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)

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Oral Argument Requested.

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The Ute Indian Tribe and affiliated appellants (Tribal parties) respectfully submit their Reply Brief.

RESPONSE TO MISSTATEMENTS IN THE ANSWER BRIEF

The Tribal parties will begin by responding to several misstatements in Mr. Becker's Answer Brief. Mr. Becker states in his Answer Brief that the Ute Tribe agreed that "if federal jurisdiction of [any] dispute turned out to be lacking, the [Utah] state court would have 'original and exclusive jurisdiction' over the dispute.[1] Becker Brief, p. 6. Then, expanding upon this misstatement, Becker asserts that the Tribal parties' complaint in *Ute Tribe v. Lawrence*, case number 2:16-cv-00579, represents "blatant forum shopping" by the Tribe, and "an attempt to spurn the very state court that the Utes selected as the designated court to adjudicate disputes under the Agreement." Becker Brief, p. 7. Both of these hyperbolic statements are wrong because both statements *infer* non-existent language into the Becker Independent Contractor Agreement ("IC Agreement"). The Ute Tribe never agreed to jurisdiction before the Third Judicial District court of Utah—or any other Utah state court for that matter. What the Becker IC Agreement says is that if federal court jurisdiction

[1] Parenthetically, the Tribal parties' undersigned counsel, Fredericks Peebles & Morgan LLP ("FPM"), wishes to emphasize that the FPM law firm did not represent the Ute Tribe, or any of the tribal parties, in calendar year 2005, the year in which the Becker Independent Contracting Agreement was negotiated and executed. FPM did not begin representing the Ute Tribe until 2008—a year after both Lynn Becker and John Jurrius resigned from their positions with the Tribe.

is lacking, then disputes may be litigated before "any court of competent jurisdiction." (emphasis added) App. I, 39, art. 23. And as the Tribal parties argued in their Opening Brief, it is the Tribe's contention that the U. S. Congress never authorized state courts in Utah—or any other state—to adjudicate claims to "the ownership" or right to possess Indian property or "any interest therein," 28 U.S.C. § 1360(b); 25 U.S.C. § 1322(b). Therefore, no state court in Utah qualifies as a "court of competent jurisdiction" under terms of the Becker IC Agreement.

LEGAL ARGUMENT

I. THE TRIBAL PARTIES' RESPONSE TO BECKER

A. THIS COURT'S DECISION IN *BECKER I* IS NOT DISPOSITIVE

Mr. Becker contends that because there was no federal question jurisdiction for his complaint in *Becker I*, it necessarily follows, *ipso facto*, that there is no federal question jurisdiction for the Tribe's complaint in *Ute Tribe v. Lawrence*, case number 2:16-cv-00579. The logical fallacy in Mr. Becker's analysis is clear: it is analogous to stating the proposition that if a dog is a mammal, then a dog is a vertebrate—and then concluding that because a cat is not a dog, a cat is not a vertebrate. Or a mammal.

Under the "well-pleaded complaint rule," federal question jurisdiction is decided on a case-by-case basis, and jurisdiction generally exists "only when a federal question is presented on the face of the plaintiff's properly pleaded

complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Because the focus is on the plaintiff's well-pleaded complaint, it does not matter that a federal-law defense is anticipated in response to the complaint. *Id*. at 393. The well-pleaded complaint rule makes the plaintiff the "master of his complaint." *Id.* at 398-399. As the "master" of his or her complaint, the plaintiff is free either to embrace, or to eschew, claims based on federal law. *Id.*

The complaint in *Becker I* could have asserted a federal question claim on its face if Mr. Becker had sought declaratory or injunctive relief, or if his complaint had shown that federal law preempts the field. *See, e.g., Memphis Biofuels, LLC v. Chickasaw Nations Industries, Inc*., 585 F.3d 917, 921-22 (6th Cir. 2009) (federal question jurisdiction existed for suit seeking a declaratory judgment that an Indian tribal corporation's immunity waiver was valid); *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459-60 (9th Cir. 1986) (federal question jurisdiction existed for suit seeking to require Secretary of Interior to approve a joint venture agreement with the Blackfeet Tribe); *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1232 n.4 (10th Cir. 2006) (federal question jurisdiction existed because "[i]n *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.").

