David K. Isom (4773)
ISOM LAW FIRM PLLC
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 209 7400
david@isomlawfirm.com
Attorney for Plaintiff Lynn D. Becker

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Lynn D. Becker, Plaintiff, vs. Ute Indian Tribe of the Uintah and Ouray Reservation, a federally chartered corporation; Ute Indian Tribe of the Uintah and Ouray Reservation, a federally recognized Indian tribe; the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings, LLC, a Delaware LLC, Defendants	**BECKER'S MOTION FOR PRELIMINARY INJUNCTION** **Civil No. 2:16-cv-958** **Judge Clark Waddoups**

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Plaintiff Lynn D. Becker ("Becker") moves pursuant to Fed. R. Civ. P. 65 for a preliminary injunction ordering the defendants ("Tribe") to cease prosecuting the action in the Ute Tribal Court that the Tribe brought against Becker on August 18, 2016 ("Tribal Court Action"). That Tribal Court Action seeks to litigate the same issues previously decided by the Utah Third District Court, Honorable Barry Lawrence ("State District Court" or "Pending State Action"). The Pending State Action is set for a nine-day jury trial beginning February 20, 2018, which is just over 5 years after this litigation began. Under these circumstances, this federal Court plays a crucial role under *Montana v. United States*[1] and its progeny in determining that the Pending State Action should move forward and that the Tribal Court Action should be stayed or dismissed.

This Court previously entered a preliminary injunction in this action that was reversed on one issue by a two-judge panel[2] of the Tenth Circuit and remanded to this Court. That issue was whether, on the record before this Court at the time the preliminary injunction was entered, Becker had shown a probability of success on a material issue – i.e., whether, "[a]lthough the Contract contains a waiver of the tribal-exhaustion rule," Becker "adequately counter[ed] the Tribe's contention that the entire Contract, including the waiver, is void because it did not receive federal-government approval...."[3] Becker had not addressed this Secretarial approval issue in this Court. Becker now addresses that issue below, and shows that federal approval of the Independent Contractor Agreement at issue here ("Agreement") was clearly not required.

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1 *Montana v. U.S.*, 450 U.S. 544 (1981).
2 Because the third panel member, Honorable Neil Gorsuch, was appointed to the United States Supreme Court after oral argument and before the decision was rendered, Judges Hartz and Ebel rendered the decision. *Becker v. Ute Indian Tribe,* 88 F.3d 1199 (10th Cir. 2017).
3 Id. at 1200.

The two-judge panel discussed but split on a second issue -- namely, whether Becker had shown likely success on the tribal court jurisdiction/exhaustion issue, including whether "the Contract [waived] the Tribe's right to litigate this dispute in tribal court…."[4] The two judges wrote dueling separate opinions, but both agreed that the observations in those separate opinions were based upon and restricted to the limited preliminary injunction record, and that on remand this Court was to allow a full record and decide these two issues afresh:

> In denying panel rehearing we note, however, that the panel did not decide the merits of the issues of exhaustion or the need for federal approval of the Becker contract. To the extent we addressed those issues, we did so only in the context of reversing a preliminary injunction on the record then before the district court. Upon remand to the district court, the parties are free to address those or other issues on the merits.[5]

OVERVIEW

The underlying dispute here should be a simple claim for breach of contract. Becker and the Tribe entered into the Agreement in 2005 pursuant to which Becker provided valuable services related to the creation, private equity funding, and operation of various entities, all aimed at producing revenue to the Tribe. The entities created included Ute Energy LLC ("Ute Energy"), a Delaware company of which the Tribe's holding company was the dominant member. The Agreement required the Tribe to pay to Becker 2% of the net revenue distributed by Ute Energy to the Tribe.

In 2012, Ute Energy had realized gross revenues of over $1 billion.[6] From 2012 to 2015, Ute Energy distributed more than $378 million of net revenue to the Tribe.

4 Id. at 1206 – 1209.
5 Id.
6 For convenience and clarity, a chronology of important events is appended to the end of this memorandum and authenticated by Becker's declaration attached hereto as Exhibit 1.

Becker claims that the Tribe breached the Agreement by taking 100% of that $378 million, instead of taking 98% and paying the other 2% to Becker as promised in the Agreement.

By the Agreement, the Tribe unambiguously waived sovereign immunity and tribal court exhaustion. The Parties agreed, if federal jurisdiction existed, that this federal Court would adjudicate Agreement-related disputes. Otherwise, if this Court determined that it lacked jurisdiction, the parties agreed that "any court of competent jurisdiction" would adjudicate any Agreement-related dispute. The Tribe claims that the Ute Tribal Court is that "court of competent jurisdiction." Becker claims that the Tribal Court could not have been the intended "court of competent jurisdiction" because by Tribal ordinance the Tribal Court lacks jurisdiction of all claims, including Becker's, against the Tribe. Becker claims that the "court of competent jurisdiction" referred to was the Utah state district court. By this Motion, Becker seeks an injunction against the Tribe's proceeding in the Ute Tribal Court.

