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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, Counterclaim and Third-Party Plaintiffs, v. LYNN D. BECKER, et al., Counterclaim and Third-Party Defendants.	**MOTION FOR LEAVE TO FILE A SUR-REPLY TO BECKER'S REPLY MEMORANDUM, DKT. 91** Case No. 2:16-cv-00958 **JUDGE CLARK WADDOUPS**

The Tribal parties move for leave to submit a surreply to Mr. Becker's reply memorandum, Dkt. 91.

GROUNDS FOR ALLOWANCE OF A SURREPLY

Mr. Becker's reply includes a highly selective and skewed set of new and distorted facts, new law and legal arguments; indeed, Becker uses his reply memorandum to spin a false and pejorative portrayal of the Tribe and its Tribal court. The Tribal parties will be severely prejudiced if they are not allowed to respond. Given Becker's Expedited and Emergency Request to Submit for Decision Without Oral Argument, Dkt. 92, the Tribal parties ask the Court to permit both the motion for leave and the surreply itself to be contained in this single pleading.

THE LAW ON SURREPLIES

When a district court accepts a reply brief from a movant, and the reply contains new material, arguments, or authorities, the court must either permit a surreply from the nonmovant or must refrain from relying on the new material or argument or authorities. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). The Tenth Circuit subsequently expanded the rule articulated in *Beaird*. In a case reversing a grant of summary judgment, the Court explained:

> In *Beaird,* we held that "[h]aving accepted the reply brief, the district court in fact had two permissible courses of action. It could either have permitted a surreply or, in granting summary judgment for the movant, it could have refrained from relying on any new material contained in the reply brief." *Id.* at 1164. … The district court incorrectly distinguished *Beaird* on the ground that it applied only to new legal arguments supported by new materials while here, the new material supported legal arguments already made. Rather, *Beaird* speaks in terms of either new legal arguments or new material.

> Therefore, in accordance with *Beaird,* we conclude the court abused its discretion to the extent it relied on new evidentiary materials presented for the first time in Sprint's reply brief.

Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1139, n. 13 (10th Cir. 2003). Although *Beaird* and *Doebele* involve dispositive motions under Rule 56, the reasoning in those cases is equally applicable to a motion for a preliminary injunction.

OBJECTION TO BECKER'S HIGHLY PEJORATIVE PORTRAYAL

Becker conceals from the Court that it was Becker himself who first requested a hearing in the Ute Indian Tribal Court; Becker did so on December 1, 2017, requesting a tribal court hearing on "all pending motions." Exhibit A. The Tribe concurred in Becker's request for a hearing on January 11, 2018. Exhibit B. Becker falsely asserts that the Tribal Court judge "immediately complied" with the Tribe's request for hearing. That is false—the Tribal Court's hearing notice was not issued until January 30, 2018, almost three weeks after the Tribe's request, and the hearing itself was not set until two weeks after that, on February 13, 2018. Exhibit C.

Becker fails to mention that, to this day, no court—not the state court, nor the tribal court, nor this federal court—has yet to rule on the legality of Becker's Independent Contractor Agreement (IC Agreement) under the organic law of the Ute Indian Tribe—the Tribe's constitution and its federal corporate charter.[1] Despite the Tribe's efforts to have

[1] The Utah state court in *Becker v. Ute Indian Tribe*, case number 140908394, has not ruled on the legality of the IC Agreement under Ute tribal law, leaving that decision instead for a Utah jury to decide. Dkt. 76-1, p. 151, ¶ 1 ("There are disputed issues of fact as to whether the Tribal Business Committee had actual authority to enter into the Contract, so that issue will be submitted for trial.").

this question adjudicated, to date no court has yet adjudicated it. And it should be the Tribal Court that adjudicates the legality of the IC Agreement under the Tribe's tribal law in the first instance.

THE TRIBE'S COUNTER-FACTS

1. Article VI, section 1(c) of the Tribe's constitution limits the powers of the Tribal Business Committee to that of either "approving or vetoing" any transaction involving tribal realty or personalty, the power

> *[t]o 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….*[2]

2. Article VI, section 1(f) of the constitution empowers the Tribal Business Committee 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." Dkt.76-1, p. 63. On August 10, 1938, the Ute Tribe ratified a corporate charter, as permitted by the Indian Reorganization Act, 25 U.S.C. § 5124, and the charter was approved by the Secretary of the Interior on July 6, 1938. Dkt. 76-1, pp. 73-78.

3. The corporate charter authorizes the Tribe to "hold, manage, operate and dispose of property of every description, real and personal," but that power is subject to the limitation that "[n]o sale or mortgage may be made by the tribe of any land, or interests in land, including … mineral rights." Sec. 5(b)(1) (underscore added). Dkt. 76-1, p. 75.

4. The corporate charter authorizes the Tribe to "make and perform contracts and agreements of every description, not inconsistent with law," provided that no contract

[2] Dkt. 76-1, p. 62.