However, the complaint in *Becker I* did not seek declaratory or injunctive relief, nor allege that federal law preempts the question of Becker's entitlement to relief. Instead, the *Becker I* complaint alleged plain-vanilla claims for "breach of contract, breach of covenant of good faith and fair dealing, and accounting." Mr. Becker's claims were founded in state law, not federal law. The Tenth Circuit affirmed the district court's dismissal on the ground that a breach of contract claim does not present a federal question. *Becker v. Ute Indian Tribe*, 770 F.3d 944, 946 (10th Cir. 2014).

It does not logically follow, however, *ipso facto*, that the Tribe's separate and distinct complaint in *Ute Tribe v. Lawrence* fails to allege one or more claims arising under federal law. In contrast to the complaint in *Becker I*, the Tribe's complaint in *Ute Tribe v. Lawrence* does not allege plain vanilla *breach of contract* claims against Judge Lawrence and Mr. Becker. The complaint in *Ute Tribe v. Lawrence* is founded in federal law, not state law. The Tribal parties seek declaratory and injunctive relief based on the Tribal plaintiffs' legal rights under the U. S. Constitution, under federal treaties, federal common law, federal statutes, and federal decisional law, including, without limitation:

* the Supremacy Clause of the U. S. Constitution, art. VI, § 2, which provides that "the Laws of the United States … and all Treaties made … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby";

* the Ute Treaties of 1863 and 1868, 13 Stat. 673 and 15 Stats. 619;

* the Utah Enabling Act of 1894, 28 Stats. 107 (pursuant to which the State of Utah "forever" disclaimed all right and title to "all lands … owned or held by any Indian or Indian tribes");

* 18 U.S.C. §§ 1151 and 1152 which statutorily define Indian country and preclude state jurisdiction and the application of state law within Indian country;

* the Civil Rights Act of 1978, Title IV, codified at 25 U.S.C. §§ 1321-1326, which prescribes the exclusive means by which the State of Utah may exercise criminal and/or civil jurisdiction over Indians within Indian country in Utah;

* 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;

* 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;

* the Indian Mineral Development Act, 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; and

* *Ute Tribe v. Utah*, 773 F.2d 1087, 1093 (10th Cir. 1986) (en banc) ("*Ute III*"), *subsequently modified*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"), *reaffirmed*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*), *cert denied*, __ U.S. __, 136 S. Ct. 1451 (2016); *reaffirmed*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*) (recognizing that the Tribe and the federal government retain exclusive jurisdiction over Indians inside the Uintah and Ouray Indian Reservation boundaries).

Because federal jurisdiction generally exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U. S. at 392, and because Becker's complaint in *Becker I* failed to allege federal question claims, there was nothing the Tribe could have done to "save" Mr. Becker's 2013 *Becker I* complaint. Eleven years earlier, the U. S. Supreme Court had categorically rejected the argument that claims asserted in a counterclaim are sufficient to create federal question jurisdiction. "[W]e decline to transform the longstanding well-pleaded complaint rule into the 'well-pleaded *complaint-or-counterclaim* rule' urged by respondent." *The Homes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 832 (2002) (emphasis in original). Therefore, even if the Tribe had filed counterclaims against Mr. Becker in *Becker I*, alleging claims similar to the claims the Tribe is raising under its complaint in *Ute Tribe v. Lawrence*, the Tribe's counterclaims would have done *nothing* to vest the federal court with federal question jurisdiction in *Becker I*. *Id*.

There is no merit to Mr. Becker's suggestion that the lack of federal jurisdiction for his breach of contract claims in *Becker I* means, *ipso facto*, there is no federal question jurisdiction for the Tribe's complaint in *Ute Tribe v. Lawrence*, case number 2:16-cv-00579. The Court is required to evaluate the Tribal parties' complaint in *Ute Tribe v. Lawrence* on its own merits, independently of Mr. Becker's complaint in *Becker I*.