PROCEDURAL BACKGROUND

First Federal Action

Becker filed the First Federal Action in this Court (Judge Benson) on February 15, 2013 and Judge Benson dismissed for lack of subject matter jurisdiction. The Tenth Circuit affirmed in October 2014.

State Court Action

Becker then sued the Tribe in the State District Court in December 2014. After discovery, and after allowing the Tribe to file a supplemental memorandum, the State

District Court, denying the Tribe's summary judgment motions, held on February 9, 2017[7] that: (1) neither PL – 280 nor any other federal law prevented the State District Court from exercising jurisdiction over Becker's claims, and the State District Court had proper jurisdiction (pp. 15 – 18); (2) the Agreement did not create or transfer to Becker any right in any trust asset, did not affect any interest of the United States, and did not require approval by the U.S. Secretary of Interior under any of the numerous federal statutes and cases advanced by the Tribe (pp. 4 – 5; 8 – 14); and (3) by the Agreement, the Tribe clearly and expressly waived sovereign immunity under federal and tribal law (pp. 2 – 3, 5 – 13).

Thereafter, the Tribe filed numerous additional supplemental motions or motions for rehearing that raised these same already-decided issues, all of which the State District Court denied. From 2015 through 2017, the Tribe filed five appeals or petitions for appellate review with the Utah Court of Appeals and/or the Utah Supreme Court, all of which were denied.

The Pending State Action is set for a nine-day jury trial of this dispute beginning February 20, 2018.

Second and Third Federal Actions

Dissatisfied with the State District Court after 18 months of intense litigation and discovery, the Tribe filed an action in this Court against Judge Lawrence and Becker to enjoin the Pending State Action and for damages for alleged civil rights violations ("Second Federal Action"). Judge Robert Shelby dismissed for lack of jurisdiction in

7 Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment dated February 9, 2017 ("February 9 Order"). Exhibit 10.

August 2016, and, two days later, the Tribe filed an action against Becker in the Ute Tribal Court – more than 3 ½ years after the commencement of the First Federal Action, and more than 1 ½ years after commencement of the Pending State Action.

Becker then sought in the State District Court an injunction against the Tribal Court Action. The State District Court determined that it lacked the power to enjoin the Tribe from proceeding with the Tribal Court Action, and the next day, on September 14, 2016, the Tribe brought this action ("Third Federal Action").

Tribal Court Action

The Tribe's initial complaint in Tribal Court, filed August 18, 2016, has been amended twice. The current Second Amended Complaint[8] purports to state three claims for declaratory judgment and one claim, apparently seeking more than $1 million in actual damages and punitive damages, that, without particularity, alleges breach of fiduciary duty, fraud, constructive fraud, theft, conversion, unjust enrichment, equitable disgorgement and restitution.

The Tribal Court ordered the parties to show cause "why this [Tribal Court] case should not be stayed or dismissed primarily for comity given that the parties have already been litigating the same issues for over four years in federal and state courts."[9] The Tribal Court then rejected any dismissal or stay on comity grounds because "tribal courts are best qualified to interpret and apply tribal law" even though, four months before the Tribal Court's order, the State District Court had decided in its February 9 Order the same core issues that the Tribal Court determined that the Tribal Court could and should decide.

8 Exhibit 13.
9 Order Denying Order to Show Cause dated June 9, 2017. Exhibit 11.

In June 2017, the Tribal Court bifurcated the Tribal Court Action, with the Tribe's first three claims to be tried in Phase 1, and the fourth claim to be tried thereafter if the action survived Phase 1.[10] The Tribal Court ordered that Phase 1 discovery was to be concluded by December 31, 2017. During that discovery period, the Tribe produced only a small fraction of the requested documents in response to Becker's requests (on the erroneous argument that all producible documents had been produced in the Pending State Action) and refused to appear for the noticed Rule 30(b)(6) depositions of the plaintiff entities.[11]

In November 2017, Becker moved in the Tribal Court to dismiss the Tribal Court Action on several grounds, including: (1) the grounds discussed in Section IB3 below that the parties to the Agreement could not have intended that the Tribal Court was a "court of competent jurisdiction" to adjudicate Becker's claims because the relevant Tribal ordinance in force in 2005 when the Agreement was executed expressly prohibited such jurisdiction; and (2) the grounds discussed in Section IB4 below that the Tribal Court lacked jurisdiction over Becker's claims because the updated, currently applicable Tribal ordinance, retaining language identical to that of the previous ordinance, also prevents Tribal Court jurisdiction of the Tribal Court Action. By its order dated December 18, 2017,[12] the Tribal Court rejected both arguments and denied Becker's motion to dismiss.

