Court, in his individual and official capacities, et al.,

Defendants - Appellees.

On appeal from the United States District Court for the District of Utah,
No. 2:16-CV-00579-CW (Honorable Judge Robert J. Shelby)

APPELLANTS' OPENING BRIEF

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November 2, 2016

Oral Argument Requested.

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CORPORATE DISCLOSURE STATEMENT

There is no non-governmental corporate party to this proceeding.

The Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe or Ute Tribe) respectfully submits its opening brief.

STATEMENT OF RELATED CASES

This case involves a dispute between the Ute Tribe and one of the Tribe's former employees, the defendant/appellee Lynn D. Becker ("Becker). In 2014, the Tenth Circuit affirmed the District Court's dismissal of Mr. Becker's federal court complaint against the Tribe for breach of contract. *Becker v. Ute Indian Tribe*, 770 F.3d 944 (10th Cir. 2014). There are now two additional appeals pending before the Tenth Circuit arising out of the parties' dispute, *Ute Indian Tribe v. Lawrence*, case number 16-4154, and *Becker v. Ute Indian Tribe*, case number 16-4175.

On October 20, 2015, this Court consolidated appeal nos. 16-4154 and 16-1475 for purposes of briefing, and granted the Tribe's motion to expedite the briefing and merits consideration.

STATEMENT OF JURISDICTION

The U.S. District Court for the District of Utah had jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343 (protection of civil rights), and 1362 (action brought by an Indian tribe). The district court had authority to grant declaratory relief under 28 U.S.C. § 2201 and 42 U.S. § 1983, and had authority to grant injunctive relief under 28 U.S.C. § 2202 and 42 U.S. § 1983, as well as the Tenth Circuit's dispositive rulings in *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th

Cir. 1986) (en banc) ("*Ute III*"), *modified*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"), *reaffirmed*, 790 F.3d 1000 (10th Cir. 2015) ("*Ute VI*"); *reaffirmed*, No. 15-4080, 2016 WL 4502057 ("*Ute VII*").

The district court dismissed the tribal plaintiffs/appellants First Amended Complaint for lack of federal question jurisdiction under both 28 U.S.C. § 1331 and § 1362.[1] The order of dismissal was entered on August 16, 2016.[2] Plaintiffs/Appellants' notice of appeal was timely filed on August 23, 2016.[3] The Tenth Circuit has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the Tribal plaintiffs/appellants' First Amended Complaint for lack of federal question jurisdiction.

STATEMENT OF THE CASE

The Ute Indian Tribe of the Uintah and Ouray Reservation is a federally recognized Indian tribe composed of three band of the greater Ute Tribe, the Uintah Band, the White River Band, and the Uncompahgre Band, who today live on the Uintah and Ouray Reservation ("U&O Reservation") in northeastern Utah. *See* 81

[1] The Tribal parties do not challenge the district court's dismissal of the Tribal parties' civil rights claims under 42 U.S.C. §§ 1983 and 1988 without prejudice. App. III, 575, ¶ 2.

[2] Appendix (App.) III, 574.

[3] *Id.*, 578.

Fed. Reg. 26826, 26830 (May 4, 2016). This case provides a small window onto a larger struggle by the Ute Tribe to prevent the State of Utah from unlawfully exercising jurisdiction over the Tribe and its members in matters that are strictly internal to the Tribe and its members. That battle is still pending in the federal courts and this year entered its forty-first year.[4] At its core, the case at bar involves the question of whether a Utah state court, or the Tribe's tribal court, or the federal district court has subject matter jurisdiction to adjudicate Mr. Becker's claim to revenues generated by the Tribe's restricted oil/gas minerals.

The defendant/appellee, Lynn D. Becker ("Becker") is a non-Indian who was employed by the Ute Indian Tribe inside the exterior boundaries of the Tribe's U&O Reservation from 2003 through 2007. Mr. Becker is suing the Tribe in a Utah state court for alleged breach of an "Independent Contractor Agreement" ("IC Agreement") in a case captioned *Becker v. Ute Indian Tribe*, case no. 140908394, Third Judicial District Court, Salt Lake County, Utah ("the *Becker* state suit"). Mr. Becker's state court complaint names as defendants the Ute Tribe, the Tribal Business Committee, and Ute Energy Holdings LLC, a wholly-tribally owned commercial entity (collectively referred to as the "Tribal parties" or the "Tribal

[4] *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1986) (en banc) ("*Ute III*"), *modified*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"), *reaffirmed*, 790 F.3d 1000 (10th Cir. 2015) ("*Ute VI*"); *reaffirmed*, No. 15-4080, 2016 WL 4502057 ("*Ute VII*").

plaintiffs/appellees").[5]