B. AN INDIAN TRIBE'S ASSERTED IMMUNITY FROM STATE LAW AND STATE COURT JURISDICTION *DOES* ESTABLISH FEDERAL QUESTION JURISDICTION

Mr. Becker apparently concedes the Tribe's argument that the Utah state court lacks jurisdiction to adjudicate any claim to "the ownership" or right to possess Indian property or "any interest therein," relying, *inter alia*, on 28 U.S.C. § 1360(b), 25 U.S.C. § 1322(b), and the disclaimer of jurisdiction in the Utah Enabling Act of 1894 (28 Stats. 107). *See* Opening Brief, pp. 22-29. Mr. Becker's Answer Brief fails to discuss, much less dispute, the Tribe's contention that the Utah state court lacks Congressionally-authorized jurisdiction to adjudicate a non-Indian's claim to restricted Indian property. Instead, Mr. Becker confines section II of his Answer Brief to a discussion of "immunity"—apparently tribal sovereign immunity—without any discussion of the paramount threshold question of subject matter jurisdiction.

Yet, even Mr. Becker's discussion of immunity is skewed and incomplete. Mr. Becker is wrong in contending, categorically, that an Indian tribe's "asserted immunity from state court adjudication is not a federal jurisdiction creating issue." Becker Brief, p. 14.

More than a century ago, the U. S. Supreme Court reversed a decision of the Oregon Supreme Court affirming a lower state court's adjudication of a claim to restricted Indian property in the Umatilla Indian Reservation. *McKay v. Kalyton*, 204 U.S. 458 (1907). In reversing the Oregon state court judgment, the Supreme Court rejected the appellee's argument—identical to Mr. Becker's argument here—that there was no federal court jurisdiction to determine state court jurisdiction:

> It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or claimed under any federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the state court. True, it is that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is [federal] jurisdiction. *Leigh v. Green*, 193 U.S.
>
> At the threshold lies the question raised and decided below relative to the jurisdiction of the state court over the controversy.

Id. at 463-64. *See also Minnesota v. United States*, 305 U.S. 382, 391 (1939) (affirming the reversal of a state court condemnation of restricted Indian land, holding, *inter alia*, that "the lower [state] court had no jurisdiction of this suit").

In 1983, the Tenth Circuit cited *McKay* with approval in a dispute arising out of the fraudulent conveyance of title to Indian allotments in New Mexico.

> …the United States is an indispensable party in any action determining a dispute arising over the possession of allotted [Indian] land by virtue of its trust relationship **and state courts do not have any jurisdiction over such disputes**. *McKay v. Kalyton*, 204 U.S. 458, 27 S. Ct. 346, 51 L.Ed. 566 (1907). Questions of ownership of fee title to an Indian allotment involves the application of federal law. (emphasis added)

Begay v. Albers, 721 F.2d 1274, 1280 (10th Cir. 1983). The Tenth Circuit also ruled that federal question jurisdiction existed in *Begay* under 28 U.S.C. § 1331, relying, in part on *Oneida Indian Nation v. Cty. Of Oneida*, 414 U.S. 661 (1974):

> We hold that questions involving whether restrictions imposed by Congress upon Indian [property] have been removed so as to extinguish the Indian allottee's claim of equitable title are "federal questions" within the purview of 28 U.S.C. § 1331, even though state law defenses are available to defeat the Indian claims.

Begay v. Albers, 721 F.2d at 1279. The same is equally true here. The Ute Tribe contends that federal law restraints on the alienation of Indian property renders Mr. Becker's IC Agreement void *ab initio*, and that question indisputably falls "within the purview of 28 U.S.C. § 1331." *Id*.

It is clear from *Oneida* and *McKay* and *Begay* that federal courts have jurisdiction to determine state court jurisdiction to adjudicate claims to restricted Indian property. Here, in contrast to the *McKay* litigants—who first challenged state court jurisdiction in a petition for rehearing before the Oregon Supreme Court—the Ute Tribe, from the beginning of the *Becker* state suit, has strenuously insisted that

the Utah state court lacks jurisdiction to adjudicate Mr. Becker's claim to an interest in restrict tribal trust assets. Unfortunately, the Tribe's arguments have fallen on deaf ears, not only before the Utah state court, but before two federal district courts as well.