On December 19, 2017, the Tribal Court denied without prejudice the remaining pending motions and set a new discovery and briefing schedule,[13] this time narrowing the

10 Scheduling Order dated June 28, 2017. Exhibit 12. (Though this order reflects that the Tribe's complaint contained five claims, one of those claims was later dropped by the Second Amended Complaint.)
11 Becker Declaration ¶ 21. Exhibit 1.
12 Order Denying Defendant's Motion to Dismiss dated December 18, 2017. Exhibit 15.
13 Order re Motions, Discovery, and Scheduling dated December 19, 2017. Exhibit 16.

next substantive issue to be decided to the Secretarial approval issue[14] that the State District Court has already decided.[15] This order set a discovery and briefing schedule requiring the last brief on the Secretarial approval issue to be filed by March 12, 2018, after the scheduled trial in the State District Court.[16]

Late last week (December 28, 2017), the Tribe filed a motion for reconsideration of the Tribal Court's December 19 discovery and briefing order, complaining that the ordered schedule was too late for the Tribe's strategy, urging that the main purpose of the Tribe's pending motions was to get "a ruling on [its pending] partial summary judgment motions before the start of the state-court jury trial because of the importance such a ruling would have to the state court proceeding."[17] That motion is still pending. Yesterday, the Tribal Court Judge handling the Tribal Court Action informed the parties that the Tribe had replaced him and that the Chief Judge of the Tribal Court will be handling the case.[18]

ADDITIONAL FACTS

The Agreement, effective March 1, 2004, was executed on April 27, 2005.[19] Ute Energy and Ute Energy Holdings LLC were created effective February 2, 2005.[20]

The original Operating Agreement of Ute Energy ("Original Ute Energy Operating Agreement") was effective May 4, 2005.[21] This operating agreement was amended twice

14 Id.
15 February 9 Order. Exhibit 10.
16 Order re Motions, Discovery, and Scheduling dated December 19, 2017. Exhibit 15.
17 Tribe's Motion for Reconsideration p. 8. Exhibit 17.
18 January 4, 2018 Email from Judge Thomas Weathers. Exhibit 18.
19 Agreement. Exhibit 3.
20 Becker Declaration ¶ 12. Exhibit 1.
21 Original Ute Energy Operating Agreement. Exhibit 4.

– the First Amended Operating Agreement was dated July 9, 2007[22] and the Second Amended Operating Agreement became effective June 1, 2010 and was in effect in 2012 when the net revenue at issue here was distributed to the Tribe.[23] These three iterations of the operating agreement are referred to below as the "Ute Energy Operating Agreement."

By a certification dated July 2, 2007, the Secretary certified that no Secretarial approval of the Original or of the First Amended Ute Energy Operating Agreement was required.[24]

SUMMARY OF ARGUMENTS

A federal court has Section 1331 jurisdiction to determine whether a tribal court has the power to compel a non-Indian to submit to the civil jurisdiction of the tribal court.[25] A federal court may enjoin a pending tribal-court action in favor of a state-court action against an Indian tribe and tribal entities.[26] In the circumstances here, the federal district court is the body charged by our federalism to determine which courts, among federal, state and tribal courts, can and should resolve disputes that arguably touch all three

22 First Amended Ute Energy Operating Agreement. Exhibit 6.
23 Second Amended Ute Energy Operating Agreement. Exhibit 7.
24 Secretarial Certification dated July 2, 2007. Exhibit 5.
25 *National Farmers Insurance Companies v. Crow Tribe of Indians,* 471 U.S. 845, 852 (1985); *Becker v. Ute Indian Tribe,* 88 F.3d 1199 (10th Cir. 2017).
26 *Stifel, Nicholaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians,* 807 F.3d 184, 188 (7th Cir. 2015) (in a federal action "to put an end to the tribal court action … the district court did not abuse his discretion in enjoining the tribal court action); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011).

courts,[27] taking into account principles of comity and abstention and the "presumption against tribal civil jurisdiction over non-Indians…."[28]

This memorandum shows that Becker satisfies the four requirements for a preliminary injunction:

> (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.[29]

Probability of Success Regarding Secretarial Approval

As to a substantial likelihood of success on the merits of the Secretarial approval issue, this memorandum shows that: (1) the State District Court, after full discovery and a detailed analysis, has already determined that Secretarial approval was not required and Becker has therefore already succeeded on the merits of this issue; (2) the Secretary has already determined that Secretarial approval of the Ute Energy Operating Agreement was not required, and therefore the revenue derived from operations under that operating agreement can be distributed without Secretarial approval; and (3) the Agreement and related documents show that no Secretarial approval was needed because the Agreement creates no interest in Tribal trust assets.

