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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, a federally recognized Indian tribe, et al., Plaintiffs, v. HONORABLE BARRY G. LAWRENCE, District Judge, Utah Third Judicial District Court, in his Individual and Official Capacities, and LYNN D. BECKER, Defendants.	**PLAINTIFFS' VERIFIED <u>EMERGENCY AND EXPEDITED</u> MOTION FOR INJUNCTIVE RELIEF — A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION, AND A PERMANENT INJUNCTION ENTERED UNDER FED. R. CIV. P. 56** CASE No. 2:16-cv-00579 Judge Clark Waddoups **<u>ORAL ARGUMENT REQUESTED</u>**

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COMES NOW the Plaintiffs, the Ute Indian Tribe and affiliated parties (the "Tribe" or "Ute Tribe"), and request "forthwith"[1] the issuance of an immediate TRO and/or preliminary injunction, and as soon thereafter as possible, a permanent injunction issued under Rule 56 of Federal Rules of Civil Procedure to enjoin *Becker v. Ute Indian Tribe, et al.*, case number 140908394, Third Judicial District Court, Salt Lake County.

REFERENCES TO THE RECORD

In addition to seeking a temporary restraining order and/or preliminary injunction, Plaintiffs are filing three motions for summary judgment, two of which, both on the substantive merits, are filed in the alternative. Evidentiary materials for the injunction and summary judgment motions are contained in a three-volume exhibit appendix. References are to the Volume and page number(s), i.e., " Appendix, VI, 1-10."

INTRODUCTION

In 1975, the Ute Tribe adopted a Tribal Law and Order Code. The Code was

> … established for the purposes of strengthening Tribal self-government, providing for the judicial needs of the Reservation, and thereby assuring the maintenance of law and order on the Reservation.[2]

The United States Department of Interior approved the Tribe's Law and Order Code as a proper and legitimate exercise of the Tribe's lawful authority as a tribal sovereign. Nonetheless, the State of Utah and its counties and municipalities moved immediately to

[1] *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1012 (10th Cir. 2015) ("Ute VI").

[2] Appendix, VI, 41; *see* Preamble to the Law and Order Code of the Ute Indian Tribe, publically available online at the National Indian Law Library, http://www.narf.org/nill/codes/ute_uintah_ouray/index.html (last visited on 12/6/2017).

thwart the Tribe's implementation of the Code.[3] In October 1975, the Tribe sued in federal court seeking both injunctive relief and a declaratory judgment that the State of Utah and its counties and municipalities "have no jurisdiction or authority to in any way interfere with [the Tribe's] sovereign powers or with any activities or business of the [Tribe] on the Uintah and Ouray Reservation."[4]

On June 19, 1981, following a bench trial, the federal district court entered an 85-page opinion that, *inter alia*, recognized the Tribe's sovereign right to implement its Law and Order Code and to exercise sovereign authority over its tribal lands. Although the federal district court denied injunctive relief, the court said:

> The denial of injunctive relief at this point is, however, a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, this Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary in order to effectuate its judgment, or as needed in aid of its jurisdiction. …[citations omitted]… The defendants are reminded that a refusal of their officers to recognize legitimate tribal judicial and governmental authority on the reservation is … [an] interference with tribal sovereignty.

Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1157 (D. Utah 1981) ("*Ute I*").

Contrary to the express promise in *Ute I*, the federal district court later denied the Tribe's request for an injunction to enjoin the State of Utah's illegal prosecution of Ute tribal members for on-reservation misdemeanors. On appeal, the Tenth Circuit reversed

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[3] Appendix, VIII, 625-31; Tribe's complaint in *Ute Tribe v. Utah*, case number 2:75-cv-00408, U. S. District Court for the District of Utah, ¶¶ 7-12.

[4] Appendix, VIII, 628; Tribe's complaint in *Ute Tribe v. Utah*, case number 2:75-cv-00408, prayer for relief, ¶ 1.

the federal district court's denial of injunctive relief and ordered the district court to enter a preliminary injunction "forthwith." In a decision authored by then-circuit Judge Neil Gorsuch—now an Associate Justice on the United States Supreme Court—the Tenth Circuit said, in pertinent part:

> The Tenth Circuit has "repeatedly stated that … an invasion of tribal sovereignty can constitute irreparable injury." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006). In *Wyandotte Nation* itself, this court upheld a preliminary injunction preventing Kansas from enforcing state gaming laws on a tract of tribal land because of the resulting infringement on tribal sovereignty. [citation omitted] And we can divine no reason or authority that might justify a different result here, where the invasion of tribal sovereignty is so much greater.
>
> Indeed the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time. Not only is the prosecution of Ms. Jenkins itself an infringement on tribal sovereignty, but the tortured litigation history that supplies its backdrop strongly suggests it is part of a renewed campaign to undo the tribal boundaries settled by *Ute III* and *V*. Neither do the [state] defendants' briefs offer any reason to hope otherwise.[5]

Last year, the Tribe again sought injunctive relief against the State of Utah's infringement of tribal sovereignty, this time before this very court in this very case, *Ute Indian Tribe v. Lawrence*, case number 2:16-cv-00579. This time the district court dismissed the Tribe's complaint for lack of federal question jurisdiction under 28 U.S.C. § 1331. On appeal, the Tenth Circuit reversed the dismissal, stating in pertinent part:

> If a suit to enjoin a tribe from exercising jurisdiction contrary to federal law is an action "arising under" federal law, then so is a suit to enjoin a State from exercising jurisdiction contrary to federal law. And, indeed, this court has exercised such arising-under jurisdiction over the years. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1237 (10th Cir. 2001) (affirming a district-court injunction forbidding Kansas authorities from

[5] *Ute Indian Tribe v. Utah*, 790 F.3d at 1005, 1012.

