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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, a federally recognized Indian tribe, et al., Plaintiffs, v. HONORABLE BARRY G. LAWRENCE, District Judge, Utah Third Judicial District Court, in his Individual and Official Capacities, and LYNN D. BECKER, Defendants.	**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR INTERIM INJUNCTIVE RELIEF** CASE No. 2:16-cv-00579 Judge Clark Waddoups

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INTRODUCTION

Neither Judge Lawrence nor Mr. Becker has submitted any evidence or legal authority to defeat the Tribe's prima facie showing that (*i*) federal law preempts state adjudicatory jurisdiction over the Becker state suit, and (*ii*) that the Becker IC Agreement is illegal and thus void *ab initio* under federal and tribal law. Notebaly, neither Judge Lawrence nor Mr. Becker has challenged any of the Tribe's undisputed facts under Dkts. Nos. 52, 53 and 54. Nor have Defendants challenged the admissibility of any of the Tribe's evidence. Instead, Mr. Becker simply urges the Court to give legal efficacy to the Independent Contractor Agreement (IC Agreement), and the state court's jurisdiction and merits rulings, without this federal court first determining independently the *antecedent* threshold federal law questions of (*i*) the state court's adjudicatory jurisdiction, and (*ii*) the illegality of the IC Agreement under federal and tribal law. In short, Mr. Becker has failed to meet the substance of the Tribe's motion for injunctive relief in any meaningful manner.

I. RESPONSE TO BECKER'S STATEMENT OF ADDITIONAL FACTS

1. Additional Fact Nos. 1 through 3. Response: The Becker IC Agreement and Tribal Resolution 05-147 speak for themselves.

2. Additional Fact No. 4. Response: This statement of fact, relating to a Tribal Court ruling, is premature. The Tribe is seeking reconsideration of the Tribal Court's ruling on the waiver of sovereign immunity, and as this Court knows, at this time there has been no exhaustion of tribal court remedies.

3. Additional Fact Nos. 5 and 6, relate to the state court's 2/9/2017 ruling on the Tribe's summary judgment motions. Response: The very day after the ruling, Mr.

Becker submitted the state court ruling to the Tenth Circuit as "supplemental authority" for the Tenth Circuit to consider in the Tribe's two pending appeals before that court, *Ute Indian Tribe v. Lawrence*, case number 16-4154, and *Becker v. Ute Indian Tribe*, case number 16-4175. Exhibit 1. As permitted by Tenth Circuit rules, the Tribe responded to the Notice of Supplemental Authority, pointing out, *inter alia*, that a "decision rendered by a tribunal that lacks jurisdiction is a nullity," citing *Burnham v. Superior Court*, 495 U.S. 604, 608 (1990). Exhibit 2. The Tenth Circuit properly undertook its own independent legal analysis of the issues, and in its ruling, the Tenth Circuit deviated in significant respects from the Utah state court's legal analyses. For instance, whereas the state court had ruled that a waiver of sovereign immunity is sufficient, by itself, to confer adjudicatory jurisdiction on the state court, the Tenth Circuit rejected that conclusion, and emphasized that "sovereign immunity and a court's lack of subject-matter jurisdiction are different animals," and that "ordinarily subject-matter is not waivable or can be waived only through specified procedures." *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 545 (10th Cir. 2017). The Tenth Circuit's order of 2/16/2018 to this Court suggests that the Tenth Circuit expects this Court likewise to undertake an independent legal analysis of the issues, confined of course by the doctrine of the law of the case. The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983).

4. Additional Fact No. 7, regards Becker's assertion that he was an independent contractor, not a tribal employee. Response: The United States Internal

Revenue Service (IRS) determined otherwise. As recounted under the Tribe's First Amended Complaint, Dkt. 4, ¶¶ 15, 27-29, the IRS invalidated Becker's "independent contractor" status, and ordered the Tribe to reclassify Becker as a tribal employee. Exhibit 3.