The Tribal parties contend, *inter alia*, that the Becker IC Agreement is void for lack of necessary federal approval under federal common law and federal statutes that prohibit the alienation of tribal trust assets, including federal statutes that require the approval of the Secretary of Interior for agreements such as the Becker IC agreement.[6] *See* Tribal parties' First Amended Complaint, App. I, 11. The Tribal parties further contend that federal law precludes the Utah state court from exercising subject matter jurisdiction over the *Becker* state suit because (1) the suit involves claims against the Tribe that arose entirely within the exterior boundaries of the U&O Reservation, and (2) the suit seeks to adjudicate Mr. Becker's claim to an interest in the Tribe's restricted oil/gas assets which are held in trust for the Tribe by the United States.

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[5] App. I, 53-60.

[6] *E.g.*, the Non-Intercourse Act, 25 U.S.C. § 177, which prohibits any "grant … or other conveyance of [Indian] lands, or of any title or claim thereto" unless authorized by Congress; 25 U.S.C. § 81(b), which states that "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary"; the Indian Reorganization Act, 25 U.S.C. § 464, which prohibits the "sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian Tribe," unless authorized by Congress; and the Indian Mineral Development Act (IMDA), 25 U.S.C. § 2102(a), which requires the Secretary of the Interior to approve any "service" or "managerial" agreement related to the "exploration for, or extraction, processing, or other development of" Indian oil and gas mineral resources.

The Utah state court denied the Tribal parties' motion to dismiss the *Becker* suit for lack of subject matter jurisdiction, and the Utah Court of Appeals summarily dismissed the Tribal parties' interlocutory appeal.[7] As a consequence, pretrial discovery is underway at this time in the *Becker* state suit.

In June, 2016, the Tribal parties filed suit in federal court, case number 2:16-cv-00579, naming as defendants Mr. Becker and the Utah state judge who is presiding over the *Becker* state suit, the Honorable Barry G. Lawrence ("Judge Lawrence").[8] The Tribal parties sought a declaratory judgment (*i*) that the Becker IC Agreement is void for lack of necessary federal approval under federal law, and (*ii*) that federal law precludes the Utah state court from exercising subject matter jurisdiction over the *Becker* state suit. The Tribal parties further sought to enjoin proceedings in the *Becker* state suit.[9] Judge Lawrence and Mr. Becker both filed motions to dismiss the complaint under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.[10]

The Tribal parties opposed the defendants' dismissal motions by relying upon sworn statements from the Tribe's former Chairwoman Irene Cuch, the Tribe's oil/gas advisor, Scott S. Trulock, and the Tribe's undersigned counsel, all of whom

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[7] App. I, 113-31, 204-05, 208-09.

[8] *Id.*, 11-29.

[9] *Id.*, 132-47.

[10] App. I, 73-90; App. II, 271-75.

attested that the oil/gas assets transferred to Ute Energy LLC and Ute Energy Holdings LLC are assets held in trust for the Tribe by the United States.[11] The defendants produced no controverting evidence.

Notwithstanding the clear issues of federal law presented by the Tribe's complaint and the Tribe's evidentiary materials, the district court dismissed the Tribe's complaint on the ground that the Tribe's complaint failed to present a federal question under either 28 U.S.C. § 1331 or 28 U.S.C. § 1362.[12] The district court did so without taking evidence (apart from the evidentiary materials attached to the parties' pleadings). The district court made no findings of fact.

STATEMENT OF FACTS

Insofar as the district court apparently dismissed the complaint based solely on the defendants' facial challenge to the complaint's allegations as to subject matter jurisdiction, the facts alleged under the First Amended Complaint must be accepted as true. *See Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015).

The Ute Tribe has nearly four thousand enrolled members, and over half its tribal members live on the U&O Reservation in Utah. The Tribe operates its own tribal government and oversees approximately 1.3 million acres of trust lands, some

[11] App. I, 212-18, Declaration of Irene Cuch; App. I, 239-48, Declaration of Frances C. Bassett; App. III, 483-87, Declaration of Scott S. Trulock.

