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

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

COMES NOW the Defendants/Counterclaimants/Third-Party Plaintiffs, to submit their opposition to Plaintiff Becker's motion for preliminary injunction.

SUMMARY OF THE OPPOSITION

Lynn Becker ("Becker") has not met the standard for issuance of a preliminary injunction against Defendants from pursuing their case in the Ute Indian Tribe of the Uintah and Ouray Tribal Court ("Tribal Court Action"). He fails to establish the likelihood of success on the merits and cannot overcome the requirement of tribal court exhaustion nor the requirement of federal approval of the Independent Contractor Agreement ("IC Agreement"). He fails on the other three elements for a preliminary injunction as well. This Court should observe the stare decisis of tribal court exhaustion and deny Mr. Becker's motion for a preliminary injunction.

STATEMENT OF FACTS

1. The Defendant Ute Indian Tribe ("Tribe" or "Ute Tribe") is a federally recognized Indian Tribe, organized with a Constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Appendix,[1] Vol. I, 51.

2. In 1938 the Tribe sought and obtained a charter to operate as a federal corporation under the Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477—a so-called "Section 17 Corporation." Appendix, Vol. I, 66.

3. Under the Ute Tribe's Constitution, the six member Uintah and Ouray Business Committee is the Tribe's unitary governing body; there are not separate

[1] All references to Appendix are to the Appendix (Dkt. 76), submitted on 1/11/18.

legislative and executive branches of government. Under the Tribe's Constitution and By-Laws, the Tribal Business Committee can act only through a majority vote of a quorum of the Committee members, sitting in legal session. Appendix, Vol. I, 51, Tribal Constitution, art. III, § 1; Tribal By-Laws, art. VI, §§ 3, 5.

4. Defendant Ute Energy Holdings LLC is a commercial entity that is wholly-owned by the Ute Tribe; the Tribe is the sole Member of the LLC. Appendix, Vol. I, 3, Declaration of Irene Cuch ¶ 19; Appendix, Vol. I, 210, Declaration of F. Bassett, Esq. ¶ 9.

5. The Ute Tribe has a tribal membership of almost four thousand individuals, and over half of its membership lives on the Uintah and Ouray Reservation. The Ute Tribe operates its own tribal government and oversees approximately 1.3 million acres of trust lands, some of which contain significant oil and gas deposits. Revenue from the development of these oil/gas resources is the primary source of money that is used to fund the Tribe's government and its health and social welfare programs for tribal members. Appendix, Vol. I, 3, Cuch Declaration, ¶ 2.

6. Mr. Becker is an individual who was employed by the Ute Tribe within the territorial boundaries of the Uintah and Ouray Reservation from 2003 through 2007. Mr. Becker came to work for the Tribe as a petroleum landman in 2003; however, it was not for another two years, on April 27, 2005, that Mr. Becker and the Tribe executed a so-called "Independent Contractor Agreement" (hereinafter "IC Agreement"). The IC Agreement purported to operate retroactively to March 1, 2004, and to provide for Becker's employment as the "Land Division Manager" of the Tribe's Energy and Minerals Department. Appendix, Vol. I, 3, Cuch Declaration, ¶¶ 6, 7, 12.

UTE ENERGY HOLDINGS AND UTE ENERGY

7. On May 4, 2005, at the behest of the Tribe's financial consultant John Jurrius, Plaintiff Becker, and other non-Indians, the Tribe entered into a series of complicated, convoluted commercial transactions that the Tribe contends were designed to transfer interests in the Ute Tribe's mineral estate to Becker, Mr. Jurrius, and other non-Indians. The Tribe alleges that the complex, multi-tiered transactions were planned deliberately to both facilitate and simultaneously obscure and conceal the transfer of tribal assets to the non-Indians. These transactions were the subject of the Tribe's claims against Mr. Jurrius and his business entities in *Ute Indian Tribe v. Jurrius, et al.*, case number 1:08-cv-01888, U. S. District Court for the District of Colorado. Appendix, Vol. I, 208.

8. Both Ute Energy Holdings LLC ("Ute Holdings") and Ute Energy LLC ("Ute Energy") were capitalized with real property, oil and gas interests, and other assets that are held in trust for the Tribe by the United States. These assets constituted 100% of the capital assets of both Ute Holdings and Ute Energy. Appendix, Vol I, 210, Bassett Declaration, ¶¶ 5, 6; Appendix, Vol. I, 216, Declaration of Scott S. Trulock, ¶¶ 4, 5, 7.

PLAINTIFF BECKER'S EMPLOYMENT FOR THE TRIBE

9. Mr. Becker's job duties were to manage and develop the Tribe's energy and mineral resources, and the Tribe's Energy and Minerals Department, both of which are located on tribal trust lands within the exterior boundaries of the Tribe's Uintah and Ouray Reservation. The IC Agreement between the Tribe and Becker was executed at the Tribe's headquarters in Fort Duchesne. Mr. Becker's office was located inside tribal

headquarters in Fort Duchesne. Mr. Becker resigned from the Tribe effective October 31, 2007. Appendix, Vol. I, 3, Cuch Declaration, ¶¶ 6, 7, 12, 16.

PLAINTIFF BECKER'S "PARTICIPATION INTEREST" IN TRIBAL ASSETS

10. The Tribe's Constitution, art. VI, Section 1, delegates only limited powers to the Tribe governing body, its six-member Tribal Business Committee:

> **Section 1.** *Enumerated powers.* The Tribal Business Committee of the Uintah and Ouray Reservation shall exercise the following powers, *subject to any limitations imposed by the statutes* or the Constitution of the United States, *and subject further to all express restrictions upon such powers contained in this Constitution* and By-laws …
> . . . .
> (c) *To approve … any* sale, *disposition*, lease or encumbrance of tribal lands, interests in tribal lands, *or other tribal assets, which may be authorized or executed by the Secretary of the Interior*, Commissioner of Indian Affairs, or any other official or agency of government. . . . (emphasis added)

Appendix, Vol. I, 51.

11. By this express language, the Tribe's Constitution limits the power of the Tribal Business Committee to dispose or encumber tribal assets; the Business Committee may only dispose or encumber tribal assets if (*i*) the agreement to dispose or encumber tribal assets does not violate federal law, *and* (*ii*) if the agreement is first approved by the Secretary of the Interior or his designee. Appendix, Vol. I, 51

12. The Becker IC Agreement required the Tribe to pay Becker a salary of $200,000.00 annually ($16,666.67 per month). In addition to the 200k salary, the Agreement contained a "Participation Plan," that granted Becker a "beneficial interest" in all net revenues that were distributed from production of the Tribe's oil/gas resources that were assigned to Ute Energy:

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

13. Neither the Becker IC Agreement—nor the purported alienation of restricted tribal assets contained within the Agreement—was ever approved by the U.S. Congress or the Secretary of the Department of Interior, as required by federal law and the Ute Tribe's Constitution. Appendix, Vol. I, 3, Cuch Declaration, ¶¶ 16, 20; Appendix, Vol. I, 210, Bassett Declaration, ¶ 14; Appendix, Vol. I, 107, Mr. Becker's Admission that his Independent Contractor Agreement was never approved by the Federal Government.

14. There also is no lawful waiver of the Tribe's sovereign immunity in accordance with the Tribe's Constitution and By-Laws, and its Law and Order Code. All decisions of the Ute Tribe – including the waiver of sovereign immunity – must be decided by a majority vote of the Tribe's six-member Tribal Business Committee sitting in legal session and embodied in written ordinances or resolutions that are "recorded" and "open to public inspection." Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation, art. VI, §§ 3, 5. Appendix, Vol. I, 51.[2]

15. Consistent with the Tribe's Constitution and By-Laws, the Tribe's Law and Order Code, Section 1-8-5, provides that the Tribe's sovereign immunity can be lawfully waived only through a duly adopted "resolution or ordinance of the Business Committee"

[2] The Tribe's Constitution and By-Laws and its Law and Order Code are matters of public record and is posted on the Internet at http://www.narf.org/nill/constitutions/ute_uintah_ouray/uteconst.html. The Tribal Defendants ask the Court to take judicial notice of the Tribe's Constitution pursuant to Rule 201(c)(2) of the Utah Rules of Evidence.

that "specifically" recites that the Business Committee has authorized a waiver of tribal sovereign immunity. Exhibit A.

16. The Business Committee Resolution that authorized Mr. Becker's Independent Contractor ("IC") Agreement, No. 05-147, does not specifically authorize a waiver of the Tribe's sovereign immunity, and therefore the waiver contained within the IC Agreement itself was not lawfully authorized pursuant to the terms and conditions of the Tribe's Constitution and By-Laws and its Law and Order Code. Appendix, Vol. I, 82.

THE TRIBAL DEFENDANTS' SUIT IN TRIBAL COURT

17. On August 18, 2016, the Tribal Defendants exercised their constitutional right of petition guaranteed to them under the U. S. Constitution, amend. I, and the Utah Constitution, art. I, §§ 1 and 11, by filing suit against Mr. Becker in the Ute Indian Tribal Court of the Uintah and Ouray Indian Reservation. Defendants' complaint in Tribal Court seeks a declaratory judgment under the Tribe's Constitution, By-Laws, and Tribal Law and Order Code, specifically that (*i*) the Independent Contractor Agreement between the Tribe and Plaintiff Becker is void and unenforceable because the Tribal Business Committee's approval of the IC Agreement was an *ultra vires* act, made in contravention of the limited powers vested in the Business Committee under the Tribe's Constitution, under Federal law, and under the Tribe's Corporate Charter; (*ii*) there was no valid waiver of the Tribe's sovereign immunity in relation to the Becker IC Agreement under tribal law; (*iii*) Mr. Becker's claims against the Ute parties are time barred under Section 1-8-7 of the Tribe's Law and Order Code; and seeks (*iv*) actual and punitive damages for Mr. Becker's breach of fiduciary duty, fraud, constructive fraud, theft/conversion of tribal assets, unjust

enrichment and equitable disgorgement and restitution. Defendants' Tribal Court Second Amended Complaint, Appendix, Vol. I, 116.

18. Less than a month later, on September 14, 2016, Becker filed this action in federal court, asking this Court to enjoin the Tribal Defendants from prosecuting their suit in Tribal Court. This Court granted the TRO and later entered a preliminary injunction. The Tenth Circuit stayed the preliminary injunction and eventually vacated the injunction and remanded the case.

19. 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. 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. On June 28, 2017, the Court bifurcated the last count from the case and entered a discovery and briefing schedule on current counts I-III.

20. On September 19, 2017, the Tribe filed three motions for partial summary judgment requesting orders on (*i*) the question of whether the Becker Independent Contractor Agreement is void *ab initio* Under Federal Law; (*ii*) the question of whether the waiver of sovereign immunity under the Becker IC Agreement is invalid under tribal law; and (*iii*) whether the Becker IC Agreement is void under Ute Indian Tribal law.

21. On October 17, 2017 and after revealing to the Tribe that his legal counsel had not even looked at the motions for partial summary judgment, Becker filed a Rule 56(d) motion requesting additional discovery, which the Tribe opposed on October 31, 2017. On November 14, 2017, Becker filed a reply and on December 19, 2017, the Tribe

filed a Sur-Reply with leave of the Court. On December 1, 2017, Becker filed a motion to compel.

22. On December 18 and 19, 2017 but before briefing was complete on the motion to compel, the Court issued two orders. In the December 18th Order, the Court denied the Tribe's motion on the question of whether the waiver of sovereign immunity is invalid under tribal law and denied Becker's motion to dismiss. In the December 19th Order, the Court denied all other pending motions with the exception of the Tribe's motion for partial summary judgment that the IC Agreement is void for lack of federal approval. The Court also ordered additional discovery. On December 29, 2017, the Tribe filed motions to reconsider portions of both Orders. These motion are still pending.

23. On January 4, 2018, Judge Pro Tem Thomas Weathers informed the parties via email that he is no longer assigned to the case. On January 9, 2018, Chief Judge Thelma Stiffarm entered an order explaining that the contract under which Judge Weathers served had expired and was not renewed. The Chief Judge stayed the December 19, 2017 Order. On January 10, 2018, Chief Judge Thelma Stiffarm entered an order assigning the case to the Honorable Judge Terry Pechota. On January 11, 2018, the Tribe filed a request to set a hearing on all pending motions.

BECKER'S STATE COURT LAWSUIT

24. Although the Utah state court denied the Tribal parties' dismissal motion under Rule 12(b)(1) of the Utah Rules of Civil Procedure, in doing so the Utah state court improperly confined its consideration to "the facts as pled in the Complaint, and the Independent Contractor Agreement entered into between plaintiff and the "Ute Indian

Tribe of the Uintah and Ouray Reservation and their subsidiaries and affiliates" (the Agreement)." The Utah state court said it would not "resort to any other extrinsic facts" in deciding the Tribe's dismissal motion. *See* State Court's Order, Dkt. 2-2, p. 2, ¶ 1.

25. 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 Ute Indian tribal sovereignty, and lack of subject matter jurisdiction. Appendix, Vol. III, 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, Vol. III, 655. The state court denied the Tribe's motion for a stay. Appendix, Vol. III, 657.

26. On December 5, 2016, the Tribal parties filed a second Rule 56 motion for dismissal in the State Court Action. The second motion was based on Mr. Becker's failure to join the United States as a necessary and indispensable party. Appendix, Vol. III, 653. On February 9, 2017, the Utah state court denied the Tribe's two summary judgment motions for dismissal. Appendix, Vol. I, 125-45.

27. On July 31, 2017, the state court scheduled a nine-day jury trial and issued a "Jury Trial Pretrial Order," which contains pretrial filing deadlines that began on November 30, 2017. Appendix, Vol. I, 113-15. On October 2, 2017, following remand of the *Ute Indian Tribe v. Lawrence*, No. 16-4154, from the Tenth Circuit, Judge Lawrence held a telephonic conference and informed the parties that he would not stay or dismiss the case unless he received an order from the Utah Supreme court or the Federal court enjoining him from proceeding.

28. On November 7, 2017, the Utah Supreme Court issued its opinion in *Harvey v. Ute Indian Tribe*, 2017 UT 75 (UT 2017), that recognized as a matter of state law, the tribal exhaustion doctrine. In light of this opinion, Judge Lawrence ordered the parties to brief the issue of tribal exhaustion. Exhibit B, Minute Entry Requesting Briefing on Tribal Exhaustion Issue. On November 30, 2017, the Tribe and Becker filed their respective briefs on tribal exhaustion. Exhibit C, Tribe's Memorandum on the Exhaustion of Tribal Court Remedies; Exhibit D, Becker's Memorandum Regarding Harvey and Tribal Court Exhaustion. On December 13, 2017, the Tribe filed a motion for leave to file an opposition along with a proposed opposition. Exhibit E, Tribe's Motion for Leave and Proposed Opposition.

29. On January 16, 2018, Judge Lawrence heard arguments on the issue of tribal court exhaustion and the pending motions *in limine* to exclude certain witnesses and evidence. On January 19, 2018, Judge Lawrence issued an order declining to apply tribal court exhaustion and issued rulings on the motions *in limine*. The Judge excluded four of the Tribe's proposed experts on the questions of federal law and federal approval requirements. The July 2, 2007 letter offered by Mr. Becker was also excluded.

30. The Judge has now framed the issues as a simple contract action. The Court announced he will consider: 1) whether the contract is valid or whether, because the Tribe's business committee entered into the contract in violation of the corporate charter which required federal approval, the contract was void or voidable and, if the latter, whether the voidable contract was nonetheless ratified; 2) if valid, whether the Contract was breached by the Tribe; and 3) if so, what were Becker's damages. Exhibit F, Ruling

on Motions *in Limine*, p. 1. The Court has also ordered additional briefing on these items with a deadline of January 31, 2018. Judge Lawrence reduced the number of trial days from nine to five with the trial now scheduled to commence on February 26, 2018.

LEGAL ARGUMENT

I. Becker Is Not Entitled to a Preliminary Injunction.

Becker fails to establish the four preliminary injunction elements.

> A party must establish four elements to obtain a preliminary injunction: (1) [that it has] a substantial likelihood of prevailing on the merits; (2) [that it will suffer] irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest.

(internal quotation marks omitted). *Becker v. Ute Indian Tribe*, 866 F.3d 1199, 1201 (10th Cir. 2017) (*quoting Dine Citizen Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016)).

Becker cites *Stifel, Nicholaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians,* 807 F.3d 184, 188 (7th Cir.) for the proposition that a federal court may enjoin a pending tribal court action in favor of a state court action. *Stifel* is distinguishable in multiple ways. In Wisconsin, where *Stifel* arose, the state courts have adjudicatory jurisdiction over Indians and Indian lands by virtue of P.L. 280. In contrast, 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, the claims in *Stifel* arose more than six-hundred miles away from the reservation whereas here, the legal claims arose within the Ute Tribe's Uintah and Ouray Reservation. The United States Supreme Court has "'repeatedly recognized,' 'tribal sovereignty is in large part

geographically determined.'" *In re Estate of Big Spring*, 255 P.3d 121, 129 (Montana 2011) (*quoting Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 457 (1989)).

A. Becker fails to establish a substantial likelihood of success on the merits.

Becker's fails to establish a substantial likelihood of success on the merits. Becker claims that he will succeed on two arguments: first that secretarial approval was not required, and second that Tribal Court exhaustion is not required.

The issues are simple, as framed by the Tenth Circuit:

> Mr. Becker has not disputed that if the Contract is void, then the tribal court has jurisdiction and the exhaustion rule applies. And the Tribe has not disputed that if the Contract is valid, then it waived the exhaustion rule.

Becker, 868 F.3d at 1203, fn. 2.

> "Law of the case" rules have developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedures § 4478 at 788 (1981).

The law of the case doctrine bars Becker from relitigating legal issues already decided. Legal rulings made in earlier stages of a case "continue to govern the same issues in subsequent stages in the same case.'" *United States v. Monsisvais,* 946 F.2d 114, 115 (10th Cir.1991) (*quoting Arizona v. California,* 460 U.S. 605, 618 (1983)). This Court previously ruled that the Tribal Court possesses jurisdiction over the Tribal Court Action based on Becker's consensual relationship with the Tribe. Preliminary Injunction Order, 9/28/2016, Dkt. 50, p. 5 ("The court concludes that the tribe has met its burden [of establishing tribal court jurisdiction] as a result of [the Tribe's consensual] contact with

plaintiff.") Mr. Becker did not appeal that ruling and the Tenth Circuit's decision recognizes Tribal Court jurisdiction based on Becker's consensual relationship with the Tribe. Similarly, the Tenth Circuit expressly rejected Becker's argument that individual contract clauses may be severed from the IC Agreement itself. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 868 F.3d 1199, 1204-05 (10th Cir. 2017) ("We agree with *Wells Fargo*[]" that a court may not validate individual clauses in a contract that is void ab initio for lack of federal approval*.).*

The Tenth Circuit has already determined that Becker has "failed to establish the first element because he has not shown a substantial likelihood that he can escape the tribal-exhaustion rule, which usually requires that the issue of tribal jurisdiction be decided by the tribal court in the first instance." *Becker v. Ute Indian Tribe*, 866 F.3d at 1202. The Tenth Circuit has also determined that Becker's counterarguments to the Tribe's contention that secretarial approval is necessary, are "not persuasive." *Id.* at 1204. There is nothing that has changed from when the Tenth Circuit issued its opinion and mandate that would support a deviation from the Tenth Circuit's holding. Becker's Motion is simply an attempt to have another bite at the proverbial apple in the hopes of a different outcome. Nevertheless, Becker fails to establish a likelihood of success on the merits this time around as well.

1. *The Tribal Exhaustion Rule Mandates that this Court Abstain from Hearing this Case.*

a. Tribal exhaustion is mandatory.

"The tribal-exhaustion rule states that absent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court jurisdiction

until tribal court remedies, including tribal appellate review, are exhausted." *Becker v. Ute Indian Tribe*, 868 F.3d at 1202 (*quoting Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011)) (internal quotations omitted). As the Tenth Circuit explained, "[t]he rule follows from the Supreme Court's recognition 'that Congress is committed to a policy of supporting tribal self-government and self-determination.' … It ensures that 'the forum whose jurisdiction is being challenged [is provided] the first opportunity to evaluate the factual and legal bases for the challenge.'" *Id.* at 1202-1203 (*quoting Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Tribal courts must "be given a 'full opportunity' to consider the issues before them[.]" *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (*quoting National Farmers Union Ins. V. Crow Tribe of Indians*, 471 U.S. 845, 857 (1983)). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.*, 480 U.S. at 18. (internal citations omitted).

In *Talton v. Mayes*, 163 U.S. 376 (1896), the Court held that interpretation of tribal laws is "solely a matter within the jurisdiction of the Courts of that Nation." *Id.* at 385. (emphasis added). "[T]he initial determination of whether the tribe has jurisdiction lies with the tribal court alone. Under the Supreme Court's ruling in National Farmers Union, 'the federal courts should *not even make a ruling on tribal court jurisdiction* … until tribal remedies are exhausted.'" *Burlington Norther R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991) (*citing Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989)) (emphasis in original). Further, the

Tenth Circuit has already addressed any concern with the timing of the filing of the Tribal Court Action. The Tenth Circuit said that even a case that lacked a tribal court action "did not diminish" the application of the exhaustion doctrine. *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991). Thus, the Ute Tribal Court is the sole arbiter of tribal law just as the Cherokee Nation court was the sole arbiter in *Talton* and the timing (or even absence) of a tribal court action does not diminish the application of the doctrine of tribal court exhaustion.

The Tribal Court is the only forum with original and exclusive jurisdiction to decide the questions of tribal law present in this case. It is necessary and important to federal policy for the Tribal Court to examine the tribal law claims, interpret, and apply tribal law. *National Farmers*, 471 U.S. at 856.

b. There is no exception to Tribal Court Exhaustion when the Tribe has implemented a process for handling complaints that allege claims against the Tribe, or Tribal Business Committee, or Individual Tribal Officers.

Becker's argument that there is an exception to tribal court exhaustion because he believes the Tribe does not have a process to handle complaints against the Tribe. Becker's position is without merit and is contrary to tribal law. In support of his request for an injunction, Mr. Becker relied on a decision that was issued by the Ute Indian Tribal Court, *Yazzie v. Ute Indian Tribe*, case number CV-09-188 (Ute Tribal Court Feb. 4, 2011), together with Tribal Ordinance 87-04 for the proposition that there is no tribal forum to handle any claim that Becker might bring against the Tribe. Mr. Becker's attorney of

record in the Tribal Court Action.[3] The decision in *Yazzie* was never appealed to the Ute Indian Appellate Court, as permitted by Rule 37 of the Ute Indian Rules of Civil Procedure. Exhibit G, Decl. of Luke Duncan, ¶ 5. Two years after the decision in *Yazzie*, the Tribe enacted Ordinance No. 13-022. Exhibit H, Ordinance 13-022. Ordinance 13-022 amends Tribal Ordinance 87-04, the Ordinance upon which the decision in *Yazzie* is based. Decl. of Luke Duncan, ¶ 6.

Since Ordinance 13-022 was enacted, the Ute Indian Tribal Court and the Tribal Business Committee have implemented a process for handling complaints that allege claims against, and name as defendants, the Tribe, or Tribal Business Committee, or individual Tribal officers who are sued in their official capacities. Decl. of Luke Duncan, ¶ 7. Tribal Resolution No. 16-426 shows how the process for handling such complaints. Exhibit I, Resolution No. 16-426; Declaration of Luke Duncan, ¶ 7.

Resolution No. 16-436 relates to a complaint that was filed by a tribal member against two tribal officers, Case No. CV 16-268. The Tribal Court issued a ruling and order in CV 16-268, dismissing the case for lack of subject matter jurisdiction under Section 1-5-8 of the Ute Indian Law and Order Code (as enacted by Ordinance 87-04 and amended by Ordinance No. 13-022). Decl. of Luke Duncan, ¶ 8; Exhibit J, Ruling and Order in Case No CV 16-268.

[3] Becker has previously argued that the Tribe failed to reveal the *Yazzie* case or Ordinance 87-04. This argument fails when Mr. Yazzie attorney in the tribal court case is the same attorney of record for Mr. Becker. Also, it is the Tribe's position that *Yazzie* is not relevant, binding, or persuasive.

Under Rule 37 of the Ute Indian Rules of Civil Procedure, the plaintiff in Case No. CV 16-268 had twenty (20) days in which to appeal the Tribal Court's order dismissing her complaint. At the end of that 20-day period, the plaintiff in Case No. CV 16-268 had not filed a notice of appeal. Decl. of Luke Duncan, ¶ 9.

If, as in case No. CV 16-268, no notice of appeal is filed, the Tribal Business Committee reviews the complaint to determine whether a conflict of interest would exist if the Business Committee were to decide the merits of the claims alleged under the complaint. If a conflict of interest exists, or potentially exists, the Business Committee directs the Tribal Court to retain the services of an outside judge (that is, a judge other than a sitting judge of the Ute Indian Tribal Court) to adjudicate the claims alleged under the complaint. Decl. of Luke Duncan, ¶ 10. That practice was followed under Resolution No. 16-426 which states in pertinent part:

> **WHEREAS**: The Complaint alleges that Ms. Sireech and Mr. Wyasket terminated Ms. Amboh in violation of policies and thus the Business Committee may have a conflict of interest in hearing this case; and
>
> **WHEREAS**: In recognition of the due process rights of the petitioner in this complaint and to ensure fairness in the adjudication of h[er] claims, the Business Committee determined that it was both necessary and proper to refer this matter to [Tribal Court] Judge Reynolds to appoint a Special Conflicts Judge to resolve these claims in accordance with Tribal Law.

Resolution No. 16-426; Decl. of Luke Duncan, ¶ 10.

The Tribal Business Committee has adopted "Guidelines for Hearings," which govern proceedings before a Special Conflicts Judge. *Id*., ¶ 11; Exhibit K, Resolution 14-018 Adopting Guidelines for Hearings. Depending on the nature of the issues presented in a complaint, the Tribal Business Committee will direct the Tribal Court to assign the

complaint to be heard by a three-judge panel, instead of just one judge. An example of that can be found in the case of *Dino Cesspooch v. Gordon Howell*, CV14-053, a suit that was filed by a tribal officer against the former Chairman of the Tribal Business Committee. Exhibit L, *Dino Cesspooch v. Gordon Howell*, Final Order, CV14-053 (Ute Tribal Court 2014); Decl. of Luke Duncan, ¶ 12.

Accordingly, the process implemented for handling claims against the Tribe under Tribal Law are mandatory under the tribal exhaustion doctrine. *LaPlante*, 480 U.S. at 16.

1. Secretarial Approval is Required

a. Federal Law Requires Secretarial Approval for the IC Agreement.

The Tenth Circuit determined that Becker's counterarguments to the Tribe, "are not persuasive." As the Tenth Circuit explained, the Tribe's arguments are that "the payments to Mr. Becker are akin to royalties, which, according to the Supreme Court, maintain the same trust status as the oil and gas assets themselves." Becker v. Ute Indian Tribe, 868 F.3d, 1204. Both the Tribe and the Tenth Circuit point to *United States v. Noble*, 237 U.S. 74, 35 (1915).[4] The Tenth Circuit explained:

> In *Noble* the Court held that the assignment of a royalty equal to a specified percentage of minerals mined or removed from the land of an Indian allottee violated a prohibition on alienation of the allotment. It wrote:
>
> > It is said that the [agreements] contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but the

[4] The Tribe cites several statutes that require federal approval for contracts such as the IC Agreement: 25 U.S.C. §§ 81, 85, 177, 464, and 2102(a). The Tenth Circuit did "not parse those statutes because Mr. Becker does not contest that the oil and gas interests themselves are tribal trust property or that transfers of tribal trust property require federal approval." *Ute Indian Tribe v. Becker*, 868 F.3d at 1204. Likewise, Becker does not contest that point before this Court either.

> fact that the rent is to be paid in money does not make it any the less a profit issuing out of the land.

Ute Indian Tribe v. Becker, 868 F.3d at 1204 (*quoting Nobel*, 237 US at 80-81).

Notwithstanding the determination made by the Tenth Circuit at the same stage in the litigation where the parties find themselves again, Becker now claims that he just did not get a chance to address the Secretarial approval issue in this Court. The Tribe would like to point out that this is simply not correct. When faced with Defendants' argument that the IC Agreement is invalid under federal law due to a lack of secretarial approval, Becker, through legal counsel, seemingly missed the point of Defendants' argument and otherwise failed to substantively respond:

> Mr. Isom: …And finally, they keep arguing various federal law based issues that were in the original federal action that didn't create 1331 jurisdiction that either have been already decided by Judge Lawrence or can be decided. They haven't cited anything that says there is exclusive jurisdiction in this court to decide whether this contract was approved by the Secretary of the State. Thank you.

Exhibit M,*Transcript of 9/27/16 Hearing*, p. 38, ln. 1-7.

Becker presented a copy of the July 2, 2007 letter to the Tenth Circuit but it was not persuaded because Becker failed to attach a copy of the Amended and Restated Ute Energy LLC Operating Agreement that is the subject of the July 2, 2007 letter. *Becker*, 868 F.3d at 1204. The Tenth Circuit explained that "without examining [the Amended and Restated Ute Energy LLC Operating Agreement], it is impossible to determine whether it contains provisions similar to the 2% grant to Mr. Becker." *Id.*

While Becker presents a copy of the Amended and Restated Ute Energy LLC Operating Agreement to this Court, he does not ultimately answer the Tenth Circuit's

question. That is, Becker does not explain whether it contains provisions similar to the 2% grant to Mr. Becker. Instead, Becker simply points to the objectionable July 2, 2007 letter and reiterated what the letter says. Motion at 17. In fact, if the Court were to consider the July 2, 2007 letter, the contents of the letter must be examined. In the Letter, the BIA explained its rationale for not requiring federal approval of the "Amended and Restated" Operating Agreement for Ute Energy LLC:

> The Restated [Operating] Agreement [for Ute Energy LLC] creates no interest in trust lands subject to approval by the BIA. Likewise the Restated Agreement does not provide for the exploration or development of minerals in which the Tribe holds a beneficial or restricted interest. **See, e.g.**, 25 C.F.R. § 225.3 (defining mineral agreements under IMDA). The Tribe will not be a signatory to the Restated Agreement nor be obligated to perform any duty under the agreement.
>
> We find that, through this agreement, the corporation is not utilizing the Tribe's surface or mineral assets for collateral, or granting any interest in the Tribe's trust assets.

(underscore added). The Letter and the Amended and Restated Operating Agreement answer the Tenth Circuit's question in the Tribe's favor – that the Operating Agreement does not convey an interest in tribal lands and does not obligate the Tribe to perform any duty under the Operating Agreement. By contrast, the Tribe *is* a signatory to the Becker IC Agreement *and* Mr. Becker contends the Tribe is obligated under the IC Agreement to pay him more than $7.5 million dollars.

These distinctions are critical, as noted by the Tribe's expert witness, Pilar Thomas, who reviewed the July 2, 2017 letter, and had this to say about that letter:

> [T]here are several key differences between the [Ute Energy LLC Amended and Restated] Operating Agreement and the Becker Agreement. The BIA stated that the Operating Agreement: 1) did not convey an interest in tribal lands; 2) did not provide for exploration and development of mineral

> interests; and 3) was not signed by the Tribe. The Becker Agreement on the other hand: does convey an interest in the Tribe's mineral rights; does provide for the management of exploration and development of the Tribe's mineral interests; and was approved by the Tribe's Business Committee and signed by the Tribe.
>
> For these reasons, in my opinion the Becker Agreement should be interpreted through the terms and purposes of the NIA and the IMDA.

Exhibit N, Pilar Thomas Expert Opinion Report, 7-8. If the court intends to consider the July 2, 2007 letter, it should also consider the April 23, 2005 letter that provided the approval for the 2005 Operating Agreement of Ute Energy LLC as well as a number of other documents related to the creation of Ute Energy LLC. None of these other documents were mentioned in the July 2, 2007 as documents that approval "may not have been required." In other words, secretarial approval was required on all of the documents listed in the April 23, 2005 letter and never withdrawn. The July 2, 2007 letter in point of fact supports the Tribe's position that secretarial approval is required of the IC Agreement.

c. Neither Comity nor Collateral Estoppel can be given to the State Court's determination that no federal approval was required because the State Court lacks subject-matter jurisdiction.

From the beginning, the doctrine of comity has been limited to situations in which two tribunals simultaneously possess concurrent jurisdiction. The U. S. Supreme Court recognized the doctrine of comity in *Hilton v. Guyo*, 159 U. S. 113 (1895)—a case in which the Court refused to grant comity to a judgment rendered against an American citizen by a French court. The *Hilton* Court recognized that comity has no application when, as here, one tribunal—the Utah state court—lacks "jurisdiction of the cause," or if a contract is illegal under the laws of one jurisdiction, or if it would otherwise be fundamentally unfair

to accord comity to that proceeding. *Id*. at 205-206. *See generally* Cohen's Handbook of Federal Indian Law, § 7.07[2][a], 661-63 (Nell Newton ed., 2012 ed.).

The Utah state court's interlocutory rulings are fundamentally unfair both in its misinterpretation of tribal law and its incorrect holding that Utah state courts possess jurisdiction over the *Becker* state suit. Furthermore, the Utah state court have confused, and conflated, the separate and distinct legal issues of (*i*) subject matter jurisdiction and (*ii*) waiver of sovereign immunity, assuming that a waiver of sovereign immunity, standing alone, is sufficient to vest the Utah state court with subject matter jurisdiction. That is incorrect. As the Tenth Circuit recently said, "[t]o begin with, sovereign immunity and a court's lack of subject matter jurisdiction are different animals." *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 545-46 (10th Cir. 2017) (*citing Blatchford v. Native Village of Noahtak*, 501 U.S. 744, 786 n. 4 (1991); *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 923-24 (9th Cir. 1991).

Comity does not require "a tribe [to] utilize judicial procedures identical to those used in the United States Courts" and that federal courts are required to "be careful to respect tribal jurisprudence along with special customs and practical limitations of tribal court systems." *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006) (*quoting Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)). The Tenth Circuit has rejected Becker's proposition to act as a play-by play referee of the Tribal Court: "[W]e firmly reject the [] position that the district court had a duty to monitor the proceedings before the tribal court." *Burrell*, 456 F.3d at 1173. While the Tenth Circuit concluded that the tribal court's decision on tribal sovereign immunity was not "entitled to recognition under either

principles of comity or collateral estoppel," the Tenth Circuit proceeded to address the merits of the sovereign immunity issue, but, importantly, in doing so, came to the same exact conclusion as the Tribal Court had. *Burrell*, 456 F.3d at 1173-1175. It is also important to emphasize that the federal court review in *Burrell* was conducted at the conclusion of the tribal court action; which is also the proper course here. *Id.* at 1161.

B. Becker fails to prove that he will suffer irreparable harm unless the injunction is issued.

Having to litigate in the Tribal Court, which is a "court of competent jurisdiction" under the IC Agreement and which has repeatedly concluded it has jurisdiction, presents no harm to Mr. Becker. Mr. Becker presents no authority to conclude otherwise.

Becker cites *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011) in support of his argument that he would be financially harmed by years of Tribal Court litigation. In *Stidham*, the Tenth Circuit found the tribal court did not have jurisdiction over the Crowe & Dunlevy law firm because the only consensual relationship was membership by Crowe & Dunlevy attorneys in the tribal bar association and the tribal court order against Crowe & Dunlevy to return earned fees did not arise under that consensual relationship. Here, by contrast, the claims against Mr. Becker in the Tribal Court Action arise directly under his IC Agreement and employment by the Tribe on its reservation.

C. The harm that a preliminary injunction will cause the Defendants outweighs any threatened injury to Becker.

An injunction would deprive Defendants of their constitutionally protected right to seek redress before the Ute Indian Tribal court. In 1983, the U. S. Supreme Court ruled that the National Labor Relations Board (NLRB) could not order an Arizona employer to

withdraw a state court complaint the employer had filed against its former employees in an on-going labor dispute:

> [W]e hold that the Board may not halt the prosecution of a state court lawsuit, regardless of the plaintiff's motive, **unless the suit lacks a reasonable basis in fact or law**.

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 748 (1983) (emphasis added). The holding in *Bill Johnson's* is dispositive here. Just as the Arizona employer in *Bill Johnson's* could not be enjoined from suing his former employees in a court that possessed subject matter jurisdiction over the suit, neither can Mr. Becker's former employer—the Ute Indian Tribe—be enjoined from suing Becker in a forum that, likewise, possesses subject matter jurisdiction over the suit, the Ute Indian Tribal Court.

The right to seek legal redress is protected under the First Amendment to the federal Constitution, which states, in relevant part, that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." Similar language is found in the Utah Constitution, art. I, sections 1 and 11. It is well established that the constitutionally-protected "'right to petition extends to all departments of the Government,'" and that "'[t]he right of access to the courts is … but one aspect of the right of petition.'" *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (*quoting California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)).

Therefore, this Court cannot enjoin the Tribal Defendants from seeking redress through the Ute Indian Tribal Court because such an injunction is unconstitutional. The injunction can survive constitutional scrutiny only if the Tribal Court suit lacks a

"reasonable basis in fact or law." *Bill Johnson's*, 461 U.S. at 748. As explained, *supra*, it is the law of the case that the Tribal Court possesses jurisdiction.