5. Additional Fact No. 8. Response: Becker falsely states that the Bureau of Indian Affairs "effectively determined" that the IC Agreement did not require secretarial approval." The truth, however, as Kevin Gambrell, one of the Tribe's experts testified, Becker's "beneficial net-revenue interest" was "*hidden*" from federal regulators:

> Gambrell: In this particular case the [Department of Interior] Solicitor or the [BIA] Superintendent was not able to look at the participating interest that Becker had because it was hidden. It never came out in any document that the Solicitor reviewed or the Superintendents reviewed. It never showed up on any audit report. It never showed up on any 10-K. And it did not show up in the EDA operational agreements.
>
> Mr. Isom: How do you know that?
>
> Gambrell: Because I read those documents.

Dkt. 55-3, 511:1-9. The Tribe objects to admission of the 7/2/2007 BIA letter and incorporates by reference the Tribe's Motion in Limine to exclude the 7/2/2007 letter, Dkt. 97.

6. Additional Fact No. 9, relates to the Tribe's contentions relating to the Tribe's federally-chartered corporation. Response: In the initial stages of the state court litigation, the Tribe's attorneys mistakenly believed that the Tribe's federally-chartered corporation was defunct. However, in the course of working with the Tribe's retained expert, Pilar Thomas, Ms. Thomas educated the Tribe's attorneys to the fact that (*i*) the

Tribe's federal corporation has been in continuous existence since it was federally-chartered, (*ii*) the Tribe's Constitution expressly incorporates the corporate Charter by reference under Article VI 1(f), and (*iii*) the corporate Charter defines the limits of the Business Committee's powers in relation to actions taken by the Business Committee that affect the Tribe's "economic affairs" and its tribal enterprises. To the extent that the Tribe's attorneys advanced an inconsistent position at an earlier stage in the state court litigation, there is no judicial estoppel, or other estoppel, because the Tribe never prevailed upon the state court to accept the Tribe's earlier, ostensibly inconsistent, position, and at this time, the state court has issued no final ruling on the question of the Tribe's federally-chartered corporation.[1] In short, Additional Fact No. 9 is simply frivolous as it pertains to this federal lawsuit.

II. THE TRIBE HAS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

Again, neither Judge Lawrence nor Mr. Becker has submitted any evidence or legal authority to defeat the Tribe's prima facie showing that (*i*) state adjudicatory jurisdiction over the Becker state suit is preempted by federal law, and (*ii*) that the Becker IC Agreement is illegal and thus void *ab initio* under federal and tribal law.

A. Defendants Have Failed to Rebut the Tribe's Prima Facie Showing that the Utah State Court Lacks Adjudicatory Jurisdiction

Three requisites must be satisfied before a court may properly undertake an adjudication. First, the court must have territorial jurisdiction of the controversy. Restatement (Second) of Judgments 2 Intro. Note (Am. Law Inst. 1982). Second, the

[1] See generally *New Hampshire v. Maine*, 532 U.S. 742 (2001) (discussing the doctrine of judicial estoppel).

court must have "*authority to adjudicate the type of controversy presented to it. This authority is generally referred to as subject matter jurisdiction and is sometimes referred to as competence* or *competency*."[2] (emphasis added) *Id*. Third, there must be sufficient minimum contacts between the forum state and the defendant—in this case the Ute Tribe—to satisfy traditional notions of fair play and substantial justice. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). All three requisites are missing here.

1. The Utah State Court Lacks Territorial Jurisdiction Under Both Federal Law and State Law

The Utah Enabling Act, enacted by Congress in 1894, to admit Utah to the Union, states in pertinent part:

> Sec. 3 (Second): "[T]he people inhabiting said proposed State do … forever disclaim *all right and title* … to all lands … owned or held by any Indian or Indian tribes … and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States…."

28 Stat. 107 (emphasis added). The disclaimer is repeated verbatim in the Utah Constitution, art. III, which states that art. III is "*irrevocable without the consent of the United States and the people of this State*":

> "[T]he people inhabiting this State do … forever disclaim *all right and title* … to all lands … owned or held by any Indian or Indian tribes … and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States…." (emphasis added)

Utah Const., art. III, § 2. The foregoing language constitutes a disclaimer of both

[2] Yes, "competency" is the precise word used in Article 23 of the Becker IC Agreement which recites that disputes can be heard by any court of "competent" jurisdiction. It should be obvious that the Utah state court is *not* a court of competent jurisdiction insofar as there is no act of Congress authorizing the State of Utah to exercise adjudicatory jurisdiction over the Ute Indian Tribe for actions undertaken by the Tribe inside its reservation boundaries.

proprietary and *governmental* authority over Indian lands and Indian people on Indian lands in Utah. *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 173-74, 179-80 (1973) (construing an identical disclaimer in the Arizona Enabling Act); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (construing an identical disclaimer in the Oklahoma Enabling Act).

