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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

LYNN D. BECKER, Plaintiff, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al., Defendants. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et al., Counterclaim and Third-Party Plaintiffs, v. LYNN D. BECKER, et al., Counterclaim and Third-Party Defendants.	**VERIFIED MOTION TO RECUSE** Case No. 2:16-cv-00958 **JUDGE CLARK WADDOUPS**

Pursuant to 28 U.S.C. §§ 144 and 455(a), the Ute Indian Tribe and affiliated parties ("the Tribe") move to recuse the assigned judge, Hon. Clark Waddoups, from this case. The motion is both timely and sufficiently supported by an affidavit.[1] As such, pursuant to 28 U.S.C. § 144, the Tribe requests that Judge Waddoups proceed no further on this motion or in this action, and instead, that another district court judge be assigned to hear and decide both this motion and all further proceedings in this case.

The case should be assigned to a judge who holds neither personal animus towards the Ute Indian Tribe, nor an antagonism toward the legal doctrines that form the bedrock of Federal Indian law—the doctrines of Indian tribal sovereignty and sovereign immunity.

I. **INTRODUCTION**

Judge Waddoups' bias against the Ute Tribe is revealed not only through the judge's prior handling of cases involving the Tribe,[2] but also by the strikingly different manner in which the judge has handled the parties' motions for injunctive relief in this case and the Tribe's companion case, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539 (10th Cir. 2017) (*Lawrence*).

Judge Waddoups has acted with unseemly haste in granting Mr. Becker injunctive relief—relief that was later reversed by the Tenth Circuit in *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017). In contrast, Judge Waddoups acted with unseemly *delay*

[1] Attachment A, Declaration of Luke Duncan, Chairman of the Tribal Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation.

[2] *Id*. The allegations made in Mr. Duncan's declaration are adopted and incorporated herein by reference.

in ruling on the Tribe's emergency and expedited motions for injunctive relief in *Lawrence*, case number 2:16-cv-00579—a case that had already been to the Tenth Circuit and back, and for which there was a Tenth Circuit mandate that Judge Waddoups failed to follow.

A. Judge Waddoups' Unseemly Haste in Case No. 2:16-cv-00958

On 9/14/2016, at 9:07 a.m., Becker filed a complaint and motion for TRO and a preliminary injunction in 16-cv-00958, seeking to enjoin the Tribe's suit against him in the Ute Indian Tribal Court. Becker did not challenge the Tribal Court's subject-matter jurisdiction but, instead, asked Judge Waddoups to enjoin the Tribal Court suit on grounds of comity. By 1:23 p.m. that same day, 9/14/2016, Judge Waddoups had scheduled a TRO hearing for later that same afternoon. By 4:56 p.m. that day, Judge Waddoups had issued a TRO, enjoining the Tribe's suit against Becker in the Tribal Court. As shown by the hearing transcript, Judge Waddoups freely permitted Mr. Becker's counsel to speak uninterrupted; conversely, Judge Waddoups at times peppered the Tribe's counsel with frequent interruptions and challenges to the Tribe's legal arguments—behavior that suggested Judge Waddoups had predetermined the outcome.[3]

Two weeks later to the day, Judge Waddoups entered a preliminary injunction enjoining the suit in Tribal Court.[4] Again, as shown by the hearing transcript, Judge Waddoups freely permitted Becker's counsel to speak uninterrupted, but in contrast, Judge Waddoups peppered the Tribe's counsel with frequent interruptions, suggesting that the ruling had been predetermined based on the judge's biases. On appeal, the

[3] Appendix B, Transcript of TRO Hearing on 9/14/2016.

[4] Appendix C, Transcript of Preliminary Injunction Hearing on 9/27/2016.

Tenth Circuit granted the Tribe's motion to stay Judge Waddoups' preliminary injunction; the Tenth Circuit later reversed the preliminary injunction, finding that Becker had not shown a substantial likelihood of success on the merits. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 868 F.3d 1199, 1204 (10th Cir. 2017).