> enforcing state motor-vehicle-registration and titling laws against the plaintiff tribe); *United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1173 (10th Cir. 1991) ("We are persuaded that an action such as this by a tribe asserting its immunity from the enforcement of state laws is a controversy within § 1362 jurisdiction as a matter arising under the Constitution, treaties or laws of the United States."); *Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel Thompson*, 874 F.2d 709, 716-17 (10th Cir. 1989) (affirming preliminary injunction preventing State of Oklahoma from interfering with operation of gaming on tribal land and from proceeding with suit in state court). And more recently, in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1007, 1012 (10th Cir. 2015) (Gorsuch, J.), *cert. denied, Uintah Cty, Utah v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 136 S. Ct. 1451 (2016); and *Wasatch Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 136 S. Ct. 1451 (2016), we reversed the district court's denial of a request for a preliminary injunction against a state prosecution and ordered the court to enter the injunction because the State was attempting to exercise criminal jurisdiction against an Indian for conduct on tribal lands. Although that case did not (as ours does) involve civil jurisdiction, no reason has been offered why that should matter. As we have already noted, Public Law 280 covers both criminal and civil jurisdiction.

Ute Indian Tribe v. Lawrence, No. 16-4154, 2017 WL 5150265, 9-10 (10th Cir. November 7, 2017).

By this motion the Ute Tribe is now seeking immediate interim, and permanent injunctive relief under Rule 56 to enjoin the State of Utah's continuing assertion of adjudicatory jurisdiction over *Becker v. Ute Indian Tribe, et al.*, case number 140908394, Third Judicial District Court, Salt Lake County ("state court case"). Injunctive relief should be granted because the undisputed facts establish unequivocally that (*i*) Mr. Becker's claim arose inside the exterior boundaries of the Tribe's Uintah and Ouray Reservation; (*ii*) the State of Utah lacks civil adjudicatory jurisdiction over the breach of contract claims brought by Defendant Lynn D. Becker ("Becker") in the state court case, number,

140908394; (*iii*) federal law preempts, precludes, and bars the State of Utah from exercising adjudicatory jurisdiction over the state court case; and alternatively, (*iv*) the Independent Contractor Agreement between Becker and the Ute Tribe is void *ab initio* under both federal law and Ute Indian tribal law.

BACKGROUND STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. Elements of Equitable Relief Against State Infringements on Tribal Sovereignty

Under long-established U. S. Supreme Court and Tenth Circuit precedents, Indian tribes are entitled to injunctive relief against a state's *threatened* or *actual* assertion of state jurisdiction over tribes and tribal members inside of Indian country. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 203 (1987) (enjoining application of state criminal laws to tribal bingo enterprises in Indian Country); *Ute Indian Tribe v. Utah*, 790 F.3d at 1007, 1012 (enjoining a state court prosecution of a Ute Indian for on-reservation conduct); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1182 (10th Cir. 1991) (enjoining the District Attorney of Tulsa County, Oklahoma from exercising criminal jurisdiction over Indian gaming in Indian Country); *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming preliminary injunction to enjoin the State of Oklahoma from exercising state jurisdiction over tribal gaming operations in Indian Country).

Under federal law, a state can assume civil adjudicatory jurisdiction over Indians in Indian Country only "with the consent" of the Indian tribe affected by the assumption. 25 U.S.C. § 1322(a)(1).[6] *Kennerly v. District Court*, 400 U.S. 423, 427 (1971).

Indian tribes in Utah have never consented to state jurisdiction over their reservations. *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985).

Further, when, as here, an Indian tribe has established a tribal court to handle disputes involving reservation Indians, concurrent state jurisdiction is an interference with tribal self-government. *Fisher v. District Court*, 424 U.S. 382, 388 (1976).

The "only measurable difference" between a preliminary injunction and a permanent injunction is that a preliminary injunction requires a showing of *substantial* likelihood of success on the merits, whereas a permanent injunction requires a showing of *actual* success on the merits. *Prairie Band of Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007).

To obtain injunctive relief, the Tribe must show: (1) a substantial likelihood of, or actual, success on the merits; (2) irreparable harm to the Tribe unless an injunction is issued; (3) that the threatened injury to the Tribe outweighs any potential harm to the State of Utah; and (4) that the injunction, if issued, will not adversely affect the public

[6] 25 U.S.C. § 1322(a)(1) reads in pertinent part: "The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption …."

interest. E.g., *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d at 822; *Wyandotte Nation v. Sebelius*, 443 F.3d at 1254-55.

B. Statement of Undisputed Material Facts

The Tribe incorporates by reference the Statement of Undisputed Material Facts that are contained in the Tribe's other two summary judgment motions on the substantive merits, Dkt. 52 and Dkt. 53.

Chronology of Case No. 140908394

1. Mr. Becker commenced suit against the Ute Indian Tribe and its affiliated parties in case number 140908394 on December 11, 2014, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. Appendix, V III, 634-41.

2. The Tribal defendants ("the Tribe") entered a special appearance in the state case and filed a motion to dismiss based, *inter alia*, on lack of subject matter jurisdiction under federal law, lack of subject matter jurisdiction based on tribal sovereign immunity, and lack of personal jurisdiction based on improper service of process. Appendix, VIII, 642-43 (condensed).

3. On July 25, 2015, the state court in *Becker v. Ute Indian Tribe* entered an order denying the Tribe's motion to dismiss. Appendix, VIII, 644-45.

4. On August 22, 2015, the Tribe filed a notice of appeal under the collateral order doctrine, a doctrine recognized by federal courts and many state courts which

permits interlocutory appeals from orders denying the defense of tribal immunity.[7] On September 30, 2015, the Utah Court of Appeals summarily dismissed the Tribe's appeal on the ground that Utah state courts do not recognize the collateral order doctrine. Appendix, VIII, 647-49.

5. On remand to the state district court, the court ordered the Tribe to file its answer and to respond to Mr. Becker's discovery on the Tribe. Appendix, VIII, 650.

6. On August 18, 2016, the Tribal parties filed suit against Mr. Becker in the Ute Indian Tribal Court, *Ute Indian Tribe v. Becker*, case number CV-16-253. The Tribal Court suit seeks, *inter alia,* a declaration that the Becker IC Agreement is void *ab initio* under federal and tribal law. The Tribe also seeks damages from Becker for breach of fiduciary duty, constructive fraud, theft and/or conversion of tribal assets, unjust enrichment and/or equitable disgorgement and restitution. Appendix, VI, 116-17.

7. On March 10, 2017, the Ute Indian Tribal Court denied Mr. Becker's motion to dismiss the Tribe's suit against him for lack of tribal court jurisdiction. Appendix, VI, 118-24.