D. An injunction will adversely affect the public interest.

The United States Supreme Court explained the public policy quite well:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> [The Supreme Court] believe[s] that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged with the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

CONCLUSION

Based on the facts and authorities cited herein, Defendants respectfully request the Court to deny Plaintiff's request or a preliminary injunction.

DATED this 26th day of January, 2018.

FREDERICKS PEEBLES & MORGAN LLP

/s/ Thomasina Real Bird

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2018, I electronically filed the foregoing **OPPOSITION TO BECKER'S MOTION FOR PRELIMINARY INJUNCTION** 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:

Brent M. Johnson
Nancy J. Sylvester
ADMINISTRATIVE OFFICE OF THE COURTS
State of Utah
P.O. Box 140241
Salt Lake City, Utah 84114-0241
Defendant Honorable Barry G. Lawrence

David K. Isom
ISOM LAW FIRM PLLC
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Defendant Lynn D. Becker

s/ Elizabeth Miller
Elizabeth Miller
Legal Assistant to Thomasina Real Bird

DEFENDANTS/COUNTERCLAIMANTS-and-THIRD-PARTY PLAINTIFFS' EXHIBIT LIST

Exhibit A Section 1-8-5 of the Tribe's Law and Order Code.

Exhibit B Minute Entry Requesting Briefing on Tribal Exhaustion Issue.

Exhibit C Tribe's Memorandum on the Exhaustion of Tribal Court Remedies.

Exhibit D Becker's Memorandum Regarding *Harvey* and Tribal Court Exhaustion.

Exhibit E Tribe's Motion for Leave to File an Opposition to Becker's Exhaustion Brief.

Exhibit F Ruling on Motions in Limine.

Exhibit G Declaration of Luke Duncan.

Exhibit H UTBC Ordinance 13-022.

Exhibit I UTBC Resolution No. 16-426.

Exhibit J Ruling & Order in *Amboh v.* Sireech, Tribal Court Case No. CV16-268.

Exhibit K UTBC Resolution No. 14-018.

Exhibit L Final Order in *Cesspooch v. Howel*, Ute Tribe Business Committee, Case No. CV14-053.

Exhibit M Transcript of September 27, 2016 Hearing.

Exhibit N Pilar Thomas Expert Opinion Report.

EXHIBIT A

THE LAW AND ORDER CODE
OF THE
UTE INDIAN TRIBE
OF THE
UINTAH AND OURAY RESERVATION
UTAH

FORT DUCHESNE, UTAH 84026

PREAMBLE

This Law and Order Code for the Ute Indian Tribe of the Uintah and Ouray Reservation is 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.

TITLE I. GENERAL PROVISIONS

CHAPTER 1. PRELIMINARY PROVISIONS

§1-1-1 **Constitutional Authority.**

This Law and Order Code is adopted pursuant to the authority vested in the Tribal Business Committee under Article VI of the Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation.

§1-1-2 **Name of Code.**

This Law and Order Code shall be known as The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation and may be referred to as the Ute Law and Order Code, or Law and Order Code, and may be abbreviated as the U.L.O.C. Sub-codes and rules included herein may be cited by the name given in the sub-code or rule heading.

§1-1-3. **Prior Inconsistent Ordinances Repealed.**

Any and all ordinances of the Tribal Business Committee which conflict in any way with the provisions of this Law and Order Code are hereby repealed to the extent that they are inconsistent with or conflict with, or are contrary to the spirit and/or purpose of this Law and Order Code.

§1-1-4. **C.F.R. No Longer Applicable.**

Any and all provisions of the Code of Federal Regulations, Title 25, Part II, as presently constituted or hereafter constituted which deal with subjects covered in this Law and Order Code or are otherwise inconsistent with or in conflict with the provisions of this Law and Order Code or the purpose and/or spirit of this Law and Order Code are declared to be no longer applicable to the Uintah and Ouray Reservation.

§1-1-5 **Amendment of Law and Order Code.**

This Law and Order Code may be amended, additions made hereto, or deletions made herefrom in the manner provided for the adoption of tribal ordinances. Amendments and additions to this Law and Order Code shall become a part thereof for all purposes and shall be codified and incorporated herein in a manner consistent with the numbering and organization hereof.

§1-6-4. Power to Excuse Jurors.

The Judge assigned to hear a case shall have the power to excuse a person subpoenaed to appear as a juror on account of sickness, disability, extreme hardship or other good cause shown upon the request for such excusal by the person subpoenaed.

§1-6-5. Compensation of Jurors.

Each juror who is called and reports for jury duty or who serves on a jury shall be entitled to receive such fees for daily service and/or mileage, if any, as the Business Committee shall establish by resolution, or as established by a rule of the Court.

CHAPTER 7. SUBPOENAS AND SERVICE OF OTHER PAPERS

§1-7-1. Issuance of Subpoenas.

(1) The Clerk shall issue subpoenas to compel the attendance of witnesses, jurors or such other persons as a judge may direct for a trial, hearing or other proceeding before a Court of the Ute Indian Tribe.

(2) In a criminal case, the complaining witness and all witnesses for the Ute Indian Tribe may be subpoenaed to appear at the date and time set for trial or a reasonable time before such time, plus the defendant shall have the right to have witnesses subpoenaed to appear in his behalf by notifying the Clerk of the Court of the names and addresses of such witnesses not less than ten (10) days prior to the scheduled trial date.

§1-7-2. Service of Subpoenas; Return on Service.

(1) Subpoenas in criminal cases shall be served by a tribal policeman, or other person designated by the Chief Judge, Chief of Police or Business Committee.

(2) Subpoenas in non-criminal cases may be served by any person, over 18 years of age, not a party to the action.

(3) Except by order of the Court based upon good cause shown therefor, no subpoena shall be served between the hours of 9:00 p.m. and 7:00 a.m. or on Sundays or legal holidays.

(4) The person serving a subpoena shall endorse upon the copy served his name, title, and the place, date, and time of service.

(5) The person serving a subpoena shall make a return to the Clerk stating the name of the case, the name of the person served, the place, date, and time of service, and shall subscribe his name thereto under penalty of perjury for the intentional making of a false return.

CHAPTER 8. GENERAL PROVISIONS

§1-8-1. Copies of Laws.

There shall be kept available for public inspection during regular business hours at the office of the Clerk of the Tribal Court, copies of this Law and Order Code and any amendments thereto, plus copies of all laws or rules which are incorporated by reference from other jurisdictions into this Law and Order Code, plus a copy of the Code of Professional Responsibility of the American Bar Association.

§1-8-2. Signature Defined.

The term "signature" or any term relating thereto as used in this Law and Order Code or subsequent resolutions or ordinances of the Business Committee, shall mean the written signature, official seal, or the mark or thumbprint of any individual witnessed by two disinterested persons subscribing their names therewith.

§1-8-3. Records of Court Open to Public Inspection; Exceptions.

The files and records of the Courts of the Ute Indian Tribe shall be open for public inspection, except that the files and records of adoptions, incompetency proceedings, and Tribal Juvenile Court proceedings shall not be open to public inspection and may be inspected only with prior specific judicial authorization.

§1-8-4. **Adoption by Reference Not A Waiver of Sovereign Power Of The Ute Indian Tribe.**

The adoption of any law, code or other document by reference into this Law and Order Code shall in no way constitute a waiver or cession of any sovereign power of the Ute Indian Tribe to the jurisdiction whose law or code is adopted or in any way diminish such sovereign power, but shall result in the law or code thus adopted becoming the law of the Ute Indian Tribe.

§1-8-5. **Sovereign Immunity.**

Except as required by federal law, or the Constitution and Bylaws of the Ute Indian Tribe, or as specifically waived by a resolution or ordinance of the Business Committee specifically referring to such, the Ute Indian Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

§1-8-6. **Actions By or Against Tribe or Its Officers or Employees.**

In any action otherwise authorized by or against the Tribe or its officers or employees arising from the performance of their official duties, the following modifications to the rules or procedures set forth in this Law and Order Code shall apply:

(1) The periods of time specified for civil cases or appeals of either a civil or criminal nature in which an answer, reply or other pleading or response of any kind shall be required shall be double the period specified.

(2) Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their official duties shall be liable for the payment of the costs or expenses of the opposing party.

(3) Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their official duties shall be required to post security by bond or otherwise for any purpose.

(4) No action, otherwise authorized, may be instituted against any officer or employee of the Tribe for a cause of action arising out of, or in the course of the performance of his duty, or any action upon the bond of any such officer or employee, unless there is filed with the complaint a cash or written bond or undertaking with at least two sufficient sureties subject to the jurisdiction of the Court in the amount of $300.00 or such greater amount as the Court may order, conditioned for the payment of such costs, charges and reasonable attorney's fees to be fixed by the Court as may be awarded against the Plaintiff in said action.

(5) No action may be instituted against the Tribe unless security under the same conditions as set forth next above is filed with the complaint.

§1-8-7. **Limitations in Civil Actions.**

Unless otherwise specifically provided in the Law and Order Code, the following limitations on the bringing of civil actions will apply:

(1) Any action against the Tribe or its officers or employees arising from the performance of their official duties must be commenced within one year of the date the cause of action accrued.

(2) Any other action must be commenced within three years of the date the cause of action accrued, provided, however, that any cause of action based on fraud or mistake shall not be deemed to have accrued until the aggrieved party has discovered or reasonably should have discovered the facts constituting the fraud or mistake.

§1-8-8. **Principles of Construction.**

The following principles of construction will apply to all of the Law and Order Code unless a different construction is obviously intended:

(1) Masculine words shall include the feminine, and singular words shall include the plural, and vice versa.

(2) Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified.

EXHIBIT B

FILED DISTRICT COURT
Third Judicial District
NOV 15 2017
By: Salt Lake County
Deputy Clerk

THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LYNN BECKER, Plaintiff, v. UTE INDIAN TRIBE, et.al., Defendants.	**MINUTE ENTRY REQUESTING BRIEFING ON TRIBAL EXHAUSTION ISSUE** Case No. 140908394 Judge: BARRY G. LAWRENCE

In *Harvey v. Ute Indian Tribe*, 2017 UT 75, the Utah Supreme Court, in a 3-2 decision, held that the plaintiffs there were first required to exhaust tribal remedies before bringing suit in State Court. However, *Harvey* involved tort claims against the Tribe and various tribal officials; there was no contractual waiver of sovereign immunity, as there is in this case.

Accordingly, there appears to be an open question whether the tribal exhaustion doctrine applies to cases such as this, where the Tribe has expressly waived its sovereign immunity and consented to jurisdiction in Utah State Court.[1]

The Court therefore requests the parties to each file a memorandum, no greater than 15 pages, on whether the tribal exhaustion doctrine applies to Mr. Becker's claims herein. Those briefs shall be filed no later than Wednesday November 29, 2017. The Court will review the

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[1] *See* Contract, Article 23, "Limited Waiver of Sovereign Immunity." ("the Tribe agrees to a limited waiver of the defense of sovereign immunity, to the extent such defense may be available, in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. . . . The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding. The Parties hereto unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts also lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts.")

submissions and determine whether oral argument is necessary. The Court is mindful of the upcoming two-week jury trial in February, and intends to resolve this issue expeditiously.

So ORDERED this 16th day of November, 2017.

BY THE COURT:

Barry G. Lawrence
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140908394 by the method and on the date specified.

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Date: 11/16/2017 /s/ NICOLE ODOHERTY

Deputy Court Clerk

EXHIBIT C

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Lynn D. Becker, Plaintiff, v. Ute Indian Tribe of the Uintah and Ouray Reservation, et al., Defendants.	**DEFENDANTS' MEMORANDUM ON THE EXHAUSTION OF TRIBAL COURT REMEDIES** Case No. 140908394 **JUDGE BARRY LAWRENCE**

The Tribal Defendants respectfully submit their memorandum in response to the Court's order of November 15, 2017, directing the parties to address the doctrine of tribal court exhaustion in light of the Utah Supreme Court's ruling in *Harvey v. Ute Indian Tribe*, 2017 UT 75, on November 7, 2017.

PRELIMINARY STATEMENT

Preliminarily, before proceeding to the matter of tribal court exhaustion, Defendants wish to emphasize a clear distinction between *Harvey* and the *Becker* case, and that distinction is subject-matter jurisdiction. It should be noted that in *Harvey* the Utah Supreme Court did not face—and did not have to decide—a challenge to state court subject-matter jurisdiction. It should also be borne in mind that the procedural posture in *Harvey* was at a very early stage—the 12(b) dismissal stage—and the jurisdictional facts were gleaned exclusively from the plaintiffs' complaint.[1] At that early juncture in *Harvey*, none of the parties had disputed the *Harvey* plaintiffs' allegations that their claims arose primarily—if not entirely—*outside* the boundaries of the Uintah and Ouray Indian Reservation. It should also be remembered that the United States Supreme Court has "repeatedly recognized that 'tribal sovereignty is in large part geographically determined.'" *In re Estate of Big Spring*, 255 P.3d 121, 129 (Montana 2011) (quoting *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 457 (1989)).

The complaint in *Harvey* alleged that the plaintiffs' businesses are located outside of the Tribe's reservation, and that most of the alleged tortious conduct, and *all* of the tortious impacts, occurred *outside* of the Tribe's reservation boundaries. In fact, the

[1] *Harvey*, 2017 UT 75, ¶ 5, n.3.

Harvey decision states that plaintiffs' businesses were located "on private fee land," and plaintiffs alleged that a "majority" of the allegedly improper demands that were made upon them occurred "off of reservation land." *Harvey*, 2017 UT 75, ¶ 5, n.4. This meant that the jurisdictional facts alleged in *Harvey* appeared to bring the case within the rule that "[a]bsent express federal law to the contrary," an Indian tribe or tribal member who undertakes activity *outside* of reservation boundaries is generally subject to state jurisdiction and the "nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973). Defendants wish to emphasize that there is no equivalency between the jurisdictional facts alleged in *Harvey* and the jurisdictional facts in *Becker*. In *Becker*, the Tribal Defendants maintain that Mr. Becker's breach of contract claim arose exclusively *inside* the Tribe's reservation boundaries, and Defendants contend, respectfully, that these jurisdictional facts mean the state court in this case lacks subject-matter jurisdiction.[2]

INTRODUCTION

The Court's minute order of November 15th states, in pertinent part:

> *Harvey* involved tort claims against the Tribe and various tribal officials; there was no contractual waiver of sovereign immunity, as there is in this case …. There appears to be an open question whether the tribal exhaustion doctrine applies to cases such as this, where the Tribe has expressly waived its sovereign immunity and consented to jurisdiction in Utah State Court.

[2] The facts in *Becker* are more analogous to *WD at the Canyon, LLC v. Honga*, No. 1 CA-CV 16-0468 (Ariz. Ct. App. Nov. 14, 2017), a case decided earlier this month by the Arizona Court of Appeals, a copy of which is attached as Exhibit A.

Defendants disagree with the Court's formulation of the question before the Court because that formulation ignores the *antecedent* issues of tribal law that are involved in this case, questions of 1) whether the Tribal Business Committee exceeded its authority under tribal law in entering into the Independent Contractor Agreement, meaning that the Agreement is void *ab initio* under tribal law, and separately, 2) whether the waiver of sovereign immunity is valid under Ute Indian tribal law.

The significance of the *Harvey* ruling is that even in a case that arises *off*-reservation—i.e., even in a case that arguably falls within the state court's subject-matter jurisdiction—if the case involves one or more antecedent issues of tribal law, the issues of tribal law must first be adjudicated in tribal court. As the Court in *Harvey* explained:

> Any harm actually suffered by Harvey is tied to whether the tribal officials had the authority to require him to obtain a permit, revoke his permit, and issue a letter telling oil and gas companies that they would suffer sanctions if they continued to use Harvey and operate on tribal lands. … Whether the tribal officials unlawfully revoked Harvey's permit is a question of tribal law, as the regulation of who may enter tribal lands is a matter of self-governance. The tribal court must have the first opportunity to address these issues. Otherwise, we may be supplanting tribal law that manages tribal governmental operations with state tort law. (underscore added)[3]

Like *Harvey*, the *Becker* case also involves antecedent issues of Ute Indian tribal law, namely the validity of the IC Agreement itself and the waiver of sovereign immunity under tribal law. Indeed, the language and rationale of *Harvey*, adapted to Becker, could read:

> Any harm actually suffered by Becker is tied to the antecedent question of whether the Tribal Business Committee had the authority to enter into the Independent Contractor Agreement with Becker. Further, the question of whether the Tribe can assert the defense of sovereign immunity under the specific facts of this case is a question of tribal law [Ute Indian Law and Order Code, § 1-8-5] and decisions of the tribal court interpreting that law.

[3] *Harvey*, 2017 UT 75, ¶ 44.

> The tribal court must have the first opportunity to address these issues. Otherwise, we would be supplanting tribal law with state law and violating the Tribe's right under federal law to "make its own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

LEGAL ARGUMENT

I. Application of Tribal Court Exhaustion to Becker

The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a state or federal court must give the tribal court precedence and afford the tribal court a full and fair opportunity to determine, *inter alia*, the extent of its own jurisdiction over a particular claim or set of claims. Further:

> The exhaustion requirement applies beyond cases involving challenges to tribal court jurisdiction. The Ninth Circuit requires exhaustion in all cases relating to tribal affairs, including those that arise off-reservation and outside Indian country, even if no tribal court proceedings are pending, so long as there is a colorable argument that the tribal court has jurisdiction over the case. Similarly, the Tenth Circuit has held that the policies behind *National Farmers* "almost always" dictate exhaustion in cases arising on reservations, and in other cases where the tribal court has jurisdiction and exhaustion would further the interests of self-government, orderly administration of justice, and utilizing tribal expertise. Examples of the kinds of cases in which courts have required exhaustion include … cases challenging the nature and extent of a tribe's sovereign immunity.

FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.04[3], p. 631 (2012 ed.). The United States Supreme Court describes the rationale for tribal exhaustion as follows:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. [citations omitted] Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence … is that the sovereign power … remains intact." [citation omitted]

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 n.8 (1987).

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction ….

Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856-57 (1985).

As pertinent here, because the legal dispute between the Tribe and Mr. Becker arises out of Becker's consensual relationship with the Ute Tribe—Becker's on-reservation contract and work for the Tribe—jurisdiction over the dispute "presumptively lies" in the Ute Indian Tribal Court.[4] As explained by the First Circuit Court of Appeals, "[c]ivil disputes arising out of the activities of non-Indians on reservation lands almost always require [tribal] exhaustion if they involve the tribe. *See Iowa Mut.*, 480 U.S. at 18, 107 S. Ct. 971 (stating that jurisdiction over such cases 'presumptively lies in the tribal courts.')." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32 (1st Cir. 2000).

Nonetheless, Mr. Becker contends the Tribe waived both sovereign immunity and the exhaustion of tribal court remedies under the express terms of the IC Agreement. The Tribe, on the other hand, disputes the legality and enforceability of the IC Agreement itself under both federal law and Ute Indian tribal law.

[4] *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8.

Each of the parties' contentions and counter-contentions are currently awaiting a ruling from the Ute Indian Tribal Court in the Tribe's suit against Becker in tribal court, *Ute Indian Tribe v. Becker*, case number CV-1625.

On September 19, 2017, the Tribal Plaintiffs filed three separate motions for entry of partial summary judgment in the tribal court on the questions of (*i*) the legality of the IC Agreement under federal law; (*ii*) the legality of the IC Agreement under tribal law; and (*iii*) the validity of the sovereign immunity waiver under tribal law. Exhibit B.

For his part, Becker has filed counterclaims against the Tribe in tribal court, as well as a second motion to dismiss the tribal court suit for lack of jurisdiction. In turn, the Tribal parties have moved to dismiss Becker's counterclaims and have objected to Becker's second motion to dismiss. By an email issued on November 21, 2017, the presiding tribal court judge, the Honorable Thomas Weathers, advised the parties that the tribal court will soon be ruling on all of the currently pending motions. Exhibit C.

Because Mr. Becker's breach of contract claim arises out of his on-reservation contract and work for the Ute Tribe, and because the Tribe contests the legality and enforceability of the Becker IC Agreement under tribal law, the case presents a colorable claim of tribal court jurisdiction. Indeed, jurisdiction over the claim "presumptively lies" in the Ute Indian Tribal Court.[5] As the First Circuit explained in reference to a contractual forum-selection clause:

> The district court resolved the Authority's claim of supervening tribal court jurisdiction by turning directly to the contract's forum-selection clause and passing upon its enforceability, *see Ninigret*, 32 F. Supp. 2d at 504-05, thus holding, by implication, that the tribal exhaustion doctrine does not apply to

[5] *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8.

> the interpretation of such a provision. There is a difference of opinion, however, as to whether contractual forum-selection clauses escape application of the doctrine. *Compare Basil Cook*, 117 F.3d at 63-64, 69 (affirming application of tribal exhaustion doctrine despite the presence of an arbitration clause in the contract *sub judice*), and *Snowbird*, 666 F. Supp. at 1444 (holding that the initial interpretation of a contractual forum-selection clause must be made by the tribal court) with *Altheimer*, 983 F.2d at 814-15 (deciding that the tribal exhaustion doctrine did not apply to a forum-selection clause in a contract between a non-Indian corporation and an Indian manufacturing company). Although the question is close, we believe that, under *National Farmers*, the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract. *See National Farmers*, 471 U.S. at 855-56, 105 S. Ct. 2447. At that stage, the pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum-selection proviso). *See Iowa Mut.*, 480 U.S. at 16, 107 S. Ct. 971; *National Farmers*, 471 U.S. at 855-57, 105 S. Ct. 2447. This logic indicates that where, as here, the tribal exhaustion doctrine applies generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the tribal court. *See Basil Cook*, 117 F.3d at 63-64, 69; *Snowbird*, 666 F. Supp. at 1444.
>
> We also believe that this approach comports with the concern for tribal sovereignty that forms the epicenter of the tribal exhaustion doctrine. *See El Paso Natural Gas*, 526 U.S. at 483, 119 S. Ct. at 1437; *National Farmers*, 471 U.S. at 856, 105 S. Ct. 2447. For the district court to bypass the tribal court and interpret the forum-selection clause itself would place the two judicial systems in direct competition with each other, and thereby undermine the tribal court's authority over tribal affairs. Proper respect for tribal legal institutions counsels convincingly against putting courts on such a collision course. *See Iowa Mut.*, 480 U.S. at 16, 107 S. Ct. 971; *see also National Farmers*, 471 U.S. at 857, 105 S. Ct. 2447 (admonishing a lower federal court to "stay its hand until the Tribal Court has had a full opportunity to determine its own jurisdiction").

Ninigret Dev. Corp., 207 F.3d at 33. That same rationale applies here and it also comports with the reasoning of the Utah Supreme Court in *Harvey*. *Accord* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.04[3], p. 634-35 (to hold that a forum-selection or

other contractual clause eliminates the need for tribal court exhaustion "overlooks the fact that the enforceability of a choice-of-forum [or other contract] clause may itself raise questions of tribal law.").

Here, the legality and enforceability of the Becker IC Agreement itself presents questions of tribal law. Therefore, this Court must afford the Ute Indian Tribal Court precedence over the Becker contract dispute.

II. The Tribal Defendants Have Properly Asserted Tribal Court Exhaustion in Becker

Defendants first raised the need for tribal court exhaustion in this case in their "Motion to Stay the State Court Action Pending the Conclusion of Proceedings in the Ute Indian Tribal Court" filed on March 3, 2017.

III. No Exception to Tribal Court Exhaustion Applies Here

Exhaustion of tribal court remedies is mandatory except where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856, n.21. None of those exceptions apply here. Because the legal dispute arises out of Mr. Becker's consensual relationship with the Ute Tribe—Becker's on-reservation contract and work for the Tribe—jurisdiction over

the dispute "presumptively lies" in the Ute Indian Tribal Court.[6] This means that there is no bad faith or ill motivation in the Tribal Defendant's resort to tribal court.

In the same vein, exhaustion here will not be futile based on an inadequate "opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856, n.21. In point of fact, Mr. Becker is challenging the tribal court's jurisdiction at this time, and that challenge is awaiting a ruling from the Tribal Court at this time.

CONCLUSION

Civil jurisdiction over "the activities of non-Indians on reservation lands … presumptively lies" in tribal courts.[7] The Utah Supreme Court's decision in *Harvey* requires this Court to abide by the doctrine of tribal court exhaustion.

Respectfully submitted this 29th day of November, 2017.

FREDERICKS PEEBLES & MORGAN LLP

/s/ Frances C. Bassett
Frances C. Bassett, *Admitted Pro Hac Vice*
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J. Preston Stieff

Attorneys for Defendants

[6] *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8.

[7] *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2017, I caused a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM ON THE EXHAUSTION OF TRIBAL COURT REMEDIES** with the Clerk of the Court using the electronic filing system which will send notification of such filing to all parties of record as follows:

David K. Isom
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/s/ J. Preston Stieff
J. Preston Stieff

Exhibits to Defendants' Memorandum on the Exhaustion of Tribal Court Remedies

EXHIBIT A

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

WD AT THE CANYON, LLC, et al., *Plaintiffs/Appellants*,

v.

WAYLON HONGA, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0468
FILED 11-14-2017

Appeal from the Superior Court in Maricopa County
No. CV2015-094807
The Honorable David King Udall, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 WD at the Canyon, LLC and James R. Brown (collectively "WD") appeal the superior court's dismissal of its lawsuit against defendants Waylon and Charlotte Honga, Charles and Artemisa Vaughn, Carrie Imus, Daniel Alvardo, Neil and Mary Ann Goodell, Derrick and Jennifer Penney, Camille Nighthorse, Michael Vaughn, Wilfred Whatoname, Sr., and Jennifer Turner (collectively "Tribal Defendants"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2005, WD entered into an agreement with Hwal'Bay Ba:j Enterprises, Inc. doing business as Grand Canyon Resort Corporation ("GCRC"), an entity of the Hualapai Tribe, for the development of a western-themed tourist attraction ("Western Town"). After WD completed construction of Western Town on the Hualapai reservation, GCRC inspected and accepted the finished product. Under the agreement's terms, Brown had the right to manage Western Town and collect management fees.

¶3 A year later, WD and GCRC entered into another agreement for WD to build cabins near Western Town. WD subsequently constructed 26 cabins. Together Western Town and the cabins make up the "Hualapai Ranch," and under the two agreements, Brown managed the Hualapai Ranch.

¶4 In 2010, the then-interim CEO of GCRC and Brown entered into a new agreement that combined the two previous agreements. The 2010 agreement superseded the two prior agreements and constituted the entire agreement between GCRC and WD. One provision in the 2010 agreement provided that the Hualapai Tribe would be the exclusive venue and jurisdiction for any litigation under the agreement and all other civil or criminal matters arising out of the services provided.

¶5 Over the next two years, while defendant Honga was GCRC's CEO, WD's relationship with GCRC began to deteriorate. In September 2012, a horse on the Hualapai Ranch with hip issues had to be put down. After consulting a veterinarian and horse chiropractor, WD elected to have the Hualapai Police Department euthanize the horse. Although the Haulapai Police Department reported that it had euthanized the horse after WD consulted a veterinarian, GCRC investigated whether WD followed proper procedures in euthanizing the horse and whether the horse had been abused.

¶6 During this time, defendant Turner became GCRC's CEO. At a December 2012 meeting, on GCRC's behalf, Turner provided WD with a notice of events of default and termination letter. The letter stated that WD had breached certain requirements in the 2010 agreement and provided instructions on how to cure the breach within a 30-day deadline. According to the letter, a barn on Hualapai Ranch had to be condemned because it had deteriorated and other buildings did not meet the requirements set forth in the 2010 agreement. WD disagreed that it had defaulted or had breached any provision in the 2010 agreement and attempted to meet with GCRC board members to discuss how to move forward. Turner and the GCRC board did not meet with or respond to WD until after the 30-day cure period had ended. Because WD had not cured the events of default within the 30 days provided, GCRC terminated the 2010 agreement in February 2013.

¶7 In March 2013, an Arizona Republic article on the Tribe's dealings with outside investors quoted defendant Charles Vaughn, a Tribal Council member, as saying that "outside investors violated legal agreements, and the Indian nation has an absolute right to determine what happens on the reservation." Vaughn did not specifically make any comments about WD.

¶8 In January 2014, WD sued GCRC in the Hualapai Tribal Court for breach of contract arising from GCRC's termination of the 2010 agreement. Four months later, WD amended its complaint to add several tort claims against the Tribal Defendants, minus defendants Honga and Charles Vaughn. The Tribal Defendants moved to dismiss for lack of subject matter jurisdiction, which the tribal court granted in August 2015. The tribal court found that it lacked subject matter jurisdiction because GCRC and the individual Tribal Defendants had sovereign immunity from suit and that they had not waived that immunity. WD appealed the tribal court's order to the Hualapai Nation Court of Appeals.

¶9 In November 2015, while its appeal in the tribal court was pending, WD initiated this suit against the Tribal Defendants in Maricopa County Superior Court. WD alleged two counts of fraud and misrepresentation against each of the individual defendants. One count pertained to GCRC's investigation after WD decided to euthanize the Hualapai Ranch horse, and the other pertained to GCRC's notice of events of default letter sent to WD. Additionally, WD alleged that all the defendants, in their individual capacities and not as representatives of GCRC or the Hualapai Tribe, had conspired to fraudulently convince GCRC's board to terminate the 2010 agreement, and engaged in a pattern of unlawful activity under A.R.S. § 13–2314.04.

¶10 Turner answered WD's complaint and denied that jurisdiction and venue were appropriate in the superior court. Shortly thereafter, the other Tribal Defendants moved to dismiss pursuant to Arizona Rules of Civil Procedure 12(b)(1), (2), and (6) on a variety of alternative grounds, including: (1) tribal sovereignty, (2) tribal sovereign immunity, (3) Hualapai tribal law's one-year statute of limitations, (4) the 2010 agreement's provision that the tribal court had exclusive jurisdiction, (5) doctrine of exhaustion due to WD's pending appeal in the Hualapai Nation Court of Appeals, and (6) WD's failure to state claims upon which relief could be granted. With their motion to dismiss, the Tribal Defendants included a declaration from Tribal Defendant Carrie Imus. Imus's declaration stated that each Tribal Defendant acted within the scope of his or her official tribal positions and that the decision to cancel the 2010 agreement was a corporate decision of GCRC's board made after WD breached the agreement. Turner subsequently moved to join the motion to dismiss.

¶11 In June 2016, the superior court held oral argument on the motion to dismiss. The superior court found that the Tribal Defendants were either GCRC board members, GCRC executives, or Hualapai Tribal council members and "permitting this case to be heard in this Court would contravene the tribal sovereignty of the Hualapai Tribe." The court further found that the Hualapai Tribe had clear jurisdiction over WD's claim and "any action by this Court would interfere and infringe upon the Tribe's sovereignty and ability to self-govern." Accordingly, the court granted Turner's motion to join and the Tribal Defendant's motion to dismiss. WD timely appealed. During the time this appeal was pending, the Hualapai Nation Court of Appeals issued its decision affirming the tribal court's ruling that the individual tribal defendants had sovereign immunity from suit.

DISCUSSION

1. Motion to Dismiss

¶12 WD argues that the superior court erred by granting the Tribal Defendant's motion to dismiss. We review a motion to dismiss for an abuse of discretion, *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 107 ¶ 11 (App. 2007), but the superior court's decision to dismiss for lack of subject matter jurisdiction is reviewed de novo, *Gnatkiv v. Machkur*, 239 Ariz. 486, 487 ¶ 8 (App. 2016). In resolving jurisdictional fact issues, the superior court may properly consider affidavits and exhibits without converting a motion to dismiss for lack of jurisdiction into one for summary judgment. *Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App. 1991). When that occurs, we view the evidence in the light most favorable to upholding the court's ruling and may infer any necessary findings the evidence reasonably supports. *Id.* Because extending state jurisdiction here would infringe on the Tribe's sovereignty and ability to self-govern, the superior court did not err by granting the motion to dismiss.

¶13 Native American tribes have long been considered sovereign nations and have the right to govern themselves: "In recognition of their sovereignty, '[t]he [United States] Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation.'" *Begay v. Roberts*, 167 Ariz. 375, 378 (App. 1990) (quoting *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, 149 Ariz. 524, 529 (1986)). Absent governing acts of Congress, the question whether states have subject matter jurisdiction depends on whether the state action "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171–72 (1973). When "the activity in question moves off the reservation[,] the State's governmental and regulatory interest increases dramatically, and federal protectiveness of Indian sovereignty lessens." *Smith Plumbing Co.*, 149 Ariz. at 530. As such, determining the limits of state power regarding tribal sovereignty turns on whether state court jurisdiction will "frustrate federal policy or violate traditional notions of tribal sovereignty." *Id.* at 529.

¶14 Here, the superior court correctly found that tribal sovereignty would be infringed if the state accepted jurisdiction. WD's claims are against individual tribal defendants who acted in their official capacity as either GCRC board members, executives, or Tribal council members. Additionally, the two activities that gave rise to the alleged fraud

and misrepresentations occurred solely on the Hualapai reservation. The first activity, the horse incident, makes up half the counts against each individual tribal defendant. The horse was on the Hualapai Ranch when its hip became dislocated and WD decided to euthanize it. Further, a Hualapai police officer reported to the scene to euthanize the horse. GCRC's decision to conduct its own investigation into the matter and create its own report further supports that this activity occurred exclusively on the Hualapai reservation.

¶15 The second activity the other fraud and misrepresentation counts stem from is the alleged acts of default stated in the letter. In December 2012, GCRC provided WD with a notice of events of default letter, which outlined all WD's alleged breaches. The letter went into detail about several buildings and areas on the Hualapai Ranch that GCRC believed had to be repaired or condemned due to WD's failure to service them. This alleged fraudulent act of condemning buildings and falsely reporting other breaches all occurred on the Hualapai reservation.

¶16 WD counters that the acts of fraud and misrepresentation were not solely located within the reservation and were not necessarily carried out on the tribe's behalf. To support this contention, WD points to the article in The Arizona Republic in which Charles Vaughn was quoted. WD contends that because Vaughn stated that "outside investors" breached their agreements with GCRC, and because the article can be viewed and read outside the reservation, the state court has an interest in exercising its jurisdiction over the claims. But Vaughn's interview with a statewide newspaper did not transform the events discussed in the interview into off-reservation activities. Vaughn's interview thus did not increase the state's governmental and regulatory interest such that a state court would be warranted in accepting jurisdiction to address claims relating to conduct that occurred on the reservation and that was directly related to a contractual agreement relating to on-reservation activities.

¶17 In this factual scenario, WD's arguments are without merit. Although WD is correct that the United States Supreme Court has limited a broad view of tribal sovereignty, *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983), any state jurisdiction here would surely infringe on the Hualapai Tribe's right to self-governance. Even in cases in which a state may properly exercise jurisdiction over the tribal members' on-reservation activities, the land where the activities occurred was taken into consideration. *See id.* at 332 n.15 (finding that *Puyallup Tribe Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), and *Montana v. United States*, 450 U.S. 544 (1981), "rested in part on the fact that the dispute

centered on lands which, although located within the reservation boundaries, no longer belonged to the tribe."). The activities here all occurred on the Hualapai reservation and involved Hualapai Tribe officials. Thus, the superior court properly dismissed WD's claims based on lack of subject matter jurisdiction and we need not address the alternative reasons for dismissal.

2. Dismissal with Prejudice

¶18 WD argues that even if the superior court did not err by dismissing its complaint, the dismissal should have been without prejudice. WD contends that because the superior court dismissed its complaint with prejudice, "it has effectively taken upon itself to override the Hualapai Tribe Court of Appeals' opportunity to exercise tribal sovereignty and resolve the pending tribal court appeal by issuing a final judgment on the merits that could in turn foreclose further review by a tribal court." But the Hualapai Nation Court of Appeals already issued its opinion in September 2016, affirming the tribal court's ruling that the individual tribal defendants had tribal sovereign immunity from suit. Even if the dismissal for lack of subject matter jurisdiction should have been without prejudice, *see Chavez v. State of Ind. for Logansport State Hosp.*, 122 Ariz. 560, 562 (1979), we need not address that issue because it is now moot, *see Flores v. Cooper Tire and Rubber Co.*, 218 Ariz. 52, 57 ¶ 24 (App. 2008) ("The mootness doctrine directs that opinions not be given concerning issues which are no longer in existence because of changes in the factual circumstances."). Because the Hualapai Nation Court of Appeals issued its opinion while this case was on appeal, the superior court's dismissal with prejudice does not affect the Hualapai Nation Court of Appeals' authority as WD suggests.