The mandate in *Becker* issued on 12/21/2017. On January 5, 2017, Becker renewed his motion for a preliminary injunction, submitting only slightly more evidence than what he had submitted in 2016. Dkt. 70.

B. Judge Waddoups' Unseemly Delay and Error in Case No. 2:16-cv-00579

On June 13, 2016, the Ute Tribe filed a complaint and motion for TRO and a preliminary injunction in 16-cv-00579, seeking to enjoin Becker's suit against the Tribe in a Utah state court. In contrast to Becker (who did not challenge the Tribal Court's subject matter jurisdiction), the Tribe did challenge the Utah state court's territorial and subject-matter jurisdiction. The district court dismissed the Tribe's complaint for lack of federal question jurisdiction, and the Tribe appealed. The Tenth Circuit reversed the dismissal and issued its mandate on November 29, 2017. The Tenth Circuit devoted eight pages of its eighteen-page opinion to rejecting Mr. Becker's argument that the Tribe's federal claims constitute mere federal law "defenses to Mr. Becker's state law claims." *Lawrence*, 875 F.3d at 544-48. The Tenth Circuit explained that the Ute Tribe is relying "on federal law 'as a basis for the asserted right of freedom from [state-court] interference.'" *Id*. at 548 (citation omitted) The Tenth Circuit further held that when a party, such as the Ute Tribe, contends that federal law preempts state law, the party asserts a federal question claim under 28 U.S.C. § 1331, and that claim cannot be characterized as a mere "defense

to state law claims." *Id*. at 547-48. The Panel's decision made clear that original jurisdiction exists under 28 U.S.C. §§ 1331 and 1362 to hear the Tribe's claims for declaratory and injunctive relief. *Lawrence*, 875 U.S. at 540, 543.

Eight days after the mandate issued, the Tribe filed emergency and expedited motions for a TRO and preliminary injunction, seeking to enjoin the state court suit. Dkt. Nos. 52, 53, 54 and 57. Three times in the following seven days, the Tribe's counsel contacted Judge Waddoups' chambers in an effort to schedule a TRO hearing. Each time the Tribe's counsel was told that Judge Waddoups hadn't yet decided what to do about the Tribe's motions for emergency injunctive relief. On the seventh day, Judge Waddoups set a month-long briefing schedule for the parties to brief the question of whether the district court "*has supplemental jurisdiction under 28 U.S.C. § 1367 and if so, whether the court should decline to exercise supplemental jurisdiction under subsection (c)*." Dkt. 58.

Judge Waddoups subsequently reversed the Tenth Circuit's holding in *Lawrence*, deciding, in contravention to the Tenth Circuit, that the Tribe's claims all fall exclusively under 28 U.S.C. § 1367 supplemental jurisdiction, and further ruling that the court would exercise its discretion under § 1367(c) to decline to adjudicate the Tribe's claims. Dkt. 70. In doing so, Judge Waddoups refused to comply with the Tenth Circuit's mandate in *Lawrence*, and refused also to recognize and enforce the Tenth Circuit's dispositive precedents in *Ute Indian Tribe v. Utah*, 773 F.2d 1298 (10th Cir. 1985) (en banc) (*Ute III*), and its progeny.

And as shown by the transcript of the hearing conducted on 1/17/2018, Judge Waddoups was aggressively adversarial and combative in his exchanges with the Tribe's attorney; in striking contrast, the judge was respectful and professional in his exchanges with the Tribe's opposing counsel.[5] The Tribe has now appealed Judge Waddoups' denial of injunctive relief to the Tenth Circuit, appeal number 18-4013.

II. LEGAL ARGUMENT

A. Judge Waddoups Has Denied the Ute Tribe Equal Protection of the Law.

Essential to constitutional due process is equal protection under the law, the principle that individuals who are similarly situated should receive equal treatment. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating racial segregation in the District of Columbia public schools under the Fifth Amendment's due process clause).