C. FEDERAL LAW PREEMPTS THE TRIBAL PARTIES' CLAIMS

Mr. Becker makes three arguments as to why the Tenth Circuit should not address, or should not hold, that federal law preempts the claims alleged under the plaintiffs' First Amended Complaint. Each of the grounds asserted by Mr. Becker is without merit.

a. The Issue of Federal Preemption Was Properly Considered by the District Court

Becker first contends that the Tribe's assertion of federal preemption was raised belatedly in the Tribe's "reply memorandum." Becker Answer Brief, p. 15. This is incorrect. To begin with, it is axiomatic that "the issue of federal court jurisdiction may be raised at any stage of the proceedings," by the parties or by the court *sua sponte*. *Ramey Constr. Co., Inc. v. The Apache Tribe*, 673 F.2d 315, 318 (10th Cir. 1982). Nonetheless, the Tribal parties wish to set the record straight.

It was Mr. Becker who moved to dismiss the *Ute Tribe v. Lawrence* complaint for lack of federal jurisdiction, and thus it was Mr. Becker who filed a "reply memorandum,"[2] not the Tribal parties. App. III, 543.

[2] App. III, 543.

In his 5-page Motion to Dismiss, Mr. Becker raised only two issues. First, he argued that the absence of federal question jurisdiction in *Becker I* meant, *ipso facto*, that there was no federal question jurisdiction for the Tribal parties' complaint in *Ute Tribe v. Lawrence*. App. II, 271-74. Secondly, Becker argued that *Becker I* is also dispositive of federal jurisdiction under 28 U.S.C. § 1362 (action brought by an Indian tribe). App. II, 274-75. The Tribal parties' responded to these two arguments in an opposition memorandum. App. III, pp. 533-41.

Becker then filed a reply memorandum in which he improperly raised a new legal issue, and cited new legal authorities. App. III, 543. Specifically, Becker argued for the first time in his reply memorandum that an action for declaratory judgment "does not change the Section 1331 analysis," citing *Oglala Sioux Tribe v. C & W Enterprises*[3] for the proposition that the Tribe "cannot change the defense of sovereign immunity to a federal cause of action by filing a suit for declaratory judgment."[4] App. III, 545.

The Tribal parties moved the district court for leave to file a surreply, App. III, 560, and argued in the surreply, *inter alia*, that the complaint in *Ute Tribe v. Lawrence* did "not rest exclusively on the assertion of tribal immunity" as a defense to Mr. Becker's breach of contract claims. App. III, 563. The Tribal parties further

[3] 2006 U. S. Dist. LEXIS 61113 (D. S. D. 2006), aff'd 487 F.3d 1129 (8th Cir. 2007).
[4] *Id*.

emphasized that federal law preempts the claims alleged under the parties' First Amended Complaint to the necessary exclusion of state court jurisdiction over the claims, citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987), and *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1232 n.4 (10th Cir. 2006) (quoting *Metropolitan Life Ins. Co.*). App. III, 564-66.

The District court granted the Tribal parties' motion to file a surreply, stating:

> 1) [Tribal] Plaintiffs' Motion for Leave to Submit a Sur-reply to the Reply filed by Defendant Lynn D. Becker is GRANTED. Plaintiffs' Sur-reply was received and considered by the court.

App. III, 575. Mr. Becker did not file a cross-appeal, and because he did not cross appeal, Becker is precluded from challenging the district court's allowance of the Tribal parties' surreply.[5] The district court properly considered the Tribal parties' legal arguments contained in their surreply, and thus, there is no merit to Becker's contention that the issue of federal preemption is not before this Court.

b. Federal Law Preempts the Claims Alleged Under the Tribal Parties' Complaint

In *Qwest Corp. v. City of Santa Fe*, the Tenth Circuit explained that the doctrine of complete preemption is not involved in a case such as *Ute Tribe v. Lawrence*, in which a plaintiff sues in federal court to enjoin a state's exercise of

[5] An appellee may not challenge a lower court ruling "with a view either to enlarging his own rights there under or of lessening the rights of his adversary." *El Paso Natural Gas Co. v. Neztsosie*, 526 U. S. 473, 479 (1999).

regulatory or adjudicatory jurisdiction over matters that are preempted by federal law:

> Whether a federal statute completely preempts or only partially preempts local enactments can only affect the federal question analysis in a case involving removal jurisdiction. This case does not involve removal jurisdiction. As the Supreme Court stated in *Shaw*: "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." [citation omitted] Our conclusion that the nature of the preemptive effect of the TCA [Federal Telecommunictions Act] is not relevant here is further supported by *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002). In that case, concerning a claim of preemption under another section of the TCA, the Court stated that federal question jurisdiction exists "if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another" unless the claim is made only to obtain jurisdiction or is insubstantial and frivolous. *Verizon*, 535 U.S. at 643, 122 S. Ct. 1753 (quotation omitted). (underscore added)

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1264 (10th Cir. 2004).