CONCLUSION

¶19 For the foregoing reasons, we affirm.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA

EXHIBIT B

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IN THE UTE INDIAN COURT OF THE UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian tribe and a federally-chartered Corporation; THE UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; and UTE ENERGY HOLDINGS LLC, a Delaware LLC, Plaintiffs, v. LYNN D. BECKER, Defendant.	**PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THE BECKER IC AGREEMENT IS VOID UNDER UTE INDIAN TRIBAL LAW** Case No. CV-16253 **JUDGE THOMAS WEATHERS**

Pursuant to Rule 27 of the Ute Indian Rules of Civil Procedure, the Ute Indian Tribe, its Tribal Business Committee, and Ute Energy Holdings LLC, a wholly tribally-owned entity (collectively the "Tribal Plaintiffs"), move for partial summary judgment and

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2017, I caused a true and correct copy of the foregoing **PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THE BECKER IC AGREEMENT IS VOID UNDER UTE INDIAN TRIBAL LAW** with the Clerk of the Court via Federal Express and electronically via e-mail to all parties of record as follows:

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UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian tribe and a federally-chartered Corporation; THE UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; and UTE ENERGY HOLDINGS LLC, a Delaware LLC, Plaintiffs, v. LYNN D. BECKER, Defendant.	**PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THE BECKER INDEPENDENT CONTRACTOR AGREEMENT IS VOID *AB INITIO* UNDER FEDERAL LAW** Case No. CV-16253 **JUDGE THOMAS WEATHERS**

Pursuant to Rule 27 of the Ute Indian Rules of Civil Procedure, the Ute Indian Tribe, the Tribal Business Committee, and Ute Energy Holdings LLC, a wholly tribally-owned entity (collectively the "Tribal Plaintiffs"), move for partial summary judgment and

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FORT DUCHESNE, UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian tribe and a federally-chartered Corporation; THE UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; and UTE ENERGY HOLDINGS LLC, a Delaware LLC, Plaintiffs, v. LYNN D. BECKER, Defendant.	**PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THE WAIVER OF SOVEREIGN IMMUNITY UNDER THE BECKER IC AGREEMENT IS INVALID UNDER TRIBAL LAW** Case No. CV-16253 **JUDGE THOMAS WEATHERS**

Pursuant to Rule 27 of the Ute Indian Rules of Civil Procedure, the Ute Indian Tribe, the Tribal Business Committee, and Ute Energy Holdings LLC, a wholly tribally-owned entity (collectively the "Tribal Plaintiffs"), move for partial summary judgment and

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2017, I caused a true and correct copy of the foregoing **PLAINTIFFS' MOTION AND SUPPORTING MEMORANDUM FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THE PURPORTED WAIVER OF SOVEREIGN IMMUNITY UNDER THE BECKER IC AGREEMENT IS INVALID UNDER TRIBAL LAW** with the Clerk of the Court via Federal Express and electronically via e-mail to all parties of record as follows:

Clark Allred
Allred, Brotherson & Harrington, P.C.
72 N. 300 East (123-14)
Roosevelt, Utah 84066

David K. Isom
ISOM LAW FIRM PLLC
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111

Defendant's Counsel

Debra Foulk
Legal Assistant to Frances C. Bassett

EXHIBIT C

From:	Thomas Weathers
To:	Debra Foulk
Cc:	david@isomlawfirm.com; "roosevelt@abhlawfirm.com"; julieh@ixoodswp.com; Roberta Cesspooch (robertac@utetribe.com); Frances Bassett; Thomasina Real Bird; Elizabeth Miller; "sandyp@utetribe.com"
Subject:	RE: Ute Indian Tribe, et al. v. Lynn D. Becker, Ute Tribal Court, Case No. CV-1625
Date:	Tuesday, November 21, 2017 4:47:26 PM

Counsel,

I have received numerous motions and filings; I have the following:

1. Plaintiff motions for partial MSJ (9/19/17)

2. Defendant Rule 56(d) motion (10/17/17)
   Plaintiff opposition to Rule 56(d) motion (11/1/17)
   Defendant reply in support of Rule 56(d) motion (11/21/17)

3. Plaintiff motion to submit sur-reply re Rule 56(d) motion (11/17/17)

4. Defendant motion to dismiss (11/2/17)
   Plaintiff objection to second motion to dismiss (11/7/17)
   Defendant reply in support of motion to dismiss (11/21/17)

5. Plaintiff motion to dismiss counterclaims (11/13/17)

6. Plaintiff motion for protective order (11/1/17)
   Defendant opposition to motion for protective order (11/21/17)
   Plaintiff reply in support of motion for protective order (11/21/17)

If I am missing something, please let me know; I will address next week the motion for protective order, then defendant's motion to dismiss, then the other motions when they are fully briefed; I would like Defendant's counsel to file by early next week a response to the request to file a sur-reply; I will then rule on that request; there will be no reply in support of the request to file a sur-reply.

Judge Thomas Weathers

EXHIBIT D

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Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE 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 MEMORANDUM REGARDING *HARVEY* AND TRIBAL COURT EXHAUSTION** Case No. 140908394 JUDGE BARRY LAWRENCE

This is plaintiff Lynn Becker's memorandum regarding *Harvey v. Ute Indian Tribe*[1] that the Court requested.

HARVEY

On November 7, 2017, the Utah Supreme Court published *Harvey.* In a 3–2 majority opinion, the Utah Supreme Court recognized an implied duty of tribal court exhaustion under some circumstances relating to tort claims against an Indian tribe.

1 2017 UT 75, 2017 Utah LEXIS 170, 851 Utah Adv. Rep. 19.

As to issues other than exhaustion, the Court was unanimous. As to exhaustion, however, Justice Durham wrote the majority opinion, in which Utah Court of Appeals Judge Kate Toomey (sitting for recused Justice Pearce) and Justice Himonas, joined. Associate Chief Justice Lee wrote a dissenting opinion on exhaustion, in which Chief Justice Durrant joined.

Justice Himonas wrote a separate concurring opinion that is particularly significant here for two reasons. First, "the majority opinion incorporates Justice Himonas's concurring opinion,"[2] thereby making the concurring opinion part of the majority opinion. Second, the concurring opinion raises the question whether a certain tribal ordinance – Section 1-2-3(5) – is currently in effect, and instructs that, if so, the very exhaustion duty that the Court recognizes would not apply. Section IV below shows that the indicated ordinance does in fact apply, and should single handedly destroy any possibility of a *Harvey* duty of exhaustion.

The Supreme Court held that under certain circumstances, before an action against an Indian tribe may be filed by a non-member of the tribe in a Utah state district court,[3] the non-member must sue in tribal court and exhaust remedies that may be available to the non-member plaintiff in the tribal court. This Court ordered[4] the parties here to address the question "whether the tribal exhaustion doctrine applies to cases such as this, where the Tribe has expressly waived its sovereign immunity and consented to jurisdiction in Utah State Court." The clear answer is clearly no.

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2 *Himonas* ¶ 3.

3 The clear implication of *Harvey,* contrary to the Tribe's arguments in this case and consonant with this Court's prior rulings, is that, in general, and in the absence of specific exceptions such as tribal remedies exhaustion, Utah state courts have jurisdiction to adjudicate claims against Indian tribes.

4 Minute Entry dated November 16, 2017 ("Minute Entry").

ARGUMENT

The following shows that no exhaustion right or duty exists here because: (1) the Agreement expressly rejects any exhaustion; (2) the major factors that led the *Harvey* court to recognize an exhaustion duty do not exist here; (3) comity, the principal underlying exhaustion, weighs against exhaustion here, not in favor; (4) no exhaustion duty applies here because the tribal court lacks jurisdiction of Becker's claims; and (5) any exhaustion duty is prevented by the harassment exception to exhaustion.

I. The Tribe Expressly Waived Any Exhaustion Duty

The Court's Minute Entry quoted the portion of Article 23 regarding waiver of sovereign immunity that the parties have discussed and that the Court has previously adjudicated. The remainder of the language in the paragraph that the Court quoted from Article 23 expressly answers the question whether an exhaustion duty exists here. The answer is no, because the Tribe expressly waived any exhaustion duty. That Article 23 language is crystal clear:

> The court or courts so designated [i.e., the federal court and the 'court of competent jurisdiction'] shall have, to the extent the Parties can so provide, original and *exclusive* jurisdiction, concerning all such Legal Proceedings, and *the Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.*

Just as a clear, express waiver of sovereign immunity is effective and enforceable, a clear, express waiver of tribal court exhaustion is effective and enforceable.[5] Nothing in *Harvey* suggests that a contract provision waiving tribal court exhaustion should be

5 *Ninigret Dev. Corp. v. Narrangansett Indian Wetuomuck Housing Auth.,* 207 F.3d 21, (1st Cir. 2000) (no exhaustion duty exists where a tribe has "explicitly waived exhaustion").

less enforceable that a provision waiving sovereign immunity. Nothing in *Harvey* suggests that an exhaustion duty may be implied in the face of an express waiver of exhaustion.

II. Even without the Express Contractual Waiver of Exhaustion, the Circumstances Upon Which the *Harvey* Exhaustion Duty May Be Implied are Not Present Here

The *Harvey* Court did not provide a definition of the reach of the implied duty that it created, or even a list of factors that must be satisfied or considered in determining when an exhaustion duty may be implied. But the factors that the *Harvey* Court emphasized in framing an implied exhaustion duty are absent here.

For example, *Harvey* "concerns a tribes' right to exclude individuals from their land."[6] There, "the majority of the actions Harvey complains of relate to the ability of the Ute Tribe to exclude non-Indians from their reservation."[7] This included numerous issues of permitting and regulations created or controlled by tribal law. *Becker* does not.

Harvey "seeks injunctions to restrain the tribe and tribal officials" from interfering with Harvey's business with several oil gas companies.[8] Becker does not.

In *Harvey,* in the absence of a contract selecting whether state law or tribal law controlled the material legal issues in the case, it appeared that tribal law would govern many issues.[9] Not so here, where the parties selected Utah law to govern the Agreement.

These distinctions suggest that the duty of exhaustion implied by *Harvey* should not be implied here, even without the express contractual waiver of exhaustion.

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6 *Harvey* at ¶ 42.
7 *Harvey* at ¶ 43.
8 *Harvey* at ¶ 43.
9 *Harvey* at ¶¶ 46 - 53.

III. Even without the Express Contractual Waiver of Exhaustion, *Harvey* Recognizes that Any Implied Exhaustion Duty Is Grounded In Comity, Which Weighs Against Implying the Duty Here

The exhaustion duty is "based on principles of comity,"[10] and is discretionary, not jurisdictional.[11] An exhaustion duty is not implied where, as here, comity interests would not be served. The rationale of the comity interests here is to support tribal self-determination and self-governance.[12] Here, the Tribe clearly and expressly waived tribal court exhaustion and other rights such as sovereign immunity precisely to induce Becker to enter into the Agreement. The Tribe's interest in self-governance and self-determination includes the important right of the Tribe, when it so chooses, reliably to waive tribal court exhaustion in order to contract with non-Indians without limiting dispute resolution to tribal courts. If parties wishing to contract with an Indian tribe cannot rely upon an express waiver of tribal court exhaustion, the tribe "may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught."[13] "To refuse enforcement of [forum and jurisdictional provisions such as the waiver of tribal court exhaustion] would be to undercut the Tribe's self-government and self-determination."[14] Thus, the comity foundation of *Harvey* weighs *against* exhaustion, not *for*. To imply a duty of exhaustion when a tribe and parties wishing to contract with a tribe expressly waive any duty of exhaustion would be to deprive the parties of important rights and to cripple the ability of tribes in the United States to do business with non-Indians.

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10 *Harvey* at ¶ 42, *quoting Nevada v. Hicks,* 533 U.S. 353, 398 (2001).
11 *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 20 n. 8 (1987) ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.")
12 *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 856 (1985).
13 *Altheimer & Gray,* 983 F.2d 803, 815 (7th Cir. 1993).
14 Id.

IV. Even without the Express Contractual Waiver of Exhaustion, No Exhaustion Is Required Because the Ute Tribal Court Lacks Jurisdiction of this Dispute

The exhaustion doctrine has five well-recognized exceptions.[15] This section shows that exceptions 2 and 5 apply here to prevent exhaustion. The Section V below shows that exhaustion is also prevented by the Exception 1 to any exhaustion duty – the harassment and bad faith exception to exhaustion.

Exception 2 precludes exhaustion where "(2) the [tribal court] action is patently violative of express jurisdictional prohibitions…."[16] Exception 5 precludes exhaustion where it is "clear that the tribal court lacks jurisdiction so that the exhaustion requirement 'would serve no purpose other than delay.'"[17] Both of these exceptions boil down to the self-evident proposition that there can be no duty to file an action or exhaust remedies in a tribal court that clearly lacks jurisdiction to adjudicate the dispute.

All five *Harvey* Justices agreed with this principle. Justices Lee and Durrant would have found no implied exhaustion duty at all, and the majority Justices, speaking through Justice Himonas' concurring opinion, declaimed as much. Justice Himonas wrote that the state district court should "explore whether the [non-Indian] plaintiffs have any nonfrivolous basis for filing … their … claims in tribal court. At first blush (and perhaps

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15 These exceptions are: (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the tribal court action is patently violative of express jurisdictional prohibitions; (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; (4) where it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by the main rule established in *Montana v. United States*; and (5) where it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay. *See generally Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir. 2006).

16 *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 85, fn. 21 (1985); *Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir. 2006).

17 *Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir. 2006).

even in the final analysis), the Ute Law and Order Code appears to bar" claims against the Tribe.[18] In a footnote, Justice Himonas explained that his research had revealed what the record on appeal did not pin down – namely that a provision (Section 1-2-3(5)) of the Ute Law and Order Code appeared to deprive the Ute Tribal Court of jurisdiction of the claims that the Supreme Court required to be exhausted if that court had such jurisdiction.

Fortunately, this Court has available to it what Justice Himonas and the rest of the *Harvey* majority could only see dimly in the incomplete *Harvey* record.

Becker recently discovered (in late October 2017), the 2011 decision of the Ute Tribal Court, *Yazzie v. Ute Tribal Court,*[19] attached hereto as Exhibit A.

Yazzie shows that Section 1-2-3(5),[20] referred to by Justice Himonas in *Harvey,*[21] and its predecessor Section 1-2-3(4)[22] of the Ute Law & Order Code enacted pursuant to Ordinance 87-04n effect from 1987 through 2013, provide:

> 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 [or] the Tribal Business Committee….

Thus, this prohibition upon claims in the Ute Tribal Court against the Ute Tribe and against the Tribal Business Committee was in effect in 2005 when Becker and the Tribe entered into the Agreement, and throughout the duration of this action, and when *Harvey* was decided.

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18 *Harvey* ¶ 110.
19 *Yazzie v. Ute Indian Tribe,* CV-09-188 (Ute Tribal Court, February 17, 2011). Exh A.
20 Ute Law & Order Code, Section 1-2-3(5). Attached hereto as Exhibit B.
21 *Harvey* ¶ 110.
22 *Yazzie* shows that Section 1-2-3(5) was adopted in 2013 as part of Tribal Ordinance 13 – 010 attached hereto as Exh B. The predecessor of Ordinance 13 – 010, namely Ordinance 87-04, was in effect from 1987 through 2013 and contained the identical language quoted above. This language was codified in 1987 as Section 1-2-3(4)).

The Tribe has recently affirmed that Section 1-2-3(5) is currently effective.[23] Thus, this Court now has available to it what the *Harvey* court lacked -- the admission of the Tribe that Section 1-2-3(5) is indeed effective tribal law, and an opinion of the Ute Tribal Court interpreting Section 1-2-3(5) to confirm that the Ute Tribal Court lacks jurisdiction of claims against the Ute Tribe and Ute Business Committee. Had these matters been before the *Harvey* court, *Harvey* would not have implied an exhaustion duty.

Yazzie shows that the Ute Tribal Court lacks jurisdiction to adjudicate Becker's claims. That is, *Yazzie* and the tribal ordinance that *Yazzie* authoritatively construes – the very Section 1-2-3(5) that Justice Himonas flagged – defeats any *Harvey* exhaustion duty because *Yazzie* and Section 1-2-3(5) answer in the affirmative the question that Justice Himonas flagged in *Harvey.*

Judge Himonas' footnote 4 makes it clear that if the Ute Tribe had made *Yazzie* available to the Utah Supreme Court, with its affirmation that Section 1-2-3(5) deprives the Tribal Court of the very jurisdiction necessary to adjudicate the claims as to which the Supreme Court implied a duty to exhaust in the Tribal Court, no implied exhaustion duty would have been recognized in *Harvey*. Together, *Harvey, Yazzie* and Section 1-2-3(5) mandate that no exhaustion duty exists here.

V. Any Exhaustion Duty Is Precluded by the Bad Faith Exception

No tribal court exhaustion duty exists "where an assertion of tribal jurisdiction is 'motivated by a desire to harass or is conduct in bad faith.'"[24] The following shows that

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23 In a memorandum filed in the Ute Tribal Court November 7, 2017, the Tribe represented that "the applicable law is ordinance No. 13-010 and Section 1-2-3(5) and that this ordinance was effective as of the November 2017 date of the Tribe's memorandum.

24 *Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir. 2006) (citations omitted).

the Tribe's contention that the Tribe has the right to have this dispute litigated in the Tribal Court is harassing and bad faith.

A. *Yazzie* Trumps *Toole*

The Tribe has repeatedly argued in this case[25] that the August 2010 Ute Tribal Court opinion *Toole v. Ute Water Settlement Accounting Services, LLC*[26] authoritatively shows that the Tribe did not properly waive sovereign immunity. The Tribe argues that *Toole* holds that under Tribal law the waiver of tribal sovereign immunity that is clearly stated in the Agreement is void because the waiver was not contained within the four corners of the resolution approving the Agreement, but only incorporated in the resolution by reference. Becker's recent discovery of *Yazzie* shows that this argument is wrong, and that the Tribe knew that the argument was wrong when the arguments were made.[27]

Decided six months after *Toole, Yazzie* rejected the very interpretation of *Toole* that the Tribe continues to advance in this action. *Yazzie* held that a resolution incorporating a contract with waiver language is a valid waiver of tribal sovereign immunity even where only the contract, and not the resolution, contains the waiver language. The Tribe has argued that it has been justified in concealing *Yazzie* because the holding of *Yazzie* is a "nullity." This is so, the Tribe argues, because the *Yazzie* tribal court concluded that it lacked jurisdiction of Yazzie's claims.[28]

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25 E.g., Tribe's Memorandum in Support of Motion to Dismiss dated February 2, 2015.
26 Case No. CV-09-161 (Ute Tribal Court. Attached hereto as Exh E.
27 Fredericks, Peebles & Morgan LLP, counsel here, represented the Tribe in both *Yazzie* and *Toole.* For example, counsel Thomasina Real Bird lists on her biographical summary on the firm's website that she has represented the Ute Tribe in *Becker, Yazzie* and *Toole* as "principal cases" that she has handled. http://www.ndnlaw.com/attorneybio.php?id=102.
28 E.g., Email from Bassett to Isom dated October 20, 2017. Exh F.

This attack upon the precedential value of *Yazzie* is unjustified. The Tribe's argument misses a critical distinction. A judgment rendered without jurisdiction may be a nullity for the purpose of enforcing any rights or duties ostensibly created by the judgment. That does not mean, however, that a court's opinion explaining the lack of jurisdiction lacks any precedential value merely because the upshot of the opinion is that the court rendering the opinion ultimately concludes that it lacks jurisdiction. For example, the federal action that Becker initiated against the Tribe in 2013 resulted in an opinion by District Judge Benson concluding that he lacked jurisdiction. The conclusion of the court that it lacked jurisdiction has not prevented other courts, however, from citing Judge Benson's opinion and treating the opinion as valid precedent.[29] *Yazzie* is good law, and the Tribe's continued touting of the *Toole* decision that *Yazzie* repudiates is improper.

B. *Yazzie* Shows that the Parties to the Agreement Intended this that Court, Not the Tribal Court, Was the "Court of Competent Jurisdiction" to Adjudicate Becker's Claims

The Tribe has also argued in this action (and in federal and tribal courts) that this Court is not a "court of competent jurisdiction" within the meaning of Article 23 of the Agreement because the parties intended by this contract language that Becker's claims under the Agreement were to be litigated in the tribal court if federal jurisdiction were found to be lacking. *Yazzie* destroys this argument by showing that, when the Tribe entered into the Agreement, the tribal ordinance (87-04)[30] in effect prohibited tribal court

29 E.g., *Olson v. Belvedere Ass'n,* 2015 U.S. Dist. LEXIS 44353, fn. 26 (D. Utah, April 2, 2015) (citing the *Becker* decision for the proposition that a federal case meets the "arising under" requirement for Section 1331 subject matter jurisdiction if it is apparent from the face of the complaint that federal law creates the plaintiff's cause of action).

30 As shown above, the relevant language of Section 1-2-3(4) effective from 1987 through 2013 that was codified from Ordinance 87-04 was identical to that of Section 1-2-3(5) codified from the 2013 ordinance.

jurisdiction over Becker's claims. The parties could not have intended the tribal court that lacked jurisdiction of Becker's claims was at the same time a "court of competent jurisdiction" to adjudicate Becker's claims.

CONCLUSION

Becker respectfully requests that the Court hold that no duty of tribal court exhaustion exists here.

Dated: November 29, 2017.

ISOM LAW FIRM PLLC

/s/ David K. Isom

_____

David K. Isom
Attorney for Plaintiff
Lynn D. Becker

TABLE OF EXHIBITS

CERTIFICATE OF SERVICE

The foregoing was served upon defendants' counsel through the Court's ECF system this 29th day of November, 2017.

/s/ David K. Isom

EXHIBIT A

IN THE UTE TRIBAL COURTS
FOR THE UINTAH AND OURAY INDIAN RESERVATION
FORT DUCHESNE, UTAH

LARRY KEE YAZZIE, Plaintiff, vs. UTE INDIAN TRIBE, BUSINESS COMMITTEE OF THE UTE INDIAN TRIBE, AND JOHN DOES 1 - 10, Defendants.	**RULING ON MOTION TO ALTER OR AMEND JUDGMENT** Case No. CV-09-188 Judge Randy A. Doucet

THE COURT having reviewed the Motion and Memoranda filed in this matter, and the Court having been fully apprised in the premises now makes the following:

RULING

Plaintiff brought a motion to enter default against the Defendants. That motion was withdrawn by the Plaintiff during the motion hearing.

The only remaining issue concerns the Defendants' Motion to Alter or Amend Judgment. The defendants request that this Court's previous ruling finding the Tribe waived sovereign immunity in a Chief Judge Contract be reconsidered based on the Ute Tribal Court's decision in Toole v. Ute Water Settlement Accounting Services, LLC, Case No. CV-09-061, (August 2010).

The defendants argue that plaintiff's civil action should be dismissed, because the Toole decision establishes precedent that this Court lacks subject matter jurisdiction over this case. Defendants argue that Resolution 07-329 does not contain an express unequivocal waiver, nor does the contract enforcement clause constitute a waiver under Toole.

Resolution 07-329 incorporated by reference the Chief Judge Contract. Incorporation by reference is a "method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary document." Black's Law Dictionary, Ninth Ed. Pg. 834. "With a contract, the document to be incorporated must be referred to and described in the contract in such a way that the document's identity is clear beyond doubt." Id. Resolution 07-329 was clear beyond doubt that the contract being incorporated by reference was the Chief Judge Contract. The resolution authorized the Chairman of the Business Committee to execute all documents necessary to carry out the intent and purpose of the resolution. The Chairman signed the contract and the Business Committee Secretary certified that the contract was adopted by the Unitah and Ouray Tribal Business Committee under the authority of the Constitution and By-Laws of the Ute Indian Tribe. This case has significant distinctions from Toole. In Toole, there was no resolution adopting the contract, nor any action taken resembling the normal process for waiving sovereign immunity, nor did the Chairman sign Mr. Toole's contract. Toole at 2. Therefore, this Court must treat the Chief Judge Contract as a valid contract incorporated into and made a part of Resolution 07-329.

At issue is whether the "Enforcement of Contract" clause constituted an express wavier of sovereign immunity. The United States Supreme Court recognized tribal sovereign immunity in Turner v. United States, "without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent." Turner v. United States, 248 U.S. 354, 358 (1919). "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." United States v. Fidelity & Guaranty Co. Et Al., 309 U.S. 506, 514 (1940). A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe. Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla. 498 U.S. 505, 509 (1991). Under Tribal law only the Ute Tribal Business Committee may waive immunity by passing a resolution or ordinance which specifically refers to the express wavier. Toole at 8.

Although "magic words" are not required to waive sovereign immunity, there must be a specific textual reference in a resolution or ordinance expressing the tribe's waiver of sovereign immunity. This Court has already established that the Chief Judge Contract was incorporated into Resolution 07-329. A Tribe can expressly waive sovereign immunity by consenting to suit

in an agreement. In U.S. v. Oregon, the Yakima Tribe was found to have expressly consented to suit in an agreement, when the Tribe agreed "[i]n the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of U. S. v. Oregon, Civil 68-513, (D.C.Or.)." United States v. State of Oregon, 657 F.2d 1009, 1016 (1981). In finding that the Yakima Tribe expressly consented to suit, the Court in Oregon considered whether the tribe agreed to submit disputes to a specific forum and whether the tribe submitted to the judgment of the specified forum.

In the Chief Judge Contract, incorporated into Resolution 07-329, the Tribe irrevocably granted to the Ute Tribal Court jurisdiction to hear and decide any and all breach of contract or other claims. However, at this point in the analysis the Court must consider the defendant's argument that the Ute Tribal Court lacks jurisdiction to hear claims against the Tribe pursuant to Ute Tribal Ordinance 87-04. The Chief Judge Contract grants jurisdiction to the Ute Tribal Court to hear contract claims and Ordinance 87-04 divests the Tribal Court of jurisdiction over claims against the Ute Indian Tribe and Tribal Business Committee. Ordinance 87-04, Section B (1).

The issue is whether the Business Committee can by resolution or contract grant jurisdiction to the Ute Tribal Court to hear and decide claims against the Tribe, when there is an ordinance divesting the Ute Tribal Court of jurisdiction over claims against the Tribe.

The Law and Order Code can only be amended by an ordinance. Amendments to the Law and Order Code may be made in the manner provided for by adoption of tribal ordinances. *See* Ute Law and Order Code, §1-1-5. The Tribal Constitution gives the Tribal Business Committee authority to "promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior..." Constitution and By-Laws of the Ute Indian Tribe, Article VI §1 (k). Ordinance 87-04 amending the Law and Order Code was approved by the Business Committee and by the Superintendent of the Uintah and Ouray Agency on November 19, 1987.

The Business Committee has authority to waive sovereign immunity by a resolution, but a tribal ordinance is required to amend the Law and Order Code to restore the Ute Tribal Court's jurisdiction over claims brought against the Tribe and its officers. Neither Resolution 07-329, nor the contract meets the Tribe's statutory and constitutional requirements necessary to amend the Law and Order Code. Therefore, the Ute Tribal Court does not have jurisdiction over the

claims against the Tribe and its officers brought by the Plaintiff. This case should be dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED ADJUDGED and DECREED THAT the Defendants' Motion is granted. Plaintiff's case is dismissed with prejudice.

Dated this 14th day of February, 2011.

JUDGE RANDY A. DOUGET

CERTIFICATION
I CERTIFY THAT THIS DOCUMENT IS A
TRUE AND CORRECT COPY OF THE ORIGINAL
CLERK

EXHIBIT B

THE UTE INDIAN TRIBAL COURTOF THE UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian tribe; the UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE; and UTE ENERGY HOLDINGS LLC, a Delaware LLC, Plaintiffs, vs. LYNN D. BECKER Defendant.	Case No. CV-16253 **ORDER (1) DENYING DEFENDANT'S MOTION TO DISMISS AND (2) DENYING PLAINTIFFS' MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THE WAIVER OF SOVEREIGN IMMUNITY UNDER THE BECKER IC AGREEMENT IS INVALID UNDER TRIBAL LAW** Judge Pro Tem Thomas Weathers

THIS MATTER comes before the Court on (1) Plaintiffs' Motion for Entry of Partial Summary Judgment on the Question of Whether the Waiver of Sovereign Immunity under the Becker IC Agreement is Invalid under Tribal Law filed on or about September 19, 2017 and (2) Defendant's Motion to Dismiss filed on or about November 2, 2017. These motions raise the same legal issue. Plaintiffs are represented by the law firm of Fredericks Peebles & Morgan LLP; Defendant is represented by the law firms of Allred, Brotherson & Harrington, P.C. and the Isom Law Firm. The Court will rule on these motions on the papers submitted without oral argument.

Having reviewed the motions and supporting documents, as well as the pleadings on file herein, the Court hereby DENIES both motions. As a matter of tribal law, the Ute Business Committee may waive the Tribe's sovereign immunity under Section 1-8-5 of the Ute Law and Order Code when the Business Committee adopts a resolution that incorporates by reference a

contract that contains a waiver of sovereign immunity. See Yazzie v. Ute Indian Tribe, Ute Indian Tribal Court, Case No. CV-09-118 (Feb. 14, 2011). Also as a matter of tribal law, Section 1-2-3(5) of the Ute Law and Order Code does not deprive this Court of jurisdiction over this pending lawsuit.

OPINION

Plaintiffs have moved for partial summary judgment on the legal question whether Section 1-8-5 of the Ute Law and Order Code requires that any waiver of sovereign immunity must be expressly authorized within the text of the written resolution or ordinance itself. Defendant has moved to dismiss on the same legal question contending that the purported waiver of sovereign immunity in the Becker IC Agreement is valid even though the resolution adopting the Becker IC Agreement only incorporated the agreement by reference rather than specifically mention the wavier within the four corners of the resolution. Defendant has also moved to dismiss in light of Section 1-2-3(5) of the Ute Law and Order Code. Because there are no disputed issues of material fact as to these legal questions, they may be decided as a matter of law.

It is undisputed that the resolution approving Becker's IC Agreement does not expressly authorize a waiver of sovereign immunity within the text of the resolution. Even so, the Court believes Section 1-8-5 has been satisfied given the reasoning of Yazzie and, based on that decision, denies Plaintiffs' motion. However, the Court will also deny Defendant's motion because this Court is likely a "court of competent jurisdiction" as contemplated by the parties.

According to Section 1-8-5 of the Ute Law and Order Code,

> Except as required by federal law, or the Constitution and Bylaws of the Ute Indian Tribe, or as specifically waived by a resolution or ordinance of the Business Committee specifically referring to such, the Ute Indian Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the

performance of their official duties.

Ute Law and Order Code § 1-8-5. The issue here is the meaning of "specifically referring to such" in the statute. In this Court's order in Toole v. Ute Water Settlement Accounting Servs., LLC, Ute Indian Tribal Court, Case No. CV-09-061 (Aug. 10, 2010), this Court held that a resolution approving a contract that waives sovereign immunity must specifically refer to the waiver of sovereign immunity in the language of the resolution itself for the waiver to be valid. However, in this Court's later order in Yazzie, this Court held that a resolution that incorporates by reference a contract that contains a waiver of sovereign immunity specifically refers to such sufficient to waive the Tribe's sovereign immunity. This Court finds the reasoning in Yazzie to be more persuasive and will follow that opinion.

Moreover, to the extent this Court only had the Toole opinion for guidance, this Court would still find the language of the resolution adopting the Becker IC Agreement to be sufficient under Section 1-8-5 of the Ute Law and Order Code. The purpose of the language "specifically referring to such" is to ensure that the Business Committee knows it is waiving the Tribe's sovereign immunity if it adopts a given resolution. When the Business Committee passed Resolution 05-147 approving the Becker IC Agreement which was attached to the resolution, the Business Committee knew it was waiving the Tribe's sovereign immunity. Assuming the Business Committee read the agreement being approved, the Business Committee must have noticed Article 23 entitled "Limited Waiver of Sovereign Immunity; Submission to Jurisdiction." If the Business Committee did not read the agreement, it still knew about the waiver because enforcement and jurisdiction were discussed before adoption of the resolution.

The Business Committee Meeting Minutes of April 27, 2005, submitted by Plaintiffs in support of their motion, reflect a discussion amongst the members of the Business Committee

just before adoption of Resolution 05-147 about Article 23, the applicability of Utah law to the contract, and whether any dispute could go to tribal court first before state or federal court. The Business Committee knew the Becker IC Agreement could be enforced in "[c]ourts of competent jurisdiction." This discussion satisfied the purpose behind the "specifically referring to such" language in Section 1-8-5. The Business Committee complied with Section 1-8-5 of the Ute Law and Order Code when it adopted Resolution No. 05-147 incorporating by reference a contract that contained a waiver of sovereign immunity.

Defendant also moves to dismiss under Yazzie on the theory that this Court lacks jurisdiction under Section B of Tribal Ordinance 87-04. That Ordinance, now codified at Section 1-2-3(5) of the Ute Law and Order Code, states:

> 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, the Tribal Business Committee of the Uintah and Ouray Reservation, or any Tribal officers or employees in their official capacities, except that the Ute Indian Tribal Court shall have jurisdiction to hear actions brought by the Ute Indian Tribe against the bonds of officers or employees and actions against officers or employees for restitution of Tribal money, property or services wrongfully converted to their personal benefit.

Ute Law and Order Code § 1-2-3(5). Becker argues that this language shows that this Tribal Court was not the intended "court of competent jurisdiction" that the parties agreed could adjudicate disputes because both parties could not sue in this Court. This Court does not read "court of competent jurisdiction" in Article 23 of the Becker IC Agreement so narrowly. The fact that this Court "shall have jurisdiction to hear actions brought by the Ute Indian Tribe against . . . employees" under tribal law as is the case here is sufficient to suggest that this Court is a "court of competent jurisdiction" as contemplated by the parties in Article 23. While Becker argues that he was not an employee, the Second Amended Complaint alleges otherwise. This Court must accept those allegations as true on Defendant's Motion to Dismiss.

Again, had the parties wanted to explicitly exclude any tribal court jurisdiction, they could have said so in the agreement. Cf. Stifel v. Lac DU Flambeau Band of Lake Superior

Chippewa Indians, 807 F.3d 184, 197-98 (7th Cir. 2015) (language expressly limiting jurisdiction to Wisconsin federal or state courts excluded tribal courts). They did not. Section 1-2-3(5) of the Ute Law and Order Code does not deprive this Court of jurisdiction over this pending lawsuit. Both motions are denied.

IT IS SO ORDERED.

Dated: 12/18/17

Thomas Weathers
Tribal Court Judge Pro Tem

EXHIBIT E

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

Lynn D. Becker, Plaintiff, v. Ute Indian Tribe of the Uintah and Ouray Reservation, a federally chartered corporation; et al., Defendants.	**DEFENDANTS' MOTION FOR LEAVE TO FILE AN OPPOSITION TO BECKER'S EXHAUSTION BRIEF** Case No. 140908394 Judge Barry Lawrence

RELIEF REQUESTED

Defendants, the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribe's governing body, the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings LLC, a wholly tribally-owned entity (collectively the "Tribal Parties"), move for leave to submit an opposition to Becker's memorandum regarding Harvey and tribal court exhaustion. **Exhibit A**, Defendant's proposed Opposition to Becker's Exhaustion Brief.

GROUNDS FOR THE RELIEF REQUESTED

Tribal Court Exhaustion

Mr. Becker argues that the Tribe expressly waived any exhaustion duty. The only case Mr. Becker cites is *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21 (1st Cir. 2001). *Ninigret*, however did not reach a decision on this question. Instead, the First Circuit cautions that "[t]here is virtually no caselaw as to the effectiveness *vel non* of an express disclaimer of tribal court remedies. Because the record here reveals no explicit waiver or other equivalent circumstances, we have no occasion to pursue that question." *Id*. at 31 and n.7. The First Circuit case relied upon by Mr. Becker is instructive for other reasons and counsels in support of the Tribal Parties' position. In debating which court should interpret the forum selection clause of a contract, the First Circuit ultimately concluded that, "under *National Farmers*, the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to the forum-selection provisions that may be contained within the four corners of an underlying contract." *Id*. at 33 (citing *National Farmers*, 471 U.S. 845, 855-56 (1985)). What this means for this case is that, according to the case offered and

relied upon by Mr. Becker, the inquiry by this Court should not be to interpret the Becker IC Agreement, but rather to look to what federal law requires. Undeniably, federal law mandates tribal court exhaustion. *National Farmers*, 471 U.S. 845, 856 (1985) ("We believe that examination [of the existence and extent of a tribal court's jurisdiction] should be conducted in the first instance in the Tribal Court itself."). The First Circuit explains:

> [T]he pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum selection proviso). *See Iowa Mutual*, 480 U.S. at 16; *National Farmers*, 471 U.S. at 855-57. This logic indicates that where, as here, the tribal exhaustion doctrine applied generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the tribal court. *See Basil Cook*, 117 F.3d at 63-64, 69; Snowbird, 666 F. Supp. at 1444. We also believe that this approach comports with the concern for tribal sovereignty that forms the epicenter of the tribal exhaustion doctrine. *See El Paso Natural Gas*, 119 S. Ct. at 1437; *National Farmers*, 471 U.S. at 856. For the district court to bypass the tribal court and interpret the forum-selection clause itself would place the two judicial systems in direct competition with each other; and thereby undermine the tribal court's authority over trial affairs. Proper respect for tribal legal institutions counsels convincingly against putting courts on such a collision course. *See Iowa Mut*., 480 U.S. at 16; see also *National Farmers*, 471 U.S. at 857 (admonishing a lower federal court to "stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction.").