Probability of Success Regarding Tribal Court Jurisdiction and Exhaustion

This memorandum shows a substantial likelihood that Becker will prevail in showing that the Tribal Court lacks jurisdiction and that tribal exhaustion is not required

27 *See Montana v. U.S.,* 450 U.S. 544, 565 (1981)
28 *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011).
29 *Fish v. Kobach,* 840 F.3d 710, 723 (10th Cir. 2016) (internal quotation marks omitted).

because: (1) federal law prohibits tribal court jurisdiction over Becker and empowers this Court to enjoin the Tribe from pursuing the Tribal Court Action; (2) the Agreement unambiguously waives any right or duty to exhaust tribal court remedies; (3) the parties to the Agreement could not have intended that the Tribal Court was a "court of competent jurisdiction" as defined by the Agreement because the crystalline provisions of the relevant Tribal ordinances in effect when the Agreement was executed show that the Tribal Court lacked jurisdiction of Becker's Agreement-related claims; and (4) Tribal Ordinance 13-010 deprives the Tribal Court of jurisdiction of all Agreement-Related claims, including the Tribe's claims against Becker.

Irreparable Harm, Balance of Harms, Public Interest

This memorandum shows that Becker satisfies the remaining three requirements for a preliminary injunction: (1) Becker will be irreparably harmed by being forced to litigate his claims in multiple fora; (2) the balance of harms favors Becker because the Tribe is not harmed by litigating Becker's claims in the forum chosen by the parties; and (3) the public interest and the furthering of Tribal self-determination and self-governance will be served by affirming and enforcing the plain Agreement of the parties.

ARGUMENT

I. There Is a Substantial Likelihood that Becker Will Prevail on the Merits

The following demonstrates "a substantial likelihood that [Becker] will prevail on the merits" of the two merits issues discussed by the Tenth Circuit – Secretarial approval and Tribal Court exhaustion.

A. Secretarial Approval Was Not Required

The Tribe asserts that the Agreement is void because neither the Tribe nor Becker sought or got the approval of the Agreement by the Secretary. This section shows that Becker is likely to prevail in establishing that Secretarial approval of the Agreement was not required.

1. The State District Court Has Determined that Secretarial Approval Was Not Required

In September 2016, the Tribe moved in the State Court Action for summary judgment, asserting that the Agreement was void for lack of federal approval. After full briefing, including a supplemental brief filed by the Tribe, the State District Court by Judge Barry Lawrence issued a detailed memorandum decision analyzing the federal statutes and cases that the Tribe had cited in support of its Secretarial-approval argument. The State District rejected the Tribe's arguments and held that Secretarial approval was not required and that the Agreement is not void for lack of Secretarial approval.[30]

2. The Secretary Has Already Determined that His Approval Was Not Required

The net revenue that Ute Energy distributed to the Tribe from 2012 through 2015, of which Becker claims 2%, was derived from Ute Energy's performance of the Ute Energy Operating Agreement.[31] The Secretary, in fact, approved the Original Ute Energy Operating Agreement and the First Amended Ute Energy Operating Agreement, and nothing material to the issue of Secretarial approval changed from the Original to the First

30 Feb. 9 Order, pp. 8 -14. Exh 10.
31 Becker Declaration ¶¶ 7 – 15 (Exhibit 1); Ute Energy Operating Agreements, as amended. Exhibits 4, 6 & 12.

Amended to the Second Amended Operating Agreement.[32] By the Secretary's July 2, 2007 letter addressed to the Chairman of the Ute Tribal Business Committee (with copies sent to Becker and the Tribe's counsel Scot Anderson), the Secretary certified, after consultation with the responsible U.S. Solicitor, that Secretarial approval of the Original and First Amended Ute Energy Operating Agreements was not required.[33]

For his conclusion that no approval was required, the Secretary pointed to the facts that: (1) the Ute Energy Operating Agreement provided for the distribution of Ute Energy's profits and losses, including Ute Energy's net revenues, but did not convey or encumber any trust assets; (2) created no interest (including liens, deeds, encumbrances or mortgages) in lands or minerals subject to approval by the Secretary; and (3) did not provide for the exploration or development of minerals in which the Tribe owned a beneficial or restricted interest; and (4) did not require the Tribe to be a signatory to the Ute Energy Operating Agreement nor to perform any duty under that agreement.

3. The Agreement and Related Documents Show that No Secretarial Approval Was Required Because the Agreement Creates No Interest in Tribal Trust Assets

Becker's Agreement is even further than the Ute Energy Operating Agreement from any connection with Tribal trust assets. Since the revenues to which Becker's 2% Interest attached were generated pursuant to an agreement that the Secretary himself determined not to trigger any approval requirement, Becker's Agreement and entitlement to a percentage of net revenues distributed from the operation of a non-approvable agreement cannot have required Secretarial approval. The Agreement neither conveys,

32 Becker Declaration ¶¶ 7 – 15. Exhibit 1.
33 Id.

transfers, encumbers, assigns, distributes, identifies, alienates nor restricts any Tribal interest in any real, mineral or trust property or asset.