[12] App. III, 574-75; 655-664.

of which contain significant oil and gas deposits. Revenue from the development of these oil/gas resources is the primary source of money used by the Tribe to fund its government and its health and social welfare programs for tribal members.[13]

For a period of seven years, from 2000 through 2007, a cabal of unscrupulous non-Indians insinuated themselves into the Tribe's government and its Energy and Minerals Department and, through a pattern of fraud, subterfuge and bullying, attempted to secure for themselves an interest in the Tribe's oil and gas mineral estate. Working ostensibly as tribal "employees" or "Independent Contractors," the coterie of unscrupulous individuals manipulated tribal members, manipulated tribal officers and departments, manipulated facts and numbers, and manipulated the Tribe's oil/gas transactions in a manner that was both fraudulent and a gross breach of the individuals' fiduciary duties as employees and agents of the Ute Tribe.[14] One of those unscrupulous individuals was the Appellee Lynn Becker. Other unscrupulous individuals and entities included the Tribe's purported "Financial Consultant," John P. Jurrius, and his business entities, the Jurrius Group LLP and Jurrius Ogle Group LLC, whom the Ute Tribe sued in 2008 on multiple counts of civil wrongdoing, including fraud and conversion, in a suit captioned *Ute Indian*

[13] App. I, p. 14, ¶ 10.

[14] *Id.*, pp. 14-16, ¶¶ 11-17.

Tribe v. Jurrius, et al., case number 1:08-cv-01888, in the U. S. District Court for the District of Colorado.[15]

On May 4, 2005, at the behest of Mr. Becker and Messrs. Jurrius and Ogle, the Tribe simultaneously organized Ute Energy Holdings LLC and Ute Energy LLC, and entered into a series of complicated, convoluted commercial transactions that the Tribe alleges was designed to both facilitate and simultaneously obscure and conceal the fraudulent transfer of tribal assets to the unscrupulous non-Indians. As the initial step in the multi-tiered transactions, the Tribe assigned interests in the Tribe's oil/gas estate to a 100% tribally-owned commercial entity, Ute Energy Holdings LLC ("Ute Holdings"). Ute Holdings then contributed 100% of its assets—i.e., the beneficial interest in the Tribe's oil/gas estate—to capitalize an oil/gas production company called Ute Energy LLC ("Ute Energy"). All of Ute Energy LLC's oil/gas production is from oil/gas minerals that are located inside the U&O Reservation and that are held in trust for the Tribe by the United States.[16]

Shortly before the organization of Ute Holdings and Ute Energy, Mr. Becker and Messrs. Jurrius and Ogle approached the Tribe and asked the Tribe to execute an Independent Contractor Agreement providing for Becker's employment as the

[15] App. I, 15, ¶ 13.

[16] Declaration of Irene Cuch, App. I, 212-17, Dkt. 14-9, ¶¶ 19-20; Declaration of Frances C. Bassett, App. I, 239-48, ¶¶ 6, 9-10, Dkt. 14-11, ¶¶ 138; Declaration of Scott S. Trulock, App. III, 483-87, Dkt. 31-1, ¶¶ 5, 7.

Land Division Manager of the Tribe's Energy and Minerals Department. The contract was signed on April 27, 2005, but was made retroactive to March 1, 2004.[17] Mr. Becker's job duties were to manage and develop the Tribe's energy and mineral resources, and the Tribe's Energy and Minerals Department, both of which are located within the exterior boundaries of the U&O Reservation. The IC Agreement was executed at tribal headquarters in Fort Duchesne in an office complex that is situated on lands held in trust for the tribe by the United States, within the exterior boundaries of the U&O Reservation. Mr. Becker's office was located inside tribal headquarters in Fort Duchesne.[18] The IC Agreement was never submitted to, or approved by, the Secretary of Interior or the Secretary's designee.[19]

Mr. Becker has sued the Tribe, alleging that he is entitled to millions of dollars under a clause in his IC Agreement captioned "Participation Plan." That contract provision states that:

> Contractor shall receive a beneficial interest of two percent (2%) of net revenue distributed to Ute Energy Holding, LLC (sic) from Ute Energy, LLC (sic) (and net of any administrative costs of Ute Energy Holdings) ("Contractor's Interest").[20]

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[17] App. I, 31.

[18] Cuch Declaration, App. I, 214, Dkt. 14-9, ¶ 7.

[19] *Id*., ¶ 20; Bassett Declaration, App. I, 243, Dkt. 14-11, ¶ 15.

[20] App. I, 43.

Mr. Becker resigned from his employment for the Tribe on October 31, 2007.[21]

SUMMARY OF ARGUMENT

The district court ignored dispositive Supreme Court and Tenth Circuit precedent in dismissing the Tribal parties' First Amended Complaint a for lack of federal jurisdiction under 28 U.S.C. § 1331 and § 1362. The dismissal must be reversed.

STANDARD OF REVIEW

When a district court dismisses a complaint for lack of subject matter jurisdiction and the court does so without taking evidence, the appellate court reviews the question de novo. *Pueblo of Jemez v. United States*, 790 F.3d at 1151. The court must accept the allegations of the complaint as true and must view the facts in the light most favorable to the Tribal plaintiffs. *Id*. at 1148, citing *Holt v. United States*, 43 F.3d 1000, 1002 (10th Cir. 1995); Fed. R. Civ. P. 12(b)(1).