Ninigret, 207 F.3d at 33. Therefore, any of the provisions of the Becker IC Agreement interpreted by this Court, e.g., the waiver of sovereign immunity, the forum selection clause, the tribal court exhaustion provision, and even, the 2% participation interest, must be first interpreted by the tribal court under the exhaustion doctrine, *Ninigret*, and all of the Supreme Court cases cited by *Ninigret*.

Harvey

Mr. Becker includes a simple list of ways to distinguish Harvey. However, the exhaustion doctrine is not limited to cases that are identical to Harvey. The United States Supreme Court and many other courts have labored over the years to explain the exhaustion doctrine and its application. Federal and State courts recognize and apply the exhaustion doctrine in a wide variety of cases including those like the case at bar. The Tribal Parties assert it is important to consider the totality of the exhaustion doctrine as applied by courts, not simply look for ways each particular case is distinguishable.

Comity

Mr. Becker asserts that the exhaustion doctrine is grounded in comity and comity weighs against the exhaustion duty. Again, Mr. Becker's only legal argument[1] relies on the tribal court exhaustion provision of the IC Agreement. However, as explained by the First Circuit and the United States Supreme Court, "[f]or the district court to bypass the tribal court and interpret the forum-selection clause itself would place the two judicial systems in direct competition with each other; and thereby undermine the tribal court's authority over tribal affairs." *Ninigret*, 207 F.3d at 33. *See also, National Farmers*, 471 U.S. at 856.

[1] Becker also offers a policy argument and alleges that the Court must interpret the exhaustion provision (a step counseled against by the First Circuit and the United States Supreme Court) in his favor because to do otherwise would "cripple the ability of tribes in the United States to do business with non-Indians." Mr. Becker misunderstands the Tribe's argument. The Tribe simply seeks to have the requirements of tribal law, and by its operation federal law, followed by those that transact business with it, including Mr. Becker and those that urged his IC Agreement. Surely adherence to tribal law is in the interest of the Tribe and those that conduct business with the Tribe.

Tribal Court Jurisdiction

Becker argues that the Tribal Court lacks jurisdiction in the case that is pending before it. Earlier in this case, Becker asked this Court to enjoin Tribal Parties from prosecuting the tribal court action. The court requested the parties submit authority on this question and ultimately declined to enjoin the tribal court. In declining to enjoin the tribal court, Judge Lawrence stated: "The Court believes that, as a state court, the Court lacks the power to enjoin parties from pursuing an action in an Indian tribal court." Order Denying Plaintiff's Motion for Sanction and Motion [for] Temporary Restraining Order entered November 9, 2016.

Mr. Becker now asks that this Court find that the Tribal Court lacks jurisdiction without citation to any authority that permits a State Court to make such a finding. The only cases cited by Mr. Becker are instances where a federal court, not a state court, has weighed in. *National Farmers*, 471 U.S. at 853 ("[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction."). There is no parallel law that permits a State Court to determine whether a tribal court has exceeded the lawful limits of its jurisdiction. Mr. Becker has not provided any and the Tribal Parties are aware of no such case.

Speculation About *Harvey*

Mr. Becker speculates that *Harvey v. Ute Indian Tribe*, 2017 UT 75 would have concluded differently had the Court received a copy of Tribal Court decision, *Yazzie v. Ute Indian Tribe*, CV-09-188 (Ute Tribal Court, Feb. 17, 2011). *Yazzie* is completely irrelevant and immaterial to the Becker case and to the Harvey case. The *Yazzie* Court

lacked jurisdiction, by its own admission, to render any substantive rulings. Even if the *Yazzie* Court had not lacked jurisdiction, the Court's attempt to judicially rewrite Section 1-8-5 is patently improper.

Bad Faith Allegation

Finally, Mr. Becker alleges a "bad faith" exception to the requirement that the parties exhaust their tribal court remedies. "Although claims of futility, bias, bad faith, and the like roll easily off the tongue, they are difficult to sustain." *Ninigret*, 207 F.3d at 34 (citation omitted). Again, Mr. Becker alleges *Yazzie* is relevant here whereas the Tribal Parties argue its irrelevance. An allegation of bad faith warrants the Court's consideration of a response in opposition from the Tribal Parties.

The Tribal Parties would be prejudiced by the lack of an opportunity to respond to Mr. Becker's exhaustion brief. *Winegar v. Springville City*, 319 P.3d 1, 8 (UT App 2014).

CONCLUSION

The Tribal Parties request the Court grant leave to file the attached opposition memorandum.

Dated this 13th day of December, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2017, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR LEAVE TO FILE AN OPPOSITION TO BECKER'S EXHAUSTION BRIEF** to be filed with the Clerk of the Court using the electronic filing system which will send notification of such filing to all parties of record as follows:

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EXHIBIT A

to Defendants' Motion for Leave to File An Opposition to Becker's Exhaustion Brief

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

Lynn D. Becker, Plaintiff, v. Ute Indian Tribe of the Uintah and Ouray Reservation, a federally chartered corporation; et al., Defendants.	**DEFENDANTS' OPPOSITION TO BECKER'S EXHAUSTION BRIEF** Case No. 140908394 Judge Barry Lawrence

Defendants, the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribe's governing body, the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings LLC, a wholly tribally-owned entity (collectively the "Tribal Parties"), submit this memorandum in opposition to Becker's Exhaustion Brief.

DEFENDANTS' STATEMENT OF PREFERRED DISPOSITION

Just as the Court recognized that "as a State Court" it "lacks the power to enjoin parties from pursuing an action in an Indian tribal court", the Court must decline Becker's invitation to wade into similar territory and decline to decide whether or not a tribal court has jurisdiction over a given case. *Order Denying Plaintiff's Motion for Sanctions and Motion for Temporary Restraining Order* entered November 9, 2016. Here, the Tribal Parties did not waive the mandatory duty to exhaust tribal court remedies. The parties to this litigation must exhaust tribal court remedies. Comity requires tribal court exhaustion. The Tribal Court is exercising jurisdiction over the complaint filed with it.

Mr. Becker invites the Court to determine that a tribal court order, in which the Tribal Court found it lacked subject matter jurisdiction, inexplicably demonstrates that, here, the bad faith exception precludes application of the doctrine of tribal court exhaustion. *Yazzie v. Ute Indian Tribe, case no. CV-09-188 (Ute Tribal Court Feb.14, 2011),* is not relevant because any decision from a court that lacks subject matter jurisdiction has no precedential value on the substantive merits of that case let alone other cases and the decision is from a trial level court of the Tribal Court system meaning it has no binding effect even on the court in the Tribal Court system. This Court should reject

Mr. Becker's request to speculate what the Utah Supreme Court would have done had it reviewed the *Yazzie* decision.

STATEMENT OF RELEVANT FACTS

On November 16, 2017, the Court requested briefing on the tribal exhaustion issue in light of *Harvey v. Ute Indian Tribe*, 2017 UT 75, decided by the Utah Supreme Court. On November 29, 2017, the Parties submitted their respective briefs on tribal court exhaustion. On December 13, 2017, the Tribal Parties sought leave to file an opposition to the exhaustion brief submitted by Mr. Becker.

LEGAL ARGUMENT

I. The Tribe Did Not Waive the Mandatory Duty to Exhaust

Mr. Becker argues that the Tribe expressly waived any exhaustion duty. The only case Mr. Becker relies on is *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21 (1st Cir. 2001). *Ninigret*, however did not reach a decision on this question. Instead, the First Circuit cautions that "[t]here is virtually no caselaw as to the effectiveness *vel non* of an express disclaimer of tribal court remedies. Because the record here reveals no explicit waiver or other equivalent circumstances, we have no occasion to pursue that question." *Id.* at 31 and n.7. *Ninigret* is instructive for other reasons and counsels in support of the Tribal Parties' position. In debating which court should interpret the forum selection clause of a contract, the First Circuit ultimately concluded that, "under *National Farmers*, the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to the forum-selection provisions that may be contained within the four corners of an

underlying contract." *Id.* at 33 (citing *National Farmers*, 471 U.S. at 855-56.). What this all means for this case, is that according to the case offered and relied upon by Mr. Becker, the inquiry by this court should not be to interpret the Becker IC Agreement, but rather to look to what federal law requires. Undeniably, federal law mandates tribal court exhaustion. *National Farmers*, 471 U.S. 845, 856 (1985) ("We believe that examination [of the existence and extent of a tribal court's jurisdiction] should be conducted in the first instance in the Tribal Court itself."). The First Circuit explains:

> [T]he pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum selection proviso). *See Iowa Mutual*, 480 U.S. at 16; *National Farmers*, 471 U.S. at 855-57. This logic indicates that where, as here, the tribal exhaustion doctrine applied generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the tribal court. *See Basil Cook*, 117 F.3d at 63-64, 69; *Snowbird*, 666 F. Supp. at 1444. We also believe that this approach comports with the concern for tribal sovereignty that forms the epicenter of the tribal exhaustion doctrine. *See El Paso Natural Gas*, 119 S. Ct. at 1437; *National Farmers*, 471 U.S. at 856. For the district court to bypass the tribal court and interpret the forum-selection clause itself would place the two judicial systems in direct competition with each other; and thereby undermine the tribal court's authority over trial affairs. Proper respect for tribal legal institutions counsels convincingly against putting courts on such a collision course. *See Iowa Mut.*, 480 U.S. at 16; see also *National Farmers*, 471 U.S. at 857 (admonishing a lower federal court to "stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction.").

Ninigret, 207 F.3d at 33. Therefore, any of the provisions of the Becker IC Agreement interpreted by this Court, e.g., the waiver of sovereign immunity, the forum selection clause, the tribal court exhaustion provision, and even, the 2%

participation interest, must be first interpreted by the tribal court under the exhaustion doctrine, *Ninigret*, and all of the Supreme Court cases cited by *Ninigret*.

II. The Parties Have an Obligation to Exhaust Tribal Remedies

In *Harvey*, the Utah Supreme Court quoted *Burlington N.R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991) which held the exhaustion of tribal remedies is "*mandatory"* when a tribe's jurisdiction is at issue:

> The Supreme Court has mandated the exhaustion of tribal remedies as a prerequisite to a federal court's exercise of its jurisdiction. "[E]xhaustion is required before such a claim may be entertained by a federal court." In *Iowa Mutual Ins. v. LaPlante*, the Supreme Court said that "federal policy . . . directs a federal court to stay its hand," and "proper respect . . . requires" tribal remedy exhaustion. Therefore, non-Indian petitioners "must exhaust available tribal remedies." The *LaPlante* Court emphasized that "National Farmers Union requires that the issue of jurisdiction be resolved by the Tribal courts in the first instance." The Supreme Court's mandate of exhaustion of tribal court remedies as a prerequisite to a federal court's exercise of its jurisdiction applies squarely to this case.

Harvey ¶ 41. The *Harvey* Court then recognized the exhaustion principles contained in *Crow Tribal Council*, 940 F.2d at 1239. "[T]he tribe's right to 'manage the use of [tribal] territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation' is necessary to protect tribal self-government." *Harvey* ¶ 42 (quoting *Mescalero Apache Tribe*, 462 U.S. at 335.). First, *Crow Tribal Council* "analyzed the policy 'supporting tribal self-government,' and the subordinate policy of 'provid[ing] the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Harvey* ¶ 49. Second, *Crow Tribal Council* counsels the evaluation of judicial economy. Third, exhaustion allows tribal courts to "explain to the parties the precise basis for accepting

jurisdiction, and . . . also provid[s] other courts with the benefit of their expertise in such matters in the event of further judicial review." *Harvey* ¶ 51 (quoting *Mescalero Apache Tribe*, 462 U.S. at 333.). Fourth, parties "must exhaust [their] remedies in tribal court, even if the tribal court must end up applying some state [and/or federal law]." *Harvey* ¶ 52. "A tribal court presumably, is as competent to interpret federal law as it is state law." *Id.* (quoting *Altheimer & Gray*, 983 F.2d at 813).

Each of these arguments announced by *Crow Tribal Council* and followed by *Harvey* counsels in favor of mandatory tribal court exhaustion in this case. The Court's order requesting briefing on the exhaustion issue reveals it is considering violating the principle that "tribal courts are best qualified to interpret tribal law," *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9,16 (1987), and "courts should be particularly hesitant to find no colorable claim of tribal jurisdiction based on an interpretation of a tribal code (as opposed to federal jurisdictional law)." *Harvey* ¶ 111 (quoting *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997) (declining "to hold that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution" because "courts as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in *National Farmers*")). *Minute Entry* dated November 16, 2017 (Referencing the *State Court's* interpretation that the Tribe waived sovereign immunity and consented to jurisdiction in Utah State Court).

The Tribal Parties incorporate the arguments contained in Defendants' *Memorandum on the Exhaustion of Tribal Court Remedies*.

III. Comity Requires Tribal Court Exhaustion

Mr. Becker argues that comity interest would not be served by adherence to the tribal court exhaustion doctrine. This argument, however, has been rejected by both the Tribal Court and the Tenth Circuit. The Tribal Court said:

> [C]omity does not require this Tribal Court to dismiss or stay this action. The ultimate resolution of this case may well turn on whether the Ute Indian Tribe lawfully waived its sovereign immunity in its agreement with Defendant. Plaintiffs assert no valid waiver under the Tribe's Constitution and By-Laws and its Law and Order Code. Because 'tribal courts are best qualified to interpret and apply tribal law,' this Tribal Court should be the court to rule on this issue of tribal law. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *see also Findleton v. Coyote Balley Band of Pomo Indians*, 1 Cal. App. 5th 1194, 1213 (Cal. St. App. 2016) (when a tribal court interprets its tribal law, other courts should give deference to that interpretation).

Ute Indian Tribe v. Becker, Case number CV-16253, slip op. at 2-3 (Ute Indian Tribal Court June 9, 2017). The Tenth Circuit determined that Mr. Becker failed to adequately counter the Tribe's position that the Becker IC Agreement is void for lack of federal approval. Without a valid contract, it stands to reason that all of the contract provisions are also void. *Becker v. Ute Indian Tribe*, 16-4175, slip op. 11 (10th Cir. Aug. 25, 2017) (*citing Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp*., 658 F.3d 684, 699-700 (7th Cir. 2011) (contractual waiver of sovereign immunity held invalid)). The Tenth Circuit concluded that "the [tribal court] exhaustion rule applies, and the tribal court should consider in the first instance whether it has jurisdiction." *Becker v. Ute Indian Tribe*, case number 16-4175, slip op. 14 (10th Cir. Aug. 25, 2017).

IV. The Ute Tribal Court Is Exercising Jurisdiction

Mr. Becker's position that the State Court should interpret tribal law to conclude that the tribal court lacks jurisdiction is the opposite of what the Utah Supreme Court and Federal Courts have held. In *Harvey*, the Utah Supreme Court is clear on this point:

> [C]omplaints must first be filed in tribal court whenever there is a colorable argument that the tribal court may have jurisdiction. Norton, 862 F.3d at 1243 (tribal exhaustion rule applied "so long as tribal courts can 'make a colorable claim that they have jurisdiction.'" (citation omitted)). **And our courts should be particularly hesitant to find no colorable claim of tribal jurisdiction based on an interpretation of a tribal code (as opposed to federal jurisdictional law)**. *See Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997) (declining "to hold that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution" because "courts, as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in *National Farmers*").

Harvey ¶ 111. (emphasis added).

> The Ute Indian Tribal Court is exercising jurisdiction over the dispute.
>
> [T]his Tribal Court finds that it has jurisdiction. If the agreement is void, this Tribal Court clearly has jurisdiction under the consensual relationship exception. If the agreement is not void, this Tribal Court may still have jurisdiction under the "court of competent jurisdiction" language in the agreement as suggested by the Tenth Circuit. Had the parties wanted to explicitly exclude any tribal court jurisdiction, they could have said so in the agreement.

Ute Indian Tribe v. Becker, Case number CV-16253, slip op. at 6 (Ute Indian Tribal Court March 10, 2017).

V. There is No Bad Faith

Mr. Becker asserts that the Tribe is engaged in harassing and bad faith and therefore the Court should find an exception to the exhaustion requirement. This inquiry, however, is a question to be answered by the tribal courts and even in instances when a

federal court analyzes the question, the proper bad faith inquiry is into the conduct of the tribal court, not the parties. *Harvey* ¶ *112 (*quoting *Basil Cook Enters*., 117 F.3d at 67 (quoting *Talton v. Mayes*, 163 U.S. 376, 385 (1896)); *Acres v. Blue Lake Rancheria*, No. 16-cv-05391, 2017 WL 733114, at *2 (N.D. Cal. Feb. 24, 2017); and *Grand Canyon Skywalk Dev., LLC v. 'sa' Nya Wa Inc.,* 715 F.3d 1196, 1201 (9th Cir. 2013)).

A. The *Yazzie* Court Lacked Jurisdiction to Render any Substantive Rulings

A ruling rendered by a tribunal that lacks jurisdiction is a nullity.

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books … [citations omitted] … and was made settled law by Lord Coke in *Case of the Marshalsea,* 10 Co.Rep. 68b, 77 Eng.Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase *coram non judice,* "before a person not a judge" -- meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment.*

Burnham v. Superior Court, 495 U.S. 604, 608-609 (1990) (emphasis in original). "Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

In view of the *Yazzie* court's determination that it lacked subject-matter jurisdiction, the four-page ruling in *Yazzie* should have been condensed down to—and should have consisted *solely* of—the final two sentences that begin on the bottom of page 3:

> [T]he Ute Tribal Court **does not have jurisdiction** over the claims against the Tribe and its officers brought by the Plaintiff. This cause should be dismissed with prejudice.

Yazzie v. Ute Indian Tribe, slip op. 3-4 (emphasis added). The two-and-a-half pages of judicial *musings* on sovereign immunity that proceeded the two-sentence dismissal

should not have been included in the ruling. Indeed, the two-and-a-half pages of judicial *musings* on sovereign immunity fail even to rise to the level of "*dicta*."[1]

The United States Supreme Court has long emphasized that dicta in its opinions is not binding on subsequent courts as authority or precedent:

> The discussion of § 5 in *East Carroll* was dictum unnecessary to the decision in that case. It is, therefore, not controlling in this case, in which the impact of § 5 is directly placed in issue.

McDaniel v. Sanchez, 452 U.S. 130, 141-42, 146 (1981) (observing that earlier precedents did not decide "the precise question that is now presented" for decision).

Thus, it should be obvious that if dicta is not precedential or authoritative, then *a fortiori*, a court's judicial musings on the *substantive merits* of a case that was dismissed for *lack of subject-matter jurisdiction* is even less precedential and even less authoritative than dicta (which has no precedential or authoritative force).

Mr. Becker asserts that even decisions finding a lack of jurisdiction are precedential. However, such decisions are precedential only on the subject of jurisdiction. *E.g., Olson v. Belvedere Ass'n*, 2015 U.S. Dist. LEXIS 44353, fn. 26 (D. Utah, April 2, 2015). Judge Benson, for example, in dismissing *Becker v. Ute Indian Tribe*, No. 2:13-cv-123, 2013 WL 5954391 (D. Utah Nov. 5, 2013), did not venture beyond the subject matter jurisdiction inquiry into a legal analysis of the other grounds argued in the parties' briefing on the motion to dismiss. In *Harvey*, the Court noted that "[t]he district

[1] Dicta is an "opinion expressed" by a court that does possess jurisdiction "on a point not necessarily arising in the case, or a statement in an opinion not responsive to any issue and not necessary to any issue and not necessary to the decision of the case." 21 C.J.S. Courts § 227 (1955).

court did not rule directly on [an] issue because it has already dismissed the entire complaint under Utah Rules of Civil Procedure 12(b)(1) and (b)(7)." *Harvey* ¶ 41, n.9.

The Court should not accept Mr. Becker's invitation to decide his allegation of bad faith. Rather, the Court should defer that question to the tribal court and when courts inquire into bad faith, they examine the conduct of the tribal courts, not the parties.

B. Even if the *Yazzie* Court Had Not Lacked Jurisdiction, the Court's Attempt to Judicially Rewrite Section 1-8-5 is Patently Improper

In its judicial musings on sovereign immunity, the *Yazzie* Court committed multiple legal errors. First, the *Yazzie* Court turned sovereign immunity jurisprudence on its head. Next the *Yazzie* Court turned the canons of statutory interpretation inside-out. And finally, the *Yazzie* Court came to a result that is 180-degrees the opposite of what sovereign immunity jurisprudence requires and what the Ute Indian Tribal Business Committee clearly intended for Section 1-8-5 to require.

For starters, it is axiomatic that courts cannot *imply* a waiver of sovereign immunity. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."). Secondly, waivers of tribal sovereign immunity are strictly construed in favor of the tribal sovereign, meaning that courts apply a strong presumption ***against*** finding a waiver of governmental immunity.[2]

[2] *See, e.g., Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011 (9th Cir. 2016); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (6th Cir. 2009); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *American Indian Ag. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-79 (8th Cir. 1985); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th. Cir 1982).

The *Yazzie* court turned these established tenets on their head, holding that sovereign immunity waivers *can* be implied, and suggesting that the Tribal Courts should apply a strong presumption not against, but in *favor of* finding waivers of governmental immunity. Worse than that, the *Yazzie* court undertook to "judicially rewrite" the statutory language of Section 1-8-5 so that the statute would say something 180-degrees the opposite of what the statute actually said on April 27, 2005, when Becker's IC Agreement was approved. The statute then read:

> Except as required by federal law, or the Constitution and Bylaws of the Ute Indian Tribe, **or as specifically waived by a resolution or ordinance** of the Business Committee **specifically referring to such**, the Ute Indian Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties. (emphasis added)

The *Yazzie* court improperly sought to "judicially rewrite" the statutory language to read:

> Except as required by federal law, or the Constitution and Bylaws of the Ute Indian Tribe, or as specifically waived **in the terms of a contract or other instrument appended to and incorporated by reference into** a resolution or ordinance of the Business Committee, the Ute Indian Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties. (emphasis added)

Contrary to the logic of the *Yazzie* court, the powers of the Tribal Court do not extend to judicial rewriting, or judicially amending, the duly-adopted resolutions and ordinances of the Tribe's elected Business Committee. Other courts are fully cognizant of this limitation on their judicial powers:

> "Courts are obligated to refrain from embellishing statutes by inserting language that [the legislative body] has opted to omit."

In re Shane Co., 464 B.R. 32, 43 (D. Colo. 2012) (quoting *Root v. New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000)).

> As the Tenth Circuit went to great lengths to explain:
>
> > Plaintiffs seem to argue that 29 U.S.C. § 1002(24) permits the plan to define "normal retirement age" only earlier than 65, not later. If Congress had intended this, it could have easily said so. There is no support for the argument that the statute should be judicially rewritten to make this modification. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n. 13, 105 S.Ct. 3275, 3284 n. 13, 87 L.Ed.2d 346 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute.").
> >
> > The exceptions to our obligation to interpret a statute according to its plain language are "few and far between." *Resolution Trust Corp. v. Westgate Partners, Ltd.*, 937 F.2d 526, 529 (10th Cir. 1991) (citing three exceptions: (1) "rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," *United States v. Ron Pair Enters.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989); (2) "if such an interpretation would lead to 'patently absurd consequences,'" *United States v. Brown*, 333 U.S. 18, 27, 68 S.Ct. 376, 380-81, 92 L.Ed. 442 (1948); and (3) "when two provisions whose meanings, if examined individually, are clear, but whose meanings, when read together, conflict, it is up to the court to interpret the provisions so that they make sense," *Love v. Thomas*, 858 F.2d 1347, 1354 (9th Cir. 1988), *cert. denied sub nom.*, *ALF-CIO v. Love*, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 403 (1989)).

Lindsay v. Thiokol Corp., 112 F.3d 1068, 1070 (10th Cir. 1997).

> And, as the United States Supreme Court has stated rather emphatically:
>
> > We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. … [citations omitted] When the words of a statute are unambiguous, then this first canon [of statutory interpretation] is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 499 U.S. 424, 430 (1981)).

There was no ambiguity in the language of Section 1-8-5 of the Tribe's Law and Order Code on April 27, 2005, the day Mr. Becker's Agreement was signed. Section 1-8-5 made clear that in order to waive sovereign immunity, the Business Committee had to "specifically" waive immunity, through a "resolution or ordinance" that "specifically refer[ed]" to the waiver of immunity.

Although the legislative branch of government—in this case the Tribal Business Committee—may itself employ "incorporation by reference" in its legislative enactments,[3] it is clearly improper for the judicial branch to invoke the doctrine of incorporation by reference in order to judicially *rewrite* statutes. Fortunately, because the *Yazzie* Court lacked subject-matter jurisdiction, the court's attempt to judicial rewrite Section 1-8-5 carries no precedential value or probative force.

In summary, The *Yazzie* court improperly exceeded its judicial powers in attempting to judicially rewrite Section 1-8-5 to delete the statute's express requirement that the Business Committee resolution or ordinance had to specifically authorize, or make specific reference to, the Business Committee's intent to waive governmental immunity.

---

[3] *See generally*, 1 Principles of Federal Appropriations Law, *4 ("Incorporation by reference is a well-accepted legislative tool. Indeed, there are numerous instances in which the Supreme Court … has accepted incorporation by reference without objection. [citations omitted] In these cases, the language of the statute evidenced a clear congressional intent to incorporate by reference, and the referenced material was specifically ascertainable from the face of the legislative language, so all would know with certainty the duties, terms, conditions, and constraints enacted into law."). 2 GAO-RB pt. B s. 4 (G.A.).), 2016 WL 1275439.

C. Section 1-2-3(5) and the Other Jurisdictional Statutes in Chapter 2 of the Law and Order Code Do Not Divest the Tribal Court of Jurisdiction

In regard to Section 1-2-3(5), Becker fails to read beyond the opening words of statute, which reads, "*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, the Tribal Business Committee of the Uintah and Ouray Reservation, or any Tribal officers or employees in their official capacities*…." Although the foregoing language 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. Mr. Becker has asserted these very same arguments to the Tribal Court in his second motion to dismiss the Tribe's complaint against him for lack of Tribal Court jurisdiction. It is the Tribal Court, not this Court, that should decide that issue.

Section 1-2-3(5) does not obviate the need for tribal court exhaustion. The decision in *Yazzie v. Ute Indian Tribe* is wholly immaterial. The *Yazzie* court's lack of subject-matter jurisdiction means that the *Yazzie* court proceeded "*coram non judice*" (without "jurisdiction of the matter")[4] in relation to the court's judicial musings on the substantive merits of the case. *See Burnham v. Superior Court*, 495 U.S. at 608-09.

CONCLUSION

The Tribal Parties request the Court order exhaustion of tribal court remedies.

[4] Ballentine's Law Dictionary, p. 272 (1969).

Dated this 13th day of December, 2017

FREDERICKS PEEBLES & MORGAN LLP

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J. Preston Stieff (4764)

Attorneys for Defendants

EXHIBIT F

FILED DISTRICT COURT
Third Judicial District
JAN 18 2018
SALT LAKE COUNTY
By
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY

STATE OF UTAH

LYNN D. BECKER, Plaintiff, vs. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, et. al, Defendants.	**RULING ON MOTIONS IN LIMINE** Case No.: 140908394 Judge: BARRY G. LAWRENCE

The parties filed various motions in limine, many of which addressed the need for experts in this matter and the scope of their expected testimony. The Court held argument on the various motions on January 16, 2018, and set the matter for a follow up telephone conference on January 18, 2018. At the conclusion of the hearing the Court took the matter under advisement. The Court now enters its ruling on some of those motions in advance of the January 18 conference.

This is a contract action between Becker and the Tribe arising out of an independent contract dated April 27, 2005 ("Contract"). A two-week trial has been scheduled to take place beginning on February 22, 2018. At trial, it appears the jury will be asked to determine three issues: (1) whether the Contract is valid or whether, because the Tribe's business committee entered into the contract in violation of the corporate charter which required federal approval, the contract was void or voidable and, if the latter, whether the voidable contract was nonetheless ratified; (2) if valid, whether the Contract was breached by the Tribe; and (3) if so, what were Becker's damages.

These are straightforward contract issues that do not normally require expert testimony. The jury can make its findings based upon the parties' contractual relationship and the facts regarding the Tribe's administration of the Contract. Yet, the Tribe has designated six experts – Alexander Skibine, Robert Miller, Kevin Gambrell, Pilar Thomas (collectively the Four Federal Experts), Michael Wozniak and Ronald Seigneur, CPA – and Becker has designated two experts Kelly Williams (as rebuttal to the Four Federal Experts), and Brian Cadman, CPA. Most of the expected expert testimony appears to be unnecessary and/or unhelpful.

I. No Expert Testimony Is Necessary On The Issue Of Federal Approval.

. The Tribe argues that the Contract was not properly authorized; i.e., that the business committee was not authorized to enter into the Contract because federal approval was first required. There are two possible bases for the requirement of federal approval – (i) federal statute, or (ii) the Tribe's controlling governing documents. With respect to the former, this Court previously ruled that no federal statutory law required approval for this Contract. *See* Order, Feb. 9, 2017, at 8-14. At that time, the Court held that no "trust assets" were implicated by the Contract, and so none of the cited federal statutes applied; the Court relied on various cases from across the country in coming to its decision. *Id.* The determination whether federal approval was required under federal law was a purely legal question that the Court answered. It was competently and extensively argued by both sides and there is no reason not to enforce that prior ruling, especially when the Tribe has nothing

new to add.[1] In any event, there is no need for expert testimony, or any evidence for that matter, on that purely legal issue.

Accordingly, the Court need not revisit its prior ruling and the jury need not weigh in on it. It follows that no expert testimony is necessary as to the history of the federal government's relationship with Indian tribes, the effect of federal statutes on the tribe's governance, and/or the need for federal approval. Accordingly, the testimony of Messrs. Skibine, Miller, Gambrell, and Thomas, and the rebuttal testimony of Ms. Williams are neither helpful nor necessary to any of the disputed facts that the jury will be asked to decide in this case; in fact, such testimony would likely cause confusion. Accordingly those experts will all be excluded from testifying at trial.

The second source of possible federal approval for the Contract lies within the Tribe's governing documents. The Tribe argues that its Constitution and corporate charter require federal approval before the Tribe may enter into certain contracts. Namely, they point to the Tribe's *Constitution and By-Laws,* which set forth the enumerated powers of the Tribal Business Committee, as follows:

> Section 1. *Enumerated Powers.* The Tribal Business Committee of the Uintah and Ouray Reservation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and By-

[1] At the January 16, 2018 hearing, the Court questioned whether its prior ruling (in an order denying the Tribe's motion for summary judgment) provided a sufficient basis to make that legal conclusion a binding one for purposes of trial. The Court asked the Tribe whether there would be any additional federal legal authority regarding federal approval and the Tribe could not provide any (not surprising given the depth of the prior briefing.) The Court's prior ruling regarding federal approval was purely legal; and, nothing has been presented to the Court on the extensive briefing on that issue then or relating to the current motions in limine that causes the Court to re-think that ruling.

> laws, and subject to review by the Ute bands themselves at any annual or special meeting; . . .
>
> (c) to approve or veto any sale, disposition, lease or encumbrance of tribal lands, interest in tribal lands, or other tribal assets, which may be authorized or executed by the Secretary of the Interior, Commissioner of Indian Affairs, or any other official or agency of government, provided that no tribal lands shall ever be encumbered or sold, except for government purposes, or leased for a period exceeding five years, except that leases for mining purposes or on irrigable land may be made for such longer period as may be authorized by law. . .
>
> (f) to regulate all economic affairs and enterprises in accordance with the terms of the Charter that may be issued to the Ute Indian Tribe of the Uintah and Ouray Reservation by the Secretary of the Interior.

Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation.

Additionally, the Corporate Charter for the Tribe, which is issued by the Secretary of the Interior, appears to limit the corporate powers of the Tribe in various respects:

> *Corporate Powers.* 5. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said Tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the tribal constitution and by-laws:
>
> (f) To make and perform contracts and agreements of every description, not inconsistent with law or with any provision of this Charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Utah, including agreements with the State of Utah for the rendition of public services: ***Provided,*** **That all contracts entered into during any one fiscal year, requiring payment of money by the Corporation, other than contracts with the United States or contracts submitted for Departmental approval, shall not exceed $10,000 in total amount except with the approval of the Secretary of the Interior.**
>
> (g) To pledge or assigned chattels or future tribal income due or to become due to the Tribe; *Provided*, that assignments of tribal income, other than assignments to the United States, shall not extend more than ten years from the date of execution and shall not cover more than one

> half of the net tribal income: ***And provided further*, That any such pledge or assignment shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.**

Corporate Charter of the Ute Indian Tribe of the Uintah and Ouray Reservation (emphasis in bold added.). Thus, the Tribe's governance, regardless of federal statutory requirements, may nevertheless require federal approval under certain limited instances.

As stated previously by this Court, the Tribe has and may assert the affirmative defenses that the Contract is invalid for this reason, based on the principles of illegality, ultra vires, and failure to obtain proper authorization. See Order dated March 22, 2017. The facts that would support those claims, however, are entirely intrinsic to the Tribe and its governing documents. Thus, there is no need for expert testimony to support any of these avoidance defenses.

Accordingly, in this contract action, there is no need for any of the Tribe's Four Federal Experts or Becker's rebuttal expert, Kelly Williams. The testimony of those federal legal experts would be impertinent, irrelevant and unnecessary. They will not be permitted to testify at trial.[2]

II. Expert Testimony as to the Contract is only Permissible on a Limited Issue.

Both parties appear to have identified witnesses to testify concerning the interpretation of the contract at issue. (Becker has designated Mr. Cadman, a CPA; The Tribe has designated Michael Wozniak, Esq., and Ronald Seigneur, CPA.) Mr. Cadman and Mr. Seigneur are CPA's and the Court understands they will be

[2] The February 2, 2007 letter from the Bureau of Indian Affairs is similarly unnecessary and irrelevant. That document will likewise be excluded at trial.

providing testimony on the issue of damages; this ruling does not affect that expected testimony.

As to determining the Contract's meaning, however, expert testimony -- in fact *any* extrinsic evidence -- is not relevant unless and until the Court concludes the contract is ambiguous. *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995). Although there is not a facial ambiguity apparent from the contract language, the Tribe alleges a *latent ambiguity* in the provision giving Becker his participating interest. *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 40, 367 P.3d 994 (a "latent ambiguity arises from a collateral matter when the document's terms are applied or executed, not from any facial deficiency in the contract's terms. So, by its very nature, a latent ambiguity is one that cannot be found within the four corners of the document but is only discoverable through the introduction of extrinsic evidence. But we have also recognized that instances where extrinsic evidence is allowed to uncover a latent ambiguity will prove to be the exception and not the rule.")

Under the Contract, Becker was given the following interest:

> In recognition of Contractor's services, Contractor shall receive a beneficial interest of two percent *(2%) of the net revenue* distributed to Ute Energy Holding LLC from Ute Energy LLC (and net of any administrative costs of Ute energy holdings)("Contractor's Interest").

The emphasized phrase, "2% of the net revenue" in isolation does not appear to be ambiguous; the Tribe appeared to concede that at the January 16 hearing. Becker argues the phrase is unambiguous and that the words "net revenue" is a known and singularly defined term, and that the verb "distributed" does not modify or disturb the "net revenue" concept. In response, the Tribe argues that the use of the verb

"distribute" modified the phrase "net revenue" thereby creating a new phrase that is not a readily known term and is therefore ambiguous.

It is the Court's role to determine whether a term or phrase is ambiguous in the first instance.[3] And, due to the nature of this latent ambiguity, the Court may rely on extrinsic evidence in the form of expert opinions to make that initial determination. *Mind & Motion*, ¶40. Here, given the disparate expert opinions of the parties' experts, it appears – at least at first blush – that the parties ascribe a different meaning to this provision. However, just because two parties ascribe a different meaning to a term or phrase, does not automatically render it *ambiguous*; the alternate meaning must be plausible, tenable and must flow naturally from the document.[4]

In order to determine whether the Contract is ambiguous, the Court needs to better understand the Tribe's asserted alternate definition of the phrase "net revenue

---

[3] Contrary to Becker's argument, "ambiguity" is not an affirmative defense that needed to be specially pleaded. URCP, Rule 8(c).

[4] As the court stated in *Saleh v. Farmers Ins. Exchange*, 2006 UT 20, ¶¶ 16-18, 133 P.3d 428:

> the proffered alternate interpretation must be plausible and reasonable in light of the language used, and that to merit consideration as an interpretation that creates an ambiguity, the alternative rendition must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction. . . . Although this court has left some discretion to courts in determining whether ambiguity exists, at minimum one universal standard applies to this determination: words and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests. In other words, for a proffered alternative interpretation to merit a court's applause, it must be more than a conjecture but may be less than a certainty.

See also e.g .Willard, 899 P.2d at 772; *Uintah Basin Medical Center v. Hardy*, 110 P.3d 168, 172, 2005 UT App 92, ¶ 13 (Utah App.,2005) (" Thus, a contract term may be imprecise, but it is not ambiguous if persons of competent skill and knowledge are capable of understanding its plain meaning.")

distributed." The Court will hear testimony from the Tribe's proposed expert on that issue, outside the presence of the jury, to determine whether there truly is an ambiguity. If not, then it would be improper for the jury to hear from the parties' experts on that issue.