B. Tribal Court Exhaustion Is Not Required

The Tribal Court jurisdiction/exhaustion issues orbit on two foci: (1) the unambiguous language of the Agreement and (2) Tribal ordinances that deprive the Tribal Court of jurisdiction of this dispute.

In deciding the appeal of this action, the Tenth Circuit instructed "that the panel did not decide the merits of the issues of exhaustion …. To the extent we addressed those issues, we did so only in the context of reversing a preliminary injunction on the record then before the district court. Upon remand to the district court, the parties are free to address those or other issues on the merits." The record and arguments here show a probability that the Tribal Court has no legitimate function to perform in this dispute and, indeed, no jurisdiction.

1. Federal Law Prohibits Tribal Court Jurisdiction Over Becker and Empowers this Court to Enjoin the Tribal Court Action

As the Supreme Court held in *Montana v. U.S.,*[34] "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe…."[35] "There is a presumption against tribal civil jurisdiction over non-Indians…."[36] Citing *Montana, the*

34 Montana v. U.S., 450 U.S. 544, 565 (1981).
35 *Montana v. U.S.,* 450 U.S. 544, 565 (1981).
36 *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011) citing *Montana v. United States,* 450 U.S. 544, 564-65 (1981) and its progeny. The Tenth Circuit explained: "This is so because while the tribes have authority to exercise civil jurisdiction over their own members, 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional

Tenth Circuit has instructed that "there are two exceptions to [the] general rule against tribal-court rule over non-Indians."[37] One exception[38] is the "consensual relationship" exception,[39] which is that where a consensual relationship is governed by a contract, the contract defines the scope and limitations of each party's rights and duties. In such a contractual relationship, the tribe has no more power over the non-member than is provided by the contract. A contract that clearly waives Tribal Court exhaustion is not a consensual relationship that perversely requires Tribal Court exhaustion.

A corollary to the *Montana* presumption against tribal court power over non-Indians is that, though a tribal court may normally determine its own jurisdiction,[40] this rule is a rule of comity, not jurisdiction, and comity may dictate that, under appropriate circumstances, a federal court should decide the issue.[41] The following shows that there are no comity considerations that can overcome the Tribal Court's lack of jurisdiction of this dispute and, in any event, comity weighs in favor of enjoining the Tribal Court action.

The recent Seventh Circuit *Stifel*[42] represents a weighing of comity interests that

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delegation.' Generally, therefore, 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmember of the tribe.'" Id. (citations omitted).

37 Id. at 565

38 The second exception does not apply here. "That exception is a narrow one which authorizes a tribe to exercise civil jurisdiction over a non-Indian whose conduct implicates the 'political integrity, the economic security, or health or welfare of the tribe.'" Id., 640 F.3d at 1153 quoting *Montana v. U.S.,* 450 U.S. 544, 566 (1981). "To support jurisdiction under this exception, the conduct must 'imperil the subsistence of the tribal community.'" Id.

39 Id. at 1150 – 51.

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

41 *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011) (though "the determination of whether the tribal court has subject matter jurisdiction over non-Indians in civil cases often 'should be conducted in the first instance in the Tribal Court itself,'" comity may dictate otherwise) (citation omitted).

42 *Stifel, Nicholaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians,* 807 F.3d 184(7th Cir. 2015).

is instructive here. There, the Seventh Circuit weighed the comity interests relating to tribal court litigation (known as exhaustion)[43] against the comity and abstention interests relating to a previously filed state court under agreements in which tribal entities consented the jurisdiction of state courts. This Court should conclude, as did the *Stifel* court under similar circumstances, that a likelihood of success on the merits showing that exhaustion is not proper here has been shown.

2. The Agreement Unambiguously Provides that the Agreement Waived Tribal Court Exhaustion

On appeal, the Tenth Circuit panel appeared to agree that the Agreement "contains a waiver of the tribal-exhaustion rule," but instructed that none of the panel's statements on the merits should be taken as established on remand. Becker therefore summarizes the obvious – that the Agreement unambiguously waives tribal court exhaustion.

By Articles 21 and 23 of the Agreement, the parties agreed that the "Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive jurisdiction over all matters involving the Tribe and waives any requirement that [Agreement-related disputes] be brought in Tribal Court or that Tribal remedies be exhausted." This language by itself is a sufficient, unambiguous waiver of tribal court exhaustion. Additional provisions make this conclusion inescapable: the parties agreed that the Agreement is governed by Utah law; that the Tribe waived sovereign immunity; the parties "unequivocally submit[ted]" to the jurisdiction of this federal court or of a "court of competent jurisdiction."[44]

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43 "[T]he concept of … abstention in cases involving Indian tribes" is known as exhaustion.

44 As shown below, the parties could not have intended this phrase to refer to the Ute Tribal Court since that court was expressly deprived by tribal ordinance of such jurisdiction.