LEGAL ARGUMENT

I. FEDERAL JURISDICTION EXISTS UNDER 28 U.S.C. §§ 1331 & 1362

District courts have "original jurisdiction of all civil actions" and "all civil actions, brought by any Indian Tribe" that arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1331, 1362. Under the "well-pleaded

[21] Cuch Declaration, App. I, 214-21, Dkt. 14-9, ¶¶ 11-19, and attachments thereto.

complaint rule," the federal question giving rise to jurisdiction must be "presented on the face of plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The federal issue must be one that is "actually disputed and substantial, [and] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1236 (10th Cir. 2006) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)).

An "independent corollary" to the well-pleaded complaint rule is the doctrine of complete federal preemption. *Id.* at 393. "In *Metropolitan Life Ins. Co. v. Taylor*, the Supreme Court recognized that 'Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.' 481 U.S. 58, 63-64." *Nicodemus*, 440 F.3d at 1232 n.4 (quoting *Metropolitan Life Ins. Co.*). That is the case with respect to the claims raised under the Tribal plaintiffs' First Amended Complaint. The U. S. Supreme Court has made clear that federal question jurisdiction exists under both § 1331 and § 1362 for Indian tribes who sue in federal court to protect, enforce, or vindicate their rights in restricted Indian property:

> [T]he assertion of a federal controversy …. rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession. . . . Finally, the complaint asserts a claim under the Nonintercourse Acts

> which put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States. To us, it is sufficiently clear that the controversy stated in the complaint arises under the federal law within the meaning of the jurisdictional statutes and our decided cases.

Cty. of Oneida v. Oneida Indian Nation, 414 U.S. 661, 677-78 (1974) (hereinafter "*Oneida I*"); *see also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968).

Indeed, the proposition that Indian tribes may sue in federal court to protect, enforce, or vindicate their rights in restricted Indian property is so universally accepted that Tenth Circuit decisions nearly always assume, without discussion, the existence of federal question jurisdiction for claims nearly identical to those raised by the Tribal plaintiffs here. *See, e.g., U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 886, 890 (10th Cir. 1989) (noting that "[e]very case addressing the validity of an unapproved bingo management contract under [25 U.S.C.] section 81 has voided the contract at the request of the tribe.").

Moreover, in the Tenth Circuit there is federal jurisdiction under § 1331 and § 1362 for "a tribe asserting its immunity from the enforcement of state laws." *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1173 (10th Cir. 1991); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1239-41 (10th Cir. 2001) (Tribe's complaint raised a colorable federal claim).

Consequently, in this case federal question jurisdiction exists under § 1331 and § 1362 because the Tribal plaintiffs' First Amended Complaint (*i*) seeks to protect the Tribe against the illegal alienation of restricted trust property, and (*ii*) seeks to protect the Tribal parties from being forced to litigate the claim involving the restricted trust asset in a state court that patently lacks jurisdiction to adjudicate the claim.

A. The Illegal Alienation of Tribal Trust Assets Presents a Federal Question

Federal law imposes restraints on the ability of Indian tribes to alienate or encumber tribal trust assets. These federal law restraints are discussed in WILLISTON ON CONTRACTS, in a section on incapacity captioned, "Native Americans; aged persons; convicts; spendthrifts; others":

> The Indian tribes in the United States have limited contractual capacity and have been described as "wards" of the federal government. The government, in turn, is declared to be the "guardian" of these Native Americans and "trustee of their property rights."

5 WILLISTON ON CONTRACTS, § 11:12 (4th ed.). The Supreme Court frames the principle this way:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.

Oneida I, 414 U.S. at 670. Without federal approval, the underlying contract or transaction is a legal nullity. *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985) (hereinafter "*Oneida II*").[22]

This long-standing tenet of federal common law has been codified in a number of federal statutes, putting into "statutory form … the accepted rule that the extinguishment of Indian title required the consent of the United States." *Id*. at 240 (quoting *Oneida I*, 414 U.S. at 678).

The Nonintercourse Act, 25 U.S.C. § 177, provides:

> No purchase, grant, lease, or other conveyance of lands, *or of any title or claim* thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. (emphasis added)

[22] *See, e.g.*, *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986), and cases cited therein (the enforceability of an agreement such as Mr. Becker's IC Agreements is "entirely dependent on the approval of the Secretary [of the Interior]."); *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 702 (7th Cir. 2011) ("failure to secure [federal] approval renders the Indenture void in its entirety and thus invalidates the Corporation's waiver of sovereign immunity"); *Black Hills Inst. of Geological Research v. S.D. Sch. Of Mines and Tech.*, 12 F.3d 737, 742-44 (8th Cir. 1993) (contract with Indian was void for failure to obtain federal approval); *Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 615 (7th Cir. 1985) (contract with tribe was void for failure to obtain federal approval); *Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Fla.*, 836 F. Supp. 2d 1296, 1305-1309 (S.D. Fla. 2011)(finding complete federal preemption and a lease of Indian lands, never approved by the Secretary of the Interior, to be void *ab initio*).