8. On June 9, 2017, the Ute Indian Tribal Court declined to stay the suit in Tribal Court on grounds of comity. Appendix, VIII, 664-66.

9. On September 2, 2016, the Tribal parties filed a Rule 56 motion for dismissal in the *Becker* state court suit on grounds of federal preemption, infringement on

[7] *E.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1159 (10th Cir. 2014) (the denial of tribal immunity is immediately appealable under the collateral orders doctrine); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004) (same under Colorado state law).

Ute Indian tribal sovereignty, and lack of subject matter jurisdiction. Appendix, VIII, 651. That same day, the Tribal parties filed a motion seeking a stay of proceedings in the state court until the state court had first ruled on the Tribe's jurisdictional challenge. Appendix, VIII, 655. The state court denied the Tribe's motion for a stay. Appendix, VIII, 657.

10. On December 5, 2016, the Tribal parties filed a second Rule 56 motion for dismissal in *Becker v. Ute Indian Tribe*. The second motion was based on Mr. Becker's failure to join the United States as a necessary and indispensable party. Appendix, VIII, 653.

11. On February 9, 2017, the Utah state court denied the Tribe's two summary judgment motions for dismissal of *Becker v. Ute Indian Tribe*. Appendix, VI, 125-45.

12. On March 1, 2017, the Tribe filed a Petition for Permission to File an Interlocutory Appeal (under Rule 5 of the Utah Rules of Appellate Procedure) from the decision of the Utah state court denying the Tribe's two summary judgment motions. Appendix, VIII, 659.

13. On March 22, 2017, the state court denied the Tribe's motion to stay proceedings in the state court pending the conclusion of proceedings in the Ute Indian Tribal Court, or alternatively, pending a final resolution of the Tribe's Petition for Interlocutory Appeal and/or a planned Petition for Extraordinary Relief to the Utah state appellate courts. Appendix, VIII, 691.

14. On April 3, 2017, the Utah Court of Appeals summarily denied the Tribe's Petition for Permission to file an Interlocutory Appeal. Appendix, VIII, 661.

15. On May 3, 2017, the Tribe filed a Petition for a Writ of Certiorari from the Utah Court of Appeals' order denying the Tribe's petition to file an interlocutory appeal. Appendix, VIII, 662. The Petition for a Writ of Certiorari was summarily denied by the Utah Supreme Court on June 23, 2017. Appendix, VIII, 670.

16. On June 14, 2017, the Tribe filed a Petition for Writ of Prohibition and Writ of Mandamus or Other Extraordinary Relief with the Utah Supreme Court. Appendix, VIII, 667. The Petition was summarily denied on August 21, 2017. Appendix, VII, 671.

17. On July 31, 2017, the state court scheduled a nine-day jury trial in *Becker v. Ute Indian Tribe,* case number 140908394, and issued a "Jury Trial Pretrial Order," which contains pretrial filing deadlines that began on November 30, 2017. Appendix, VI, 113-15.

18. On August 25, 2017, the Tenth Circuit ruled in favor of the Tribe in the related federal litigation, *Ute Indian Tribe v. Lawrence*, case number 16-4154, and *Becker v. Ute Indian Tribe*, case number 16-4175. The Tenth Circuit mandate in 16-4175 issued on November 29, 2017.

19. On August 30, 2017, in the *Becker* suit in state court, the Tribe filed a "Notice of Supplemental Authority and Renewed Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction and to Vacate Trial Setting and Pretrial Deadlines." Appendix, VIII, 692-97.

20. During a telephonic hearing on October 2, 2017, in the *Becker* state court case, the Honorable Barry Lawrence said the only thing that will stop the February 20, 2018 jury trial from proceeding will be the issuance of a federal court injunction:

> [I]f the [Tribe] gets an order from a federal court that looks at this and thinks that there is a substantial likelihood, or whatever the standard is applicable to them, to issue an order enjoining me, then I certainly will respect that order. But anything short of that, we are going to go forward with the trial.

Appendix,VIII, 676:10-15.

21. In oral argument before the Tenth Circuit, Mr. Becker, a resident of the State of Colorado, admitted through counsel that his lawsuit against the Ute Tribe could just as easily have been brought in a Colorado court. Appendix, VIII, 693:12-21.

LEGAL ARGUMENT

Plaintiffs request "forthwith"[8] issuance of an immediate TRO and/or preliminary injunction, followed as soon thereafter as possible, with a permanent injunction under Rule 56 to enjoin further proceedings in the *Becker* suit in state court.

I. THE STANDARD FOR INJUNCTIVE RELIEF IS MET HERE

It is axiomatic that litigation, by its nature, is "peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Therefore, to require a sovereign—such as the Ute Indian Tribe—to defend a case all the way through a jury trial before a tribunal that patently lacks subject-matter jurisdiction clearly negates the sovereign's right "to be free from the 'crippling interference' of litigation." *See Marx v. Guam*, 866 F.2d 294, 296 (9th Cir. 1989). The Supreme Court has observed that the harm to a sovereign government lies not only in the expenditure of time and resources in defending against unauthorized litigation, but also in "the indignity of subjecting a sovereign" to "the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. 139, 146 (1993).

Since the 1832 decision in *Worcester v. Georgia*, 31 U.S. 515, 561-63 (1832), it has been a fundamental tenet of federal law that states lack jurisdiction over Indians for conduct occurring within Indian country. "Absent clear federal authorization, state courts lack jurisdiction to hear actions against Indians arising within Indian country." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §7.03[1][a][ii], p. 608 (2012 ed.). Further, the United

[8] *Ute VI*, 790 F.3d 1012.

States Supreme Court has repeatedly made clear that state courts are prohibited from exercising adjudicatory jurisdiction over tribal Indians for activity undertaken inside their reservations unless the "*Congress has expressly so provided*." *California v. Cabazon Band of Indians*, 480 U.S. at 207 (emphasis added) (upholding an injunction to enjoin the application of California law inside California Indian reservations); *see also Williams v. Lee*, 358 U.S. 217, 220 (1959).