If, on the other hand, the Court determines that there *is* an ambiguity, limited expert testimony may be permitted to determine the parties' intent regarding that phrase. That extrinsic evidence, however, is limited in scope. *See Mind & Motion*, 2016 UT 6, ¶ 40, 367 P.3d 994 ("the extrinsic evidence must show that due to some collateral matter—trade usage, course of dealing, or some other linguistic particularity that arises in the context of extrinsic collateral matters—the contract's terms mislabel a person or thing, or otherwise fail to reflect the parties' intentions.")

As applied here, the only pertinent expert testimony would be limited to an explanation, of the meaning of the term or phrase according to its custom or usage in the expert's relevant specialized industry. *See e.g. Craig Food Indus., Inc. v. Weihing*, 746 P.2d 279, 283 (Utah Ct. App. 1987) ("Trade usage or custom is permissible to explain technical terms in contracts to which particular meanings attach; to make certain that which is indefinite, ambiguous or obscure; to supply necessary matters upon which the contract itself is silent; and generally to elucidate the intention of the parties when the meaning of the contract cannot be clearly ascertained from the language."). It would not be appropriate, however, for experts to opine beyond that – i.e., generally as to the meaning of the Contract, regarding negotiations, to substitute their opinion as to the interpretation of the Contract, or to

opine as to the parties' intent. So, even if permitted to testify as to the meaning of the contract, the expert testimony would be strictly limited to this one discrete.

Thus, the Court reserves ruling on whether the remaining experts (Cadman, Seigneur and Wozniak) may give testimony about the Contract's meaning; however, any such testimony would be strictly limited as stated above.

III. The Remaining Motions are Premature.

In separate motions, the Tribe moved to exclude the Financial Spreadsheet Document (the "Waterfall Evaluation") and certain Privileged Communications. Both of those motions appear to be premature. Becker will need to support the foundation for the Waterfall Evaluation at trial in order for it to be admitted into evidence. Alternatively, as Becker has asserted, Becker's expert may rely on the document, even if it is inadmissible hearsay, if it can be shown that his expert "would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Utah R. Evid., Rule 703. The Court will address that issue at trial.

Similarly, the Court will rule on the Tribe's assertion of attorney-client privilege at trial if and when it arises. It appears that any communication between the Tribe and its law firm are privileged and should be protected from disclosure, unless a clear waiver is shown. The Court will address that issue at trial, if and when necessary.

IV. Conclusion

Accordingly, the Court HEREBY ORDERS AS FOLLOWS:

1. Designated expert witnesses Alexander Skibine, Robert Miller, Kevin Gambrell, and Pilar Thomas, and rebuttal expert witness Kelly Williams will be excluded as witnesses at trial.
2. The February 2, 2007 letter to the Tribe from the Bureau of Indian Affairs is similarly excluded.
3. The testimony from the remaining experts (Brian Cadman, Ronald Seigneur and Michael Wozniak) will be strictly limited, if permitted at all, as reflected above.
4. The motions regarding the Financial Spreadsheet and Privileged Communications are DENIED as premature.
5. No further Order is required. U.R.C.P. 7(j)(1).

IT IS SO ORDERED this 18th day of January, 2018.

BY THE COURT:

Barry G. Lawrence
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140908394 by the method and on the date specified.

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01/18/2018 /s/ NICOLE ODOHERTY

Date: _____ _____

Deputy Court Clerk

EXHIBIT G

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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

I, Luke J. Duncan, am over 18 years of age. I have personal knowledge of the facts set forth herein, and if called upon, I will testify to these facts.

1. I am an enrolled member of the Ute Tribe of the Uintah and Ouray Indian Reservation and I have lived on the Reservation my entire life.

2. I have served as Chairman of the Uintah and Ouray Tribal Business Committee ("Tribal Business Committee") since May 8, 2017. I have also previously served as an elected member of the Tribal Business Committee, most recently in 2001-2003.

3. In 1937, the Ute Tribe organized and adopted its tribal Constitution and Bylaws pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, and the Constitution and Bylaws were approved by the Secretary of the Interior on January 19, 1937.

4. Mr. Becker is seeking an injunction to enjoin the Tribe's lawsuit against him that is currently pending in the Ute Indian Tribal Court, *Ute Indian Tribe, et al. v. Becker*, case number CV-16-253.

5. In support of his request for an injunction, Mr. Becker relies on a decision that was issued by the Ute Indian Tribal Court in an entirely separate case, *Yazzie v. Ute Indian Tribe*, case number CV-09-188. The decision in *Yazzie* is dated February 4, 2011. The decision in *Yazzie* was never appealed to the Ute Indian Appellate Court, as permitted by Rule 37 of the Ute Indian Rules of Civil Procedure.

6. Two years after the decision in *Yazzie*, the Tribe enacted Ordinance No. 13-022. Ordinance No. 13-022 amends Tribal Ordinance 87-04, the Ordinance on which the decision in *Yazzie* is based.

7. Since Ordinance No. 13-022 was enacted, the Ute Indian Tribal Court and the Tribal Business Committee have implemented a process for handling complaints that allege claims against, and name as defendants, the Tribe, or Tribal Business Committee, or individual Tribal officers who are sued in their official capacities. Tribal Resolution No. 16-426 shows how the process for handling such complaints are handled.

8. Resolution No. 16-426 relates to a complaint that was filed by a tribal member against two tribal officers, Case No. CV 16-268. The Tribal Court issued a ruling and order in CV 16-268, dismissing the case for lack of subject matter jurisdiction under Section 1-5-8 of the Ute Indian Law and Order Code (as enacted by Ordinance No. 87-04 and amended by Ordinance No. 13-022).

9. Under Rule 37 of the Ute Indian Rules of Civil Procedure, the plaintiff in Case No. CV 16-268 had twenty (20) days in which to appeal the Tribal Court's order dismissing her complaint. At the end of that 20-day period, the plaintiff in Case No. CV 16-268 had not filed a notice of appeal.

10. If, as in Case No. CV 16-268, no notice of appeal is filed, the Tribal Business Committee reviews the complaint to determine whether a conflict of interest would exist if the Business Committee were to decide the merits of the claims alleged under the complaint. If a conflict of interest exists, or potentially exists, the Business Committee directs the Tribal Court to retain the services of an outside judge (that is, a judge other

than a sitting judge of the Ute Indian Tribal Court) to adjudicate the claims alleged under the complaint. That practice was followed under Resolution No. 16-426. Resolution No. 16-426 states, in pertinent part:

> **WHEREAS:** The Complaint alleges that Ms. Sireech and Mr. Wyasket terminated Ms. Amboh in violation of policies and thus the Business Committee may have a conflict of interest in hearing this case; and
>
> **WHEREAS:** In recognition of the dues process rights of the petitioner in this complaint and to ensure fairness in the adjudication of h[er] claims, the Business Committee determined that it was both necessary and proper to refer this matter to [Tribal Court] Judge Reynolds to appoint a Special Conflicts Judge to resolve these claims in accordance with Tribal law.

11. The Tribal Business Committee has adopted "Guidelines for Hearings," which govern proceedings before a Special Conflicts Judge.

12. Depending on the nature of the issues presented in a complaint, the Tribal Business will direct the Tribal Court to assign the complaint to be heard by a three-judge panel, instead of just one judge. An example of that can be found in the case of *Dino Cesspooch v. Gordon Howel*, CV14-053, a suit that was filed by a tribal officer against the former Chairman of the Tribal Business Committee.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 19th day of January, 2018.

Luke J. Duncan, Chairman
Tribal Business Committee
Ute Indian Tribe of the Uintah and Ouray
Indian Reservation

EXHIBIT H

13-022

Ordinance No. _____

AN ORDINANCE AMENDING AND RESTATING UTE ORDINANCE NO. 87-04

The Tribal Business Committee ("Business Committee") of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") hereby makes the following findings regarding the need for and purpose in amending Ordinance No. 87-04 concerning the jurisdiction of the Business Committee and the Tribal Court to hear all cases and claims against the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities.

FINDINGS

i. The Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") is empowered by Article VI, Sections 1(f) and (l) of the Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Constitution" and "By-Laws") to regulate the economic affairs and enterprises of the Tribe and promote the general welfare of the Tribe by regulating the conduct of trade and the use and disposition of property on the reservation; and

ii. The Business Committee of the Ute Indian Tribe is empowered by Article VI, § 1(k) of the Constitution and By-Laws of the Tribe to provide for the maintenance of law and order and for the administration of justice by establishing a Reservation Indian Court and defining its duties and powers; and

iii. The Business Committee adopted Ordinance No. 87-04, to Amend the Law and Order Code to address the conflict between the Constitution and the Law and Order Code in providing two systems for review of the actions of the Business Committee; and

iv. Ordinance No. 87-04 acknowledged and adopted the review system provided for in the Constitution as the exclusive system of review of Business Committee actions and specifically repealed § 1-2-7 of the Law and Order Code in doing so; and

v. The Business Committee recognizes a potential inconsistency between §§ 1-2-3(4), 1-2-5 and 1-8-6(3) of the Law and Order Code regarding jurisdiction over complaints and claims against Tribal employees; and

vi. The Business Committee hereby reaffirms its intent behind Ordinance No. 87-04 to vest the Business Committee with exclusive, original jurisdiction to hear all complaints and claims against the Tribe, the Business Committee, any Tribal officers, or certain employees in their official capacities; and

vii. The Business Committee therefore amends Ordinance No. 87-04 to clarify the original purpose of the Ordinance and address new issues not previously dealt with in the former Ordinance; and

viii. The Business Committee has determined that there is a compelling need to define "Tribal employee" as it intended in reference to the exclusive, original jurisdiction of the

Business Committee and hereby limits the definition to the Tribe's Executive Director, Department Directors, employees of the Administration Department, Tribal Attorneys, Prosecutors and any employee who works on a direct and continuous basis with the Tribal Business Committee and also to define "officer" to mean any elected or appointed official of the Tribe; and

ix. The Business Committee intends that any complaint or claim against Tribal employees as defined herein who are found to be acting outside their official capacities will be subject to the jurisdiction of the Tribal Court; and

x. The Business Committee notes that nothing in this Ordinance prevents claims from being brought against Tribal employees not included in the definition herein; and

PURPOSE

The purpose of this amendment to Ordinance No. 87-04 is to further clarify the original intent of the Business Committee behind the passage of Ordinance No. 87-04. The functions of the Business Committee with regard to the Tribal Court, in the absence of a Constitutional mandate to the contrary, are supervisory in nature and parallel to similar activities of the Business Committee in setting up and supervising Tribal administrative agencies and enterprises. It is the desire of the Business Committee to provide Tribal members and others with a workable system for hearing their claims and grievances.

NOW THEREFORE, BE IT ENACTED BY THE UINTAH AND OURAY TRIBAL BUSINESS COMMITTEE OF THE UTE INDIAN TRIBE by virtue of its inherent authority as a sovereign Indian tribe to regulate the conduct of persons on the Uintah and Ouray Reservation, such authority being recognized and confirmed by the Act of Congress of June 18, 1934, 48 Stat. 984, and pursuant to the powers of the Tribal Business Committee, as enumerated in the Constitution of the Ute Indian Tribe at Article VI, Sections 1(k) and (l), to provide for the maintenance of law and order and the administration of justice and to safeguard and promote the peace, safety, morals and general welfare of the tribal membership, that Ordinance No. 87-04 is hereby amended in the following respects.

Any and all previously adopted ordinances of the Business Committee which conflict in any way with the provisions and amendments of this ordinance are hereby repealed to the extent that they are inconsistent with or conflict with, or are contrary to the spirit and/or purpose of this ordinance.

13-022

Ordinance No. _____

ORDINANCE ESTABLISHING COMMITTEES AND
AMENDING THE UTE LAW AND ORDER CODE

WHEREAS members of the Ute Indian Tribe have petitioned the Uintah and Ouray Tribal Business Committee for a Referendum Election to review the Tribal Business Committee's Resolution 87-130, and

WHEREAS that petition has prompted the Tribal Business Committee to examine what appears to be a major conflict with the current wording of the Tribal Constitution and the Ute Law and Order Code (ULOC), and

WHEREAS the Tribal Business Committee also has expended substantial effort to understand the causes of the current problem being experienced among the Tribal Court, the Tribal Business Committee and the general membership of the Tribe (as evidenced by the Petition for a Referendum Election and also by a contempt citation against the previous Tribal Business Committee), and

WHEREAS personality clashes may have been involved, especially between the Court and the previous Tribal Business Committee, the present Tribal Business Committee believes that the main problem is structural; that is, the present structure of Tribal government in the form of the Tribal Constitution and By-Laws and the Ute Law and Order Code creates an atmosphere in which conflict is inevitable, and

WHEREAS under the Tribal Constitution, executive, legislative and judicial authority resides in the Tribal Business Committee and there is no separate and independent judiciary under the Tribal Constitution, and

WHEREAS Article VI of the Constitution of the Ute Indian Tribe enumerates the powers of the Tribal Business Committee and states therein at Section l(k) that the Tribal Business Committee shall promulgate ordinances governing the conduct of members of the Tribe and provide for "the maintenance of law and order and the administration of justice by establishing a Reservation Indian Court and defining its duties and powers.", and

WHEREAS the Tribal organization established in the Tribal Constitution indicates that the Tribal Court is subordinate to the Tribal Business Committee, because the Tribal Business Committee appoints judges and establishes qualifications for the office of judge and sets the terms of office for judges and sets the criteria for removal of judges and can remove judges in accordance with those criteria and establishes the jurisdiction and powers of the Tribal Court and promulgates its rules of procedure and sets its budget, and

WHEREAS these functions of the Tribal Business Committee with regard to the Tribal Court, in the absence of a Constitutional mandate to the contrary, are supervisory in nature and parallel to similar activities of the Tribal Business Committee in setting up and supervising Tribal administrative agencies and enterprises, and

WHEREAS the ULOC as drafted provides a system by which the Tribal Court can review the actions of the Tribal Business Committee, and it is now obvious that the Tribal

Business Committee cannot fully exercise its supervisory powers over the Court if the Tribal Business Committee is also subject to review by that Court, and

WHEREAS the Tribal Business Committee believes that the clash between the Tribal Business Committee's supervisory powers and responsibilities over the Court and the power of the Tribal Court to review the actions of the Tribal Business Committee comprise one of two, fundamental causes of the difficulties which are currently being encountered, and

WHEREAS the Court's power and jurisdiction to review the actions of the Tribal Business Committee were created by ordinances promulgated by the Tribal Business Committee itself, and such power and jurisdiction of the Court are not mandated by the Tribal Constitution, and

WHEREAS the Tribal Constitution specifies five different methods by which the actions of the Tribal Business Committee are to be reviewed:

6. Review of all actions of the Tribal Business Committee by General Meetings of the Tribe (both annual and special meetings) (Article VI , Section 1, introductory paragraph)

7. Referendum Election to review all ordinances and resolutions of the Tribal Business Committee (both en- acted and proposed) (Article IX)

8. Recall Election of individual members of the Tribal Business Committee (Article V, Section 3)

9. Review by the Bureau of Indian Affairs and the Secretary of Interior of certain, specified ordinances & resolutions; (numerous subsections in Article VI)

10. Regular Election of Members of the Tribal Business Committee; this is an indirect review which does not have the immediate impact of the other four methods (Articles III and IV), and

WHEREAS a second, fundamental problem with the current wording of the Tribal Constitution and the current wording of the ULOC is that two systems for review of the actions of the Tribal Business Committee have been created, one under the Constitution and the other under the ULOC, and

WHEREAS this condition raises the possibility that these two systems of review may collide under certain circumstances, and

WHEREAS a collision between the Constitutionally-mandated review of the actions of the Tribal Business Committee and the judicial review created by ordinances of the Tribal Business Committee recently occurred when the newly-elected Tribal Business Committee yielded to the Tribal Court's order regarding payment of past dividends to a group of applicants which the Court had ordered enrolled as members of the Tribe (Resolution 87-130); the Tribal Business Committee did so out of respect for the notion that orders of the Court should be obeyed and because refusal to do so would have a very disruptive influence on the Tribe and its institutions; a few weeks after adoption of Resolution 87-130 and pursuant to Article IX of the Tribal Constitution, certain Tribal members presented to the Tribal Business Committee a valid Petition for a Referendum Election to review the action of the Tribal Business Committee in passing Resolution 87-130; that Referendum Election is scheduled for November 18, 1987, and

WHEREAS regardless of the outcome of that particular election, the fact that such an election is being held dramatically demonstrates that the Tribal Business Committee is caught between the Constitutionally-mandated system for review of its actions by the Tribal membership and a system for judicial review which the Tribal Business Committee created by promulgation of certain provisions of the ULOC, and

WHEREAS the Tribal Business Committee finds itself in the impossible position of trying to obey two systems of review which may ultimately issue conflicting instructions, and

WHEREAS this distressing situation begs for a remedy, and

WHEREAS it is mandatory for the Tribal Business Committee to find such a remedy, and

WHEREAS the Tribal Business Committee has carefully considered alternative solutions to this problem, and

WHEREAS the two most reasonable choices are to recommend to the Tribal membership an extensive revision of the Tribal Constitution in order to provide for an independent judiciary and full powers of judicial review or to remove the power and jurisdiction of the Tribal Court to review the actions of the Tribal Business Committee by adopting appropriate ordinances, thus leaving the Constitutional process as the exclusive system of review, and

WHEREAS in deciding upon which course to take, the Tribal Business Committee considered Tribal tradition and customs and the relative difficulty of implementing various alternatives, and

WHEREAS the Tribal Business Committee finds that it is more consistent with Tribal tradition and custom to honor the review system provided for in the Tribal Constitution as the exclusive system for review of its actions, and

WHEREAS after careful consideration, the Tribal Business Committee felt that it should acknowledge the Constitutional system of review and adopt an ordinance to make it the exclusive system of review of Tribal Business Committee action, and

WHEREAS this traditional system of review is still viable and consistent with Tribal custom, because the Tribe only has approximately three-thousand members, a great majority of whom are located within reasonably short distances from polling places and from the Tribal Offices, and

WHEREAS this choice also seems justified because the judicial system of review was a creation of the Tribal Business Committee in the first place, and

WHEREAS unless and until the Tribe decides to change its Constitutional form of government, it is much more desirable to have review of the Tribal Business Committee by bodies (general membership and BIA) over which the Tribal Business Committee has no supervisory authority or responsibility, and

WHEREAS the Tribal Business Committee's action in this Ordinance does not preclude revision of the Tribal Constitution at a later date, so if the Tribal membership desires to amend the Constitution, it can do so at its own pace, and

WHEREAS the remedy selected is within the scope of authority of the Tribal Business Committee while the other choice requires action by the general membership of the Tribe, and

WHEREAS it is desirable to provide Tribal members and others with a workable system for hearing their claims and grievances, and

WHEREAS some changes in the structure of Tribal government and also substantial changes in the Ute Law and Order Code are necessary to accomplish the above stated objectives, and

WHEREAS this ordinance is necessarily complex, the Tribal Business Committee felt that a diagram showing the structural differences between the United States Government and the Ute Tribal Government would be helpful to a more complete understanding of Tribal Government, such a diagram is attached to this Ordinance, and

WHEREAS another diagram is also attached which illustrates the applicability of the United States Constitution as compared to the Ute Tribal Constitution;

NOW THEREFORE, be it enacted by the Uintah and Ouray Tribal Business Committee as follows:

Any and all previously adopted ordinances of the Tribal Business Committee which conflict in any way with the provisions of this ordinance are hereby repealed to the extent that they are inconsistent with or conflict with, or are contrary to the spirit and/or purpose of this ordinance.

Section A. Committees

1. Enrollment Committee

a) Composition and term of office. There is hereby established a Ute Tribal Enrollment Committee which shall be comprised of three members appointed by the Tribal Business Committee, one member from each of the three bands. Each of the three members shall serve for a term of one year and may be appointed to serve consecutive terms without interruption.

b) Purpose. The purpose of Enrollment Committee is to decide whether an applicant for enrollment as a member of the Ute Indian Tribe of the Uintah and Ouray Reservation is eligible under the provisions of the Constitution and By-Laws of the Tribe.

c) Clerk. The Tribal Enrollment Clerk shall act as the clerk to the Committee and as an ex-officio member of the Committee without vote and shall assist applicants for enrollment in completing their written applications.

d) Meetings. The Enrollment Committee shall meet at least once each month to consider applications for enrollment.

e) Compensation. Compensation of Enrollment Committee members shall be fixed from time to time by the Tribal Business Committee.

f) Chairman. The voting members of the Enrollment Committee shall elect a chairman from among their number. The Committee shall set the term of office of the chairman, but such term shall not exceed the chairman's term of office on the Enrollment Committee.

g) Procedure. The Committee may follow Roberts' Rules of Order or any other set of procedural rules it may choose for the orderly and expeditious transaction of its business.

h) Questions of parentage. If there is a question as to the identity of either natural parent of an applicant, the Committee shall refer that question to the Ute Indian Tribal Court for determination of parentage. The applicant for enrollment or the applicant's guardian and any other interested person may appear before the Court and offer evidence of parentage to assist the Court in its determination. After appeals, if any, have been exhausted, the decision of the Court as to parentage shall be binding upon the Committee.

i) Written record. The Enrollment Committee shall file in its records, a written decision regarding each application for enrollment. The Tribal Enrollment Clerk shall deliver a copy of each decision made by the Enrollment Committee to the Tribal Business Committee immediately upon completion of each written decision.

j) Vesting of rights. The right of an applicant for enrollment to receive Tribal dividends or any other benefit of Tribal membership shall not vest in the applicant until the Tribal Business Committee approves the enrollment or, in the case of inaction by the Tribal Business Committee, until 30 days following the delivery to the Tribal Business Committee of a copy of the Enrollment Committee's written de-cision that such person is eligible for enrollment.

k) Review. Action of the Enrollment Committee in favor of enrollment of an applicant is reviewable by the Tribal Business Committee during the 30 days following the delivery to the Tribal Business Committee of a copy of the Enrollment Committee's written decision that such person is eligible for enrollment. A decision by the Enrollment Committee against enrollment of an applicant is reviewable upon appeal to the Tribal Business Committee at any time. If, upon review of the Enrollment Committee's decision against an applicant, the Tribal Business Committee finds that the applicant is eligible for enrollment, the applicant's right to receive the benefits of Tribal membership shall vest on the day that the Tribal Business Committee makes such finding, but such finding is subject to review in accordance with the provisions of the Tribe's Constitution and By-Laws.

l) No monetary awards. The Enrollment Committee shall not have authority to make any monetary award of any kind to anyone.

m) Removal. The Tribal Business Committee may remove from office prior to the expiration of their terms of office members of the Enrollment Committee for neglect of duty as a Committee member, gross personal misconduct, or malfeasance in office.

2. Personnel/Grievance Committee

This committee shall continue to be organized and to operate in accordance with the provisions of the Personnel Policies and Procedures section of the document entitled Ute Indian Tribe Personnel System.

3. The Tribal Business Committee shall exercise its traditional authority under the Tribal Constitution to hear all complaints and claims against the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities not relating to enrollment or personnel matters. Pursuant to this section "employee" is limited to the Tribe's Executive Director, Department Directors, employees of the Administration Department, Tribal Attorneys, Prosecutors and any employee who works on a direct and continuous basis with the Tribal Business Committee. "Officer" means any elected or appointed official of the Tribe. The Tribal Business Committee shall continue to hear such complaints on an informal basis, but the secretary to the Tribal Business Committee shall keep detailed minutes of the proceedings and record the final disposition of each matter considered by the Tribal Business Committee. All decisions of the Tribal Business Committee are reviewable as provided in the Tribe's Constitution and By-Laws. The jurisdiction of the Tribal Business Committee to hear said complaints and claims shall be original and exclusive.

Section B. Amending the Ute Law and Order Code as follows:

1. § 1-2-3(4) and (5) of the U.L.O.C. is hereby adopted as follows: § 1-2-3 (4) 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, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities, except that the Ute Indian Tribal Court shall have jurisdiction to hear actions brought by the Ute Indian Tribe against the bonds of officers or employees and actions against officers or employees for restitution of Tribal money, property, or services wrongfully converted to their personal benefit. Pursuant to this section "employee" is limited to the Tribe's Executive Director, Department Directors, employees of the Administration Department, Tribal Attorneys, Prosecutors and any employee who works on a direct and continuous basis with the Tribal Business Committee. "Officer" means any elected or appointed official of the Tribe.

§ 1-2-3(5) The Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against the United States Government or any of its officers or employees in their official capacities.

2. § 1-2-5 is hereby amended as follows:

§ 1-2-5. General Subject Matter Jurisdiction; Limitations.

Subject to any contrary provisions, exceptions, or limitations contained in either federal law, or the Tribal Constitution and By-Laws or Tribal Ordinances, the Courts of the Ute Indian Tribe shall have jurisdiction over all civil causes of action, and over all offenses prohibited by this Code except the Courts of the Ute Indian Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either a member of the Tribe, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its Tribal members may be directly or indirectly affected.

3. § 1-2-7 Exclusive Original Jurisdiction is hereby repealed.

4. § 1-3-1(2) is hereby amended as follows:

§ 1-3-1(2). There is hereby established a Ute Indian Tribal Court, which may be referred to as the Tribal Court, to handle all matters of a judicial nature not specifically placed within the jurisdiction of some other forum. The Ute Indian Tribal Court shall be a court of general civil and criminal jurisdiction.

5. § 1-8-6 is hereby repealed.

6. A new § 1-8-6 is hereby adopted as follows:

§ 1-8-6. Exclusive Remedies for Certain Claims.

(1) The procedure described in connection with establishment of the Enrollment Committee shall be the exclusive remedy for applicants for enrollment as Tribal members. The Courts of the Ute Indian Tribe shall not review decisions of the Enrollment Committee or the Tribal Business Committee and said Courts shall not have jurisdiction regarding any matters relating to enrollment of Tribal members except the Courts of the Ute Indian Tribe shall decide questions of parentage of applicants for enrollment when such questions are referred to the Courts by the Enrollment Committee or the Tribal Business Committee.

(2) The provisions of the Personnel Policies and Procedures section of the document entitled *Ute Indian Personnel System* shall comprise the exclusive remedy regarding personnel matters of the Ute Indian Tribe of the Uintah and Ouray Reservation. The Courts of the Ute Indian Tribe shall not review or otherwise become involved in personnel matters of the Tribe.

(3) The Tribal Business Committee shall have exclusive, original jurisdiction to hear all complaints and claims against the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities not relating to enrollment or personnel matters. All decisions of the Tribal Business Committee are reviewable as provided in the Tribe's Constitution and By-Laws. The Courts of the Ute Indian Tribe shall not review actions of the Tribal Business Committee and shall not have jurisdiction to hear any claims against the Tribe or its officers or employees in their official capacities. Pursuant to this section "employee" is limited to the Tribe's Executive Director, Department Directors, employees of the Administration Department, Tribal Attorneys, Prosecutors and any employee who works on a direct and continuous basis with the Tribal Business Committee. "Officer" means any elected or appointed official of the Tribe.

7. § 1-8-7 is hereby amended as follows:

§ 1-8-7. Limitations in Civil Actions.

Unless otherwise specifically provided in the Law and Order Code, the following limitations on the bringing of civil actions will apply:

Any action must be commenced within three years of the date the cause of action accrued, provided, however, that any cause of action based on fraud or mistake shall not

be deemed to have accrued until the aggrieved party has discovered or reasonably should have discovered the facts constituting the fraud or mistake.

8. Rule 25 e) is hereby amended as follows:

The court shall not award attorney's fees in a case unless such have been specifically provided for by a contract or agreement of the parties under dispute, or unless it reasonably appears that the case has been prosecuted for purposes of harassment only, or that there was no reasonable expectation of success on the part of the affirmatively claiming party. In any action by the Tribe, against the bond of any officer of employee, if judgment shall be against the Defendant, the Court shall award a reasonable attorney's fee against Defendant and in favor of the Tribe.

9. Rule 26 b) is hereby amended as follows:

Judgment by default may be entered by the clerk if the party's claim against the opposing party is for a sum of money which is or can by computation be made certain, and in the opposing party has been personally served on the reservation. Otherwise, judgment by default can be entered only by the court upon receipt of whatever evidence the court deems necessary to establish the claim.

10. Rule 35 a) repealed. Rules 35 b) through d) are unchanged.

11. A new § 1-8-6 is hereby adopted as follows:

Resolution No. 87-153 of the Tribal Business Committee of the Uintah and Ouray Reservation adopted July 20, 1987 which adds Rule 2 d) to the Ute Indian Rules of Civil Procedure is hereby repealed.

Section C. Directing Tribal Court to transfer cases: The Courts of the Ute Indian Tribe are hereby directed to transfer immediately to the Tribal Enrollment Clerk, the Personnel/Grievance Committee or to the Tribal Business Committee all cases, complaints and causes of action now pending before any such Court in which the Ute Indian Tribe or any of its officers or employees in their official capacities are named as Defendants and which have not been reduced to final judgment in such Courts at the time of adoption of this ordinance. Matters pertaining to enrollment shall be transferred, together with file folders containing complete copies of the Court's files on such matters, to the Tribal Enrollment Clerk. Matters pertaining to Tribal employee grievances shall be transferred, together with file folders containing complete copies of the Court's files on such matters, to the Personnel/Grievance Committee. Any other matters in which the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities are named as Defendants and which have not been reduced to final judgment at the time of adoption of this ordinance shall be transferred to the Tribal Business Committee, together with file folders containing complete copies of the Court's files on such matters. Pursuant to this section "employee" is limited to the Tribe's Executive Director, Department Directors, employees of the Administration Department, Tribal Attorneys, Prosecutors and any

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Ordinance No. _____

employee who works on a direct and continuous basis with the Tribal Business Committee. "Officer" means any elected or appointed official of the Tribe.

Irene C. Cuch, Chairwoman

Ron Wopsock, Vice-Chairman

Frances M. Poowegup, Member

Stewart Pike, Member

Phillip Chimburas, Member

absent
Richard Jenks, Jr., Member

CERTIFICATION

I HEREBY CERTIFY THAT the above Ordinance enacted was adopted by the Tribal Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation pursuant to the Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation at a duly called meeting in Vernal, UT, on the 27 day of March, 2013 at which time a quorum was present and votes:

5 for; 0 against; 0 abstaining; and 1 absent.

Reanin Tapoof
Secretary of the Tribal Business Committee
Ute Indian Tribe, Uintah & Ouray Reservation

EXHIBIT I

16-426

UINTAH AND OURAY
TRIBAL BUSINESS COMMITTEE

Resolution No. _____

WHEREAS: The Tribal Business Committee ("Business Committee") of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") is empowered by Article VI, Sections 1(k) of the Constitution and By-Laws of the Tribe to provide for the maintenance of law and order and the administration of justice of the Tribe; and

WHEREAS: On or about September 7, 2016, Tara Amboh filed a *Civil Complaint* (the "*Complaint*") in Ute Tribal Court, identified as Case No. CV16-268, Valentina Sireech, UIT Enterprise CEO Director; and Patrick Wyasket, UIT Director Water Settlement; and

WHEREAS: The *Complaint* raised issues governed by Ordinance No. 87-04, as amended by Ordinance No. 13-022 and codified at Sections 1-2-3 (4) and 1-8-6 (3) of the Ute Indian Law and Order Code, including, but not limited to, allegations against the Ms. Sireech and Mr. Wyasket; and

WHEREAS: The Ute Tribal Court issued a Ruling & Order on September 21, 2016, dismissing the case for lack of subject matter jurisdiction pursuant to Ordinance No. 87-04, as amended by Ordinance No. 13-022, and ordered that the file be immediately forwarded to the Tribal Business Committee for adjudication; and

WHEREAS: Rule 37(c) of the Ute Rules of Civil Procedure provides that a notice of appeal may be filed within twenty (20) days from the date of the entry of an Order by the Tribal Court; and

WHEREAS: Twenty (20) days have now lapsed since the date of entry of the Ruling & Order transferring the case to the Business Committee and no notice of appeal has been filed with the Tribal Court; and

WHEREAS: The Business Committee desires to resolve the case, by referring this matter to a Special Conflicts Judge; and

WHEREAS: The complaint alleges that Ms. Sireech and Mr. Wyasket terminated Ms. Amboh in violation of policies and thus the Business Committee may have a conflict of interest in hearing this case; and

WHEREAS: In order to remedy this real or perceived conflict of interest and to avoid any appearance of impropriety, the Business Committee desires to engage the services of a disinterested judge to adjudicate this matter; and

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WHEREAS: In recognition of the due process rights of the petitioner in this complaint and to ensure fairness in the adjudication of his claims, the Business Committee determined that it was both necessary and proper to refer this matter to Judge Reynolds to appoint a Special Conflicts Judge to resolve these claims in accordance with Tribal law.

NOW, THEREFORE, BE IT RESOLVED: that the Business Committee, at a duly called meeting with a quorum present, hereby directs Judge Reynolds to appoint a Special Conflicts Judge to finally and fully adjudicate the claims associated with this case that has been presented to the Business Committee under Ordinance No. 87-04, amended and reaffirmed by Ordinance No. 13-022.

BE IT FURTHER RESOLVED: that the Business Committee hereby delegates its authority under Ordinance No. 87-04, amended and reaffirmed by Ordinance No. 13-022 to the Special Conflicts Judge to finally and fully adjudicate the claims associated with the above case referred to the Business Committee.

BE IT FURTHER RESOLVED: that the Special Conflicts Judge is serving in the role of an Administrative Hearing Officer acting in place of the Business Committee and any decision rendered by the Special Conflicts Judge shall be treated as a final decision of the Business Committee and not a decision of the Tribal Court.

BE IT FURTHER RESOLVED: that the Business Committee hereby directs Judge Reynolds to Ensure the adoption of the attached Guidelines for Hearings to govern the proceedings in the above case and provide both sides with the opportunity to be heard.

BE IT FURTHER RESOLVED: that J. Preston Stieff is hereby appointed as Special Counsel to represent Valentina Sireech, Ute Indian Enterprise Director and Patrick Wyasket, Ute Indian Water Settlement Director, in this matter.

BE IT FURTHER RESOLVED: that the decision rendered by Special Conflicts Judge in this case shall be final and not appealable to the Business Committee, the Tribal Court, or the Tribal Court of Appeals.

BE IT FURTHER RESOLVED: that if the Special Conflicts Judge determines that tribal law has been violated, the Tribal Court shall hold a separate hearing to determine the penalties for the violation, including but not limited to sanctions and/or removal from position.

BE IT FINALLY RESOLVED: that the Business Committee hereby authorizes and approves its Chairman or, in his absence, the Vice-Chairman, to execute any and all documents as may be necessary and appropriate to carry out the terms, conditions and intent of this Resolution.

Shaun Chapoose, Chairman

absent

Edred Secakuku, Vice-Chairman

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Ronald Wopsock, Member

absent
Cummings Justin Vanderhoop, Member

Bruce Ignacio, Member

Tony Small, Member

CERTIFICATION

I HEREBY CERTIFY THAT THE FOREGOING Resolution was adopted by the Tribal Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation pursuant to the Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation at a duly called meeting in Ft. Duchesne, Utah, on the 30 day of November, 2016, at which time a quorum was present and votes 4 for, 0 against, 0 abstaining and 2 absent.

Reannin Stewart
Tribal Business Committee - Secretary
Ute Indian Tribe, Uintah & Ouray Reservation

GUIDELINES FOR HEARING[1]

Hearing on the Complaint

(1) The Special Conflicts Judge shall preside over the hearing. The Special Conflicts Judge shall afford the accused official all of the rights guaranteed under the Indian Civil Rights Act, the Ute Tribe Constitution, tribal law and traditional law. The Special Conflicts Judge shall conduct the hearing and shall rule on preliminary and procedural matters before and at the hearing. The Special Conflicts Judge shall conduct the hearing in an informal manner and the rules of procedure applicable to civil proceedings in federal, state or tribal courts shall not apply.

(2) If an issue arises at any stage during the hearing that involves the interpretation of any provision of the Tribal Constitution, the Special Conflicts Judge shall have the authority to interpret the provision. Such interpretation shall have no precedential value.

(3) The Special Conflicts Judge shall conduct a hearing on the complaint, which shall be open to the public. The hearing shall be held at the place and shall commence on the date and time specified in the Notice of Hearing. An audio recording of the hearing shall be made in the same manner as for hearings in Tribal Court.

(4) The Special Conflicts Judge shall have the same power to swear witnesses and take testimony under oath and to issue process to compel the attendance of witnesses and the production of documents or other evidence, and to impose the same sanctions for failure to comply, as at a criminal proceeding under the Law and Order Code. This power shall extend to tribal officials, and to documents and other evidence in the possession of the Tribe, notwithstanding claims of sovereign immunity.

(5) The parties to the proceeding shall be the petitioner, who shall be designated as the petitioner, and the accused official, who shall be designated as the respondent. Each of the parties shall have the right to be represented by counsel of their own choosing at his or her own expense.