25 U.S.C. §81(b) provides in pertinent part:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

25 U.S.C. § 464 provides in pertinent part:

> [N]o sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved.

The Indian Mineral Development Act (IMDA), 25 U.S.C. § 2102(a), provides in pertinent part:

> **(a) Authorization for tribes; approval by Secretary**
>
> 1. Any Indian tribe, *subject to approval of the Secretary* … may enter into any joint venture, operating, production sharing, *service, managerial*, lease or other agreement … providing for the exploration for, or extraction, processing, *or other development of*, oil, gas … mineral resources … in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources. (emphasis added)

IMDA states that the Secretary "shall" formally "approve or disapprove" any agreement submitted to him upon "written findings." 25 U.S.C. § 2103(a) & (c). To approve a proposed agreement, the Secretary must find that the agreement "is in the best interest" of the Tribe. 25 U.S.C. § 2103(b).

In *Oneida II*, the Supreme Court further emphasized that the various federal non-alienations statutes do not preempt the "Indians' right to pursue common law

remedies" for a violation of Indian property rights. *Oneida II*, 479 U.S. at 236-240. Accordingly, against the backdrop of this federal common law and statutory framework, we turn to the "Participation Plan" under Mr. Becker's IC Agreement. It seems clear that the "Participation Plan" constitutes an illegal alienation of the Tribe's oil/gas mineral interests. The IC provision states:

> Contractor shall receive a beneficial interest of two percent (2%) of net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC.

App. I, 43. Under the allegations of the Tribe's complaint—as well as the undisputed sworn statements of the Tribe's witnesses—all of Ute Energy LLC's oil/gas production is from oil/gas minerals located inside the U&O Reservation and held in trust for the Tribe by the United States.[23]

In *United States v. Noble*, 237 U.S. 74 (1915), the Supreme Court reversed the lower court's dismissal of a suit brought by the U.S. to set aside various mining leases and assignments of royalties from a mining lease on Indian land. Although the non-alienation statute in *Noble* differs from the non-alienation statutes cited above, the controlling legal principle remains the same. The *Noble* Court ruled that the leases and assignment of royalties violated restraints against the alienation of Indian property, and therefore, the leases and assignments were "unauthorized and

[23] Declaration of Irene Cuch, App. I, 212-17, Dkt. 14-9, ¶¶ 19-20; Declaration of Frances C. Bassett, App. I, 239-48, ¶¶ 6, 9-10, Dkt. 14-11, ¶¶ 138; Declaration of Scott S. Trulock, App. III, 483-87, Dkt. 31-1, ¶¶ 5, 7.

void." *Id*. In reaching that conclusion, it was necessary for the Court to determine whether "rents and royalties" from Indian minerals constitute real property subject to the federal restraints on the alienation of Indian property. The Court's determination and rationale in *Noble* applies with equal force to Mr. Becker's claim to two percent of "net revenues" from the Ute Tribe's oil/gas minerals:

> [W]hile the allottee could makes leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. **The rents and royalties were profit issuing out of the land**. When they accrued, they became personal property; but rents and royalties to accrue [in the future] were a part of the estate remaining in the lessor…. It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties. It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but **the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land**. The further argument is made that the power to lease should be construed as implying the power to dispose of *rents to accrue*. This is wholly untenable. The one is in no way involved in the other; the complete exercise of the authority which the statute confers would still leave the rents and royalties to accrue as part of the estate remaining in the lessor. It was the intent of Congress that the [Indians], during the period of restriction, should be secure in their actual enjoyment of their land. [citation omitted] The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute. (emphasis added)

Id. at 80. The same reasoning applies here. The Becker IC Agreement, executed in 2005, purported to grant Becker two percent (2%) of the future "profits" issuing out of the Tribe's oil/gas minerals produced by Ute Energy LLC. But here, as in *Noble*, the fact that the two percent was to be "paid in money does not make it any the less

a profit issuing out of the land." *Id.* at 80. *See also Woodenware Co. v. U.S.*, 106 U.S. 432, 435 (1882) (Indian timber at all stages of conversion remained trust property and its purchase by a third party did not divest title or the right of possession); *Starr v. Campbell*, 208 U.S. 527, 534 (1908) (same); *see also Chippewa Cree Tribe v. U.S.*, 73 Fed. Cl. 154, 162 (Fed. Cl. 2006) (proceeds from the sale of tribal property still remain tribal property despite their conversion to money) (quoting *Eastern Band of Cherokee Indians v. U.S.*, 7 Ind. Cl. Comm'n 140,154 (1958)).