Obviously, then, an Indian tribe's immunity to state adjudicatory jurisdiction is an "entitlement" to "immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial"—a practice that would subject Indian tribes to both the costs of litigation and the burdens of broad-reaching discovery. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (emphasis in original).

The limited purpose of a preliminary injunction "is merely to preserve" the status quo. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981). With respect to Indian tribes, the status quo that a federal court must preserve is the status quo that is required by controlling federal law, including without limitation, the Tenth Circuit's holdings in *Ute Tribe v. Utah*.

In *Kiowa Indian Tribe of Okla. v. Hoover*, the Kiowa Tribe filed suit in federal court against not one, but *three* (3) Oklahoma state district court *judges*, seeking a federal injunction to enjoin state court proceedings that threatened the seizure of tribal assets. The U.S. district court denied injunctive relief and dismissed the suit. On appeal, the Tenth Circuit reversed, agreeing with the Tribe that "the burdens of litigating in a [state] court" that lacked jurisdiction over the Tribe "constituted *per se* irreparable harm." *Kiowa*

Tribe v. Hoover, 150 F.3d 1163, 1171-72 (10th Cir. 1998).

Both before *Kiowa* and since *Kiowa*, multiple courts in the Tenth Circuit have granted, or affirmed, federal injunctions to enjoin the enforcement of state civil law against Indian tribes, tribal members, or tribal entities related to actions arising from within Indian country. *See, e.g., Wyandotte Nation v. Sebelius*, 443 F.3d at 1255 ("We have repeatedly stated" that enforcing state law in relation to legal disputes arising on tribal lands "can cause irreparable injury."); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (state defendants' refusal to recognize federal constraints on state jurisdiction "causes an obvious harm to the tribe"); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 710 (10th Cir. 1989) (enjoining two pending state court suits in which the State of Oklahoma sought to enjoin tribal gaming operations); *Choctaw Nation of Oklahoma v. State of Oklahoma*, 724 F. Supp. 2d 1182, 1187 (W.D. Okla. 2010) (remedies at law are inadequate to remedy illegal assertions of state jurisdiction in Indian country, in this case, the assertion of state court civil adjudicatory jurisdiction over torts occurring within Indian country); *Winnebago Tribe of Nebraska v. Stovall,* 216 F. Supp. 2d 1226, 1240 (D. Kan. 2002), and *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d 1217, 1222 (D. Kan. 2002) (monetary damages are not sufficient "to undo the damage" caused by illegal seizures of property and encroachments on tribal sovereignty).

A. The Ute Tribe Will Prevail on the Merits

As to the first requirement, the Tribe will prevail on the merits because the State of Utah lacks civil adjudicatory jurisdiction "over civil causes of action between Indians or to which Indians are parties" that arise in Indian country. Further, there is no act of

Congress—nor any holding by the U. S. Supreme Court—that allows the Ute Indian Tribal Business Committee to unilaterally confer subject-matter jurisdiction on a state court. *E.g., Kennerly v. District Court*; 25 U.S.C. §§ 1322, 1326. Further, under both 28 U.S.C. § 1360(b) and 25 U.S.C. 1322(b), Congress has expressly *prohibited* state courts in all fifty states from adjudicating "in probate proceedings or otherwise" the ownership or right to possess "any real or personal property" or "any interest therein" belonging "to any Indian or any Indian tribe." *See Bryan v. Itasca Cty.*, 426 U. S. 373, 388-89 (1976). Finally, even assuming, *arguendo*, that the Ute Indian Tribal Business Committee could unilaterally *confer* subject-matter jurisdiction by *waiving* sovereign immunity, in this case there is no valid waiver of sovereign immunity because the IC Agreement between Becker and the Ute Tribe is void *ab initio* under both federal law and Ute Indian tribal law. *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 (9th Cir. 1986) (and cases cited therein). *See also Oneida Indian Nation v. Cty. of Oneida v.* 414 U.S. 661, 667-75 (1974) (sale of tribal lands was void for lack of federal approval); *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 individual 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).

In sum, as Judge Gorsuch observed in *Ute Tribe v. Utah*:

> In the end, then, the [State] defendants offer no legal authority for their position and face a considerable and uniform body of authority stacked against it. Any consideration of the merits would seem to favor the Tribe—and favor it strongly.

Ute Tribe v. Utah, 790 F.3d at 1006.

B. Absent An Injunction, the Tribe Will Suffer Irreparable Harm

State encroachments on tribal sovereignty constitute an irreparable injury because the harm to tribal self-government is "not easily subject to valuation," and more importantly, because "monetary relief" is generally not available to remedy the harm to the Indian tribe due to "the state's sovereign immunity." *Prairie Band*, 253 F.3d at 1250; *Choctaw Nation of Okla. v. Okla.*, 724 F. Supp. 2d at 1187 (remedies at law are inadequate to remedy illegal assertions of state jurisdiction in Indian country); *Winnebago Tribe of Nebraska v. Stovall,* 205 F. Supp. 2d at 1222 (monetary damages are not sufficient "to undo the damage" caused by illegal seizures of property and encroachments on tribal sovereignty).

In *Ute VI*, the Tenth Circuit reversed the district court's refusal to enjoin the State of Utah's criminal prosecutions of Ute Indians for on-reservation conduct. In doing so, the Tenth Circuit said:

> On the record before us, there's just no room to debate whether the defendants' conduct "create[s] the prospect of significant interference with [tribal] self-government" that this court has found sufficient to constitute "irreparable injury."

Ute VI, 790 F.3d at 1006 (citing *Prairie Band*, 253 F.3d at 1250-51, which found irreparable harm to tribal interest in the Tribe's regulation of motor vehicles within its

reservation boundaries). *See also Wyandotte Nation v. Sebelius*, 443 F.3d at 1255 ("We have repeatedly stated" that enforcing state law in relation to legal disputes arising on tribal lands "can cause irreparable injury"); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d at 713 (concluding inability to offer Indian gaming would cause irreparable loss of governmental revenue and jobs, interfering with tribal self-governance).