Yet, both Judge Lawrence and Mr. Becker have steadfastly ignored the disclaimer, believing, apparently, that the pesky disclaimer can simply be swept under the rug.[3] Yet, the jurisdictional disclaimer cannot be swept under the rug because, as explained below, the absence of territorial jurisdiction means there is, likewise, no subject matter jurisdiction.

2. The Utah State Court Lacks Subject Matter Jurisdiction

A court's subject-matter jurisdiction "is derived from the law … is vested in the courts by the constitution or statutes." 21 C.J.S. *Courts* § 15 (1955). Yet, we know from the disclaimer of jurisdiction in the Utah Enabling Act and the Utah Constitution that the State of Utah relinquished *proprietary* and *governmental* authority over Indian lands in Utah. Further, the State of Utah stipulated that Indian lands would remain "under the absolute jurisdiction and control of the Congress of the United States…." This means that the only governmental body empowered to vest Utah states courts with subject matter jurisdiction over Indians for conduct occurring on Indian lands in Utah is the United States Congress—a point that is underscored by the United States Supreme Court which

[3] The Court will scour Judge Lawrence's rulings in vain for any mention of the jurisdictional disclaimer contained in both the Utah Enabling Act and the Utah Constitution. Apparently, not knowing how to handle the disclaimer, Judge Lawrence chose simply to ignore it.

has repeatedly ruled that state courts are prohibited from exercising adjudicatory jurisdiction over Indians for activity undertaken inside their reservations unless "*Congress has expressly so provided*." *California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (emphasis added); *see also, e.g., Fisher v. District Court*, 424 U.S. 382, 388 (1976); *Kennerly v. District Court*, 400 U.S. 423 (1971); *Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v. Georgia*, 31 U.S. 515, 561-63 (1832).

Yet, neither Judge Lawrence nor Mr. Becker has identified a single act of Congress that empowers the State of Utah to exercise adjudicatory jurisdiction over the Ute Indian Tribe for actions undertaken by the Tribe within the exterior boundaries of its reservation. Indeed, this very question was fully, fairly and conclusively adjudicated in the Tribe's favor nearly forty years ago in *Ute Tribe v. Utah*, 521 F. Supp. 1072, 1157 (D. Utah 1981) (*Ute I*), *aff'd in part, rev'd in part on other grounds*, 773 F.3d 1087 (10th Cir. 1985) (*Ute III*) (*en banc*).

Ute Tribe v. Utah holds that the State of Utah lacks jurisdiction over the Ute Tribe for actions undertaken by the Tribe inside the exterior boundaries of its reservation. That holding is binding upon Judge Lawrence, a state officer, under the doctrine of res judicata. That holding is binding upon Mr. Becker under the doctrine of collateral estoppel. And that holding is binding upon this federal district court under the doctrine of stare decisis. As Judge Gorsuch emphasized in *Ute Tribe v. Myton*, "*Over the last forty years the questions haven't changed—and neither have our answers*." *Ute Tribe v. Myton*, 835 F.3d 1255, 1258 (10th Cir. 2016) (emphasis added).

a. Public Law 280

Mr. Becker is simply wrong in asserting that Public Law 280 is limited in scope to "individual tribal members." Becker Opp. at 21. Of course, it is necessary to read the *entire* statute, *both* subsection (a) and (b). 28 U.S.C. § 1360 reads, in pertinent part:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State ….
>
> | | |
> |---|---|
> | Alaska | All Indian country within the State. |
> | California | All Indian country within the State. |
> | Minnesota | All Indian country within the State, except the Red Lake Reservation. |
> | Nebraska | All Indian country within the State. |
> | Oregon | All Indian country within the State, except the Warm Springs Reservation. |
> | Wisconsin | All Indian country within the State. |
>
> (b) **Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe**, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States … **or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein**.