3. Yazzie and Tribal Ordinance 87-04 Show that the Parties Did Not Intend that the Ute Tribal Court Was a "Court of Competent Jurisdiction" to Adjudicate Agreement-Related Disputes

At the very moment in 2005 that the Tribe agreed that Becker's claims could be litigated, if federal jurisdiction were absent, in "any court of competent jurisdiction," the Tribe knew that its Tribal Court was not a court of competent jurisdiction to litigate Becker's claims against the Tribe because Tribal Ordinance 87-04 prevented any such jurisdiction: "The Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against the Ute Indian Tribe of the Uintah and Ouray Reservation…."[45] Thus, it is clear that the parties to the Agreement did not intend the Ute Tribal Court when they selected a "court of competent jurisdiction" to adjudicate Agreement-related disputes.[46]

4. Tribal Ordinance 13-010 Deprives the Tribal Court of Jurisdiction of Claims Against Becker

[E]xhaustion is not required if it is 'clear that the tribal court lacks jurisdiction,' such

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45 Ute Tribal Ordinance 87-04 (Exhibit 2); Ruling on Motion to Alter or Amend Judgment, *Yazzie v. Ute Tribal Court* CV-09-188 (Ute Tribal Court, Feb. 14, 2011). *Yazzie* held that this Ute Tribal Ordinance (87-04) was operative from 1987 at least through the 2011 date of the *Yazzie* decision. Thus, Ordinance 87-04 was effective in 2005 when the Becker Agreement was entered.

46 As discussed below, the Tribe argues that, even if the Tribal Court cannot adjudicate Becker's claims against the Tribe, the Tribal Court has jurisdiction to adjudicate claims against Becker because he was an employee of the Tribe. As shown below, Becker was not an employee and the Tribal ordinance therefore does not create jurisdiction even if the Ordinance were valid under *Montana v. United States.* More importantly in this context, however, is that this Argument misses the point, which is what the parties intended in 2005 by the selection of a "court of competent jurisdiction." To be a court of competent jurisdiction within the meaning of the Agreement, the Court obviously was required to have jurisdiction of Becker's claims against the Tribe, and not simply of the Tribe's claims against Becker.

that 'the exhaustion would serve no purpose other than delay.'"[47]

Here, it is clear that exhaustion is not required because the Tribal Court lacks jurisdiction of Becker's claims, since the relevant Tribal ordinance in effect now and when the Tribe filed the Tribal Court Action, Ute Tribal Ordinance 13-010, prohibits such jurisdiction with language identical to the relevant language of the predecessor ordinance 87-04: "The Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against the Ute Indian Tribe of the Uintah and Ouray Reservation…."[48]

The Tribe will argue that, even though this ordinance deprives the Tribal Court of jurisdiction of Becker's claims *against* the Tribe, a later clause provides Tribal Court jurisdiction of claims *by* the Tribe against Becker. In a recent memorandum in the Tribal Court,[49] the Tribe argued:

> Although the foregoing language [i.e., the language quoted here in the previous paragraph] **may** impact Mr. Becker's ability to prosecute his counterclaims against the Tribe, the quoted language has no effect whatsoever on the Tribe's claims *against* Becker – claims that Section 1-2-3(5) expressly authorizes. (Emphasis added.)

The Tribe then argues that, even if the Tribal Court lacks jurisdiction of Becker's claims against the Tribe, the following language of Tribal Ordinance 13-010 creates jurisdiction over the Tribe's claims against Becker because, the Tribe argues, Becker was an employee of the Tribe pursuant to the Agreement:

> The Courts of the Ute Indian Tribe … shall have jurisdiction to hear actions *brought by the Ute Indian Tribe … against* officers or *employees* for restitution of Tribal money, property or services wrongfully converted to their personal benefit. (Emphasis added.)

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47 *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011) (citations omitted).

48 Tribal Ordinance 13-010 §1-2-3(5): "The Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against the Ute Indian Tribe…." Exhibit 8.

49 Tribe's Objection to Becker's Motion to Dismiss. Exhibit 14.

This argument is wrong for at least the following reasons.

First, at least in the circumstances here, this ordinance is contrary to the presumption of *Montana v. United States* against tribal court jurisdiction over non-members, and therefore cannot validly apply here.