Here, the Tribe has made a sufficient showing of irreparable harm "*as a matter of law*." *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 at 1171 (emphasis added). In *Kiowa* the Tenth Circuit rejected the district court's finding of no irreparable harm. Instead, the Tenth Circuit said it was "convinced" the Kiowa Tribe had made a sufficient showing or irreparable harm "*as a matter of law*." (emphasis added) *Id.* In so ruling, the Court explained that the Tribe's sovereign immunity would be "irrevocably lost" once the Tribe was forced to "endure the burdens of litigation." *Id.* at 1171. The same is true here. By any reasonable estimate, the Tribe has spent hundreds of thousands of dollars in defending against the *Becker* suit in state court, and the suit has been very disruptive to tribal governance. Appendix, VI, 210-15, Declaration of Frances Bassett.

It is axiomatic that litigation can be "peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. at 817. Tribal sovereign immunity is the "entitlement" to "immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial" before a tribunal that lacks subject-matter jurisdiction, a practice that would subject governments to both the costs of litigation and the burdens of broad-reaching discovery. *Mitchell v. Forsyth*, 472 U.S. at 525 (emphasis in original). It should be obvious that requiring the Ute Tribe to defend the *Becker* suit in

state court violates the Tribe's right "to be free from the 'crippling interference' of litigation." *Marx v. Guam*, 866 F.2d at 296. The harm to a sovereign government lies not only in the expenditure of time and resources in defending against unauthorized litigation but, also, "the indignity of subjecting a sovereign" to "the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. at 146.

C. The Defendants Will Not Be Irreparably Harmed in Any Material Manner if the Motion For TRO/Preliminary Injunction is Granted

The threatened injury to the Ute Tribe and its tribal members outweighs any conceivable harm to the Defendants. As the Tenth Circuit reasoned in *Kiowa*:

> Recognizing the sovereign status of the Kiowa Tribe, we are convinced the Tribe has made a sufficient showing of irreparable harm as a matter of law. … The Tribe should not be compelled "to expend time and effort on litigation in a court that does not have jurisdiction over them." (citations omitted) The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation. (citations omitted)

Kiowa, 150 F.3d at 1171-72. The same is true here.

D. The Injunction Will Advance and Enhance the Public Interest

There is no harm to the public interest in requiring the State of Utah and Mr. Becker to comply with controlling federal law. Further, issuance of the injunction will advance the strong public policy of assuring tribal self-government, self-sufficiency and self-determination. *See, e.g., Fisher v. District Court*, 424 U.S. at 388; *Ute Tribe v. Utah*, 790 F.3d at 1007; *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.2d at 713.

II. NO GROUNDS EXIST FOR DENYING INJUNCTIVE RELIEF

No grounds exist for denying injunctive relief.

A. NEITHER THE ANTI-INJUNCTION ACT NOR THE ROOKER-FELDMAN DOCTRINE APPLIES HERE

a. The Anti-Injunction Act Has No Application

The Anti-Injunction Act ("AIA"), 28 U.S.C. § 2282, provides that federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (underscore added) The second and third AIA exceptions apply here.

> Cases are legion which affirm the exercise of a federal court's power to prevent state court action from interfering with federal jurisdiction and from undermining federal court judgments. Many of these cases arose in situations such as the present where a federal court has forged remedies to protect the rights under federal law of a disadvantaged minority, only to be called immediately to defend its judgment from hostile flanking movements in state court.

United States v. Michigan, 508 F. Supp. 480, 488 (W.D. Mich. 1980) (quoting *United States v. Washington*, 459 F. Supp. 1020, 1029 (W.D. Wash. 1978)); *see also Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-96 (1979) (affirming the power of federal courts to enjoin a state's violation of federal law and federal court decrees).

The Tribe sued the State of Utah in 1975, seeking both injunctive relief and a declaratory judgment that the State of Utah "has no jurisdiction or authority to in any way interfere with [the Tribe's] sovereign powers or with any activities or business of the [Tribe]

on the Uintah and Ouray Reservation."[9] On June 19, 1981, the federal district court entered an 85-page memorandum decision and order that, *inter alia*, recognized the Tribe's federally protected right to self-government—the right to exercise sovereign authority over its tribal lands free from state interference. Although the federal district court denied injunctive relief in 1981, the district court said:

> The denial of injunctive relief at this point is, however, a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, this Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary in order to effectuate its judgment, or as needed in aid of its jurisdiction. …[citations omitted]… **The [state] defendants are reminded that a refusal of their officers to recognize legitimate tribal judicial and governmental authority on the reservation is … [an] interference with tribal sovereignty**. (emphasis added)

Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1157 (D. Utah 1981) ("*Ute I*"). That "interference with tribal sovereignty" is precisely what is occurring here now in *Becker v. Ute Indian Tribe, et al.*, case number 140908394, Third Judicial District Court, Salt Lake County. No Act of Congress and no Supreme Court precedent authorizes Judge Lawrence's continued assertion of state jurisdiction over the *Becker* suit, yet Judge Lawrence refuses to stay—let alone dismiss—the *Becker* suit unless and until he is ordered to do so by a federal court:

> [I]f the [Tribe] gets an order from a federal court … then I certainly will respect that order. But anything short of that, we are going to go forward with the trial.

[9] Appendix, VIII, 628; Tribe's complaint in *Ute Tribe v. Utah*, case number 2:75-cv-00408, prayer for relief, ¶ 1.

Appendix, VIII, 676:10-15. Under these facts, this Court has both the power and the obligation to (*i*) protect and effectuate the judgments entered in *Ute Tribe v. Utah*,[10] and (*ii*) "to preserve the integrity" of the Tribe's attempts to enjoin this infringement on tribal sovereignty through its complaint in the case at bar. *White Mountain Apache Tribe v. Smith Plumbing Co., Inc.*, 856 F.2d 1301, 1304 (9th Cir. 1988) (holding the AIA did not bar the Tribe's request for an injunction); *see also Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540-41 (9th Cir. 1994) (rejecting the State of California's argument that, even if California state courts lack jurisdiction over Indians as a matter of substantive law, the AIA prevented the federal court from enjoining the state's illegal assertion of state jurisdiction); *Alonzo v. United States*, 249 F.2d 189, 197 (10th Cir. 1957) (holding the AIA did not preclude an injunction against a state court suit that sought to adjudicate a non-Indian's claim to restricted Indian property).

b. The *Rooker-Feldman* Doctrine Has No Application

The *Rooker-Feldman* doctrine—named for two cases decided by the U. S. Supreme Court six decades apart[11]—holds that lower federal courts lack "appellate jurisdiction" to review a final state court judgment when the state judgment was rendered before the initiation of a parallel federal court suit. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 294 (2005) (reversing the lower federal courts' reliance

[10] *Ute Tribe v. Utah*, 773 F.3d 1087 (10th Cir. 1985) (en banc); *Ute Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997); *Ute Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015); *Ute Tribe v. Myton*, 835 F.3d 1255 (10th Cir. 2016); *Ute Tribe v. Lawrence*, No. 16-4154, 2017 WL 5150265, 9-10 (10th Cir. November 7, 2017).