The provision of PL-280 that allows other states to assume civil jurisdiction within Indian country with the consent of the Indians affected, 25 U.S.C. 1322, contains an identical prohibition of state adjudicatory jurisdiction over Indian property interests:

> (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country … jurisdiction over any or all such civil causes …
>
> (b) **Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe**, band, or community that is held in

> trust by the United States or is subject to a restriction against alienation imposed by the United States … **or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein**.

25 U.S.C. § 1322. The significance of subsection (b) in both 28 U.S.C. § 1360 and 25 U.S.C. § 1322 is the refusal of the United States Congress to vest state courts with jurisdiction to "adjudicate, in probate proceedings or otherwise, the ownership or right to possess "any real or personal property … belonging to any Indian or any *Indian tribe*." (emphasis added). That restriction is significant to the case at bar because that is precisely what the Becker state court suit seeks to do—it seeks to adjudicate "the ownership," or right to possess, "real or personal property" belonging to the Ute Tribe.

Even the six PL-280 states—the states enumerated under 28 U.S.C. § 1360—recognize that their state courts lack jurisdiction to adjudicate disputes over Indian property. For instance, in *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (1977), the Alaska Supreme Court affirmed that it lacked jurisdiction to adjudicate a suit bought by individual Indians, saying:

> A state court adjudication of questions of tribal membership would necessarily encompass issues of ownership or right to possession of property held in trust and subject to restrictions on alienation. The state has no jurisdiction 'to adjudicate … the ownership or right to possession of such property or any interest therein.' 28 U.S.C. 1360(b).

Id. at 36. In California, another PL-280 state, state courts will not even adjudicate the question of whether certain property in dispute is, or is not, Indian trust property:

> As long as the Indian party to the litigation claims that the property is Indian trust or allotted land, the dispute may be characterized as one concerning ownership and possession of Indian land, and is therefore barred from state court jurisdiction.

Boisclair v. Superior Court, 51 Cal. 3d 1140, 1152-54 (Cal. 1990). *See also In re Blue Lake Forest Prods., Inc.*, 143 B.R. 563, 566-68 (N.D. Cal. 1992) (same).

3. There Are No Minimum Contacts Between the Tribal Parties and the State of Utah in the Becker Contract Dispute

The Defendants fail to dispute—and therefore concede—that there are no minimum contacts between the State of Utah and the Ute Tribe in relation to Mr. Becker's on-reservation work for the Tribe. Mr. Becker, a resident of the State of Colorado, solicited employment with the Tribe, and his job duties consisted of managing the development of the Tribe's on-reservation oil and gas minerals. At no time did the Ute Tribe intentionally invoke or benefit from the protection of Utah state law in relation to Mr. Becker's employment. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. at 879-87. The Due Process Clause guarantees that parties will only be subjected to "lawful" acts of authority; the Due Process Clause "'protect[s] a person against having the Government impose burdens upon him except in accordance with the valid laws of the land.'" *Id.* (underscore added) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 408 (1966)). "This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere." *Id*. (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law."). *See also* Restatement (Second) of Conflict of Laws § 24 cmt. b ("One basic principle underlies all rules of Jurisdiction. This principle is that a state does not have jurisdiction in the absence of some reasonable basis for exercising it."); Restatement (Second) of Conflict of Laws § 24 cmt. e (A

judgment rendered in this country without judicial jurisdiction is void, even in the State where rendered, and is not entitled to full faith and credit in sister States.)

Here, there are no minimum contacts between the State of Utah and the Ute Tribe in relation to the Becker IC Agreement. Therefore, the state court's continued assertion of jurisdiction over the state court suit offends traditional notions of fair play and substantial justice. *J. McIntyre Machinery*, 564 U.S. at 886-87.