This Court's analysis in *Qwest* is dispositive here. Like *Qwest*, this case does not involve removal jurisdiction. Furthermore, the claims raised by the Tribal plaintiffs under the First Amended Complaint were not raised "only to obtain jurisdiction." *Id*. Nor are the claims "wholly insubstantial or frivolous." *Id*. Quite the contrary.

The Tribal parties' complaint seeks to insure that the Tribal parties are not forced "to expend time and effort on litigation in a court that does not have

jurisdiction over them." *Kiowa Tribe v. Hoover*, 150 F.3d 1163, 1171-72 (10th Cir. 1998).

Count I of the Tribal parties' First Amended Complaint alleges that a "long-standing body of federal statutory and decisional law prohibits state courts in Utah from exercising suits brought against Indian tribes, tribal members, or trial entities arising from alleged wrongs committed within Indian country." App. I, 20-22, ¶¶ 34-36.

Count II of the First Amended Complaint alleges that Mr. Becker's Independent Contractor Agreement "is void for lack of necessary federal approval as required under both (*i*) the Ute Tribe's Constitution, and (*ii*) under federal common law and Congressional statutes that prohibit the alienation, or encumbrance, of Indian property and interests in Indian property." App. I, 23-24, ¶¶ 42-45.

Mr. Becker is suing to enforce a contract that purports to grant him a "beneficial interest" in revenues from the Tribe's restricted oil/gas mineral estate. However, the preemptive force of federal law restraints on the alienation of Indian trust assets is "so powerful as to displace entirely any state cause of action" for breach of contract when the contract in question requires the alienation of Indian trust assets. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (holding that § 301 of the Federal Labor Management Act preempts any state cause of action

for breach of a labor contract). The Supreme Court has equated its holding in *Avco* with its holding in *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661 (1974), a case the Tribal parties contend is dispositive of federal question jurisdiction in *Ute Tribe v. Lawrence*:

> The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." … *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Bd. of State of Cal. v. Construction Laborers, 463 U.S. 1, 23-24 (1983). The Court then equated the holding in *Avco* to its holding in *Oneida*:

> To similar effect is *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677, 94 S. Ct. 772, 782, 39 L.Ed.2d 73 (1974), in which we held that—unlike all other ejectment suits in which the plaintiff derives its claim from a federal grant, *e.g.*, *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L.Ed. 1218 (1914)—an ejectment suit based on Indian title is within the original "federal question jurisdiction of the district courts, because Indian title creates a federal possessory right to tribal lands, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." Cf. 414 U.S., at 682-683, 94 S. Ct., at 784-785 (REHNQUIST, J., concurring).

The United States hold legal title to the Ute Indian Tribe's surface and mineral lands in trust for the Tribe.[6] As explained in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW:

[6] The Tribal plaintiffs' First Amended Complaint alleges that the Tribe "oversees approximately 1.3 million acres of [Indian] trust lands, some of which contain

> The concept of a trust relationship to tribal land can be traced to the Proclamation of 1763, declaring that certain land was "under the dominion and protection" of the Crown "for the use of the … Indians," and to the international law governing the relationship of Great Britain, France, and Spain to the inhabitants and the land they claimed by virtue of first contact or "discovery" of the New World. The relationship between tribes and the federal government with regard to tribal land was first outlined in the early Supreme Court opinions of the Marshall Court. The Court analogized the relationship between tribes and the federal government to that between a ward and guardian, and described the property interests of tribes and the United States as a split title, with the United States holding what was described as the "ultimate title" and tribes a "title of occupancy."

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §15.03, p. 997 (2012 ed.) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), and *Johnson v. M'Intosh*, 21 U.S. 543, 585 (1823)).[7]

Mr. Becker contends he is not suing to gain a share of the Tribe's restricted trust assets, arguing first that his IC Agreement did not "create or include any deed, lien, conveyance, encumbrance or interest in tribal property." Becker also asserts

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significant oil and gas deposits," and alleges that "[r]evenue from the development of these oil/gas resources is the primary source of money that is used to fund the Tribe's government and its health and social welfare programs for tribal members." App. I, 14, ¶ 10.