"shall … exceed $10,000 in total amount except with the approval of the Secretary of the Interior." Sec. 5(f) (underscore added). Dkt. 76-1, p. 76.

5. Finally, the corporate charter authorizes the Tribe to pledge or assign chattels or future tribal income due or to become due to the Tribe, provided that "any such pledge or assignment shall be subject to the approval of the Secretary of the Interior." Sec. 5(g) (underscore added). Dkt. 76-1, p. 76.

6. On September 19, 2017, the Tribal parties filed a motion for partial summary judgment in their Tribal Court suit against Mr. Becker, challenging the legality of the IC Agreement under the Tribe's constitution and corporate charter. Exhibit D.

7. Mr. Becker did not file an opposition to the Tribe's summary judgment motion; he did, however, file a Rule 56(d) motion seeking additional time to gather opposing facts. The Tribe opposed Becker's Rule 56(d) motion. Exhibit E.

8. On December 19, 2017, the Tribal Court issued an order that summarily denied the Tribe's motion for partial summary judgment "without prejudice." The Tribal Court order extended discovery and directed the parties to engage in additional discovery. Exhibit F. The Tribe is seeking reconsideration of that ruling on the ground that the Tribal Court could not arbitrarily deny a summary judgment motion, but was required to apply the legal standards that govern Rule 56 motions. Exhibit G.

9. The presiding tribal court judge, the Honorable Terry Pechota, is set to hear all pending motions at a hearing on February 16, 2018.

10. Although Mr. Becker attempts to impugn Judge Pechota through negative implication, Judge Pechota is an experienced attorney and a former U. S. Attorney for the District of South Dakota. Exhibit H.

LEGAL ARGUMENT

With now-familiar hyperbole, Becker asserts that federal courts "do not hesitate to enjoin litigants, *like the Tribe*, from trying to circumvent an existing order." (emphasis added) Becker Reply, 5. *What* court order, pray tell, is Becker referring to? The Tribe is not circumventing *any* existing court order. In fact, the Tenth Circuit reversed the 2016 preliminary injunction imposed on the Tribe because it was clear to the Tenth Circuit that Becker had not established a likelihood of success on the merits.[3] Since then, the Tribe's evidence in support of its claim that the IC Agreement required federal approval has only strengthened. The Tribe has gathered an impressive array of expert witnesses whose testimony and expert reports make it almost impossible for Becker to show a likelihood of success on the merits. The record before this Court contains the following evidence:

1) The written report of Michael Wozniak, Esq., which opines that the IC Agreement granted Becker "the right to assert a claim against the working interest of the Tribe" in the oil/gas assets that were assigned to Ute Energy LLC—a fact that made the IC Agreement subject to federal approval under the Indian Mineral Development Act, 25 U.S.C. § 2102(a). Dkt. 76-2, pp. 383-99.

[3] *Becker v. Ute Indian Tribe*, 868 F.3d 1199, 1205 (10th Cir. 2017).

2) The written report of Pilar Thomas, Esq., former Deputy Solicitor for Indian Affairs at the U. S. Department of Interior, and former Deputy Director of the Office of Indian Energy Policy and Programs at the U. S. Department of Energy. Ms. Thomas opines that the Becker IC Agreement required federal approval under both the Indian Nonintercourse Act, 25 U.S.C. § 177, and IMDA, 25 U.S.C. § 2102(a), and further opines that the Tribal Business Committee lacked authority under the Tribe's constitution and corporate charter to enter into the IC Agreement without federal approval. Dkt. 76-2, pp. 432-51.

3) Kevin Gambrell, former Regional Director of the Federal Indian Minerals Office, U.S. Department of Interior, who testified that the two-percent "net revenue interest" under the IC Agreement granted "Becker with a 2 percent working interest in the tribal interest" in the Tribe's EDAs that were assigned to Ute Energy LLC, and thus the IC Agreement was subject to federal approval. Dkt. 76-3, pp. 485-522.

4) Robert J. Miller, professor of law at the Sandra Day O'Connor College of Law at Arizona State University, who testified that the Becker IC Agreement is void *ab initio* for lack of federal law, both under federal law and under the restrictions contained in the Tribe's constitution and corporate charter. Dkt. 76-3, pp. 570-619.

5) Alexander Skibine, professor of law at the University of Utah S. J. Quinney College of Law, testified that the IC Agreement required federal approval under 25 U.S.C. § 2102(a), or alternatively, 25 U.S.C. § 177. Dkt. 76-3, pp. 523-69.

CONCLUSION

Given the evidence the Tribe has compiled, Mr. Becker's likelihood of success on the merits is significantly less than what it was in 2016. Accordingly, this Court should deny Becker's motion for a preliminary injunction to enjoin the Tribal Court suit.

Respectfully submitted this 4th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2018, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE A SUR-REPLY TO BECKER'S REPLY MEMORANDUM, DKT. 91** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record as follows:

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