[11] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

on *Rooker-Feldman* to dismiss a parallel federal court suit for lack of subject matter jurisdiction); *Guttman v. Khalsa*, 446 F.3d 1027, 1031 (10th Cir. 2006) (lower federal courts have jurisdiction over parallel federal suits that are commenced before the judgment in a parallel state court suit has become final).

Before the Supreme Court's unanimous decision in *Exxon Mobil*, the lower federal courts had often invoked *Rooker-Feldman* in a wide variety of circumstances to dismiss federal court suits.[12] The Supreme Court granted certiorari in *Exxon Mobil* to "resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine." *Exxon Mobil*, 544 U.S. at 291. Explaining that the Third Circuit in *Exxon Mobil* had "misperceived the narrow ground occupied by *Rooker-Feldman*," *id.* at 284, the Supreme Court then proceeded to clarify the limited scope of the doctrine:

> When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court. This Court has repeatedly held that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." [citations omitted] . . . . [N]either *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court.
>
> * * * *
>
> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. … In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

[12] *See, e.g.,* Adam McLain, Comment, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555 (2001).

Id. at 292-93. The Supreme Court in *Exxon Mobil* went on to expressly reject the Third Circuit's criticism in *Exxon Mobil* of litigants who pursue a federal lawsuit as an "insurance policy" against a potentially adverse result in state court. *Id*. at 294, n.9. As pertinent to the Ute Tribe's federal claims here, the Supreme Court in *Exxon Mobil* emphasized that there "is nothing necessarily inappropriate" in a party such as the Ute Tribe "filing a protective action" in federal court. *Id*.

For purposes of the *Rooker-Feldman* doctrine, a state court judgment does not become final until after the entry of final judgment ***and*** the subsequent exhaustion of all avenues of appeal through the state court system. Thus, for instance, the plaintiff in *Guttman v. Khalsa* filed his federal court suit *after* losing in the state court but while his petition for a writ of certiorari was pending before the New Mexico Supreme Court. *Guttman*, 446 F.3d at 1030. Because the plaintiff in *Guttman* filed suit in federal court before the state-court judgment had become final, the Tenth Circuit held that the district court's dismissal of the federal suit on the basis of *Rooker-Feldman* was in error. *Id*. at 1031. Because the Ute Tribal plaintiffs in this case initiated their federal suit before the entry of judgment in Mr. Becker's state-court suit, it is readily apparent that *Rooker-Feldman* provides no basis for dismissing, or staying, the Tribal plaintiffs' federal lawsuit.[13]

[13] Even without the benefit of the Supreme Court's 2005 decision in *Exxon Mobil Corp.*, the Tenth Circuit in 1998 reversed a U.S. District Court's dismissal of the Kiowa Indian Tribe's federal court suit seeking to enjoin the enforcement of state court judgments entered against the Tribe by Oklahoma state courts, saying the District Court's reliance on *Rooker-Feldman* was in error. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d at 1169-71.

B. NO IMPORTANT STATE INTEREST WARRANTS *YOUNGER* ABSTENTION

Nor is *Younger* abstention proper here. In fact, the Tenth Circuit's holdings in *Ute Tribe v. Utah*, 790 F.3d at 1008-09 (*Ute VI*), and *Seneca-Cayuga*, 874 F.2d at 711-14—decisions that rejected *Younger* abstention—are dispositive here. For *Younger* abstention to apply, there must be "an ongoing state judicial … proceeding, the presence of an important state interest, and an adequate opportunity to raise federal claims in the state proceeding." *Seneca-Cayuga*, 874 F.2d at 711. In *Seneca-Cayuga* the State of Oklahoma sued the Seneca-Cayuga and Quapaw Tribes in separate state court suits seeking to enjoin the operation of tribal bingo games on lands within the Tribes' reservations. *Id*. at 710. In *Ute VI*, the State of Utah instituted multiple criminal prosecutions of Ute tribal members in Utah state courts for alleged criminal conduct that occurred within the exterior boundaries of the Ute Tribe's U&O Reservation. 790 F.3d at 1005. In both cases, the Tribes commenced independent suits in federal court, asking the federal courts to enjoin the state court proceedings. In both cases, the Tenth Circuit rejected the States' arguments that *Younger* abstention applied, and ordered the state court proceedings to be enjoined. *Seneca-Cayuga*, 874 F.2d at 716-17; *Ute VI*, 790 F.3d at 1009, 1012.

In *Seneca-Cayuga*, the Oklahoma Supreme Court asserted two ostensibly important state interests as a basis for the federal court to abstain from enjoining the State court litigation over the legality of Indian gaming inside the exterior boundaries of the Seneca-Cayuga and Quapaw reservations: (1) preventing the infiltration of organized crime, and (2) protecting the State's economy and tax base. The Tenth Circuit rejected

both of Oklahoma's asserted state interests and in doing so, the Court emphasized that the case "*concerns activities that are necessarily primarily of federal interest*." 874 F.2d at 712 (emphasis added). The Tenth Circuit ruled similarly in *Ute VI*, 790 F.3d at 1008-09.

Here, as in *Ute VI* and *Seneca-Cayuga*, the Tribal plaintiffs allege that the Utah state court lacks subject matter jurisdiction to adjudicate the *Becker* lawsuit. The question of whether the Utah state court lacks subject matter jurisdiction over the *Becker* lawsuit is itself a question of federal law:

> State courts are, of course, competent to decide such jurisdictional questions, but the fact that this central issue is not one of state law indicates that the importance of the State's interest in the state litigation is minimal. Where, as in this case, a state court is asked to decide issues of federal law in an area in which federal interests predominate, the State's interest in the litigation is in our view not important enough to warrant *Younger* abstention.