[7] As articulated by Chief Justice John Marshall, Indian tribes "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile…. [t]heir relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). As a consequence of the imposed dependency, the federal government from its inception has assumed trust responsibilities and prerogatives over Indians and their property. *E.g.*, *U.S. v. Kagama*, 118 U.S. 375, 384-85 (1886).

that the IC Agreement "merely required the payment of 2% of specified revenue from one Delaware limited liability company to another Delaware limited liability company." (underscore added) Answer Brief, p. 3. The Tribal parties will address each argument in turn.

1. Becker's "Partitcaption Interest" in Net Revenues from the Tribe's Restricted Oil/Gas Minerals Was Subject to Federal Approval

Mr. Becker does not dispute the Tribal plaintiffs' allegation in their complaint that the Secretary of Interior never approved Becker's "Independent Contractor Agreement," as required by federal law.[8]

The Indian Mineral Development Act ("IMDA"), 25 U.S.C. § 2102(a), requires federal approval for, *inter alia,* any joint venture, production sharing, service or managerial agreements, and "any other" agreements involving the "exploration" or "development" of Indian mineral resources or "the sale or other disposition" of the "production or products of such mineral resources."

Before IMDA was enacted in 1982, tribal minerals could be developed only through leasing agreements authorized by the 1938 Indian Mineral Leasing Act ("IMLA"). *See* H.R. Rep. 97-746 (1982) (attached as Appendix 1).[9] To remedy this limitation, Congress enacted IMDA for the express purpose of giving Indian tribes

[8] *See* the Tribal plaintiff's First Amended Complaint, App. I, 24, ¶ 44.

[9] The Tribal plaintiffs ask the Court to take judicial notice of House of Representatives Report 97-746.

flexibility to enter into "various kinds of commercial agreements" for the "development and disposition of their energy and non-energy mineral resources." *Id*. Under the statute's express language, IMDA agreements can span a broad spectrum, ranging from "joint venture" and "production sharing" agreements to "service" and "managerial" agreements, and "any other" agreements for the "exploration" or "development" of mineral resources or "the sale or other disposition" of the "production or products of such mineral resources." 25 U.S.C. § 2102(a).

Congress made clear that by "enumerating various kinds of agreements" in the text of IMDA, it was not limiting the "scope" of the "non-lease" agreements the Act was authorizing. H.R. Rep. 97-746 (1982). Rather, the Congressional intent was to allow tribes to "realize a greater return" from their mineral resources by enabling them to enter into "innovative, flexible business arrangements"—a flexibility that is subject only to the approval of the Secretary of Interior. Absent federal approval, there is no enforceable agreement under IMDA. *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986).

Given the commercial flexibility that IMDA not only allows, but encourages, it is completely immaterial that the Tribe's oil/gas resources were placed into one or more Delaware limited liability companies. Becker Answer Brief, p. 3. The federal government's trust responsibility followed the Tribe's oil/gas assets into those

LLCs. That point is made clear in *Long Royalty Company, Appellant*, MMS-87-0244-IND (FE), 1989 WL 1712513 (September 22, 1989) (attached as Appendix 2).

In *Long*, the United States Department of Interior ("Department") made clear that the federal government's trust responsibility to Indians extends to the collection of revenues from Indian oil/gas minerals—even when an Indian tribe's oil/gas assets are placed into a joint venture with non-Indians. In *Long*, the Department denied Long's appeal from a departmental decision requiring Long to pay additional proceeds to the Cheyenne and Arapaho Tribes on an Indian oil/gas lease in Oklahoma following an audit conducted by the Department's Minerals Management Service ("MMS"). The Department soundly rejected Long's argument that the federal government's trust responsibility to Indians does not encompass "revenue collection" from oil/gas wells on Indian lands:

> "This contention is wholly without merit.
>
> The Federal courts have long recognized the existence of a trust relationship between the Federal Government and Indians. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sandoval*, 231 U.S. 28 (1913); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Cramer v. United States*, 261 U.S. 219 (1923); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D.Cal. 1973); and *Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

Most recently, the Congress has provided a clear and specific statutory basis for the trust responsibility of the Secretary of the Interior (Secretary) with respect to the collection of all oil and gas revenues earned from covered lands. In this respect, section 2(a)(4) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701(a)(4) (1982) directs that the Secretary should "aggressively carry out his trust responsibility in the administration of Indian oil and gas." Congress states therein that the purposes of FOGRMA at 30 U.S.C. 1701(b) (1982) are in relevant part: (3) to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States and Indian lessors and those inuring to the benefit of States; [and]

(4) to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources; * * *.