Second, Becker was not an employee of the Tribe, but an independent contractor. Under Utah common law, which applies pursuant to the choice-of-law provision of the Agreement,[50] the following provisions and articles of the Agreement show that Becker was an independent contractor, and not an employee:

1. The title of the Agreement is "Independent Contractor Agreement."
2. Becker is referred to as the "Contractor."
3. Becker was not required to devote full time to the Agreement. Art. 2A.
4. "Contractor and the Tribe understand and intend that Contractor shall perform the Services as an independent contractor." Art. 3.
5. "The Tribe does not have the right to control the manner and means by which these goals are to be accomplished nor will the Tribe establish a quality standard for Contractor." Art. 4A.
6. Becker determined when, where and how to perform his services, had no set hours, and was not required to perform work on the Tribe's premises. Art. 4B
7. Becker was responsible for all income taxes and similar payments. Art. 6D.
8. "[Becker] is not an employee of the Tribe and, therefore, shall not be entitled to any benefits, coverages or privileges, including, without limitation, social security, unemployment, workers' compensation, medical or pension payments, made payable to employees of the Tribe.
9. "[Becker] shall be solely responsible for all of his own insurance coverage. Art. 15.

The common law of Utah has roots in master-servant principles, which consider a variety of factors in distinguishing contractors from employees.[51] "Of paramount importance in this determination, however, is the principal's right to control the 'means

50 Agreement Article 21.

51 *Mallory v. Brigham Young University,* 332 P.3d 922, 928 (Utah 2014) (Utah "courts commonly look to several factors in determining whether" a relationship is that of employee-employer or independent contractors).

and method of performance,'"[52] By the Agreement, the Tribe lacked this right of control. The above factors clearly define an independent contractor relationship, not employer-employee.

Finally, nothing about the Agreement or fundamental fairness suggests the astonishing premise that the Tribe appears to be suggesting – that, in the absence of federal jurisdiction, the Tribe can sue Becker in Tribal Court, but Becker cannot bring his claims to enforce the Agreement in any court.

II. The Preliminary Injunction Is Needed to Prevent Irreparable Harm to Becker

Becker will be irreparably harmed in numerous ways by the continuation of the Tribal Court Action. Though financial harm that can be compensated by money does not normally constitute irreparable harm, financial harm that foreseeably may not be compensable does constitute such harm.[53] Here, Becker simply cannot financially sustain years of Tribal Court litigation.[54] If the Tribal Court Action proceeds at its current pace, Becker faces the possible irreparable harm of being forced to abandon his claims. Without an injunction, Becker risks the near certainty of the expenditure of significant time, money and effort of defending the Tribal Court Action.[55]

The irreparable harm required for a preliminary injunction includes injuries that cannot be adequately compensated in damages, even if the damage might ultimately be

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52 Id. (citation omitted).
53 *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1157 (10th Cir. 2011).
54 Becker Declaration ¶¶ 16 - 20. Exhibit 1.
55 The Tenth Circuit affirmed a preliminary injunction against a tribal court action and held that the non-Indian's likely inability to recover the attorney fees needed to defend the tribal court action satisfied the irreparable harm requirement for a preliminary injunction. *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1101157 (10th Cir. 2011).

susceptible of being assigned a monetary value.[56] Here, Becker's reputation and ability to find remunerative work have been damaged by the publication of numerous articles about this dispute, including 12 articles that repeat the Tribe's scandalous allegations that Becker is a member "of a cabal of unscrupulous non-Indians" who attempted to defraud the Tribe.[57] The damage to Becker's ability to find remunerative work, to his reputation and to his shared dream of supporting the advancement of Indian commercial success[58] is magnified by each passing month of Tribal Court litigation. In short, Becker will be irreparably harmed by the requirement to defend an action that itself constitutes a breach of contract.

III. The Threatened Injury to Becker Outweighs Possible Damage to the Tribe

The harm to Becker discussed above clearly outweighs any damage to the Tribe. In this context, the balance-of-harms issues largely reflect the important policies associated with waiver of sovereign immunity, forum selection, waiver of tribal court exhaustion, freedom to enter into binding, enforceable contracts, and tribal self-determination and self-government described above and below.[59] The Tribe cannot be damaged by being ordered to forego the tribal litigation that it delayed 3 ½ years in asserting and that it so clearly waived in the Agreement.[60] The burden upon Becker of continuing the Tribal Court Action would be devastating.

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56 *See Hunsaker v. Kersh,* 991 P.2d 67, 69 (Utah 1999).
57 Becker Declaration ¶¶ 22 & 23. Exh 1; Articles (Exhibit 19).
58 Becker Declaration ¶¶ 16 – 20, 22 & 23. Exh 1.
59 *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1157 (10th Cir. 2011) (the balance-of-equities "argument is simply a refashioning of [the tribal party's] general sovereign immunity and tribal court jurisdiction arguments, which we have already found unpersuasive").
60 Id.

IV. The Preliminary Injunction Will Not Be Adverse to the Public Interest

Were it allowed to proceed, the Tribal Court Action would infringe the public interest in numerous ways.