Seneca-Cayuga, 874 F.2d at 714. In a case virtually identical to the case at bar, the U.S. District Court for the District of New Mexico refused to dismiss a federal court suit brought by an Indian tribe seeking to enjoin a civil tort suit brought against the Tribe and its tribal enterprise in a New Mexico state court. The U.S. District Court rejected the arguments advance by the State court judge for dismissing the suit on the basis of *Younger* abstention:

> The [State judge's] argument, however, overlooks the threshold question raised by Tamaya and Santa Ana [Indian Pueblo], namely whether the state court has jurisdiction in the first place to hear the Personal Representatives' tort claims. Resolving this jurisdictional question implicates tribal sovereign immunity—an issue that is paramount and federal. *See Seneca-Cayuga Tribe*, 874 F.2d 709, 713 (10th Cir. 1989) ("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country"); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1204-05 (10th Cir. 2003) (affirming the district court's conclusion that the threshold

> question of whether the state had jurisdiction to tax a tribe "was a matter of federal, not state law"). Accordingly, due to the primacy of this federal jurisdictional issue, the state's interest in the litigation is not significant enough to justify *Younger* abstention. *Seneca-Cayuga Tribe*, 874 F.2d at 714 (finding that when state court is asked to decide "issues of federal law where federal interests predominate," such as whether state had jurisdiction to regulate tribes, "the State's interest in the litigation is … not important enough to warrant *Younger* abstention"); *Fort Belknap Indian Cmty. of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 431-32 (9th Cir. 1994) (finding the "threshold question"—whether the state had jurisdiction to prosecute—to be "paramount and federal," making *Younger* abstention inappropriate); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (finding *Younger* abstention inappropriate where threshold issue was whether state had jurisdiction to prosecute Indians pursuant to state gaming laws).

Pueblo of Santa Ana v. Nash, 854 F. Supp. 2d 1128, 1141 (D.N.M. 2012). The same is true here. There simply is no important state interest at stake here. Indeed, Mr. Becker does not even *reside* in the State of Utah—a point that Mr. Becker's attorney emphasized in oral argument to the Tenth Circuit:

> Attorney Isom: Mr. Becker lives in Colorado. Was he excluded from suing [in Colorado]? No. He could have sued [in Colorado], but he [chose] to sue in Utah.

Appendix, VIII, 689:12-14. Because Becker is not even a resident of Utah, the State of Utah obviously lacks even a *parens patriae* interest in the *Becker* suit in state court.

The Tenth Circuit's rejection of *Younger* abstention in *Ute Tribe v. Utah* and *Seneca-Cayuga* is dispositive here. Mr. Becker's state court suit seeks damages for breach of contract involving his IC Agreement with the Ute Tribe—a claim that arose exclusively within the boundaries of the U&O Reservation. Furthermore, the Tribal plaintiffs contend that both the Becker IC Agreement itself and the purported waiver of tribal sovereign immunity within the Agreement are invalid under federal and tribal law.

The validity of the Becker IC Agreement and the purported waiver of immunity within the Agreement present paramount and threshold issues of federal law that make *Younger* abstention unwarranted.

C. ABSTENTION IS NOT WARRANTED UNDER COLORADO RIVER PRINCIPLES

Insofar as abstention is not appropriate under *Younger*, *a fortiori*, abstention is clearly not appropriate under *Colorado River* principles. In contrast to other abstention doctrines, application of the *Colorado River* doctrine is prudential and discretionary. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976) ("the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration—[i.e., *Colorado River* abstention]---are considerably more limited than the circumstances appropriate for abstention" generally). Moreover, the *Colorado River* doctrine *presumes* the existence of valid subject matter jurisdiction in *both* a state court and a federal court *simultaneously*, and the doctrine is invoked primarily to avoid wasteful duplication of litigation. *Id*. Here, however, the Ute Tribal plaintiffs dispute that the Utah state court possesses subject matter jurisdiction over the *Becker* lawsuit; the Tribal plaintiffs' challenge to the state court's subject matter jurisdiction in *Becker* presents a paramount "threshold question" of federal law, *e.g., Seneca-Cayuga Tribe*, *Santa Ana v. Nash*, and the Tribal plaintiffs have the right under federal law to have that paramount "threshold question" of federal law decided by a federal court in the first instance. *See England v. Med. Examiners*, 375 U.S. 411, 415 (1964) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.") (quoting *Willcox v. Consol.*

Gas Co., 212 U.S. 19, 40 (1909)).

The Tribal plaintiffs are not aware of any federal court that has invoked *Colorado River* principles to abstain from deciding the paramount "threshold question" of state court subject-matter jurisdiction over litigation arising in Indian country involving Indian tribes and tribal entities.

D. THE TRIBAL PLAINTIFFS' CLAIMS ARE NOT BARRED BY ELEVENTH AMENDMENT IMMUNITY

It must be emphasized that the Tribal plaintiffs seek issuance of an injunction under 28 U.S.C. § 2202—not 42 U.S.C. § 1983. This means that the Tribe's request for injunctive relief is not subject to the limiting language under § 1983, stating that injunctive relief may be granted against a judicial officer only when "a declaratory decree was violated or declaratory relief was unavailable."[14] 42 U.S.C. § 1983.

Further, the State of Utah expressly and unequivocally waived Eleventh Amendment immunity in its motion to intervene and in its answer to the Tribe's complaint in *Ute Tribe v. Utah*. Appendix, VIII, 632-33. Clearly, then, the State of Utah's waiver of immunity necessarily extends to the Tribe's subsequent enforcement of the rulings in *Ute Tribe v. Utah*. Stated differently, the State of Utah unequivocally and unconditionally waived immunity with respect to the Tribe's request for both declaratory judgment *and* injunctive relief in *Ute Tribe v. Utah*. And because the State waived immunity unconditionally—that is, with respect to both declaratory and injunctive relief—there is no

[14] Parenthetically, Plaintiffs do contend that Judge Lawrence's assertion of jurisdiction over *Becker v. Ute Indian Tribe* violates the declaratory rulings that have been entered in the *Ute Tribe v. Utah* line of cases.

basis in law for holding that the State of Utah can waive sovereign immunity on the substantive merits, but later invoke sovereign immunity to avoid *enforcement* of the merits judgment. The Tribe's position is that the State's unconditional waiver of immunity in *Ute Tribe v. Utah* means that the State of Utah, through Judge Lawrence, is now precluded from invoking immunity as a means of avoiding enforcement of the declaratory rulings that were entered in *Ute Tribe v. Utah* over the years.