B. Defendants Have Failed to Rebut the Tribe's Prima Facie Showing that the IC Agreement is Illegal Under Federal and Tribal Law

Judge Lawrence and Mr. Becker are both dismissive of the need for federal approval of the Becker IC Agreement. Defendants treat federal approval as if it is a pesky technicality that can be ignored, minimized, or "ratified" around. Neither Defendant has dealt candidly with the reason *why* federal approval is required, that is, because Indian tribes themselves lack legal *capacity* to enter into contracts such as the Becker IC Agreement. The fact that Indian tribes lack legal capacity to contract is so widley-recognized and so well-established that it is included in WILLISTON ON CONTRACTS in a section on legal incapacity captioned, "Native Americans; aged persons; convicts; spendthrifts; others":

> The Indian tribes in the United States have limited contractual capacity and have been described as "wards" of the federal government. The government, in turn, is declared to be the "guardian" of these Native Americans and "trustee of their property rights."

5 WILLISTON ON CONTRACTS, § 11:12 (4th ed.). Yet, Judge Lawrence and Mr. Becker persist in side-stepping the question of legal capacity. Mr. Becker argues that individual clauses can be severed from the Agreement to magically transport the entire Agreement

out of the realm of legal incapacity.[4] It cannot. The United States Supreme Court rejected this argument decades ago: when a contract with an Indian tribe or individual Indian requires federal approval, *no portion of the unapproved contract is enforceable*:

> We think the better view is that, where an [Indian] allottee undertakes to negotiate a [forbidden mineral] lease … he enters a field where he must be regarded as without capacity or authority to negotiate or act, and the resulting lease is **void**. (emphasis added)

Smith v. McCullough, 270 U.S. 456, 463, 465 (1926) ("it was beyond the power [of the Indian allottee], on his own volition, to grant" the mineral lease in dispute).[5]

Without addressing or distinguishing *Smith v. McCullough*—or any of the Tribe's other legal authority—Mr. Becker asserts, incorrectly, that federal approval can be dispensed with on grounds that the Tribe ratified the IC Agreement, or that Mr. Becker

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[4] Becker Opposition, 8-9.

[5] *See also Johnson v. M'Intosh*, 8 Wheat 543, 573-74 (1823) (where the requisite federal approval was never obtained and the Indians "annul[ed]" the agreement, "we know of no tribunal" that can enforce the [annulled] agreement); *Ewert v. Bluejacket*, 259 U.S. 129, 137 (1922) (the illegal alienation of Indian property confers no enforceable rights); *Wells Fargo Bank v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 698-700 (7th Cir. 2011) (trust indenture and waiver of sovereign immunity contained therein were void *ab initio* for lack of federal approval); *Catskill Dev., L.L.C. v. Park Place Entm't, Corp.*, 547 F.3d 115, 127-30 (2d Cir. 2008) (contracts with Mohawk Indian Tribe were void *ab initio* for lack of federal approval); *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.2d 737, 742-43 (8th Cir. 1993) (holding that federal restraints on the alienation of Indian property apply not only to real property but also "to interests in [Indian] land, like fossils" (or minerals) "that become personal property when severed from the land."); *Quantum Expl., Inc. v. Clark*, 780 F.2d 1457, 1459-60 (9th Cir. 1986) (and cases cited therein) (agreement not approved under the Indian Mineral Development Act is not enforceable); *Pueblo of Santa Ana v. Mt. States Tel. and Telegraph Co.*, 734 F.2d 1402, 1406 (10th Cir. 1984), *rev'd on other grounds*, 472 U.S. 237 (1985) (nullifying a 1928 right-of-way because it was void *ab initio*); *see generally* William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 170-172 (1994), and cases cited therein.

should be allowed to rely on the doctrine of apparent authority, or that the Tribe was legally obligated to procure federal approval.[6] Yet, the United States Supreme Court has repeatedly rejected similar arguments, for instance in *Bunch v. Cole*, a decision that acknowledged the obvious propriety of federal law restrictions on the alienation of Indian property:

> The state court was persuaded that its conclusion had support in decisions dealing with leases made between parties entirely competent to make them, but not executed in conformity with local laws, such as the statute of frauds. But decisions of that class are not apposite. These leases were made in violation of a congressional prohibition. They were not merely voidable at the election of the [Indian] allottee, but absolutely void and not susceptible of ratification by him. Nothing passed under them ….
>
> It is not our province to inquire particularly into the need for the protection intended to be afforded by the restrictions, but, if it were, the need would find strong illustration in this case; for it appears that each of the leases was obtained for a cash rental of $75, and that when the time arrived for assuming possession under them the defendants readily sublet the land on terms which netted them $890.40 in 1917 and $384.35 in 1918, the latter year being one of pronounced drought.