There is no substantive difference between revenues from the Ute Tribe's oil/gas minerals on the one hand, and royalties from zinc ore mining in *Noble* on the other hand—proceeds from the Ute Tribe's oil/gas minerals and royalties from zinc mining in *Noble* are *both* "profits issuing out of the land," to borrow the Supreme Court's characterization in *Noble*. And as "profits issuing out of the land," revenues from the Ute Tribe's oil/gas minerals and the royalties from zinc ore mining in *Noble* are *both* Indian property interests that are subject to federal protection.

Furthermore, the holding in *Noble* applies with equal force when, as here, an Indian or Indian tribe is suing directly to vindicate Indian property interests. As explained by the Supreme Court in *Poafpybitty v. Skelly Oil Co.*, "federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official do not prevent the Indian landowner, like other property

owners, from maintaining suits appropriate to the protection of his rights." *Poafpybitty*, 390 U.S. at 372.

Because the net revenues from the Ute Tribe's oil/gas minerals are "profits issuing out of the land," and thus subject to federal protection, the district court in this case erred in dismissing the Tribal plaintiffs' First Amended Complaint for lack of federal question jurisdiction. The Supreme Court's holdings in *Oneida I* and *Oneida II* are dispositive of this question.

The district court in *Oneida I*—like the district court in this case—dismissed the Oneida tribe's complaint for lack of federal question jurisdiction, and on appeal, the Second Circuit affirmed the dismissal. The Supreme Court reversed the dismissal, explaining:

> Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.
>
> * * * *
>
> Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain

> that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362.
>
> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, *these tribal rights to Indian lands, became the exclusive province of federal law*. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

Oneida I, 414 U.S. 666-67 (emphasis added).

As pertinent to this case, Mr. Becker sought to extinguish the Ute Tribe's title to two percent of the "profit issuing out of the land," *Noble*, 237 U. S. at 80, that is, out of the Tribe's oil/gas minerals produced by Ute Energy LLC. Consequently, federal question jurisdiction exists under both § 1331 and § 1362 to determine the Ute Tribe's claim that the IC Agreement between the Tribe and Mr. Becker is void *ab initio* under federal law. The Tribal plaintiffs' threshold challenge to the legal efficacy of the IC Agreement is "plainly enough alleged to be based on federal law." *Oneida I*, 414 U.S. 666-67.

The Tribe strenuously pressed this point to the district court in this case; indeed, the Tribe even offered to amend its complaint to affirmatively seek rescission or cancellation of the IC Agreement:

> Tribe's Attorney: Count 2, we are asking for [a] declaratory judgment

> that the [Becker] independent contracting agreement is a legal nullity under federal law and tribal law.
>
> The Court: No. I mean the statement that it's an issue that the United States could sue for.
>
> Tribe's Attorney: Well, I think it's implicit in what we have said, Your Honor. We have said that this is an unauthorized alienation of tribal trust interests. Implicit in that is that either the U.S. or the Tribe can appear and ask either for declaratory relief, or I have said, and I will repeat it here again, if need be, we will amend our complaint to add a count for rescission of the contract.

App. III, 617:10-22; *see also* App. III, 627:9 – 628:18. The district court apparently believed that for federal jurisdiction to exist under 28 U.S.C. §§ 1331 or 1362, it was necessary for the Tribe to adhere to some technical, but unspecified, rule of pleading, i.e., alleging affirmatively that the Tribe's claim against Mr. Becker was one that the United States could have prosecuted on the Tribe's behalf. However, a holding to that effect would obviously be contrary to *Poafpybitty*, 390 U.S. at 372 (holding that Indians themselves can vindicate Indian property rights), and contrary to *Oneida I* and *Oneida II*—cases that were not prosecuted by the United States but by the Oneida Nation itself without the federal government's involvement.

B. The Utah State Court Lacks Jurisdiction to Adjudicate Mr. Becker's Claims to Tribal Trust Assets

Whether it is the Federal Government or an Indian tribe that sues to "protect"—or enforce—Indian property interests, *Poafpybitty*, 390 U.S. at 372, the lawsuit can be brought in only two judicial forums: federal court and/or tribal court. State courts in the United States possess no power to adjudicate any claim to "the ownership" or right to possess Indian trust property, or "any interest therein." 28 U.S.C. § 1360 (b); 25 U.S.C. § 1322(b) (emphasis added). It is well-established that states may exercise adjudicatory jurisdiction over tribal Indians for claims arising inside of an Indian reservation only when "*Congress has expressly so provided*." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (emphasis added); *Williams v. Lee*, 358 U.S. 217 (1958).