- All witnesses to the hearing must be sequestered at the beginning of the hearing and are not allowed to hear the testimony of other witnesses during the course of the hearing; and
- The petitioner and respondent shall each be afforded thirty (30) minutes to present their Case-in-Chief; and
- The petitioner may reserve some of their allotted time to present rebuttal witnesses to the respondent's reply to petitioner's case. During the reserved time the petitioner may only contradict the respondent's witnesses and evidence, rather than present new arguments, provided, the petitioner's total time does not exceed thirty (30) minutes; and
- The Special Conflicts Judge shall ensure that each party's time period is strictly followed and each side has a full and fair opportunity to present their case; and
- Both the petitioner and the respondent (jointly) shall be afforded five (5) minutes at the conclusion of the hearing to present closing argument.

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[1] These Guidelines are intended to provide a framework to conduct the proceedings and can be modified at the sole discretion of the Special Conflicts Judge to promote judicial efficiency and to promote the interests of justice.

(6) The petitioner shall have the burden of going forward with the evidence and the burden of proving the allegations in the complaints by clear and convincing evidence.[2]

(7) Both the petitioner and the respondent shall have the right to appear at the hearing, to present evidence and argument, and to call and examine witnesses. The respondent and the petitioner shall each have the right to address the Special Conflicts Judge regarding the complaint.

(8) The Special Conflicts Judge shall first decide whether the respondent acted outside of their official capacity in interpreting and applying customary law of the Ute Indian Tribe. If the Special Conflicts Judge concludes that the respondent did not act outside of their official capacity then the Special Conflicts Judge shall dismiss the complaint with prejudice in accordance with Ordinance No. 13-022, § 1-2-3(5). At each stage of the proceeding the Special Conflicts Judge shall decide whether the petitioner met their burden of proof. If the Special Conflicts Judge concludes that the respondent acted outside of her official capacity, the Special Conflicts Judge shall issue findings relating to the respondent's actions and the case shall be remanded to the Tribal Court who shall schedule a separate hearing to decide whether there is sufficient evidence of wrongdoing to warrant that the respondent should be sanctioned and/or removed from her position based on the findings of the Special Conflicts Judge.

(9) The Special Conflicts Judge shall have the authority to institute all other remedies normally afforded under the Law Order Code to the tribal court; however, the decision of the Special Conflicts Judge shall be treated as a decision of the Business Committee. The Special Conflicts Judge shall prepare a written legal opinion setting forth his findings and the reasons for his decision. The final decision shall be rendered at the conclusion of the hearing or shortly thereafter upon the issuance of a written legal opinion. The decision of the Special Conflicts Judge shall be final and not appealable to the Business Committee, the Tribal Court or the Tribal Court of Appeals.

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[2] "Clear and Convincing Evidence is evidence that produces in your mind a firm belief as to the matter at issue…For evidence to be clear and convincing, it must have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence." MUJI 2.19

EXHIBIT J

FILED
BY NT 3:26pm
SEP 21 2016
UTE INDIAN TRIBAL COURT
FT. DUCHESNE, UTAH 84026

THE UTE INDIAN TRIBAL COURTOF THE UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

TARA AMBOH, Plaintiff, Vs. VALENTINA SIREECH as UIT Enterprise CEO Director, and PATRICK WYASKET as UIT Director Water Settlement. Defendant.	**RULING & ORDER** Case No. CV16-268 Judge William Reynolds

This matter is before the Court *sua suponte* regarding a Complaint filed by Tara Amboh. This action complains of the decisions and actions of the Ute Indian Enterprise Director and the actions of the Ute Indian Water Settlement Director in their official capacities. Based upon the foregoing the court finds that this action implicates Ordinance No. 13-022. In 1987 issues arouse which forced the Tribe to consider how to resolve conflicts between the Tribal Court and the Tribal Business Committee. Ultimately the dispute was resolved through Ordnance No. 87-04 which was later restated and slightly amended by Ordinance 13-022. These Ordinances amend Section 1-2-3 (4) of the Ute Indian Law and Order Code. Section 1-2-3 (4), in relevant part, now reads as follows:

> "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, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities…" U.L.O.C § 1-2-3 (4).

A new Section 1-8-6(3) was also adopted which provides that "the Tribal Business Committee shall exercise its traditional authority under the Tribal Constitution to hear all complaints and claims against the Ute Indian Tribe of the Uintah and Ouray Reservation, the Tribal Business Committee of the Uintah and Ouray Reservation or any Tribal officers or employees in their official capacities not relating to enrollment or personal matters." U.L.O.C § 1-8-6(3). Section 1-8-6(3) in its amended form defines "employee" as "the Tribe's Executive Director, Department Directors, employees of the Administration Department, Tribal Attorneys, Prosecutors and any employee who works on a direct and continuous basis with the Tribal Business Committee." *Id.* The UIT Enterprise Director and the UIT Water Settlement Director appear to meet the definition of "employee."

Thus the court must consider whether the alleged misconduct appears to have been in the course of their official capacities. Ms. Amboh alleges that the Enterprise and Water Settlement Directors, acting in their capacities as directors, wrongfully terminated her employment. Section 1-8-4 dictates that the "Courts of the Ute Indian Tribe shall not have jurisdiction to hear claims against …employees in their official capacities." U.L.O.C § 1-2-3 (4). The power to hear these claims may only be exercised by the Business Committee. *See*, U.L.O.C § 1-8-6(3).

Based on the forgoing the court hereby ORDERS the following:

1. That this matter be dismissed in the Ute Indian Tribal Court for lack of subject matter jurisdiction.
2. That the file relating to this case be immediately be forwarded to the Tribal Business Committee for adjudication.

IT IS SO ORDERED.

Dated this 21st day of September, 2015

William Reynolds
Tribal Court Judge

EXHIBIT K

14 - 0 18

UINTAH AND OURAY
TRIBAL BUSINESS COMMITTEE

Resolution No. _____

WHEREAS: The Tribal Business Committee ("Business Committee") of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") is empowered by Article VI, Sections 1(k) of the Constitution and By-Laws of the Tribe to provide for the maintenance of law and order and the administration of justice of the Tribe; and

WHEREAS: On May 28, 2013, Percel Cesspooch, Plaintiff, filed a civil complaint against Roberta Cesspooch, the Court Administrator requesting the removal of the Court Administrator. As grounds for removal, the Plaintiff alleged, among other things, that the Court Administrator failed to uphold the laws of the Court system, breach of contract, denied access to court records, tampered with case files and made other alleged violations of due process; and

WHEREAS: On September 27, 2013, Chief Judge Tsosie issued an *Order* transferring *Cesspooch v. Cesspooch*, Case No. 13-188 (May 2013) to the Business Committee pursuant to *Ordinance 13-022*, which gives the Business Committee exclusive, original jurisdiction to hear all complaints and claims against the Tribe or its officers or employees in their official capacities and directs the Court to transfer such cases to the Business Committee. In the *Order*, the Court further determined that the Defendant, Roberta Cesspooch, as Court Administrator is defined as an employee under the Ute Law and Order Code § 1-3-11, who works on a direct and continuous basis for the Business Committee, the Court therefore, *sua sponte* directed this case to the Business Committee for final resolution; and

WHEREAS: Under Rule 37(c) of the Ute Rules of Civil Procedure, it provides that a notice of appeal may be filed within twenty (20) days from the date of the entry of the *Order*. There being no notice of appeal filed within the twenty (20) days provided, the Business Committee will conduct a hearing and adopt guidelines to resolve this matter.

NOW, THEREFORE, BE IT RESOLVED: that the Business Committee, at a duly called meeting with a quorum present, hereby adopts the attached Guidelines for Hearing on Roberta Cesspooch.

BE IT FINALLY RESOLVED: that the Business Committee hereby authorizes and approves its Chairman or, in his absence, the Vice-Chairman, to execute any and all documents as may be necessary and appropriate to carry out the terms, conditions and intent of this Resolution.

14 - 0 18

Gordon Howell, Chairman

Ron Wopsock, Vice-Chairman

Absent

Bruce Ignacio, Member

Stewart Pike, Member

Phillip Chimburas, Member

Tony Small, Member

CERTIFICATION

I HEREBY CERTIFY THAT THE FOREGOING Resolution was adopted by the Tribal Business Committee of the Ute Indian Tribe of the Uintah and Ouray Reservation pursuant to the Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation at a duly called meeting in Ft.Duchesne, Utah, on the 15 day of January 2014, at which time a quorum was present and votes 5 for, 0 against, 0 abstaining and 1 absent.

Tribal Business Committee - Secretary
Ute Indian Tribe, Uintah & Ouray Reservation

14-018

GUIDELINES FOR HEARING ON ROBERTA CESSPOOCH

Hearing on the Petition

(1) The Chairman and Vice-Chairman of the Business Committee shall work together and serve as Co-Chairmen and preside over the hearing. The Chairman and Vice-Chairman shall afford the accused official all of the rights guaranteed under the Indian Civil Rights Act and the Ute Tribe Constitution. The Chairman and Vice-Chairman shall conduct the hearing and shall rule on preliminary and procedural matters before and at the hearing. The Chairman and Vice-Chairman shall conduct the hearing in an informal manner and the rules of procedure applicable to civil proceedings in federal, state or tribal courts shall not apply.

(2) If an issue arises at any stage during the hearing that involves the interpretation of any provision of the Tribal Constitution, the Business Committee, with the assistance of the General Counsel shall have the authority to interpret the provision. Such interpretation shall have no precedential value.

(3) The Business Committee shall conduct a hearing on the petition, which shall be open to the public. The hearing shall be held at the place and shall commence on the date and time specified in the Notice of Hearing. An audio recording of the hearing shall be made in the same manner as for hearings in Tribal Court.

(4) The Co-Chairmen shall have the same power to swear witnesses and take testimony under oath and to issue process to compel the attendance of witnesses and the production of documents or other evidence, and to impose the same sanctions for failure to comply, as at a criminal proceeding under the Law and Order Code. This power shall extend to tribal officials, and to documents and other evidence in the possession of the Tribe, notwithstanding claims of sovereign immunity.

(5) The parties to the proceeding shall be the petitioners, who shall be designated as the petitioner(s), and the accused official, who shall be designated as the respondent. Each of the parties shall have the right to be represented by counsel of their own choosing at his or her own expense. The Business Committee shall have the assistance of the General Counsel to assist the Business Committee on any matters that may arise during the hearing.

- All witnesses to the hearing must be sequestered at the beginning of the hearing and are not allowed to hear the testimony of other witnesses during the course of the hearing;
- Both the parties to the petition shall only be afforded thirty (30) minutes to present their Case-in-Chief;
- The petitioner may reserve their time total time allotted to present rebuttal witnesses to the respondent's Case-in-Chief, (a brief period during which the petitioner may only contradict the respondent's witnesses and evidence, rather than present new arguments), provided, the petitioner's total time does not exceed thirty (30) minutes;
- The Co-Chairmen of the Business Committee shall ensure that each party's time period is strictly followed and each side has a full and fair opportunity to present their case; and

- Both the petitioner and the respondent shall be afforded five (5) minutes at the conclusion of the hearing to present closing argument.

(6) The petitioner(s) shall have the burden of going forward with the evidence and the burden of proving the allegations in the petition by clear and convincing evidence.[1]

(7) Both the petitioners and the respondent shall have the right to appear at the hearing, to present evidence and argument, and to call and examine witnesses. The accused official and the petitioner(s) shall have the right to address the Business Committee regarding the petition.

(8) The Business Committee shall decide whether the petitioner(s) met the burden of proof and whether there is sufficient evidence of wrongdoing to warrant that the accused official should be removed from office. The decision must be supported by a majority of the Business Committee, provided a quorum is present. The Business Committee shall prepare a resolution setting forth its findings and the reasons for its decision. The decision shall be recorded by the Secretary of the Business Committee. The final decision shall be rendered at the conclusion of the hearing. The decision of the Business Committee shall be final and not appealable to the Tribal Court or the Tribal Court of Appeals.

[1] "Clear and Convincing Evidence is evidence that produces in your mind a firm belief as to the matter at issue...For evidence to be clear and convincing, it must have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence." MUJI 2.19

EXHIBIT L

FILED
BY [illegible] 11:07am
SEP 18 [illegible]
UTE INDIAN TRIBAL COURT
FT. DUCHESNE, UTAH 84026

IN THE UTE TRIBE BUSINESS COMMITTEE
of the
UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

DINO CESSPOOCH, **Petitioner,**	) **CV14-053**
v.	) **FINAL ORDER**
GORDON HOWEL, Individually and in his official capacity, **Respondent.**	)

THIS MATTER having come before the three judge Hearing Panel (Panel), following transfer from the Ute Tribal Court to the Business Committee, through appointment by the Ute Tribal Business Committee (Committee). See Resolution Nos. 14-122 and 14-139. A hearing was originally scheduled for June 24, 2014 but was continued to July 31, 2014 and then to August 21, 2014. A video hearing was held August 21, 2014, in accordance with the "Guidelines for Hearings" which had been presented to the Panel and both parties. Dino Cesspooch (Petitioner) was present and represented by attorney Robert C. Fillerup and Gordon Howel (Respondent) was present and represented by attorney J. Preston Stieff. Both parties presented testimony and made arguments to the Panel. At the conclusion of the hearing, the Panel reserved its final order.

This action was brought as a result of Petitioner's removal as a commissioner of the Ute Tribal Employment Rights Office (UTERO) by Resolution 13-258 dated November 7, 2013. Petitioner had originally been appointed by Resolution 11-407 dated December 14, 2011. Petitioner commenced this litigation by filing suit in Ute Tribal Court on January 14, 2014.

The Panel must make an initial determination as to whether Respondent's actions where within his official capacity as Chairman of the Business Committee. If the Panel finds that Respondent's actions were outside his official capacity, then the Panel shall make further determination as to any wrongdoing by the Respondent. If, however, Respondent's actions as to Petitioner being

removed from his position as a UTERO Commissioner fall within his official capacity, then this matter must be dismissed with prejudice in accordance with Ordinance N0 13-0.22.

Following testimony and argument at the August 21, 2014 hearing and review of all admitted evidence and briefs submitted by the parties, the Panel makes the following findings of fact:

1. Petitioner was appointed by the Committee as a UTERO Commissioner representing the UnCompahgre Band on December 14, 2011 with a term expiring December 31, 2013 by Resolution 11-407. Neither party objected to this resolution nor the manner in which the appointment was made.
2. Petitioner served as a UTERO Commissioner until November 7, 2013 when the Committee passed Resolution 13-358 which terminated his appointment based upon a finding of misconduct in office and other good cause. The termination was made effective immediately.
3. The Committee met November 7, 2014 at Fort Duchesne on a Thursday as there had been overflow business from the previous meeting. Neither party contested that all procedural notice requirements had been satisfied.
4. The meeting was attended by 4 of the 6 Committee Members and a quorum was established. Respondent presided over the meeting and a vote was taken on Resolution 13-358. The Resolution was passed by a vote of 3 (three) in favor and 1 (one) against. Voting in favor of the Resolution was the Respondent, and Committee Members Bruce Ignacio and Phillip Chiniburas. Committee Member Tony Small voted against. Committee Members Ron Wopsock and Stewart Pike were absent. The Resolution was certified by the Committee secretary.
5. Testimony was presented that Respondent had a potential conflict of interest concerning any issues coming before the Committee arising from UTERO as he had a business involved with UTERO. The Panel finds that Respondent should have abstained from the deliberations and vote but that in the absence of his involvement, the resolution would have passed by the required majority vote and a quorum was maintained as per Ordinance 90-01, Article 2, § 2-5.
6. The Constitution of the Ute Tribe grants the Committee the authority to regulate the procedures of all tribal agencies of the Uintah and Ouray Reservation. See Ute Tribal Constitution, Art. (VI (r).

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7. The Panel finds that Resolution 13-358 was validly enacted and that Respondent and the Committee were acting within their official capacity at the time of enactment. Therefore, the Panel finds that Petitioner did not meet his burden of proof that Respondent acted outside of his official capacity and therefore, per the Guidelines set for this matter by the Committee, this case must be dismissed with prejudice.

ORDER

It is hereby ordered that the Respondent acted within his official capacity in the passage of Resolution 13-358 removing Petitioner from his appointment as UTERO Commissioner. Therefore, Respondent's motion to dismiss this case is granted and this matter is dismissed with prejudice.

SO ORDERED THIS 17th DAY OF SEPTEMBER 2014

For the Panel:

The Honorable Lisa L. Atkinson

The Honorable Lisa M. Vanderford-Anderson

Jerry R. Ford, Judge

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
LYNN D. BECKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:16-CV-958
UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally chartered corporation and a federally recognized Indian Tribe,	)	
	)	
Defendants.	)	
	)	
_____	)	

BEFORE THE HONORABLE CLARK WADDOUPS

September 27, 2016

Motion for Temporary Restraining Order
Motion to Dismiss For Failure to State a Claim

Laura W. Robinson, RPR, FCRR, CSR, CP
351 South West Temple
8.430 U.S. Courthouse
Salt Lake City, Utah 84101
(801)328-4800

Appearances of Counsel:

For the Plaintiff:	David K. Isom Attorney at Law Isom Law Firm 299 S. Main Street Suite 1300 Salt Lake City, Utah 84111
For the Defendants:	Frances C. Bassett Thomasina Real Bird Attorneys at Law Fredericks Peebles & Morgan 1900 Plaza Drive Louisville, CO 80027
For Judge Barry G. Lawrence:	Nancy Sylvester Attorney at Law Administrative Office of the Courts PO Box 140241 Salt Lake City, Utah 84114

Salt Lake City, Utah, September 27, 2016

*** * * * ***

THE COURT: Good afternoon, we are here in the matter of Becker versus the Ute Indian Tribe of the Uintah and Ouray Reservation and others, case 2:16-CV-958. Will counsel please state their appearance?

MR. ISOM: Your Honor, David Isom for the plaintiff, Mr. Becker, who is with me at counsel table.

THE COURT: Thank you.

MS. SYLVESTER: Nancy Sylvester for Judge Barry Lawrence, the third-party defendant.

THE COURT: Thank you.

MS. BASSETT: Yes, Your Honor, Francis Bassett and Thomasina Real Bird for the defendants.

THE COURT: We are here on the motion to convert the TRO that was previously issued into a preliminary injunction and other issues related to that including motions to dismiss.

I want to begin with the motion on the -- whether the TRO should be converted to a preliminary or permanent injunction. And as a framework for that discussion I want to outline some principles and I invite your discussion as to whether or not you agree or disagree with these principles. And ultimately I want you to discuss the issues as framed within this framework.

Based on my research and your briefing, I believe that the following propositions are supported by the existing law. The first is that the scope of the Tribal Court's jurisdiction is a federal question under Section 1331. Second, that the Tribal Court does not have jurisdiction over civil disputes arising on tribal lands between a non-tribal member and the Tribe unless one of two exceptions apply. The first exception is that non-members who enter into consensual relationships with the Tribe or its members; or two, activities that directly affect the Tribe's political integrity, economic security, health or welfare. And for that proposition I'm relying on *Strate v A-1 Contractors,* 520 U.S. 438 at 446, which is a 1997 case, and *Montana versus the United States* which is at 450 U.S. 544, a 1981 case.

The third principle is that the Tribe bears the burden of establishing that one of these exceptions applies. That comes from the *Belcourt Public School District* which is quoting the *Commerce Bank* which is found at 554 U.S. at 330.

The fourth principle is if an exception applies giving the Tribal Court jurisdiction, the plaintiff generally must exhaust his remedies before the Tribal Court before proceeding in federal court. And that proposition comes from *National Farmers Union Insurance Companies versus the Crow Tribe of Indians* found at 471 U.S. 845 and that

discussion appears at pages 855 through 856. That is a 1985 case.

Now, the next principle is that exhaustion is not required if an exception to the rule applies and there are four exceptions. The first is that if there is an assertion of tribal jurisdiction -- if the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; two, the action is patently volitive of express jurisdictional prohibitions; and three, the exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction. That's the *Stridham* case which is quoting *National Farmers.*

The *Stridham* case provides an additional exception which is that the court may excuse exhaustion if it is clear that the Tribal Court lacks jurisdiction and the judicial proceedings would serve no purpose other than delay.

So within this framework, I think the issue to be discussed is one, whether the exceptions to exhaustion apply and primarily whether or not the Tribe has, under Article III, waived sovereign immunity and agreed to the submission of jurisdiction within a court of competent jurisdiction which would be the state court.

So within that I would like you to begin discussing whether or not the TRO should be made permanent within this framework. Mr. Isom, do you want to begin?

MR. ISOM: Yes, Your Honor. Your Honor in short we agree with all of those principles. Let me comment on just some of them. Well, let me go through them. First, that 1331 jurisdiction includes this court's power to determine the scope of Tribal Court jurisdiction.

Second, that a Tribal Court has jurisdiction over a non-member of a tribe if that person enters into a commercial contract. That jurisdiction, of course, is subject to limitations and in particular is subject to the exceptions that I will discuss. The first one the court mentioned is if the contract waives that jurisdiction and/or waives Tribal Court exhaustion Tribal Court jurisdiction. In those cases, the Tribal Court has no jurisdiction.

Third, that it is the Tribe's burden to show that no exception applies, we agree with. Set forth in general there is an exhaustion requirement, we agree with that. Fifth, no exhaustion is required under circumstances that clearly apply here. We think first of all that this the exception for harassment or bad faith applies here. The reason is that this argument wasn't made until three and a half years after litigation began. It wasn't made until the tribe was facing the possibility of discovery sanctions. It didn't occur when they were arguing to Judge Benson that there was no jurisdiction. Had they believed then that there was a Tribal Court issue, they could have inserted

that as a Section 1331 creating issue. They chose not to do that until three and a half years later. One can only surmise, but reasonably surmise, that the reason was they were deliberately trying to avoid federal court jurisdiction at that time. And to bring the Tribal Court action when they did, there can only be -- the question is were they doing it for harassment or bad faith. There can only be two motives, both of which probably apply, but either one of which is harassing and bad faith.

The first is they did it to get an adjudication in Tribal Court. In the face of it, the clearest waiver one can imagine, in other words the clearest agreement possible that they never would go to Tribal Court, or their motive was to hope that we then would try to enjoin the Tribal Court litigation and invent, create 1331 jurisdiction after Judges Benson, Judge Shelby and the Tenth Circuit had held that without this issue there is no 1331 jurisdiction.

The third -- the next exception is that it is violative of an express prohibition. I'm not sure the scope of that exception because it seems to overlap the later exception which is that they had waived jurisdiction. So I imagine both of these apply. But in any event, the third one clearly does. This case boils down to something simple. They entered into a contract, they waived jurisdiction, Tribal Court exhaustion and jurisdiction, they specifically

agreed that the contract would be governed by state law, and specifically agreed that only the federal court and if not the federal court a competent -- a court of competent jurisdiction which Judge Lawrence has held to include the state courts of the State of Utah would be the sole adjudicators of this contract.

I think I have dressed all of the questions, Your Honor.

THE COURT: Okay. Ms. Bassett?

MS. BASSETT: Good morning -- or good afternoon, Your Honor. Um, I am recovering from a respiratory infection and so my voice is a little raspy and you will have to bear with me.

We do agree that federal courts have jurisdiction, federal question jurisdiction under 1331 to determine whether or not a Tribal Court is exceeding the scope of its Tribal Court jurisdiction. The next thing was about Tribal Court's jurisdiction over non-Indians. And the court has cited the *Strate* case and also the *Montana* case.

I would like to point out, Your Honor, that we do agree with the proposition as far as it went, but we do point out that both *Strate* and *Montana* were cases that dealt with a Tribe's jurisdiction over non-Indian for conduct that occurred on non-Indian lands inside the reservation. That aspect sometimes becomes obscured and all Tribes believe

that makes a difference. In this case, for instance, most of the activities of Mr. Becker occurred on tribal fee land, fee lands that are held in trust by the United States. So we believe that where the conduct of a non-tribal member is pursuant to a commercial dealing and a consensual arrangement between the Tribe and a non-Indian, and the non-Indian's conduct occurs on tribal trust lands that the Tribal Court has greater authority than it would if the conduct occurred on non-fee or -- fee lands. We -- I would guess, yes, the Tribe bears the burden of establishing those exceptions.

THE COURT: Before you leave the point that you just made, in the *Strate* case the Supreme Court does not make any distinction between whether the conduct occurred on fee land or on tribal lands.

MS. BASSETT: Well, but that is dicta. That statement is dicta because the -- at a different portion in that opinion, Your Honor, the court does explain that the right-of-way in question, this was not just -- it was not tribal land and it was not tribal land --

THE COURT: I don't think there was a right-of-way at issue, was there?

MS. BASSETT: Well, it was on a roadway. And I guess the other thing that I would point out --

THE COURT: Well, it was a claim for personal injury.

MS. BASSETT: Yes. Yes. Arising on the right-of-way I believe, Your Honor.

THE COURT: Wasn't it at a school? Wasn't this the one that took place at the school?

MS. BASSETT: Perhaps it is. I may be --

THE COURT: It was. The court describes it as that the -- there was an accident between -- there was a collision on the reservation on a highway between an automobile that was driven by a tribal member's non-Indian widow and a truck that belonged to a non-Indian owned enterprise.

MS. BASSETT: Yes. And there is another place in that opinion, Your Honor, that makes clear that the right-of-way had been sold. So it was essentially fee land. But this is a case in which the issue of Tribal Court jurisdiction went to whether or not the Tribal Court had jurisdiction over a suit between one nonmember and another nonmember that occurred on non-fee lands.

THE COURT: And so why in this case is not -- this involves basically a contract dispute. How is that different?

MS. BASSETT: Well --

THE COURT: It doesn't matter whether it occurred on the reservation or on fee lands, the argument is that there was a contract and you breached the contract and you have

waived jurisdiction.

MS. BASSETT: Yes, but as -- if the court is saying that it is our burden to establish one of the exceptions and you asked did we accept the premise.

THE COURT: Well, I think that you have established that there was a consensual relationship. So that element, I think, is satisfied.

MS. BASSETT: Okay. Let's see, why exhaustion would not apply, I guess, would it fall within one of the exceptions. And I would note this distinction between this case and the Crowe & Dunlevy case, Your Honor, and that is that in the Crowe & Dunlevy case, the Tribal Court had exercised jurisdiction for a period of two years and, in fact, had entered an order requiring the law firm to return attorney fees. It was at that point that the law firm went into federal court. They had an actual order of a court, order of the Tribal Court that could be looked at to see if the Tribal Court had exceeded its jurisdiction. And we do not have that in this case. The Tribal Court has not taken any action in this case.

THE COURT: The original language that the *Crowe* case relied upon, however, is the *National Farmer's Union Case* which says if it is futile or if it has been challenged that there is no jurisdiction. That is one of the exceptions. Why doesn't that exception apply?

MS. BASSETT: Well, but I believe that that exception is met in this case, Your Honor, in that there is Tribal Court jurisdiction. This was a consensual agreement between Mr. Becker and the Tribe.

THE COURT: That is the last step which I agreed.

MS. BASSETT: Okay.

THE COURT: The next step is why is exhaustion, why would exhaustion be required which in simple terms mean why should -- why should the Tribal Court have the first stab at this issue?

MS. BASSETT: Well, Your Honor, Mr. Isom relied primarily upon a bad faith exception, as I recall, and for that he said that we did not -- he begins by noticing that in the first federal court action that the Tribe did not raise a question of Tribal Court jurisdiction.

Now, I do not have the case in front of me here today, but there Judge Scalia issued an opinion in which he said you would not look to the -- so we were in that first federal action the Tribe was the defendant. Judge Scalia has issued an opinion that says, you cannot look to anything that the defendant would raise in a counterclaim to provide for 1331 jurisdiction. You look solely to the complaint. So there is nothing that the Tribe could have done in that federal -- first federal court action to even raise Tribal Court jurisdiction.

Now, so then we go to -- and I would point this out that there is nothing that would have prevented Mr. Becker from filing a suit in the Tribal Court. It is open to both Indians and non-Indians. And that does happen. We do have non-Indians who come into the Tribal Court and bring causes of action there. We have a lawyer who serves as the judge on the Tribal Court. We bring in practicing attorneys to act as conflicts judge, and we hire outside practicing attorneys for appellate judges. So I mean it's a full-fledged judicial court.

Now, let me go onto what happened when Mr. Isom or Mr. Becker then sued in the Utah State Court. Well, what we did there was we filed a motion to dismiss for lack of subject matter jurisdiction among other things. Now, what Judge Lawrence did in that case was he said and we attached --

THE COURT: Isn't that beside the point?

MS. BASSETT: Well, I mean if you're asking --

THE COURT: I mean the question is, is whether or not the Tribal Court lacks jurisdiction?

MS. BASSETT: But you're asking do any of the exceptions to exhaustion --

THE COURT: Yes, and one of them is that the Tribal Court lacks jurisdiction. Isn't that the important exception here?

MS. BASSETT: Well, but based upon the contract, based upon the waiver of the contract, is that what the court is --

THE COURT: Yes.

MS. BASSETT: Yes, okay. Well, we, as you know, both in the state court action and in this court, we are challenging the legal effectiveness of that agreement. We believe that that is an agreement that had to be approved by the federal government, had to under federal law, and --

THE COURT: Let me ask you some questions about that.

MS. BASSETT: Okay.

THE COURT: First of all, is there any dispute that the Article 23 is clear? There is no ambiguity that it was clearly stated as an attempt to waive jurisdiction and place jurisdiction either in the federal court or in another court of competent jurisdiction. No ambiguity about that is there?

MS. BASSETT: Well, it does not -- there are two things that Article 23 does not do. It does not provide for jurisdiction in the State of Utah or State of Utah Courts.

THE COURT: No, it provides for jurisdiction in a court of competent jurisdiction.

MS. BASSETT: That is correct. And it does not waive the jurisdiction of the Tribal Court. All it waives is a requirement for exhaustion.

THE COURT: Yes. And that is what we're talking about.

MS. BASSETT: Yes.

THE COURT: So why shouldn't the tribe and the defendants be held to that waiver right now?

MS. BASSETT: Because the Tribe is challenging the validity of the agreement itself under federal law and under tribal law.

THE COURT: What factual basis does the Tribe have? I didn't read anything in your pleadings that challenged this waiver. There is no facts in dispute as to the fact that the Tribe to which the business committee entered into this agreement and the agreement contained the waiver.

MS. BASSETT: There are facts in our pleadings, Your Honor, that challenge the waiver.

THE COURT: Okay. What are those facts?

MS. BASSETT: Okay. The facts are that the waiver is not made in accordance or in compliance with tribal law. And I explained that the tribal -- our tribal government has a six member business committee. It is a unitary legislative and executive branch and it can only act when a quorum of those six members are sitting in a legal session.

THE COURT: Well, we have a resolution signed by six members of the tribal business committee.

MS. BASSETT: But, it contains within it no

authorization for the waiver of tribal sovereign immunity. That is what the tribal code says, Your Honor.

THE COURT: Well, let me read you the specific language. Now, therefore be it resolved by the Uintah and Ouray Tribal Business Committee of the Ute Indian Tribe that the Business Committee hereby agrees to enter into the independent contractor agreement attached as Exhibit A to this resolution.

Why isn't that sufficient authorization?

MS. BASSETT: Because of what the tribal -- or the tribal code requires. The Tribe --

THE COURT: But you're referring to a later code.

MS. BASSETT: No, I'm not.

THE COURT: What was the code? What was the code provision in place when this was entered in 2004?

MS. BASSETT: Well, we have provided that to the court.

THE COURT: You haven't so far.

MS. BASSETT: That is Exhibit G to the Tribe's -- our own motion for TRO and Preliminary Injunction Exhibit G.

THE COURT: And that says specifically waived by resolution or ordinance of the Business Committee. Well, that's what we have.

MS. BASSETT: No. No. Because the resolution itself has to make a specific reference to the fact that sovereign

immunity is being waived because that is -- there again, that is how the Business Committee acts. It sits in a legal session.

THE COURT: The resolution in fact does that.

MS. BASSETT: No, it does not.

THE COURT: It incorporates by reference the entire agreement.

MS. BASSETT: If --

THE COURT: And includes the agreement as a stamped part of the same numbered resolution.

MS. BASSETT: The Exhibit H that we provided are samples of Business Committee resolutions.

THE COURT: Those are all after the fact.

MS. BASSETT: Well, but that -- they were provided in there to show you that what a resolution in compliance with tribal law looks like because there again I go back --

THE COURT: But that doesn't mean that is the only way they can look. The fact that they chose to do it at the time these resolutions were adopted doesn't mean that the way they did it in 2004 is not an effective waiver.

MS. BASSETT: Well, the tribal law says that there has to be a resolution. It has to be voted upon by the Business Committee, and it has to make specific reference to the fact that the Tribe's sovereign immunity -- that this hey hello, this is a --

THE COURT: That is why I'm trying to understand your argument.

MS. BASSETT: Yes. I mean --

THE COURT: Because we have a resolution approved by six members of the Tribal Business Community, correct?

MS. BASSETT: Yes.

THE COURT: And we have a resolution that specifically adopts and incorporates the agreement, correct?

MS. BASSETT: I am not sure that it adopts. It incorporates if that is the wording I --

THE COURT: Well, the Business Committee hereby agrees to enter into the independent contractor agreement attached as Exhibit A to this resolution, and then it goes on, the chairman is authorized to carry out the terms and intent of this resolution. And then the agreement, the resolution is given a number 05-147. The agreement is attached and it is given the same number. It is included as a part of the resolution.

MS. BASSETT: Yes, but I believe and I don't --

THE COURT: What is -- what is wrong with that analysis.

MS. BASSETT: The resolution -- I believe that the resolution also says that it has to -- or the contract itself says, if you will give me just a moment here, it says, "the Tribe's waiver of sovereign immunity shall be

further evidenced by a tribal resolution delivered at the time of execution of this agreement in accordance with tribal laws that expressly authorizes the foregoing submission of jurisdiction of the court so designated and the execution of this agreement." We don't believe that it does that.

THE COURT: Why in substance does it not do that?

MS. BASSETT: Because -- because again, Your Honor, it is and I am not, you know, if you --

THE COURT: How could anybody read this resolution with the attached agreement and not conclude that it was the intent of the business tribe to waive sovereign immunity and attach as a part of it the very agreement that contains that express language? And then the parties went forward relying upon that.

MS. BASSETT: I believe, Your Honor, that we have cited authority in here for other federal circuit courts in which they have said that the requirements of tribal law have to be followed for there to be a valid waiver of sovereign immunity. One of those is a circuit case.

THE COURT: I am accepting for purposes of this argument that proposition is correct.

MS. BASSETT: Okay.

THE COURT: Why doesn't this resolution with the attached agreement meet that requirement?

MS. BASSETT: Well, what normally happens is that the Business Committee does not read through the contracts themselves.

THE COURT: But that is -- that is not either here nor there. That is their choice.

MS. BASSETT: Well --

THE COURT: If they adopt an agreement and authorized its signature and agreed to be bound by it, whether they read it or doesn't read it doesn't have anything to do with jurisdiction.

MS. BASSETT: But what the tribal law requires is that the resolution itself has to authorize a waiver of sovereign immunity. Then those resolutions are kept as a matter of public record. Anyone can come in and see them.

THE COURT: But you're missing the point. The attached agreement is a part of the resolution.

MS. BASSETT: Yes. And, you know, I mean it is quite a lengthy agreement. One would not necessarily know where to look or --

THE COURT: So was the Internal Revenue Code quite a lengthy statute. The fact that it is lengthy doesn't excuse us from being bound by it.

MS. BASSETT: But I mean our position would be, Your Honor, that the state courts in Utah are not courts of competent jurisdiction and that a waiver of sovereign

immunity is one thing that is over here, but subject matter jurisdiction is over here.

THE COURT: That is an issue for the state court to decide.

MS. BASSETT: No, it is an issue for the federal court to decide, Your Honor.

THE COURT: It is not before me.

MS. BASSETT: Yes, it is. It is --

THE COURT: Not on this --

MS. BASSETT: We have raised it.

THE COURT: Not on this TRO.

MS. BASSETT: Are we going to --

THE COURT: The only issue before me --

MS. BASSETT: Are you going to hear our motion for a TRO?

THE COURT: We'll get to that issue. But on the TRO, the only issue for this court to decide is whether or not the tribal -- whether or not the parties should be enjoined from proceeding in the Tribal Court because they have waived tribal jurisdiction.

MS. BASSETT: But it should be for the state court to determine, I mean for the Tribal Court to determine if the waiver is valid under tribal law.

THE COURT: Why is that? Why should that go to them? What issues would they possibly be better capable of

deciding than this court? That is the rationale for the exhaustion. If there is a credibility of witnesses, if there is some subtlety in terms of the tribal law, some unique aspect that this court can't decide, then the court said well give them the first chance to create a record. So what is there in this case that the Tribal Court would be able to hear that I don't have in front of me?

MS. BASSETT: Well, because part of the policy, Your Honor, for the exhaustion rule, is to promote and to encourage tribal self governance. So one of the ways that you do that is by having tribal courts make these sort of determinations.

THE COURT: Why do we have the exceptions?