Alternatively, in *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court carved out an exception to Eleventh Amendment immunity for suits that are brought against state officials, such as Judge Lawrence, which seek prospective injunctive relief against ongoing violations of federal law. *Id.* at 159-60. "The *Ex Parte Young* exception proceeds on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state and, as a result, is not subject to the doctrine of sovereign immunity." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-56 (10th Cir. 2011) (extending the *Ex Parte Young* exception to an Indian tribal court judge); *see also Hill v. Kemp*, 478 F.3d 1236, 1255-50 (10th Cir. 2007) (discussing the rationale and subsequent history of *Ex Parte Young*). "By adhering to this fiction, the *Ex Parte Young* doctrine enables 'federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.'" *Crowe & Dunlevy*, 640 F.3d at 1154 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)).

Clearly, if the *Ex Parte Young* exception can be invoked to enjoin an Indian tribal court judge from unlawfully exceeding the lawful jurisdiction of a tribal court, as in *Crowe & Dunlevy*, then *Ex Parte Young* is equally available to enjoin a state court judge from

unlawfully exceeding the jurisdiction of a state court. Indeed, both the Tenth Circuit and district courts within the Tenth Circuit have enjoined state court judges from presiding over court cases involving Indian tribes: *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006) (enjoining the defendants, including a Kansas state judge); *Kiowa Tribe v. Hoover*, 150 F.3d at 1171-72 (enjoining the defendants, including two Oklahoma state judges); and *Seneca-Cayuga*, 874 F.2d at 716-17 (enjoining defendants, including two Oklahoma state judges).

In determining whether a suit falls within the *Ex Parte Young* exception, the Court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Ser. Comm'n of Md.*, 535 U.S. 635, 645 (2002). A prayer for injunctive relief asking that a state official be restrained from acting in contravention of controlling federal law satisfies *Verizon's* straightforward inquiry. *Id*.

The Tribal plaintiffs' complaint satisfies this test. The Tribal plaintiffs allege that the prosecution of the *Becker* suit violates not only the holdings in *Ute Tribe v. Utah*, but also the long-established body of federal statutory and decisional law that prohibits state courts in Utah from exercising jurisdiction over suits brought against Indian tribes, tribal members, or tribal entities arising from conduct that occurs within Indian country. This long-established body of federal statutory and decisional law includes, without limitation: (*i*) 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….;" (*ii*) the Ute Treaties of

1863 and 1868, 13 Stat. 673 and 15 Stat. 619; (*iii*) the Utah Enabling Act of 1894, 28 Stat. 107, and the Utah Constitution, art. III, §2, in which the State of Utah "forever" disclaimed all right and title to "all lands … owned or held by any Indian or Indian tribes;"[15] (*iv*) 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;[16] (*v*) 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; and (*vi*) 28 U.S.C. § 1360(b) and 25 U.S.C. 1322(b), wherein Congress expressly *prohibits* state courts in all fifty states from adjudicating "in probate proceedings or otherwise" the ownership or right to possess "any real or personal property" or "any interest therein" belonging "to any Indian or any Indian tribe."

Accordingly, the *Ex Parte Young* exception applies to the Tribe's request for an injunction against Judge Lawrence, acting in his official capacity. *Crowe & Dunlevy*, 640 F.3d at 1156 ("The *Ex Parte Young* exception applies in this case because Crowe seeks relief from Judge Stidham in his official capacity").

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[15] The disclaimer disclaims both proprietary and governmental authority. *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d at 710, 716 (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).

[16] "Indian country," as defined in 18 U.S.C. § 1151, includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." This definition applies to questions of both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987) (citing *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

E. THE TRIBAL PLAINTIFFS' CLAIMS FOR DECLARATORY JUDGMENT ARE NOT BARRED BY JUDICIAL IMMUNITY

Judicial immunity applies only to personal capacity claims. *Crowe & Dunlevy*, 640 F.3d at 1154 (citing *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985))). Furthermore, the Tenth Circuit has continued to recognize that judicial immunity is not a bar to declaratory relief. *Lawrence v. Kuenhold*, 271 Fed. Appx. 763, 766 n.6 (10th Cir. 2011). Therefore, the Tribal plaintiffs' claims for declaratory judgment are not barred by judicial immunity. *Pueblo of Santa Ana v. Nash*, 854 F. Supp. 2d at 1140.

CONCLUSION

Plaintiffs request the immediate issuance of a TRO and/or preliminary injunction, and as soon thereafter as possible, a permanent injunction to enjoin both Judge Lawrence and Defendant Becker from continuing to prosecute *Becker v. Ute Indian Tribe, et al.*, case number 140908394, Third Judicial District Court, Salt Lake County.

Respectfully submitted this 7th day of December, 2017.

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VERIFICATION

I, FRANCES C. BASSETT, have reviewed the foregoing and acknowledge that the matters raised are true and correct and irreparable harm and damage will result if relief is not granted.

s/ Frances C. Bassett
Frances C. Bassett

SWORN AND SUBSCRIBED before me this 7th day of December, 2017.

s/ Debra Ann Foulk
Notary Public

My Commission Expires: August 7, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of DUCivR56-1(g)(1), because this brief contains 9069 words, excluding the parts of the brief exempted by DUCivR56-1 (g)(1). I relied on my word processor to obtain the count and it is Microsoft Office Word 2016.

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*
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2017, I electronically filed the foregoing **PLAINTIFFS' VERIFIED EMERGENCY AND EXPEDITED MOTION FOR INJUNCTIVE RELIEF—A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION, AND A PERMANENT INJUNCTION ENTERED UNDER FED. R. CIV. P. 56** 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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