When the party complaining of disparate treatment is a member of a suspect class, the courts apply a heightened level of scrutiny to that party's claim. The Ute Indian Tribe and its affiliated parties are members of a constitutionally protected class under three separate criteria: the Tribal parties are minorities on the basis of race, national origin, and religion. Mr. Becker is a member of the white majority population. Judge Waddoups has discriminated against the Tribal parties and failed to accord the Tribe equal protection of the law, as demonstrated, *inter alia*, by the judge's strikingly disparate treatment of the Tribe's and Becker's separate motions for injunctive relief in case numbers 2:16-cv-00579 and 2:16-cv-00958.

[5] Appendix D, Transcript of Hearing on 1/17/2018.

B. A Reasonable Person with Knowledge of All the Circumstance Would Conclude that Judge Waddoups Holds a Personal Hostility or Bias Against Both the Ute Tribe and the Bedrock Principles of Federal Indian law to Such an Extent that a Fair Judgment and Interim Rulings Appear Impossible.

Litigants have a fundamental due process right to appear before a judge who, from an objective viewpoint, is not biased. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3541 (3d ed.). The issue in a motion to recuse is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *Caperton v. A.T. Massey Coal, Co., Inc.*, 556 U.S. 868, 872 (2009). *See also Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150, (1968) ("any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"); *ABA Model Code of Judicial Conduct* Canon 1 ("A judge . . . shall avoid impropriety and the appearance of impropriety in all of the judge's activities."); *id.* at cmt. 1 ("Public Confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.").

The United States Supreme Court has clarified that a party seeking to recuse a judge is not required to present extrajudicial evidence of bias. *Liteky v. United States*, 510 U.S. 540, 554-55 (1994). The Court explained that although judicial rulings alone almost never constitute a valid basis for recusal, comments or opinions expressed by a judge are a different matter. *Id*. at 555. Judicial remarks and opinions provide a basis for recusal if the remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id*. Such is the case here.

From the initial hearing in *Becker*, 16-cv-958, Judge Waddoups has seized upon the contractual waivers of sovereign immunity and tribal court exhaustion as grounds for summarily rejecting the Tribe's arguments altogether. In fact, Judge Waddoups has dismissed—and refused even to consider—the Tribe's contention that the *Becker* Agreement is *void ab initio* under federal law and tribal law for lack of federal approval—the very ground the Tenth Circuit relied upon to reverse Judge Waddoups' preliminary injunction order:

> The Tribe responds … that any waiver is ineffective because the [Becker] Contract is void for lack of approval by federal authorities. … Mr. Becker's counterarguments are not persuasive. … If there is law exempting the [Becker] contract from the requirement of federal approval, Mr. Becker has not provided it to this court.

Becker, 868 F.3d at 1203-04.

At the second *Becker* hearing, Judge Waddoups became an active participant on behalf of Mr. Becker when the judge *sua sponte* raised the doctrine of severability and suggested that the Contract's severability clause could be bootstrapped to validate and enforce the waiver clauses[6]—a contention Becker repeated on appeal but which the Tenth Circuit *expressly* rejected, citing *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 699-700 (7th Cir. 2001) ("*We agree with Wells Fargo*.") (holding a severability clause could not be invoked to validate a contractual waiver of sovereign immunity when the entire contract was void for lack of federal approval)).

[6] See Appendix C, pp. 22:19 – 26:11.

Yet, notwithstanding the Tenth Circuit's rulings in *Becker*—rulings that rejected severability and said that Becker had failed to establish the legality of the contract—notwithstanding these appellate rulings—and without the benefit of *any* additional evidence from Becker—Judge Waddoups has continued to insist that the *Becker* Contract is legally enforceable. The first paragraph of the judge's Memorandum Decision and Order, denying the Tribe's motions for emergency injunctive relief in *Lawrence*, states in a strident tone:

> The dispute is between a non-Indian [and the Tribe] … under a contract that includes express waivers of the Tribe's sovereign immunity and any requirement for exhaustion of remedies in the Tribal Court.