It is evident by its terms that **FOGRMA's requirements apply to working interest revenues as well as to royalties payable under this Indian lease**. Section 102(a), 30 U.S.C. 1712(a) (1982) states that a lessee is under a duty to make "any royalty or other payment" in the time and manner as specified by the Secretary. Moreover, section 3(13) thereof 30 U.S.C. 1702(14) (1982) prescribes that for these purposes:

> "royalty" means any payment based on the value or volume of production which is due to the United States or an Indian tribe or an Indian allottee on production of oil or gas from the Outer Continental Shelf, Federal, or Indian lands, or any minimum royalty owed to the United States or an Indian tribe or an Indian allottee under any provision of a lease; ***.

It is evident from this authority that it is well within the Secretary's trust responsibilities to oversee the collection of revenues earned from a lessor's working interest in Indian oil and gas leases. The Appellant has provided no basis whatsoever for its contention that the working interest or "joint venture" arrangement authorized by this lease falls outside these responsibilities.

The appeal is denied."

Id. at ** 2, 3 (emphasis added). Mr. Becker is suing to enforce the illegal alienation of tribal oil/gas revenues under his IC Agreement. There is federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362 for the Tribal plaintiffs' First Amended Complaint which seeks to have the Becker IC Agreement declared a legal nullity. *Oneida Indian Nation*, 414 U.S. at 677; *Begay v. Albers*, 721 F.2d at 1279-80; *United States v. Noble*, 237 U.S. 74 (1915); *see also Bunch v. Cole*, 263 U.S. 250, 252 (1923) ("The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them …is beyond question, and of course it is not competent for a state to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose."); *United States v. Martin*, 45 F.2d 836, 841 (E.D. Okla. 1930) (same); *United States v. Apple*, 262 F. 200, 204 (D. Kan. 1919) (same).

Mr. Becker's argument that his "Participation Interest" does not constitute an encumbrance on real property is, likewise, devoid of merit. *See Danciger Oil & Refining Co. v. Burroughs*, 75 F.2d 855, 857 (10th Cir. 1935) (holding that a conveyance of proceeds from an oil/gas well constitutes "a conveyance of an interest in land because it is the general rule than an assignment of an overriding royalty carries an interest in real estate," citing, *inter alia*, *United States v. Noble*, 237 U.S. 74 (1915)).

c. Federal Law Also Preempts State Court Jurisdiction over Mr. Becker's suit

The regulation of trade and intercourse between Indian tribes and non-Indians is exclusively the province of federal law. U.S. Const. art. I, § 8, cl. 3. In 1896, the United States required the State of Utah to disclaim jurisdiction over Indian lands in Utah as a condition to the State's admission to the Union. 28 Stats. 107. Since then, the U. S. Congress has never authorized state courts in Utah—or any other state—to adjudicate claims to "the ownership" or right to possess Indian property or "any interest therein," 28 U.S.C. § 1360(b); 25 U.S.C. § 1322(b). Therefore, federal law preempts state court jurisdiction over Mr. Becker's suit. *Oneida Indian Nation*, 414 U.S. at 677; *Minnesota v. United States*, 305 U.S. at 391 ("the lower [state] court had no jurisdiction of this suit."); *Begay v. Albers*, 721 F.2d at 1280 ("state courts do not have any jurisdiction over such disputes.").

II. THE TRIBAL PARTIES' RESPONSE TO JUDGE LAWRENCE

The District Court ruled that its dismissal of claims against Mr. Becker rendered the claims against the Honorable Judge Lawrence "moot." App. III, 575. Although Judge Lawrence did not file a cross-appeal, the Judge appears to dispute the District Court's determination of mootness; alternatively, Judge Lawrence appears to be asking this Court to render an advisory opinion on the issues he raised in his Answer Brief. The issues raised by Judge Lawrence are not properly before this Court.