MS. BASSETT: Well, I mean I would argue that the exceptions don't apply here because this is -- this is something that the Tribal Court should be allowed to decide in the first instance. It's an interpretation of tribal law what the tribal law requires. But let me -- let me go on to say this, Your Honor, is that even -- even if the waiver is contained in the contract, and the contract itself is void, then you don't even get to the language of the waiver.

THE COURT: Are you familiar with the cases that say that when you interpret these waiver provisions you look at whether the waiver provision itself is efficacious. And so you can have a situation, for example, it happens in

arbitration all the time, the court finds the arbitration provision is enforceable. The question as to whether the contract was entered into in fraud in the inducement is for the other court, for the arbitrator to decide. Those are severable provisions. And this very contract includes a severability provision. So whether or not your claim that the contract may be void for lack of approval by the Secretary of the Interior, or whether there may have been fraud in the inducement, none of those go to the question as to whether or not the severability and the waiver provisions are enforceable.

MS. BASSETT: So this is the second time I have been in front of a court where a court is referring to cases that have not been cited by the parties. So I would object to any -- I mean I can't respond to cases that I am not aware of. But I would say this --

THE COURT: Well is that a -- I mean are you aware of that as a general principle of law.

MS. BASSETT: But it does not apply --

THE COURT: That when you have a severability provision you look at that enforceability of that as a separate agreement.

MS. BASSETT: But it does not apply in this case and in this area of law.

THE COURT: Why not?

MS. BASSETT: Because the federal law is that absent federal approval, these contracts are void. Void. Not that you sever certain portions out or not. And I would give you this example, Your Honor. Mr. Becker through Mr. Isom has mentioned the *Stifel* case. And I would -- it would be my position that the *Stifel* case, which is a Seventh Circuit case, does not apply here in the Tenth Circuit. But, in any event, there was a case, a predecessor case to *Stifel* and that case is *Wells Fargo Bank v Lake of the Torches Economic Development Corporation*, the cite is 658 F.3d 684. So this is a case in which suit was brought on these trust indentures. And the holding in this case is that the certain of these trust indentures were void ab initio for lack of federal approval. I mean that is the rule in the Indian field realm and it goes to the fact that Indian interest in land cannot be alienated, congress has to authorize it. Congress sometimes authorizes it through statutes in which the congress delegates to the Secretary of the Interior the ability to review and approve those contracts. And this contract itself I mean falls under the Indian Minerals Development Act, IMDA we call it for short, and that requires the Secretary of the Interior to review the -- first review the agreement, and then upon written findings make factual findings that the agreement is in the interest of the Tribe. That never occurred here. It was

never submitted for the Secretary's review. And, you know, in our complaint in this case we have cited -- I mean IMDA, Indian Development Minerals Act is just one of the federal acts, we have cited several of them. The nonintercourse act, um, the section under the Indian Reorganization Act, all of them that is the body of jurisprudence under all of these federal statutes is that without the necessary federal approval the agreements are void.

Now beyond that, beyond that issue under federal law is the issue under the Tribe's constitution because the Tribe's constitution delegates only limited authority to its Business Committee. And it says that before the Business Committee can enter into any sort of agreement that would essentially alienate, encumber, assign any of its tribal assets, that those have to be federally approved. There, again, so that is an issue for the Tribal Court to determine in the first instance looking at the Tribe's constitution.

So this is not an action that was brought in the Tribal Court for bad faith or harassment. But the Tribe as any other litigant has the right to challenge the enforceability and the legality of this contract. The federal government does it. If someone in the federal government has signed a contract without proper authority and I imagine the State of Utah on occasion will dispute certain contracts. The Tribe has that same right. And so

our position is this was not -- it's not a bad faith brought in bad faith or harassment, it simply we did take an appeal from the -- Judge Lawrence dismissed under 12(b)(1) he dismissed it without looking at any of our evidence, he looked only at the complaint and this agreement attached to it. So all of the issues that we had raised and we had attached certain exhibits to it. He didn't consider those. We did attempt to prosecute an interlocutory appeal and we perhaps didn't file it under the right rule, but it does not appear likely to me that we would have had a viable interlocutory appeal in any event.

THE COURT: But you have now pending a motion for summary judgment.

MS. BASSETT: Yes.

THE COURT: In which you can make all of those arguments in front of the state court.

MS. BASSETT: Well, what -- what we were on the verge of doing before the state court, Your Honor, before literally I got back from the hearing in front of the state court judge, Judge Lawrence gave us a very fair hearing. And the next thing that I was going to do was draft up a request to Judge Lawrence to ask him to refer those issues to the Tribal Court to determine under Tribal Court law similar to the way federal courts will sometimes reach out to a state court to have them address issues of state law.

I was going -- I was in -- that was going to be the next thing I was going to do but we ended up, we have been here in this court ever since.

THE COURT: Well, I think you forgot an intervening cause -- action. The Tribe filed an action in Tribal Court and tried to proceed with that action and refused to grant a continuance to allow this issue to be resolved. And so it is not as if you said well, let's -- let's send this over to the -- let's ask the Tribal Court for an advisory opinion on this issue. The Tribe tried to proceed in Tribal Court in conflict direct contravention to what was happening in the state court.

MS. BASSETT: Well, it's not our belief that it was in direct contravention because it's our position that the state court does not have subject matter jurisdiction even if there was a waiver of sovereign immunity. Those --

THE COURT: I'm just saying that your explanation that you were going to ask the state court to seek opinion from the Tribal Court as to whether this was in compliance, that is not quite a fair statement of what really happened.

MS. BASSETT: Well, the reason why we filed in Tribal Court was because it became clearer to us that it was not appropriate for either a state court or a federal court to be deciding the issues of tribal law, the interpretation of the Tribe's Constitution, and its bylaws and its law and

order code. The Tribal Court should decide those issues in the first instance.

THE COURT: Okay. Any other arguments you wish to make as to why the TRO should not be made a Preliminary Injunction?

MS. BASSETT: Well, I would just -- the court has maybe read our pleadings, but we do believe that if you look at the *Crowe & Dunlevy* case, and that is the first time that the Tenth Circuit has authorized or approved of an injunction, a federal court injunction enjoining a Tribal Court, to my knowledge that's the first time, they did so under the fiction of ex-parte Young which means that Young, ex-parte Young applies against individual tribal officers and that is not being followed here. The Tribal Court -- neither the Tribal Court nor the Tribal Court judge has been named as a party and they're not here to defend the Tribal Court or the Tribal Court judge his jurisdiction, but instead what the injunction that is being sought here is one to restrain the tribal parties themselves from proceeding with the lawsuit. And as we -- as we argue in our objection, we believe that this impinges upon the tribal parties rights to seek legal redress and those are constitutional rights.

Now, Mr. Isom has said well the cases that we cited, and he referred to one of the cases, that it had to do with

the NLRB enjoining or directing an employer in Arizona to withdraw a suit in state court. And the U.S. Supreme Court said no, you can't do that, that is unconstitutional. It impinges upon the right to seek legal redress. And the right to seek legal redress means through the courts as well as the other branches of government. And now it's true we're not talking here about the NLRB but it's the underlying constitutional principle that is articulated in that case and the other case. So we object to being enjoined, the tribe, as litigants before the court when we believe that the only authority in the Tenth Circuit is for an injunction against the Tribal Court judge who is not a named party.

Our other reason for objecting is that the injunction has been sought to enjoin the Tribal Court proceeding because there is an ongoing state court proceeding. But our position is that the state court does not have subject matter jurisdiction. So our position is that we can't be enjoined over here for the reason that there is a proceeding underway over here, when this proceeding is not one in which the court has subject matter jurisdiction.

THE COURT: Is not the state court a court of general jurisdiction?

MS. BASSETT: Not -- not over causes of action that arise in Indian Country. And if I could, could I take just

a moment, Your Honor?

THE COURT: Sure.

MS. BASSETT: I was up very late last night because we were responding to Judge Lawrence's pleadings in which the State of Utah argues that we have relied upon among other laws because it's not a single law that prohibits the Utah State Court from exercising jurisdiction, it's a framework. But everyone keeps saying to us well what law is it? Well one of the laws that you can look at is 25 USC 1322 in which for the State of Utah to be able to exercise jurisdiction over, and this is the language quote, civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country situated within the State of Utah for that to occur. And then -- but let's drop down to number B because that was subsection A. But subsection B says, "but even if there is an assumption of this state civil jurisdiction, it can only occur if it's approved by a majority of the Indian residents of the Indian Country affected, that is under 13 -- Section 1326. But even if that were to occur, subsection B goes on to say, but nothing in this section authorizes the alienation, encumbrance of any real or personal property belonging to any Indian or and Indian tribe band or community that is held in trust by the U.S. or is subject to a restriction against alienation imposed by the U.S., dot, dot, dot, or, and this is the key

language, nothing in this section shall confer jurisdiction upon the state to adjudicate the ownership or right to possession of such property or innate interest therein. This is what Mr. Becker is asserting. He is asserting a participation interest in the revenues produced by the Tribe's oil and gas assets.

THE COURT: Aren't revenues different that the lands?

MS. BASSETT: Nope, nope there is a long string of federal cases that say even for instance there is a case in which timber was being harvested on an Indian Reservation and the courts hold even after it's sold, the revenue, the money revenue, remains trust status property.

THE COURT: That means any time the Tribe enters into a contract it can argue that the money that goes to pay that contract comes from tribal revenues and there is no jurisdiction in the state court.

MS. BASSETT: Well, you know that's --

THE COURT: Doesn't that prove too much?

MS. BASSETT: That's a hypothetical situation. Number one, Tribes enter into contracts all of the time that don't involve the alienation, encumbrance, or sell of trust assets.

THE COURT: Well, but my real question here is that is a defense to the state court action. Why shouldn't you bring that defense and let the state court decide it?

MS. BASSETT: Because and I -- I have cited all of the federal cases in all of our briefing here to you, but the Tenth Circuit has said over and over and over again that that is a federal question. That's what the Tenth Circuit has said over and over and over again. That it is a federal question. That does not have to be litigated in the state because the state doesn't have the jurisdiction to begin with. And I want to say what I was wanting to point out here is in the briefing filed yesterday, that Judge Lawrence argues that Section 1322(a) since the reference there is only to Indians, that the statute obviously refers to individual Indians and not the Tribe itself. But here is, you know, and I was responding to this quite late last night and I said I wanted to reserve the opportunity to say something more about this and I would like to do that at this time, Your Honor. The --

(Brief pause in proceedings.)

MS. BASSETT: I think of all of the federal circuits, the federal circuit that handles the most Indian law cases is the Tenth Circuit by virtue of the fact that two of the states at least within the Tenth Circuit, New Mexico and Oklahoma, have a high number of Indian tribes within them. But this -- the argument that Judge Lawrence raised yesterday that this language in Section 322(a) can only apply to individual Indians and not to the Tribes. It is

our position that that issue is res judicata to the State of Utah. And the reason why it is is because the case of *Ute Tribe V Utah,* which has now had its seventh published opinion at the Tenth Circuit, this was brought by the Ute Tribe, not by individuals, by the Ute Tribe. And it was, excuse me, it was to establish in a binding judicial precedent that the State of Utah does not have civil and criminal jurisdiction over the Ute Indian Reservation. And that is what the Tenth Circuit has held now in seven opinions. Not once has the State of Utah argued that 1322 or 1321(a) applies only to individual Indians. So it is our position that issue is res judicata. I would also say to you, Your Honor, that in what we filed very late last night, the state in making that argument Judge Lawrence has relied upon this case out of the State of Washington. It's a state court decision. While this court is not in the State of Washington, we're in the Tenth Circuit, and the Tenth Circuit has -- is replete, replete with cases in which Indian tribes have brought the very sort of claims that we're bringing here. *United Keetoowah Band of Cherokee Indians*, it's the Tribe itself via --

THE COURT: Have you --

MS. BASSETT: -- the State of Oklahoma.

THE COURT: Is there a Tenth Circuit case that you can point me to where there was an explicit waiver of

jurisdiction, an agreement that it would be litigated in a court of competent jurisdiction in which the Tenth Circuit has said, well, state court is not a competent court of jurisdiction?

MS. BASSETT: Well, there are Tenth Circuit cases out of Oklahoma, that's the *Kiowa Tribe* case, I think, or -- but in any event I am not sure that there is that very issue except to the extent that it was decided in *Ute Tribe v Utah* in which that was where the issue in that case was the Tribe had adopted its law and order code. Did that law and order code apply to the Tribe and tribal Indians within the reservation boundaries? That was the entire issue.

THE COURT: Was that a criminal prosecution?

MS. BASSETT: No, it was not. I mean the original case was brought to declare that the Tribe had all of the rights of an Indian Tribe including the right to adopt its tribal law and order code. Tribal law and order code covered both civil and criminal matters. So the more --

THE COURT: Is there a case from the Tenth Circuit in which the Tenth Circuit said that a civil cause of action that arises within the Tribal Court cannot be litigated in the jurisdiction of the state court?

MS. BASSETT: Well, what we have is the *C&L Enterprises* which is a U.S. Supreme Court case and that was the case in which the -- and the cite to that is 532 U.S.

411 and that is a case in which now the holding in that case which the state will cite is that a tribe's waiver of sovereign immunity subjected the tribe to the jurisdiction of an Oklahoma State Court. But in that case the Supreme Court was careful to emphasize this, didn't have to say it but it does, says the claim, cause of action arose off the reservation. And this is the exact words that the Supreme Court uses, the property in question, quote, is not on the Tribe's reservation or on land held by the federal government in trust for the Tribe.

THE COURT: That doesn't quite answer the question, does it?

MS. BASSETT: Well, I believe that it -- well that case in combination with the *Kennerly v District Court* case which is another U.S. Supreme Court case, that is 400 U.S. 428 or 423, I'm sorry. This is when the tribal counsel for the Blackfeet Indian Tribe adopted a resolution much like the resolution you see approving Mr. Becker's contract, it was just a resolution. But that resolution, instead of adopting a contract, said we hereby declare that the Montana State Courts will have concurrent jurisdiction with our Tribal Court for the civil causes of action that arise within our reservation boundaries. That went up to the Supreme Court and the Supreme Court reversed it and said that the -- that the tribal counsel could not through a

resolution circumvent the statutory process that is outlined under 25 USC 1322. It says only --

THE COURT: That case, if I remember correctly, did not include a waiver of sovereign immunity. Several have concurrent jurisdiction.

MS. BASSETT: That is correct. I mean but the two cases together, between *C&L Enterprises* and *Kennerly*, you have to -- you have to. But, I mean, so if there is not a case on all fours with this case, but I mean I think I have cited to you as much law as I can possibly cite for the proposition that and, you know, and we have cited in our briefing or our briefs there is this plethora of cases that say subject matter jurisdiction cannot be waived by the parties. It can't be waived. So why would it be that in this instance courts say it can be waived?

THE COURT: I'm very confused by your argument. There are all kinds of cases that say you can agree to arbitration agreements including Tribes. How is that not contrary to saying you can't waive subject matter jurisdiction?

MS. BASSETT: Well --

THE COURT: You can't confer subject matter jurisdiction. That point is well established.

MS. BASSETT: Well, I think we have something called a Federal Arbitration Act that authorizes arbitration, Your Honor. And --

THE COURT: But all of those cases, the Federal Arbitration Act, the State Arbitration Act, all of them say this is a matter of contract which is a matter of usually state law.

MS. BASSETT: But we have no equivalent law in the field of Federal Indian Law. This is what we have. We have the Tribe's treaties, the Tribe's treaties promised them a land part. You know we have the language in the Utah Enabling Act and the Utah Constitution in which the state -- the state is disclaiming any jurisdiction, all authority, for anything occurring within the Tribe's reservation boundaries. So we have an entire framework of laws. It's not equivalent. It simply is not equivalent to the arbitration example you posit.

THE COURT: Any other arguments you want to make before I hear from Mr. Isom?

MS. BASSETT: No.

THE COURT: Mr. Isom, do you wish to respond?

MR. ISOM: Your Honor, I am happy to respond to any questions, but I don't see the need to make any further argument.

THE COURT: Well, I think her point which she raises is that there is a plethora of cases, she says, which states that the state court can't have jurisdiction. Now that is not directly the issue that is raised by this preliminary

injunction, but if there is -- if there is no jurisdiction in the state court and the Tribe has not validly waived jurisdiction, then should the court hold this case in abeyance and send it back to the Tribal Court to allow you to pursue your arguments there that the waiver is effective?

MR. ISOM: Your Honor, it is worth noting how fundamental this question is and how important this question is. Having said that, they have not cited a case, we're not aware of a case, where an Indian Tribe as clearly as can be waives Tribal Court exhaustion, waives sovereign immunity, agrees to litigate in the federal court or a court of competent jurisdiction. We're not aware of any support for the proposition that under those circumstances no state court in this country can adjudicate that claim. That's radical and completely unsupported.

THE COURT: Anything further you wish to argue?

MR. ISOM: Two or three things, as long as I'm here. They argue that the Tribal Court action wasn't supposed to be in contravention of the state court. Of course it was. The remedy they seek is to keep the state court from adjudicating the contract.

Secondly, they keep confusing the state court and the Tribal Court. Over and over again they say that the Tribal -- that the state court this and that. This is about the Tribal Court.

And finally, they keep arguing various federal law based issues that were in the original federal action that didn't create 1331 jurisdiction that either have been already decided by Judge Lawrence or can be decided. They haven't cited anything that says there is exclusive jurisdiction in this court to decide whether this contract was approved by the Secretary of the State. Thank you.

THE COURT: Thank you. I'm going to take a brief recess and see if I can rule on this pending motion and then we'll hear the other motions. So we'll be in brief recess for just a few moments.

(Recess.)

THE COURT: We are back in session in Becker versus The Ute Indian Tribe. I believe that it is in the best interest of the parties for me to enter an oral ruling at this point.

This is certainly an area in which a written ruling would be appropriate, but I think the parties need to move forward with this litigation and I believe I have sufficient arguments to reach a decision on the request that the TRO be converted to a preliminary injunction. And so I am going to rule orally so that you can move forward with whatever additional issues you wish to pursue after the court's ruling.

I am going to grant the motion and grant a preliminary

injunction. My reasoning for doing so is as follows: First, as I indicated, I have concluded and make a finding that the scope of the Tribal Court's jurisdiction is a federal question under Section 1331. I do not understand either party to question this principle.

Second, the court concludes based on the current authority, including the Supreme Court authority, that the Tribal Court does not have jurisdiction over civil disputes arising on tribal lands between a non-tribal member and a Tribe unless one of two exceptions apply. The exceptions are one, nonmembers who enter into consensual relationships with the Tribe or its members; and two, activity that directly affects the Tribe's political integrity, economic security, health or welfare. These principles are stated and exceptions are stated in *Strate v A-1 Contractors,* 520 U.S. -- 438 at 446, a 1997 case, and *Montana versus The United States*, which is found at 450 U.S. 544, 1981.

The court finds that the -- I should say that the Tribe bears the burden of establishing one of these exceptions applies which is set forth in the *Belcourt Public School District* case 786 F.3d at 658 quoting the United States Supreme Court in *Commerce Bank* at 554 U.S. at 330.

The court finds that the Tribe has met its burden of proving that there was a consensual relationship between Mr. Becker and the Tribe. Because that exception is met,

the court does not need to go to the second exception as to whether the activity directly affects the tribal's political integrity or economic security, health or welfare.

That is not the end of the analysis however. The exception applies giving the Tribal Court jurisdiction over Mr. Becker and generally law is established that Mr. Becker then would be required to exhaust his remedies before the Tribal Court before proceeding in federal court. That principle is established by *National Farmer's Union Insurance Company versus Crow Tribe of Indians*, 471 U.S. 845 at 855 through 856, a 1985 case. It is also established and recognized by the Tenth Circuit in the Thlopthlocco Tribe, let me spell that, T-H-L-O-P-T-H-L-O-C-C-O Tribal Town versus Stridhan, S-T-R-I-D-H-A-N, 765 F.3d 1226 which is a Tenth Circuit case of 2014 in which Judge Tymkovich was the author. I want to quote specifically the exception that that court cited. Where it is clear that the Tribal Court lacks jurisdiction and the judicial proceedings would serve no purpose other than delay, a federal court may excuse exhaustion. And the Tenth Circuit was citing *Nevada versus Hicks*, which is 533 U.S. 353 for that cite.

There are other exceptions that apply to eliminate the requirement that a party exhaust remedies in the Tribal Court. Those exceptions include an assertion of tribal jurisdiction is motivated by a desire to harass or is

conducted in bad faith.

Mr. Becker has argued that the three and a half year delay by the Tribe in this case evidences a desire to harass or was conducted in bad faith. The court need not reach a finding on that particular issue at this point because I believe that the other exception is met which is that the action is patently violative of express jurisdictional prohibitions. I believe that overlaps with the quote that I just read from the *Stridhan* case in which the court found that the lacking jurisdiction is clear.

The other opportunity that -- or excuse me, exception to the exhaustion requirement is that exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. The court need not make a finding on that one because I believe that the jurisdiction exception is met which would excuse any requirement for exhaustion before the Tribal Court in this case.

As to that issue, the court finds that there is a likelihood of success on the part of Mr. Becker based on the evidence that has been presented and the legal precedent that has been cited. First, with respect to the resolution of the Tribe which was adopted on April 27, 2005, as resolution number 05-147, that resolution is signed by the Tribal Business Committee, all six members signed the

resolution. The resolution includes a recital that Mr. Becker should be engaged as an independent consultant. It includes a recital that he -- that the Venture Fund Board has determined that Mr. Becker should be engaged pursuant to the terms and conditions of the independent contractor agreement which is attached to this resolution. And specifically on the issue of jurisdiction, the resolution provides, all in caps, now therefore be it resolved by the Uintah and Ouray Tribal Business Committee of the Ute Indian Tribe that the Business Committee hereby agrees to enter into the independent contractor agreement attached as Exhibit A to this resolution.

Now, the court finds that the Ute Indian Tribe was the authorized entity to act on behalf of the Tribe and that the independent contractor agreement is attached and included in the resolution as is evidenced by the fact that it is given the same resolution number 05-147.

The contracting party in that case is between the Utah Indian Tribe of the Uintah and Ouray Reservation Utah and its subsidiaries and affiliates, and between Lynn D. Becker. Specifically the contract provides under Article 23 which is entitled limited waiver of sovereign immunity submission to jurisdiction, and I am going to quote the relevant language, the parties hereto unequivocally submit to the jurisdiction of the following courts, the U.S. -- U.S. District Court for

the District of Utah and appellate courts therefrom, and paren two, if and only if such courts also lack jurisdiction over such case to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts.

The court -- the provision then continues, the court or courts so designated shall to the extent the parties can so provide original and exclusive jurisdiction concerning all legal proceedings and the Tribe waives any requirement of tribal law stating that Tribal Courts have jurisdiction -- original jurisdiction over all matters involving the Tribe and waives any requirement that such legal proceedings be brought in Tribal Courts -- Tribal Court or that tribal remedies be exhausted.

The agreement also specifically provides for a waiver, a limited waiver of the defense of sovereign immunity to the extent that such defense may be available. It is also important to note that the agreement provides this agreement and all disputes arising hereunder shall be subject to, governed by, and construed in accordance with the laws of the State of Utah. All disputes arising under or relating to this agreement shall be resolved in the United States District Court for the District of Utah. Pursuant to these, well, finally, in Article 24 the agreement provides that in the event that any provision of this agreement shall be

invalid, illegal, or otherwise unenforceable, the validity, legality, and enforceability of the remaining provisions shall in no way be affected or impaired hereunder.

The court finds first of all that a suit was brought in Federal District Court, and Federal District Court concluded that it lacked jurisdiction. The action was then brought in state court. The question as to whether or not the state court has competent jurisdiction to hear the matter is not before this court on this motion. The court also finds that under the severability provisions any argument that the agreement may have been entered into by fraud in the inducement or was unauthorized because of necessary federal approval was not obtained would not affect the legitimacy of the provision that provides for waiver of sovereign immunity and that the decisions are to be decided by a court of competent jurisdiction and the waiver of any requirement that remedies be exhausted in a Tribal Court.

And I would note in this analysis that the Tribe waives the requirement of tribal law which would mean any arguments that have been made to the court that this was not in compliance with the exact procedures of the tribal law in terms of how resolutions were to be framed or drafted would not be controlling in this case because those provisions have been waived.

The court finds that the waiver is express. That the

waiver -- there is no -- it is clear that there is no ambiguity in what is being waived. The resolution approves or requires or authorizes the chair woman to execute the agreement. The agreement was executed by the chair woman. And as I indicated the resolution was approved by six members of the Tribal Business Community. There is no evidence before this court that the Tribal Business Community was not authorized to act on behalf of the Ute Indian Tribe of the Uintah and Ouray Reservation and its subsidiaries and affiliates. Because of this agreement, the court finds that jurisdiction -- that the Tribal Court has waived jurisdiction to the extent that the State Court is a court of competent jurisdiction. That the Tribal Court has waived the application of tribal law to govern this and that the proceeding is to be governed by the Utah State law.

For all of those reasons, the court finds that Mr. Becker as the plaintiff in this action is likely to prevail on the merits.

Addressing the second requirement for a preliminary injunction which is that the parties show irreparable harm, the court finds as I indicated at the time that I entered the TRO that a requirement that Mr. Becker proceed in two different courts with a possibility of inconsistent results and rulings is sufficient to satisfy the requirement of irreparable harm. In terms of the next requirement for a

balancing of harms, the court finds that the harms favor Mr. Becker in terms of the balance. Any arguments that the Tribe makes that the State Court is not a state -- a court of competent jurisdiction can be made before the State Court. That proceeding is ongoing. Motion for summary judgment has been filed and the state has all of its opportunities to make all of those arguments at that time.

Finally, the last requirement is that the preliminary injunction be in favor of the public interest. I believe that it is in the public interest that contract provisions that are clear as this appears to be, and that have largely in terms of based on the allegations of the complaint been performed, should be honored and respected, and that these decisions should be resolved in a reasonable and ordinary way without conflicts between courts deciding the same issues.

For all of those reasons, I am granting the preliminary injunction. The requirement for a bond in the amount of $10,000.00 will remain in place. Any additions or corrections or clarifications to the order granting the preliminary injunction?

MR. ISOM: Your Honor, just one note. I think that the court said that the Tribal Court waived jurisdiction. I think that it would be proper to say that the Tribe and the parties waived the jurisdiction of the Tribal Court.

THE COURT: That is correct. With that correction, I think that is an appropriate amendment to the court's discussion.

MS. BASSETT: Your Honor, we would ask that bond be continued.

THE COURT: Yes, the bond of 10,000. That is what I said, the bond of $10,000.00 will be -- will continue.

MS. BASSETT: Okay. And we would like to request a stay pending appeal. We will be taking an appeal. Can I request a stay pending appeal?

THE COURT: What does that mean?

MS. BASSETT: It would mean that the injunction is stayed during the pendency of the appeal.

THE COURT: Does that mean that the parties can proceed to prosecute in the Tribal Court?

MS. BASSETT: Yes.

THE COURT: Then the motion is denied.

MS. BASSETT: Thank you.

THE COURT: Let's turn to the remaining issues. Discussing the counterclaims, I have a motion to -- for leave to allow the filing of the second amended answer, counterclaim, and third-party complaint. It's my intent to grant that motion and allow the second amended answer, counterclaim, and third-party complaint which is Docket Number 34 to be filed. Anyone wish to be heard on this

issue?

MR. ISOM: No, Your Honor. I think we're the only ones that objected and we don't object.

THE COURT: Okay. And I want to hear argument on this issue. There is a motion to dismiss the counterclaim. I have reviewed the counterclaim. It appears to me that in substance Counts 1, 2 and 3 are substantially the same as the counterclaims that were dismissed by judge -- by the -- I should call them counterclaims, the claims, the counts that were dismissed by Judge Shelby in his ruling that are now on appeal. I'm happy to hear argument as to why these should be treated differently, but it's my -- I am persuaded by Judge Shelby's ruling and would be inclined to grant the motion to dismiss Counts 1, 2 and 3 for the same reasons that Judge Shelby gave. Does either party want to be heard on any of these three counts?

MS. BASSETT: Yes, I would.

THE COURT: You may proceed.

MS. BASSETT: Your Honor, it's unclear to me what the grounds would be for dismissing those. Is it a res judicata argument, I am unclear. But in the pleading that we filed, which was an objection to dismissal on the counterclaim --

THE COURT: Let me make a point clear. I am not inclined to dismiss them on the grounds of res judicata.

MS. BASSETT: Okay.

THE COURT: I am persuaded by Judge Shelby's reasoning and would adopt the same reasoning for dismissing the counts but I don't think res judicata applies.

MS. BASSETT: Okay. So then -- then it would be an issue, I believe, of whether or not this is a case that arises under federal law or presents a federal question within the meaning of 1331. And there, again, there are many Tenth Circuit cases which stand for the proposition that this is precisely the sort of claims that a tribe may come into federal court and that do present questions of -- federal questions under 1331. For instance, the *United Keetoowah Band of Cherokee v Oklahoma*, and that is 927 F2d 1170. And specifically in that case, in the *United Keetoowah* case, the District Court dismissed saying that -- dismissed it actually under 1362 which is very similar to 1331 except for it's for claims brought by an Indian Tribe. But both of them require that they present a federal question. And so in the *United Keetoowah* case, the Tenth Circuit said that we are -- we are, and this is a direct quote, 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 Section 1362 jurisdiction as a matter arising under the Constitution, Treaties or Laws of the United States and they cite a U.S. Supreme Court case *Moe v Confederated Salish*, 425 U.S. 463. And then they go

through a discussion and they sum it up saying, 1362 serves as an adequate jurisdictional grant for this Indian. It was a case in which the Tribe had sought a preliminary injunction against the enforcement of state law inside the reservation. The analogy, Your Honor, is that what we have here is a state court that is sitting in a case that is adjudicating issues that occurred inside the Indian reservation borders.

THE COURT: As I understand Judge Shelby's reasoning, and you may be able to explain it more fully, he was primarily concerned that you were attempting to create a federal question as a defense. And why isn't that same bar applicable here?

MS. BASSETT: Well --

THE COURT: You're asserting a counterclaim which effectively is raising a defense in the state court action asserting state court doesn't have jurisdiction. Why shouldn't you bring that defense in the state action before the state court?

MS. BASSETT: Because the claims that we are raising under those three counts are claims that the state court does not have jurisdiction.

THE COURT: And, again, my question, why shouldn't you raise that question before the State Court. If the State Court decides it doesn't have jurisdiction, then you can

proceed.

MS. BASSETT: But the procedural posture of the two cases are different, Your Honor. In the case that we brought before Judge Shelby, it was our complaint and he said that is a defense in the State Court or whatever, but in this case we are bringing them as compulsory counterclaims. The court has already determined that it has federal question jurisdiction and we cite in here --

THE COURT: But the complaint -- why is any compulsory counterclaim? The only issue raised by the plaintiff's complaint was an issue as to whether or not the Tribal Court had waived jurisdiction. That doesn't raise an issue as to whether or not the State Court is a court of competent jurisdiction.

MS. BASSETT: Well, it arises out of the same act in, you know, transaction, and it has to do with the respective jurisdiction of all three of the courts frankly, the Tribal Court, the State Court and this court. So, you know, and I also -- we go on here to discuss cases in which, and this is a series of cases decided by the U.S. Supreme Court in the late 1980s or whatever, but it talks about this doctrine, the independent corollary to the well-pleaded complaint rule is the Doctrine of Complete Federal Preemption. That is our contention here is that there is a complete federal preemption. Federal law completely preempts the issues that

are in all three of the courts. And when that is the case, the Tenth Circuit has said that the federal issues are paramount and they should be decided in federal court.

THE COURT: If that were correct then Judge Benson got it wrong when he dismissed the lawsuit.

MS. BASSETT: Judge -- well, Judge Benson was the first federal action.

THE COURT: Yes. And he dismissed it because it was a state cause of action.

MS. BASSETT: That is all that it was pled as.

THE COURT: If you were right about preemption, that was wrong and that was affirmed by the Tenth Circuit.

MS. BASSETT: That was Mr. Becker's complaint. He was the master of his own complaint. That is the term that the federal courts used. He could have asked for a declaratory judgment as to these federal issues. He did not. He brought it strictly as a breach of contract case and the federal courts are very clear that there is not federal question jurisdiction for a simple breach of contract cases. Equally clear is the case -- is the Judge Scalia case that I mentioned to you earlier, and I'm sorry I don't have the citation, we argued it before Judge Shelby, but Judge Scalia said look, we are not going to expand this rule to say that we can look to counterclaims to provide the federal question jurisdiction. So there --

THE COURT: Why doesn't that rule preclude you -- preclude Count 1?

MS. BASSETT: Because the difference is this. That was a court deciding based upon the complaint itself. We have here you Your Honor have already decided that there is -- you have federal question jurisdiction.

THE COURT: To decide a very narrow issue.

MS. BASSETT: Well, then that becomes disadvantageous to the Tribe, Your Honor, frankly because I mean if -- then what you're saying is if you open your doors to hear the case to enjoin the Tribal Court not the State Court.

THE COURT: And enjoining the parties, the defendants, from proceeding in Tribal Court.

MS. BASSETT: But the effect is still much the same. And, you know, we have said that that is to us and we will -- that will be our position on appeal, but that denies the Tribe of equal protection of the law. I mean it's treating two similarly situated parties differently basically and it is saying okay, we're going to enjoin the proceedings in one court, but not in the other. And that's frankly unfair.

THE COURT: Okay.

MS. BASSETT: We go on to say that, you know, we are challenging the legal efficacy of the agreement itself under federal law, under those federal non-alienation statutes, and those are issues that should be decided by the federal

court in the first instance.

We have cited the case *Pueblo of Santa Ana v Kelly*, a Tenth Circuit case, 104 F3d 1546, and that is a case in which where -- where that was an Indian Tribe that was challenging whether or not or not there was a valid waiver of sovereign immunity and the Tenth Circuit said that is a federal question.

THE COURT: Are you still addressing just Count 1?

MS. BASSETT: I'm sorry?

THE COURT: Are you addressing Count 1 of the counterclaim?

MS. BASSETT: Um, well, there are Count 1 -- let me see.

THE COURT: And I want you to address first of all just Count 1. What are your arguments as to why I shouldn't adopt Judge Shelby's reasoning as to Count 1?

MS. BASSETT: That one is, Your Honor, the --

THE COURT: That's where you seek a declaratory judgment that the State Court lacks subject matter jurisdiction over the Becker lawsuit.

MS. BASSETT: There, again, that is an issue that the Tenth Circuit has said in several cases is a paramount federal question is when you're talking about the jurisdiction of State Courts or state governmental bodies over Indian Tribes, that is a paramount federal issue that

is proper to be determined by the Federal Courts in the first instance. So --

THE COURT: Okay.

MS. BASSETT: And the cases we have cited several there, they are all Tenth Circuit cases, *Seneca-Cayuga Tribe of Oklahoma v State of Oklahoma*, we have cited the own -- the *Ute Tribe V Utah* cases, these are all cases in which I mean the issue in the *Ute Tribe v Utah* that we have been litigating for three years, I mean the same argument was made in that case by the counties and the Utah counties where there were these criminal prosecutions of tribal members. They were saying let our State Courts decide this. They can decide whether or not they have jurisdiction. The Tenth Circuit said no, that's not necessary. That is that the Federal Courts are the courts that should be deciding this. This is -- it presents a question of the balance and the jurisdictional boundaries and barriers between the State and the Tribe. And so those are federal issues that should be decided in the first instance by the Federal Court.

The second one is the -- there again we are seeking declaratory judgment, recission of the contract, injunction and damages. You know, we have not sought -- we have not filed any counterclaims in the State Court action and we have not done so because we do not believe that the State Court has jurisdiction. It's our belief that the end of the

process, whether in the Utah State Court itself or the Utah Appellate Courts or the U.S. Supreme Court or the Tenth Circuit in the interim is going to say that the State Court does not have jurisdiction and that will mean that if you want to talk policy and waste of judicial resources, that would be a tremendous waste of resources to go through the State Court action, expend all of that time and money. I know State Court dockets are crowded, and then to have some superior court say it was all for not. We know this court has jurisdiction, so this court should exercise the jurisdiction that it has.

Count 3, and that's the question on the waiving of the sovereign immunity, which, you know, we have made those arguments and -- but this court has made an initial determination, has not conducted an evidentiary hearing or anything partly because I think that the court's ruling is mostly a legal ruling, but, you know, still in all we believe that as long as -- this is the proper judicial forum to decide all of these issues. I don't think that they should be separated out. Federal courts have already said that, the Tenth Circuit has already said that this is the kind of case that is appropriate for Federal Court jurisdiction. And I would mention, Your Honor, that we think that it is going to be a waste of judicial resources going through the State Court proceeding.

Is there anything else?

THE COURT: Thank you. Mr. Isom, do you wish to respond as to Counts 1, 2 and 3?

MR. ISOM: I would, Your Honor. Your Honor, the defendants are arguing first about unfairness. I didn't quite follow, but there is no unfairness here. For three and a half years Mr. Becker has tried simply to get a trial on the merits. For three and a half years the Tribe has deflected that by various maneuvers that are not fair. The Tribe had the opportunity before Judge Benson to say well by the way, Your Honor, it would be fair, of course, for you to take jurisdiction here. There is no fairness argument here except that the only fair thing would be to do whatever gets this simple state law contract dispute to a resolution.