Ute Indian Tribe v. Lawrence, No. 2:16-cv-00579, 2018 WL 637395, at * 1, (D. Utah Jan. 31, 2018). Judge Waddoups then referred to extrajudicial evidence that was never included in the record before him:

> The Tribe was represented in the transaction by experienced and competent counsel.
>
> In connection with entering the contract with Becker, the Tribe … requested and received certification from the … Department of the Interior… that no federal approval was required ….

Id. Not only was there no evidentiary support for the foregoing statements, but the latter statement by Judge Waddoups is fundamentally incorrect and misleading.

Judge Waddoups then proceeded to distort and incorrectly characterize the Tribe's Law and Order Code, remarking that:

> A tribal ordinance in force at the time expressly stated that the Tribal Court lacked jurisdiction over such a dispute with the Tribe.

Id. Judge Waddoups' contemptuous remark is focused on a single provision in the Tribal Code and fails to acknowledge other provisions in the Tribal Code that do just the opposite—provisions that expressly vest the Tribal Court with jurisdiction over the Tribe's complaint against Mr. Becker.[7] More importantly, to the extent there is a conflict between two different sections in the Tribal Code, it is for Tribal Court—not Judge Waddoups—to interpret and reconcile the conflicting tribal laws. As of today, the Tribal Court has refused to dismiss the Tribal Court suit for a lack of tribal court jurisdiction under Section 1-2-3(5) of the Tribal Code.

"Findings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice." *Peacock Records, Inc. v. Checker Records, Inc.*, 430 F.2d 85, 89 (7th Cir. 1970). Such is the case here.

C. The Motion to Recuse is Well-Supported and Timely Filed

While motions to recuse should, if possible, be brought early in a case, the right to an unbiased judge extends throughout the proceeding, such that if the judge develops improper bias as the case progresses, recusal is required. *E.g., In re School Asbestos Litigation*, 977 F.2d 764, 783 (3d Cir. 1992). The *Becker* case was filed on September 14, 2016, Dkt. 2, and was before Judge Waddoups for only sixteen (16 days) before the Tribe filed its appeal on September 29, 2016. Dkt. 51. Since the case was remanded to

[7] Appendix E, Section 1-2-3(2)(C) vests the Tribal Court with jurisdiction over any person such as Becker who "transacts, conducts, or performs any business or activity within the Tribe's territorial jurisdiction."

Judge Waddoups on December 21, 2017, the judge has not made any substantive rulings.

The motion is fully supported by the declaration of Luke Duncan, Chairman of the Tribal Business Committee. Appendix A.

CONCLUSION

For the reasons articulated above, this motion to recuse should be granted.

DATED this 13th day of February, 2018.

FREDERICKS PEEBLES & MORGAN LLP

/s/ Frances C. Bassett
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VERIFICATION

I, FRANCES C. BASSETT, have reviewed the foregoing and acknowledge that the matters raised are true and correct to the best of my knowledge and belief.

s/ Frances C. Bassett
Frances C. Bassett

SWORN AND SUBSCRIBED before me this 13th day of February, 2018.

s/ Debra Ann Foulk
Notary Public

My Commission Expires: August 7, 2020

CERTIFICATE OF COUNSEL

Pursuant to 28 U.S.C. § 144, the undersigned counsel of record certifies that the accompanying Defendants' Verified Motion for Recusal is made in good faith.

s/ Frances C. Bassett
Frances C. Bassett

CERTIFICATION OF WORD COUNT

Pursuant to DUCivR 7-1(3)(C), Counsel certifies that this motion contains 2.492 words.

s/ Frances C. Bassett
Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2018, I electronically filed the foregoing **VERIFIED MOTION TO RECUSE** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record as follows:

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