A. JUDGE LAWRENCE LACKS STANDING TO RAISE THE ISSUES ASSERTED IN HIS ANSWER BRIEF, AND THIS COURT SHOULD DECLINE THE JUDGE'S REQUEST TO RENDER AN IMPROPER ADVISORY OPINION

Prevailing parties generally lack standing to appeal a district court order. *Arizonans for Official English v. Az.*, 520 U.S. 43, 64 (1977); *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 926 (10th Cir. 2008).

It is also settled that an appellee may not "attack the decree with a view either to enlarging his own rights there under or of lessening the rights of his adversary." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999). Thus, if, as here, an appellee seeks either to enlarge his own rights or lessen the rights of his adversary, a cross-appeal is required, Fed. R. App. P. 4(a)(3), and it is error for an appellate court to decide issues that were not properly raised by cross-appeal. *Id*. at 480-81.

"It is not the role of federal courts to resolve abstract issues of law." *Columbia Fin. Corp. v. Bancinsure, Inc.*, 650 F.3d 1372, 1376 (10th Cir. 2011). Accordingly, the Tenth Circuit should not address the issues raised under Judge Lawrence's Answer Brief. However, should the Tenth Circuit proceed to address those issues, the Tribal parties' response is provided below.

B. A TRIBE'S UNILATERAL WAIVER OF SOVEREIGN IMMUNITY DOES NOT, *IPSO FACTO*, VEST STATE COURTS WITH SUBJECT MATTER JURISDICTION IN DEROGATION OF CONTROLLING FEDERAL LAW

Judge Lawrence has cited no legal authority to refute the Tribal parties' argument that the U.S. Congress has never authorized state courts in Utah or any other state to adjudicate claims to "the ownership" or right to possess Indian property or "any interest therein," 28 U.S.C. § 1360(b); 25 U.S.C. § 1322(b).

Ignoring that argument, Judge Lawrence nonetheless urges adoption of the rule articulated in *Outsource Services Mgmt. LLC v. Nooksack Business Corp.*, 333 P.3d 380, 381 (Wash. 2014), in which the Washington Supreme Court ruled that a Tribe's waiver of sovereign immunity allows Washington state courts to adjudicate disputes between tribes and non-Indians, even when a disputes arises within Indian country. *Outsource*, however, is immaterial to the *Becker* case because the question of the State of Utah's jurisdictional authority within the Uintah and Ouray Indian Reservation was conclusively adjudicated decades ago in *Ute Tribe v. Utah*.

Under its rulings in *Ute Tribe v. Utah*, the Tenth Circuit conclusively determined the scope of the Tribe's territorial boundaries and the concomitant scope of the Tribe's jurisdictional authority within those boundaries. The Court did so with express reference to the statutory definition of Indian country under 18 U.S.C. § 1151, holding that:

> . . . the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, the Uncompahgre Reservation, and the three categories of non-trust lands that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation.

Ute Indian Tribe v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997). The doctrines of res judicata, collateral estoppel, and stare decisis prevent Judge Lawrence and the State of Utah from relitigating those same questions anew in the Becker lawsuit.

Furthermore, the holding in *Outsource Services* is clearly at odds with the Supreme Court's holding in *Kennerly v. Dist. Court*, 400 U.S. 423 (1971) (invalidating state court jurisdiction on the ground that the Blackfeet Tribal Council could not unilaterally circumvent the requirements of 25 U.S.C. §§1322, 1326).

CONCLUSION

The Tenth Circuit should reverse the District Court's order dismissing the Tribal plaintiffs' First Amended Complaint for lack of federal question jurisdiction. The Tribal plaintiffs urge the Court to not render an advisory opinion on the legal issues asserted under Judge Lawrence's Answer Brief.

Respectfully submitted this 19th day of December, 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 6,435 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.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14 point font.

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' REPLY 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 12/19/16, 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 19th day of December, 2016, a copy of this **APPELLANTS' REPLY BRIEF** was 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 21st day of December, 2016, the original of the foregoing **APPELLANTS' REPLY BRIEF** was delivered by courier to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

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