As to the specific arguments, most of the arguments that the Tribe has made are prevented by the Tenth Circuit. The court is bound by *Becker Versus the Ute Tribe.* It found that these issues that by the way were previewed, pre-staged in Mr. Becker's complaint didn't create 1331 jurisdiction. And it didn't matter whether they were previewed in the complaint or in a defense, they simply don't sustain 1331 jurisdiction.

Now, that there is one issue here that has 1331 jurisdiction, they still don't. They're not 1331 claims. For example, they say Mr. Becker could have made an action

or could have asked for a declaratory judgment. That doesn't change any jurisdictional question. The declaratory judgment statute doesn't create its own independent jurisdiction. The Claims 1 through 3 here are not compulsory counterclaims, they as narrowly as possible asked this court to prevent Tribal Court jurisdiction and that's all. The Tribe talks about, you know, finality and multiple jurisdictions and that sort of thing. That is all belied by the obvious fact that these claims are now pending and some have already been decided by the state court and this court shouldn't be conducting sort of collateral proceedings on the same issue. And finally, as Judge Lawrence has argued, these -- having these pending here would violate comity and abstention under various doctrines. Thank you.

THE COURT: Ms. Sylvester, do you wish to be heard on Counts 1, 2 and 3?

MS. SYLVESTER: I believe it has already been pretty well covered unless you want me to go back over basically what you have already ruled. Those are basically our arguments about validity.

THE COURT: Thank you. Let's go to Count Number 4. With respect to Count Number 4, which is the count alleging -- seeking a declaratory judgment on the deprivation of property due process and equal protection. It appears to me that this count is precluded by the waiver argument which is

made in the TRO.

Ms. Bassett, do you want to be heard on why Count 4 should not be dismissed?

MS. BASSETT: I believe, Your Honor, given the hour, I will just go ahead and rest on what we have cited in our briefs.

THE COURT: Okay. Let's go then to Count 5 which is the claim for fraud, fraudulent inducement, constructive fraud, theft conversion, tribal assets and breach of fiduciary duty. Those all appear to be state claims for which the court would have supplemental jurisdiction if it chose to exercise it.

Any argument as to why the court should not dismiss that claim?

MS. BASSETT: Our argument would be, Your Honor, that as I said before, that we believe that at the end of the day there will be a ruling that the State Court does not have jurisdiction and for that reason we have not brought these sort of claims in the State Court. So I believe that it would be in the best interest of there again these arguments about waste of judicial resources I would like to have these claims heard in this court, Your Honor.

THE COURT: Mr. Isom, do you have a response?

MR. ISOM: Yes, just briefly, Your Honor, only to say that we agree that this is -- it is clearly a state law

claim. And the question whether the court should assert supplemental jurisdiction we think under 1367(4), the fourth one, the court shouldn't assert supplemental jurisdiction. It would be really disruptive of the state proceeding. The only reason they have asserted it is they somehow don't want to get too close to the state proceeding. If -- I mean that's no argument. If they have a claim and still can assert it, which we don't know and don't know if they can, then they can assert it in the state claim case. If they have waived it there, they shouldn't get a new bite at the apple on a state claim in this court.

MS. BASSETT: May I?

THE COURT: Of course.

MS. BASSETT: So I guess I would like to ask the court and Mr. Isom that if this case is dismissed by the Federal Court and the Tribe is not willing to bring it in the State Court because we believe that the State Court lacks jurisdiction, is it the court's position then and is it Mr. Becker's position that the injunction that the court has entered would preclude the Tribe from bringing this count in the Tribal Court?

THE COURT: Mr. Isom, do you want to respond?

MR. ISOM: Would you put the question again?

THE COURT: The question is if the -- if it is concluded that the State Court lacks jurisdiction, would any

court ruling -- would any ruling by this court on these counts preclude the Tribe from raising the issues in Tribal Court?

MR. ISOM: Well of course they would. They have waived Tribal Court jurisdiction and exhaustion.

THE COURT: Well, assuming that if they prevail on that claim.

MR. ISOM: If the question --

THE COURT: Let me articulate the way that could happen. The agreement says any court of competent jurisdiction. If the State concluded it was not a court of competent jurisdiction, the Tribe could well argue that the Tribal Court is the next court of competent jurisdiction and bring its claims before the Tribal Court.

MR. ISOM: Well, I think --

THE COURT: In that case, would it be -- would these claims be preserved?

MR. ISOM: No, our position would be that they're not. First of all, the Tribal Court, within the meaning of the agreement, is clearly not a court of tribal -- of competent jurisdiction. They have waived all jurisdiction, all -- all application of tribal law, and so when it says it is either in the Federal Court or any court of competent jurisdiction, it clearly cannot be coming in the back door what they excluded in the front door.

THE COURT: All right. Let me ask a further question I would like you to address. The court can proceed in two ways. One way would be dismiss these causes of action for using the same reasoning, and other reasoning I'll provide, without prejudice. The second way the court could proceed would be to enter a stay as to the counterclaim and hold it in abeyance pending resolution of the State Court claims. Do you have an argument as to which of those two paths would be most appropriate?

MR. ISOM: Can I take one minute?

THE COURT: Sure.

(Brief pause in proceedings.)

MR. ISOM: Your Honor, would the court allow a five minute break for us to discuss this?

THE COURT: Of course. Ms. Bassett, do you want to be heard before or after the break?

MS. BASSETT: After the break, Your Honor.

THE COURT: Okay. Let's take a five minute break.

(Recess.)

THE COURT: Mr. Rasmussen? Mr. Rasmussen -- Mr. Isom.

MR. ISOM: Yes. Thank you, Your Honor. Your Honor, we clearly do not want a dismissal without prejudice. These parties have shown that after Judge Shelby dismissed the claim without prejudice and invited them to amend, they instead came here. There would be nothing, I take it, to

stop them from filing a new action tomorrow if the claims were dismissed without prejudice. So we would not like that.

Let me suggest another alternative and then if that is not acceptable we would opt, given these choices, for a stay pending the resolution of the state action. And that option would be to dismiss, to enter judgment and a permanent injunction on our claim, dismiss without prejudice the counterclaims that would make they could raise that on appeal which they are apparently going to do any way, would create finality and more clarity as the state action proceeds. And I believe from what I am hearing that first of all the court would have power to advance that adjudication to now or soon.

And secondly, I don't think there is a single thing that hasn't been argued that would need to be argued in a motion to dismiss -- a motion for judgment on the pleadings. It is a pleadings based motion and I think all of the issues have been presented to the court.

THE COURT: Thank you. Ms. Bassett, what is the position of the Tribe?

MS. BASSETT: Well, to begin with we would object to a dismissal with prejudice because there are no grounds for dismissing with prejudice. Um --

MR. ISOM: Excuse me, just to clarify I thought I said

without prejudice to the claims.

MS. BASSETT: I wrote down with prejudice.

MR. ISOM: Oh no. No.

MS. BASSETT: If it is without prejudice, that would be okay. My question would be does the injunction, which I have not seen, I guess it may look like the TRO, would that preclude us from filing these claims in the Tribal Court? First question.

Then we would object to converting this hearing into a permanent injunction because we did not receive advanced notice that that would be required. We also have objected to the motion for judgment on the pleadings. We do note in there we don't believe that judgment on the pleadings is appropriate primarily because Mr. Becker is not contesting the jurisdiction of the Tribal Court. He has not said that the Tribal Court lacks jurisdiction. He simply has asked this court to enjoin us from proceeding in the Tribal Court based on grounds -- principles of comity. So we don't believe that there is a basis for entering judgment on the pleadings.

And in our pleading that was filed yesterday, Your Honor, Docket 43, that is where we objected to both the motion for judgment on the pleadings and we objected to this hearing being converted into a hearing for entry of a permanent injunction. We cited the Tenth Circuit cases

there and they stand for the proposition that plaintiffs have to have notice and opportunity to prepare for a permanent injunction hearing. So we don't believe that we have been provided that kind of notice. Thank you.

THE COURT: Thank you. First of all, with respect to the motion for judgment as a matter of law on the pleadings, I am going to deny that motion. Those issues can be resolved at a later time on the merits. With respect to the motion to convert this hearing to a motion for a permanent injunction, I am going to also deny that motion. We will discuss in a moment how we proceed to bring that to resolution.

With respect to the motions to dismiss the counterclaim with respect to Counts 1, 2 and 3, I find that the reasoning of Judge Shelby in the companion case persuasive. I adopt that reasoning and will deny Counts 1 -- will dismiss Counts 1, 2 and 3 without prejudice. I would also note with respect to the cases and authorities cited by the tribal defendants that most of those cases or all of those cases, to the best of my recollection, do not waive -- or raise the waiver issues that are at issue in this case.

With respect to Count 4, the court concludes that one, the claim should be dismissed without prejudice. The court is persuaded that as pled there is no deprivation of a right

and the Tribe is free to litigate that claim in State Court. I find that Mr. Shaun Chapoose is -- does not have standing to raise Tribe's and that the Tribe is not a person under Section 1983.

Also, there is authority in the *Keweenaw Bay Indian Community v Rising* which is found at 569 F3d 589, Sixth Circuit, 2009, which was cited by the defendants in Docket Number 44. That that 1983 claims cannot be pursued for a breach of civil rights when sovereign immunity is not incidental. In this case, sovereign immunity is not incidental, so the claims, I think, would fail on that ground. But again, this dismissal of Count 4 is without prejudice. And with respect to Count 4, excuse me, Count 5, the court finds that this is a state law claim and the court declines to exercise supplemental jurisdiction as to that claim.

There is a request by the defendants for a preliminary injunction against the State Court proceeding or against Judge Lawrence to state it more correctly. Because of the dismissal of the counterclaims, that motion for preliminary injunction is now moot.

Let's talk for a moment how we proceed with respect to what your feeling is in terms of how you want to proceed on resolving the question as to whether the preliminary injunction should be converted to a permanent injunction.

How much -- how much time do you want? What additional issues need to be addressed before we can hear that issue? Ms. Bassett?

MS. BASSETT: Well, Your Honor, we would like to take an appeal which is our right to take an appeal from a preliminary injunction, so we would ask that proceedings be stayed. While I understand that you're not going to stay the injunction against proceeding in the Tribal Court, but we would like to request that the court stay these proceedings on a permanent injunction pending the appeal.

THE COURT: Mr. Isom, what is your response to a request for a stay of the pleadings pending the completion of the appeal?

MR. ISOM: Your Honor, we would -- we would like to get this issue finally resolved. And if the court still has jurisdiction after an appeal, or even could do it before the appeal, we would like to. But obviously, if the court loses jurisdiction by the appeal, we don't need to stay, it would just be precluded by the appeal.

THE COURT: Maybe the best way to proceed in this is to reserve ruling on the request, allow you to file your appeal. Once the interlocutory appeal is filed, you can file with this court an appropriate motion for stay of the ongoing proceedings pending resolution of the appeal and give Mr. Isom an opportunity to respond to that. The court

will rule upon a more complete record than we have today.

MS. BASSETT: Thank you, Your Honor.

MR. ISOM: Thank you.

THE COURT: Anything further that we should address before we recess?

MS. BASSETT: No.

MR. ISOM: No, Your Honor.

THE COURT: Thank you, counsel. Each of you has done a lot of research and a lot of briefing on some rather difficult legal issues. I appreciate all of the effort that you have taken to be prepared and we could resolve this without very much time for you to prepare.

We will be in recess.

MR. ISOM: Thank you.

MS. BASSETT: Thank you.

(Whereupon, the hearing concluded at 3:49 p.m.)

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this 3rd day of October, 2016.

_____

Laura W. Robinson

RPR, FCRR, CSR, CP

EXHIBIT N

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June 16, 2017

Our File Number: 303329-00001

VIA E-MAIL FBASSETT@NDNLAW.COM

Frances Bassett
Partner
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027

RE: Becker v. Ute Indian Tribe

Dear Ms. Bassett:

I have been asked to serve as an expert on the issue of the applicability of federal and tribal law in the above-referenced case. Specifically, I have been retained to provide opinions, based on my education, training, and experience concerning background principles of federal Indian law and federal approval requirements related to agreements with Indian tribes. More specifically, I have been hired to serve as a rebuttal expert to Kelly Williams, Esq., who testified and offered opinions concerning the applicability of federal law to the Independent Contractor Agreement by and between the Tribe and Lynn D. Becker ("The Becker Agreement).

To prepare this report, I have reviewed in detail the documents provided below.

1. Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation Utah, adopted on Dec. 19, 1936 and approved Jan. 19, 1937 (Exhibit 53)
2. Corporate Charter of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, approved July 6, 1938 and ratified August 10, 1938.
3. Uintah and Ouray Tribal Business Committee of the Ute Indian Tribe, Resolution No. 05-147 (Apr. 27, 2005)
4. Independent Contractor Agreement Between the Ute Indian Tribe and Lynn D. Becker
5. Exhibit A – Services of the Independent Contractor Agreement
6. Exhibit B – Participation Plan of the Independent Contractor Agreement
7. Tribal Ordinance 03.003, To Provide for the Reorganization of the Energy and Minerals Department of the Ute Indian Tribe (Exhibit C of the Independent Contractor Agreement), adopted Oct. 27, 2003
8. Transcript of Deposition for Kelly Williams, Esq, conducted on April 26, 2017
9. Becker's Designation of Expert and Disclosure of Information, filed March 22, 2017
10. Non-Intercourse Act, 25 U.S.C. § 177 (Exhibit 60)
11. Indian Mineral Development Act, 25 U.S.C. § 2101 et. Seq. (Exhibit 61)
12. Senate Report No. 97-472 (Exhibit 59)
13. Oil and Gas, Geothermal and Solid Minerals Agreements, 25 CFR Part 225 (2005 ed.) (Exhibit 62)
14. Transcript of Deposition for Robert Miller, Esq, conducted on March 17, 2017
15. Transcript of Deposition for Alex Skibine, conducted on March 8, 2017
16. Transcript of Deposition for Kevin Gambrell conducted on March 15, 2017.

17. Letter dated 12/30/03 from Lynn Becker to the Jurrius Group.
18. Memo dated 2/9/2004 from John Jurrius to Lynn Becker and Brett Painter.
19. Letter dated 2/11/2003 [2/11/2004] from Lynn Becker to John Jurrius
20. Letter from Dinah Peltier, Acting Superintendent, Ouray Agency to Chairman Curtis Cesspooch, Ute Indian Tribe Business Committee, dated July 2,2007 (Exhibit 45)
21. Amended and Restated Operating Agreement of Ute Energy LLC, dated July 9, 2007

I. QUALIFICATIONS

I am a practicing attorney licensed in the state of Arizona, where my practice is focused almost exclusively in federal Indian law, tribal law, economic development, and energy development for Tribes. I graduated from the University of New Mexico, School of Law in 2002 magna cum laude with a certificate in Indian Law.

I have served as Trial Attorney for the United States Department of Justice in the Environment and Natural Resources Division, Indian Resources Section, in Washington, DC, where my practice was concentrated on Indian treaty rights, water rights, tribal land into trust, and Indian gaming matters. My primary responsibilities as a Department of Justice Trial Attorney focused on defending the Secretary of the Interior and other federal officials in administrative decisions made for and on behalf of Tribes. I also participated in several Indian water rights cases, litigating as well as negotiating water rights settlements, and several land into trust cases.

Subsequent to the Department of Justice, I was the interim Attorney General for the Pascua Yaqui Tribe in Tucson, Arizona, where my primary responsibility was to provide advice and negotiate on behalf of the Tribal Council and the tribal government departments. For three years, I was responsible for ensuring that all tribal law was compliant with the Tribe's Constitution, as well as consistent with federal law and any other federal regulations.

I then became Of Counsel at Lewis and Roca in Phoenix, Arizona where my primary clients were involved in tribal gaming and energy and economic development. I was responsible for assisting several tribes with establishing limited liability companies, negotiating operating agreements, and ensuring compliance of those operating agreements with state, federal and tribal laws.

In September 2009, I was appointed by Secretary Ken Salazar to be the Deputy Solicitor for Indian Affairs at the Department of Interior, where my primary responsibility was to provide legal advice to the Secretary and other department officials, including the Assistant Secretary for Indian Affairs, on legal matters related to Indian tribes. I provided legal advice for Department decisions related to, among other things, tribal contracts, tribal charters, land into trust, gaming compacts, regulations, and legislation. I was responsible to write, manage, and approve legal opinions, both formal and informal, as requested by Department officials on any matter related to the legal authority to take particular actions. I was also responsible for working with regional solicitors and field solicitors on legal advice and guidance to the regional or agency level Department employees on matters related to Indian tribes.

In 2011, I was appointed Deputy Director of the Office of Indian Energy Policy and Programs at the Department of Energy, where I was responsible for developing and standing up the Office of Indian Energy. The Office of Indian Energy is responsible for promoting energy

development on tribal lands. We worked with all federally recognized tribes plus tribal enterprises on energy development as primarily responsible for developing policies and most importantly programs that would ensure and promote energy development for tribes including, oil and gas development, coal development, and renewable energy development.

I returned to private practice at Lewis Roca Rothgerber Christie in 2015, where my practice for the last two and a half years has focused on energy development for tribes and economic development for tribes, including infrastructure development, transmission line development, clean energy projects, land into trust, gaming, and environmental review and regulatory review in assistance to tribes and developers doing energy projects on tribal lands.

My law firm is being compensated at the rate of $390.00 per hour. My compensation is not dependent on the outcome of the case.

II. SUMMARY OF OPINIONS

I hold the following opinions as will be outlined in more detail in the remainder of the report:

A. The Becker Agreement should be interpreted in the context of federal Indian laws because it implicates real property mineral interests owned directly by the Ute Indian Tribe, and because federal law requires that the substance of an agreement, and not the form of the agreement, determines whether the agreement complies with federal law. Therefore, I disagree with the Plaintiff's Expert Witness, Kelly Williams, that federal law does not apply to the Becker Agreement, and that the form of the Becker Agreement controls the applicability of federal law.

B. The Becker Agreement is subject to the Non-Intercourse Act, 25 U.S.C. § 177, because it creates a claim against the mineral interests owned directly by the Ute Indian Tribe, and therefore, I disagree with the Plaintiff's Expert Witness, Kelly Williams, that the Becker Agreement does not create an interest in Indian lands.

C. The Becker Agreement is subject to the Indian Mineral Development Act, 25 U.S.C. § 2101 et. seq., because it is a Mineral Agreement under the Act that creates a claim against Indian mineral interests.

D. The Ute Business Committee lacked the authority to enter into the Becker Agreement without the Secretary's approval because the Tribe's constitution and corporate charter requires Secretarial approval to convey interests in tribal assets.

III. BACKGROUND

A. The Contract

On or about April 27, 2005, the Ute Indian Tribe ("Tribe") entered into an Independent Contractor Agreement ("Becker Agreement") with Lynn Becker ("Contractor"). The Becker Agreement was approved by resolution of the Ute Tribal Business Committee on April 27, 2005, pursuant to its constitutional authority to regulate the economic affairs of the Tribe.

The purpose of the Becker Agreement was to retain the services of the Contractor to, amongst other things, continue to perform the duties of Land Division Manager in the Tribe's Energy and Minerals Department. The Contractor was designated as an independent contractor and not an employee of the Tribe. These duties also included "the implementation of the restructuring and development of the Tribal Energy and Minerals Department as set forth in Tribal Ordinance 03.003, attached hereto as "Exhibit C-Tribal Ordinance."

Pursuant to the Tribal Ordinance, the Land Division is "responsible for the administration and maintenance of leases, contracts, surface use, unitization and all other types of agreements covering Tribal energy, surface and minerals resources. . . . The Land Division shall also be responsible for . . . the supervision of all energy and/or mineral related field operations." The Land Division Manager is responsible for the "overall management of the Land Division."

The Contractor was compensated for these duties in two ways: 1) "Consulting Fees" in the amount of $16,666.67 per month; and 2) "Participation Rights" as determined under the Participation Plan – Exhibit B. The Participation Plan – Exhibit B of the Becker Agreement – reads in relevant part:

> *In the future*, a) if the Tribe participates in any projects involving the *development, exploration and/or exploitation of minerals* in which the Tribe has any participating interest and/or earning rights, or similar commercial interests and Contractor is providing services under this agreement, and b) the Tribe elects not to place such interests in Ute Energy Holding LLC, then Contractor *shall receive* a two percent (2%) beneficial net revenue interest *in such assets* . . . (emphasis added)

B. Federal Law

1. Interpretation Principles. Federal case law consistently makes clear that agreements with Indian tribes that implicate or may implicate federal laws should be interpreted based on the substance of the agreement. Thus, federal courts have held that:

* An oil and gas development and operating agreement is actually a "lease." State of Utah v. Babbitt, 53 F.3d 1145 (10th Cir. 1995). In Babbitt, the primary issue was whether a development and operating agreement for oil and gas development was subject to the federal law requirement to share revenue from "leases" on the Utah portion of the Navajo reservation. The court held that the term lease was sufficiently broad, that the elements of the operating agreement should be interpreted to fall under the term "lease" to meet the intent of the federal law.

* A bond trust indenture is actually a "management contract." Wells Fargo v. Lake of the Torches Economic Development Corp., 658 F.3d 684 (7th Cir. 2011). The court looked at several key provisions in a bond trust indenture that denoted a certain level of management control of a tribal gaming enterprise in the event of default on a bond (loan), and held that these provisions rendered the trust indenture a "management contract" under the Indian Gaming Regulatory Act.

* Unapproved and illegal easements are not "permits." Gila River Indian Community v. Winkleman, 2006 WL 1418079 (D. Ariz. 2006). The court did not allow the conversion of unlawful easements into permits.

* Unapproved and illegal easements are not "licenses" United States v. Southern Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976). The court disagreed that federally unapproved railroad easements could be considered licenses, so as to allow for use of Indian lands without the federal government's approval.

2. The Non-Intercourse Act (NIA). Originally adopted in 1790, and last amended under the Trade and Intercourse Act of 1834, the Non-Intercourse Act, 25 U.S.C. § 177, is long-standing federal Indian law that prohibits the conveyance of, and claims against, Indian lands without the approval of the federal government. See also Miller Deposition, pp. 67-69 The 1834 Act reflects the federal government's trust responsibility to protect tribal lands and resources and to ensure tribes are treated fairly in the conveyance of interests in tribal lands. The United States has long taken the position that the NIA is not limited to tribal trust lands. See Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 fn.5 (1998).

Federal courts have held that where a conveyance or claim against Indian land is sought, it must be done pursuant to either a treaty or federal law. Shoshone Indian Tribe v. United States, 672 F.23 1021 (Fed. Cir. 2012) (leases for oil and gas development required to be approved under the NIA and the Indian Mineral Leasing Act); Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996) (surface leases required to be approved under the NIA and the Long Term Leasing Act). For conveyance of, or claims against, Indian mineral interests, the Indian Mineral Leasing Act or the Indian Mineral Development Act are the relevant and applicable law to comply with the NIA. See also, Senate Report No. 97-472, p. 2 (discussing the applicability of the Non-Intercourse Act to unsevered mineral interests).

3. The Indian Mineral Development Act (IMDA). The IMDA authorizes any Indian tribe to enter into Mineral Agreements, "subject to the approval of the Secretary and any limitations or provisions contained in its constitution or charter." 25 U.S.C. § 2102(a). Mineral Agreements are defined as:

> "[A]ny joint venture, operating, production sharing, service, *managerial,* lease, or *other agreement*, or any amendment, supplement or other modification of such agreement . . . providing for the exploration for, or extraction, processing, or *other development of*, oil, gas, uranium, coal, geothermal, or other energy or non-energy mineral resources in which such Indian tribe owns a beneficial or restricted interest . . . ." (emphasis added)

According to the congressional record, Congress intended that these terms be interpreted broadly, so as to encompass any type of agreement tribes chose to negotiate with mineral interest developers. The primary issue before Congress was that the 1938 Indian Mineral Leasing Act appeared limited to "leases." Even though the Secretary was approving other types of agreements, there was uncertainty in the law. Thus, the need to explicitly authorize tribes to develop "more beneficial arrangements for mineral sales through negotiated agreements." Senate Report 97-457, at 3.

While Congress understood that tribes may be "better able to determine which kinds of contracts are in their own best interest and to tailor agreements to their own particular needs," the Secretary is still required to ensure overall fairness. Id. at 4. Further, while the list of the types of agreements in Section 1(a) of the IMDA "are also more clearly identified by the use of terms commonly used in the parlance of the mineral industry . . . the enumeration of

agreements is not meant to restrict the types of agreements that can be entered into." Id., at 5. Lastly, Congress also intended that the IMDA would include "any minerals owned by a tribe, not just those on reservation or trust lands. Id.

The federal regulations implementing the IMDA, 25 CFR Part 225, conform to this view of broadly interpreting the types of agreements subject to the Secretary's review. 25 CFR § 225.21(b) ("No particular form of minerals agreement is prescribed.")

C. Tribal Law

The Ute Tribe is organized in two ways under the Indian Reorganization Act: as a tribal government and as a federal corporation. The Ute Tribe's Constitution, adopted under the IRA in 1937, establishes the Ute Tribe Government, and creates the Ute Indian Tribe Business Committee as the governing body. ART. III, SEC. 1. The Business Committee's powers are enumerated in ART. VI, but constrained by "any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and By-laws . . . ."

Amongst the several enumerated powers of the Business Committee are the following two powers:

1. The Business Committee has the power to "approve or veto any sale, disposition, lease or encumbrance of tribal lands, interest in tribal lands, or other tribal assets, which may be authorized or executed by the Secretary of the Interior . . . ." ART. VI, SEC. 1(c); and

2. The Business Committee has the power to "regulate all economic affairs and enterprises in accordance with the terms of a Charter that may be issued to the Ute Indian Tribe . . . by the Secretary of the Interior." ART. VI, SEC. 1(f)

The Tribe adopted and ratified a Corporate Charter, which was approved by the Secretary on July 6, 1938. According to the terms of the Charter, the Business Committee exercises all corporate powers of the Tribe. Sec. 4. The Business Committee's corporate powers are limited by federal law, as well as any limitations in the Tribe's Constitution. Sec. 5. Specific corporate powers include:

3. To hold, manage, operate and dispose of property of every description, real and personal, subject to the limitation that no sale or mortgage may be made of any land, or interests in land, including mineral rights Sec. 5(b)(1);

4. To make and perform contracts and agreements of every description, not inconsistent with law and provided that any contract that requires payment from the corporation "shall not exceed $10,000 in total amount except with the approval of the Secretary of the Interior." Sec. 5(f);

5. To pledge or assign chattels or future tribal income due or to become due to the Tribe and provided that "any such pledge or assignment shall be subject to the approval of the Secretary of the Interior or his duly authorized representative." Sec. 5(g)

IV. OPINIONS

A. The Becker Agreement is subject to federal law, because federal law looks to the substance, not the form, of the agreement

I disagree with Plaintiff's Expert Witness, Kelly Williams, that the Agreement is not subject to federal law. When asked about whether she was familiar with the federal approval process for Indian lands and whether federal approval was required for an agreement related to Indian lands, Ms. Williams testified that she would "make that determination on a case-by-case basis based on the document that [she] was reviewing." Williams Depo., p. 42. However, when questioned further about whether she looked to any federal law or regulations in assessing whether the Becker Agreement required such approval, she testified that she did not review any federal laws or regulations. Williams Depo., pp. 91, 93, 94, 147, 148, 155. She further testified that she did not review any federal case law. Williams Depo., p. 156.

Instead, Ms. Williams testified that, she and Plaintiff's Counsel compiled a list of various types of agreements, see Plaintiff's Expert Disclosure p.2; Williams Depo., p.99, 173, and because the Becker Agreement was not one of the types of agreement on that list, her opinion was that she did not need to review federal law to determine whether the Becker Agreement required federal approval. Williams Depo. pp. 98-99.

> "Q: Well, is it an agreement that requires federal approval under the Indian Mineral Development Act?
> A: You don't get to that question because it does not – it doesn't - - it's not any of the items that were listed at mineral - - or, sorry, a lease, a lien - - I got the list in front of me. So whether - - what - - but no, I don't think it requires approval.".

Ms. Williams proceeded to testify that because the Becker Agreement was not like any agreements on the list, it was not subject to federal law. Williams Depo., p. 142, 147, 175 ("I stated before that in looking at the Independent Contractor Agreement to do the first part where is this an agreement that is a mineral lease, a lien, a deed of trust, and all of those things. It wasn't, in my opinion, and you don't get to the second step."). I disagree with Plaintiff's Expert, Ms. Williams, that the form of the agreement is dispositive of whether the federal law applies to the agreement.

It is my opinion that the appropriate analytical framework is to look to the substance of the Becker Agreement to determine if it implicates federal statutory requirements under the NIA and/or the IMDA relating to approvals of agreements with Indian tribes. The substance must be viewed, and interpreted, in the context of federal law requirements. The title of the agreement, or the lack of (or inclusion of) magic words is irrelevant to the question of whether the agreement is covered by federal law.

The Letter from the Acting Superintendent regarding federal approval of the Amended and Restated Operating Agreement for Ute Energy LLC ("Operating Agreement") (Deposition Exhibit 45), which Ms. Williams cites in support of her analysis, actually comports with my analytical framework. When asked to review the Operating Agreement for Ute Energy LLC, the BIA and Solicitor's Office did not look to the form or label on the document. Instead, they evaluated the substance to determine if the Operating Agreement conveyed any mineral

interests to invoke the Non-Intercourse Act, was a Mineral Agreement under the IMDA, or was a covered agreement under 25 U.S.C. § 81.

Ms. Williams' positive view of the BIA analysis of the Operating Agreement notwithstanding, there are several key differences between the Operating Agreement and the Becker Agreement. The BIA stated that the Operating Agreement: 1) did not convey any interest in tribal lands; 2) did not provide for exploration and development of mineral interests; and 3) was not signed by the Tribe. The Becker Agreement on the other hand: does convey an interest in the Tribe's mineral rights; does provide for the management of exploration and development of the Tribe's mineral interests; and was approved by the Tribe's Business Committee and signed by the Tribe.

For these reasons, in my opinion the Becker Agreement should be interpreted through the terms and purposes of the NIA and the IMDA.

B. The Becker Agreement is subject to the Non-Intercourse Act, 25 U.S.C. § 177

I disagree with Ms. Williams' testimony that the Becker Agreement does not create an interest in tribal lands or Indian lands. Williams Depo., pp. 123-124, 148. I further disagree with her testimony that Becker Agreement only "contemplates future potential opportunities" that doesn't create any obligations on the part of the Tribe, Williams Depo., p.137, and that the interest being created is merely a payment obligation. Williams Depo., p. 138.

Looking to the substance of the Becker Agreement, the operative language that establishes a claim against the Tribe's direct mineral interest is found in Paragraph 2 of the Participation Plan. Paragraph 2 entitles the Contractor to compensation based on the Tribe's participation in "the development , exploration and/or exploitation of minerals in which the Tribe has any participating interest . . . ." The Contractor "shall receive a two percent (2%) beneficial net revenue interest in such assets." Furthermore, this compensation claim is triggered for projects and rights held directly by the Tribe ("elects not to place such interests in Ute Energy Holding LLC").

"Shall receive" is a mandatory term that denotes entitlement and is sufficient to create a future claim. "Such assets" is a clear reference to mineral interest projects that develop, explore and/or exploit the Tribe's mineral assets. Together, these terms create a mandatory future claim against the Tribe's assets.

The memoranda that memorialize the negotiation of the Becker Agreement contemplate that the Contractor will be entitled to receive a percentage of the Ute Tribe's working interest. Because working interests are directly tied to mineral interests, such an entitlement is a claim on the Ute Tribe's mineral interest.

Because Paragraph 2 of the Participation Plan creates a claim against the Tribe's mineral interest, it is my opinion that the Becker Agreement is subject to the Non-Intercourse Act.

C. The Becker Agreement is subject to the Indian Mineral Development Act, 25 U.S.C. § 2101 et. seq.

Ms. Williams testified that, because the Becker Agreement was not the type of agreement listed in her disclosure, in her opinion it was not subject to the Indian Mineral Development Act. Williams Depo., pp. 99, 155, 160. She also testified that since, in her opinion, the Becker Agreement did not implicate tribal mineral interests, federal approval under the IMDA was not necessary, Williams Depo., p.159-160. Ms. Williams testified that she did not look to the IMDA, its regulations or federal case or administrative law to reach these opinions. Williams Depo., p. 155, 156, 158. I disagree with Ms. Williams that the Becker Agreement is not subject to the IMDA approval requirements.

The Becker Agreement's stated purpose was to retain the Contractor as the Land Division Manager in the Tribe's Energy and Minerals Department, and implement the "restructuring and development of the Tribal Energy and Minerals Department." Becker Agreement, Art. 1. In this role, the Contractor was responsible for the maintenance and administration of mineral agreements and to oversee and supervise field operations. Tribal Ord. 03.003; Becker Agreement Art. 4.3, 5.2. In fact, Ms. Williams testified that the Becker Agreement is managerial and related to management issues. Williams Depo., p. 67-68. The Becker Agreement is clearly related to the development and management of the Tribe's mineral interests.

In return for performing these duties, the Contractor was compensated not just through a monthly consulting fee, but also through the Participation Plan that entitled the Contractor to receive a 2% interest in the Ute Tribe's working interest of mineral development projects, thereby creating a claim against the Tribe's mineral interests.

Federal law, and Congress' intent, compels that the substance, not the title, of the Becker Agreement be evaluated under the requirements of the IMDA. Ms. Williams' testimony and opinion of what the Becker Agreement is not is directly contradicted by the intention of the Senate Committee to not limit mineral agreements under the IMDA to a "fixed list of permissible agreements."

The Becker Agreement falls within the scope of the IMDA because it can be fairly characterized as a service agreement, a managerial agreement, or other agreement for the development of the Ute Tribe's mineral interests. Furthermore, the Becker Agreement grants to the Contractor a claim against the Tribe's directly owned mineral interests. For these reasons, it is my opinion that the Becker Agreement is a Mineral Agreement under the IMDA, and was subject to the Secretary of Interior's approval.

D. The Ute Business Committee lacked authority to enter into the Becker Agreement without the approval of the Secretary of the Interior.

The resolution approving the Becker Agreement states that the Business Committee is acting pursuant to its authority to regulate the economic affairs of the Tribe. The legal actions of the Ute Business Committee are specifically authorized, and limited, by the governing documents of the Ute Tribe – the Tribe's Constitution and Corporate Charter. The Constitution provides three limitations relevant here: 1) Business Committee action may be limited based on federal law; 2) the authority of the Business Committee to "approve . . . any interest in tribal

lands, or other tribal assets, which may be authorized . . . by the Secretary of the Interior . . . ." CONST. ART. VI, SEC 1(c); and 3) the regulation of economic activity subject to the terms of the Charter. CONST. ART. VI, SEC. 1(f). The Ute Business Committee thus had to comply with its Constitution, its Charter, and federal law for its actions in approving and entering into the Becker Agreement to be lawful under the Constitution.

Under the Tribe's Corporate Charter, the Tribal Business Committee exercises corporate power to regulate the Tribe's economic affairs subject to additional specific limitations. Those limitations include: the lack of authority to sell or mortgage any mineral rights, Sec. 5(b)(1); make or perform agreements greater than $10,000 that will be paid by the corporation without the Secretary's approval, Sec. 5(f); and to pledge or assign any future tribal income without the Secretary's approval, Sec. 5(g).

In my opinion, the Becker Agreement, as discussed above, is subject to the NIA and IMDA, and thus required to be approved by the Secretary under federal law. It is undisputed that the Business Committee did not receive the approval of the Secretary for the Becker Agreement.

In my opinion, because the Participation Plan creates a claim against the Tribe's "net revenue" from its mineral interests and participation rights, the Becker Agreement is a pledge or assignment of the Tribe's future income from its mineral interest. It is undisputed that the Business Committee did not get the Secretary's approval to pledge or assign the Tribe's future income from its mineral interests, as required by the Charter.

Therefore, it is my opinion that the Business Committee lacked the authority to enter into the Becker Agreement without the Secretary's approval.

Further support for this opinion is found in the fact that the Tribe submitted its Ute Energy LLC Operating Agreement to the BIA for approval, as the Tribe apparently believed that the Operating Agreement was subject to federal approval requirements. Once the Tribe received the Letter from the Acting Superintendent, only then did the Tribe, acting through its wholly owned company Ute Energy Holdings LLC, enter into the Operating Agreement.

V. Summary

In summary, my opinions are that: 1) the substance of the Becker Agreement is to be interpreted consistent with federal law; 2) the Becker Agreement is subject to the Non-Intercourse Act; 3) the Becker Agreement is subject to the Indian Mineral Development Act, and thus should have been approved by the Secretary; and 4) the Ute Business Committee lacked authority under tribal law to enter into the Becker Agreement without the Secretary's approval.

Sincerely,

Pilar Thomas
Lewis Roca Rothgerber Christie LLP