As pertinent here, Congress clearly required the State of Utah to disclaim jurisdiction over Indian country in Utah as a condition to joining the Union. Utah Enabling Act of 1894 (28 Stats. 107). This is a disclaimer of both proprietary and governmental authority. *See Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (considering the disclaimer in the Oklahoma Enabling Act which is identical to the Utah Enabling Act of 1894); *Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n.*, 829 F.2d 967, 976-81 (10th Cir. 1987) (same).

Furthermore, the U.S. Congress has authorized only six states—excluding Utah—to exercise adjudicatory jurisdiction "over civil causes of action between Indians or to which Indians are parties" that arise in Indian country. 28 U.S.C. § 1360 (a). And—significantly—even in those six states, state courts lack jurisdiction to adjudicate any claim to "the ownership" or right to possess Indian property or "any interest therein."

28 U.S. Code § 1360 - State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the State.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) **Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is**

> **held in trust by the United States or is subject to a restriction against alienation imposed by the United States**; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; **or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein**. (emphasis added)

Under 25 U.S.C. § 1322 and §1326, a state may exercise civil jurisdiction over Indian reservations inside their borders only if a majority of the adult Indians living within the Indian reservation in question have voted to accept state jurisdiction over their reservations in a special election conducted by the Secretary of Interior. Parenthetically, Indian tribes in Utah have never consented to state jurisdiction over their reservations under PL-280. *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985). But even where tribes accept state civil jurisdiction under 25 U.S.C. § 1322, courts in those states still lack any power "to adjudicate, in probate proceedings, or otherwise, the ownership, or right to possess tribal trust property, "or any interest therein." (emphasis added) 25 U.S.C. § 1322(b).

The language of 28 U.S.C. § 1360 (b) and 25 U.S.C. § 1322(b) is clear and unequivocal. Yet the federal district courts in Utah—in both case numbers 2:16-cv-00579 and 2:16-cv-00958—insist that state courts in Utah are "courts of general jurisdiction," and as such, are fully competent to adjudicate Mr. Becker's claim to a

portion of the Tribe's restricted trust assets.[24] That clearly is not the case. The holding in *C & L Enterprises* is not to the contrary. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411 (2001) (holding that a tribe's waiver of immunity subjected the tribe to suit in state court). The Supreme Court was careful in *C & L Enterprises* to emphasize that the dispute in that case arose off the tribe's Indian reservation and did not involve tribal trust assets. *Id* at 415 (the property in question "is not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe"). *C & L Enterprises* is a sovereign immunity case—not a civil jurisdiction case.

C. The Cases Relied Upon by Mr. Becker and the District Court for Dismissal Do Not Involve Claims to Tribal Trust Assets

The district court dismissed the Tribe's First Amended Complaint on the ground that the tribal claims amounted to federal law defenses to Becker's breach of contract suit in state court. In doing so, the court said it considered the cases of *Public Service Comm'n v. Wycoff Co., Inc,*, 344 U.S. 237 (1952), and *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195 (10th Cir. 2012) to be dispositive.[25] Parenthetically, the Tribe's undersigned counsel was at a disadvantage

[24] In response to the Tribe's arguments that the Becker IC Agreement violates federal restraints on the alienation of tribal property, the district court replied, "Even if [it] raises questions of federal law, the state courts can apply federal law. They do all the time. They're courts of general jurisdiction." App. III, 604:3-9.

[25] App. III, 657:18 – 658:4.

at oral argument because neither defendant had cited *Wycoff* or *Devon* in their motions to dismiss;[26] rather, the district court cited *Wycoff* and *Devon sua sponte* at oral argument without affording the Tribal parties reasonable notice or opportunity to respond properly.[27] Nonetheless, the Tribe's counsel attempted to distinguish the two cases, asking the court, "I don't believe either of the cases involved Indian tribes. Is that fair to say?" The Tribe's counsel then attempted to explain grounds for distinguishing *Wycoff* and *Devon* from the case at bar:

> Tribe's Attorney: We have here a … contract that purports to grant Mr. Becker a participation interest in the Tribe's oil and gas assets. We have put before the Court a—declarations from, I think, myself, Irene Cuch, the former chairwoman of the [Tribal] Business Committee, and Mr. Scott Trulock, who was a financial and oil and gas advisor for the Tribe. All three of us have stated that these assets that were used to capitalize both Ute Energy [LLC] and Ute Energy Holdings [LLC] are protected trust assets.
>
> So I do believe that that puts in our—
>
> The Court: So I should assume the truth of that representation, even thought it will be – I think it will be disputed, it was in Mr. Becker's original federal complaint, stated that that would be a disputed issue, and it would determine the validity of the contract. I should presume the truth of the proposition without making a legal conclusion about it, and on that basis

[26] App. I, 73; App. II, 271.