First, further Tribal Court litigation would impinge upon the Tribe's interest in self-determination and self-governance,[61] the interests of non-Indians wishing to contract with the Tribe such as Becker and the many other companies that provided funding and other services here, and the interests of Tribal members in encouraging and reaping the rewards of beneficial commerce.[62] Tribal members have as keen an interest in enforcing forum selection provisions as do those entities and persons who contract with the Tribe,[63] even if the frequently-rotating membership of a Tribe's business committee or other governing councils tempts new members of such bodies in the short-run to repudiate contracts when payment comes due. By extension, the precedential impact of a ruling allowing further Tribal Court litigation here would similarly harm the interests of other Indian tribes, potential non-Indian contractors, and tribal members. To the extent that the travesty of this litigation becomes public knowledge, these interests are injured. This is because potential contractors with the Tribe and other tribes will learn that, regardless of carefully-drafted contracts and clear waivers that make non-tribal court litigation a material condition of the contract, those waivers are not trustworthy. A preliminary

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61 *Altheimer & Gray v. Sioux Manufacturing Corp.,* 983 F.2d 803, 815 (7th Cir. 1993) (the Sioux tribal commercial entity "explicitly agreed to submit to the venue and jurisdiction of federal and state courts located in Illinois. To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination…. If contracting parties cannot trust the validity of choice of law and venue provisions, [the Sioux tribal commercial entity] may well find itself unable to compete and the Tribe's efforts to improve the economy may come to naught.")

62 Id.

63 Id.

injunction would prevent exacerbating the harm already suffered here of being dragged through cost-prohibitive and exhausting litigation in Tribal Court and specious counterclaims and attacks upon reputation, and the message that even beginning after years of federal or state court litigation, tribal parties can try to exhaust a litigant by moving the end line from a dash to a marathon. Enjoining further Tribal Court litigation will help restore the hope that this Tribe and other Indian tribes and those who wish to contract with them can reliably choose the forum in which contracts with the tribes may and must be enforced.

The Tenth Circuit has rejected the argument that a preliminary injunction like that sought here in the context of clear waivers of sovereign immunity and tribal court exhaustion "is against public policy because it impairs the authority of the tribal courts. This argument, like his balance-of-equities argument, is a recasting of the sovereign immunity and tribal jurisdiction arguments we have rejected. We simply are not persuaded that the exertion of tribal authority over [Becker], a non-consenting, nonmember, is in the public's interest."[64]

64 *Crowe & Dunlevy,* 640 F.3d 1140, 1158 (10th Cir. 2011).

CONCLUSION

Becker respectfully requests that the Court issue a preliminary injunction enjoining the Tribe from proceeding with the Tribal Court Action.

Date: January 5, 2018.

ISOM LAW FIRM PLLC

/s/ David K. Isom

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David K. Isom

Attorney for Plaintiff Lynn D. Becker

CHRONOLOGY

Date	Event
November 16, 1987	Ute Tribal Ordinance 87-04
March 1, 2004	Effective date of the Independent Contractor Agreement
February 2,2005	Creation of Ute Energy LLC and Ute Energy Holdings LLC
April 27, 2005	Execution of the Independent Contractor Agreement and Resolution
May 4. 2005	Effective date of the Original Ute Energy Operating Agreement
October 31, 2007	Becker resigns with cause
February 14, 2011	*Yazzie* decision, Ute Tribal Court
2012	First of three distributions from Ute Energy to Tribe totaling $378,709,233.74
February 15, 2013	First Federal Action
May 1, 2013	Ute Tribal Ordinance 13-010
October 21, 2014	Tenth Circuit affirmed dismissal of First Federal Action
December 11, 2014	Becker files Pending State Action
July 23, 2015	State District Court denies Tribe's motion to dismiss
August 22, 2015	Tribe files notice of appeal of Pending State Action
September 30, 2015	Utah Court of Appeals dismisses Tribe's appeal of denial of motion to dismiss Pending State Action
April 16, 2016	Laurie Bales Declaration & Waterfall Accounting
June 13, 2016	Tribe files Second Federal Action against Judge Lawrence and Becker
August 16, 2016	Second Federal Action is dismissed for lack of jurisdiction

August 18, 2016	Tribe files Tribal Court Action
February 9, 2017	State District Court order denying summary judgment
June 9, 2017	Tribal Court Order denying Order to Show Cause
June 28, 2017	Tribal Court Scheduling and Bifurcation Order
September 26, 2017	Tribe's Second Amended Complaint in Tribal Court
November 7, 2017	Tribe's Objection to Becker's Motion to Dismiss tribal court action
December 18, 2017	Tribal Court Order denying Becker's Motion to Dismiss
December 19, 2017	Tribal Court Order re Motions, Discovery
December 28, 2017	Tribe's Tribal Court Motion for Reconsideration
January 4, 2018	Judge Weather's email re termination
January 4, 2018	Articles about the litigation
February 20, 2018	State Court Action jury trial

CERTIFICATE OF SERVICE

The undersigned certifies that on this 5th day of January 2018, the foregoing was served on all attorneys of record through the Court's electronic filing system.

/s/ David K. Isom

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