[27] The court saying, "So under *Devon*, *Merrell Dow Pharmaceuticals*, and *Wycoff* – *Wycoff* is a Supreme Court decision from 1952. Let me give you the cite because I don't think this was cited by the parties." App. III, 607:2-6.

> decide that even though this is an issue that involves a contract, we won't even reach the contract? I think that's what you're saying, isn't it?
>
> Tribe's Attorney: Yes, that is what I'm saying.
>
> The Court: What case stands for that proposition?
>
> Tribe's Attorney: Let's take a look at the *Oneida* cases. We cited this in our briefing, but also in our motion for leave to submit a surreply.

App. III, 609:2 – 620:2. In short, the Tribe distinguished *Wycoff* and *Devon* on two significant grounds: first, neither case involved a non-Indian's claim to tribal trust assets; and secondly, it was undisputed that the state courts in *Wycoff* and *Devon* possessed subject matter jurisdiction to adjudicate the disputes in those cases.[28] Here, in contrast, Mr. Becker is asserting a claim to the tribe's restricted oil/gas properties, and it is simply beyond cavil that the Utah state court lacks jurisdiction to adjudicate any claim to "the ownership" or right to possess Indian property or "any interest therein." E.g., 28 U.S.C. § 1360(b); 28 U.S.C. § 1322(b); Utah Enabling Act of 1894 (28 Stats. 107).

Apart from *Wycoff* and *Devon*, the district court also raised *sua sponte* at oral argument the case of *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989)). *Graham* is readily distinguishable, however, as is the Tenth Circuit decision in *Okla.*

[28] App. III, 603:1-22; 612:15 – 617:25.

Tax Comm'n v. Wyandotte Tribe, 919 F.2d 1449 (1990). Both *Graham* and *Wyandotte* involved tax actions based on the State's power under state law to tax certain transactions involving non-Indians in Indian country. *See, e.g.*, *Washington v. Confederated Tribes*, 447 U.S. 134, 155 (1980). Thus, in contrast to the Tribal plaintiffs' federal complaint in this case, the complaints in *Graham* and *Wyandotte* were limited to state-law tax claims. Furthermore, the only federal issue presented in *Graham* and *Wyandotte* was the issue of tribal sovereign immunity. Here, in contrast, the Tribal plaintiffs contend (*i*) that federal restraints on the alienation of Indian property render the Becker IC Agreement void *ab initio*, and moreover, (*ii*) that federal law preempts and precludes the Utah state court from adjudicating Mr. Becker's claim to "ownership" or right to possess the Tribe's restricted oil/gas assets or "any interest therein" in any event. According to Wright and Miller's treatise on Federal Practice and Procedure:

> The best example of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws.

13D Federal Practice & Procedure, § 3566 (3d ed.) (April 2016 Update). The Tribal plaintiffs' First Amended Complaint expressly seeks declaratory and injunctive relief based in part on the Supremacy Clause, App. I, 20-23, ¶¶ 33-40, and therefore, to this

extent the district court's dismissal of the Tribal parties' complaint was patently in error.[29]

CONCLUSION

Based on the facts and authorities cited herein, the Tribal parties respectfully ask the Court to reverse the district court's dismissal of the First Amended Complaint.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the obvious significance of this case to the Ute Indian Tribe and the complexity of the legal issues. The Tribe believes that the parties and the Court will both benefit from oral argument.

[29] The district court also relied upon three cases cited by Mr. Becker for the proposition that federal question jurisdiction under § 1331 and § 1362 is substantively the same, *Sac & For Nation v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999); *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052 (10th Cir. 1993); and *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980). *See* App. II, 275, Dkt. 19; App. III, 662. To the extent that Becker contends that § 1362 is now superfluous in light of the removal of the amount in controversy under 28 U.S.C. § 1331, the Tribal plaintiffs adopt and incorporate their objection to that argument in their objection memorandum, App. III, 539-40, Dkt. 32.

Respectfully submitted this 2nd day of November, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 7,389 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. Local Rule 32(b). I relied on my word processor to obtain the count and it is Microsoft Office Word 2013.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ *Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 11/02/16, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2016, a copy of this **APPELLANTS' OPENING BRIEF and APPENDIX VOLUMES I - III**, were served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

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I hereby certify that on the 4th day of November, 2016, the original of the foregoing **APPELLANTS' OPENING BRIEF and APPENDIX VOLUMES I - III**, were delivered by courier to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

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