Bunch v. Cole, 263 U.S. 250, 254-55 (1923). Similar indica of "greed … and … improvidence" is obvious in the Becker contract.[7] At the 2005 meeting of the Tribal Business Committee, when Mr. Becker's IC Agreement was being promoted to the Tribe by Mr. Becker's friend John Jurrius,[8] one of the Tribal Councilors asked if Becker would be required to invest money in order to receive a two percent participation interest in the

[6] Becker Opposition, 9-21.

[7] *See Sunderland v. U.S.*, 266 U.S. 226, 233-34 (1924).

[8] The Tribe sued Mr. Jurrius in 2008 on multiple counts of civil wrongdoing, including fraud and conversion, in a suit captioned *Ute Indian Tribe v. Jurrius*, case number 1:08-v-01888, in the U. S. District Court for the District of Colorado.

Tribe's working interest under the Exploration and Development Agreements (EDAs) that were placed into Ute Energy LLC. Mr. Jurrius falsely replied, "If you pay, he [Becker] pays." Dkt. 95-1, p. 4. In fact, however, for the next seven-plus years, the Tribe contributed its pro-rata working interest share of production costs under the EDAs, but Becker never paid a single cent; yet, Becker now claims he is entitled to a windfall of 7.5 million dollars—and that amount a windfall over and above the $200,000.00/per year salary the Tribe paid him during his employment.[9] At the end of the day, the Becker IC Agreement is just as patently preposterous as the agricultural lease in *Bunch v. Cole* that the U.S. Supreme Court felt compelled to criticize.

The Tribe's evidence before this Court includes testimony and reports from five experts who support the Tribe's contention that Becker's "net revenue interest" is a real property interest in the Tribe's mineral estate, and that the IC Agreement required federal approval:

1) The written report of Michael Wozniak, Esq., an oil-and-gas attorney, who 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 Agreement subject to federal approval under the Indian Mineral Development Act (IMDA), 25 U.S.C. § 2102(a). Dkt. 55-2, 383-99.

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

[9] Becker Declaration of 6/10/2016, Dkt. 55-1, 112, ¶ 21.

Indian Energy Policy and Programs at the U. S. Department of Energy. Ms. Thomas opines that the Becker 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. 55-2, 432-51.

3) Kevin Gambrell, former Regional Director of the Federal Indian Minerals Office, U.S. Department of Interior, testified that the two-percent "net revenue interest" under the Agreement granted Becker "a 2 percent working interest in the tribal interest" in the Tribe's EDAs that were assigned to Ute Energy LLC, making the Becker Agreement subject to federal approval. Dkt. 55-3, 485-522.

4) Robert J. Miller, professor of law at the Sandra Day O'Connor College of Law at Arizona State University, testified that the Becker Agreement is void *ab initio* for lack of federal approval, both under federal law and under the restrictions contained in the Tribe's constitution and corporate charter. Dkt. 55-3, 570-619.

5) Alexander Skibine, professor of law at the University of Utah S. J. Quinney College of Law, testified that the Agreement required federal approval under 25 U.S.C. § 2102(a), or alternatively, 25 U.S.C. § 177. Dkt. 55-3, 523-69.

Neither Judge Lawrence nor Mr. Becker has presented any evidence to rebut the Tribe's prima facie showing that the IC Agreement is void *ab initio* for lack of federal approval.

1. The Court Must Reject Becker's Deliberate Misrepresentations of Facts and Law

The Tribe cannot allow Becker's deliberate misrepresentations of facts and law to go unaddressed. Becker relies on the *Stifel* case to argue that individual contract provisions are severable from the IC Agreement and separately enforceable.[10] Yet, the Tenth Circuit expressly Mr. Becker's argument on this very point in *Becker v. Ute Indian Tribe*, 868 F.3d 1199, 1204-05 (10th Cir. 2017),[11] and the Tenth Circuit's decision has become the law of the case.

Next, Becker asserts, preposterously, that "[t]he Tribe's asserted immunity from a state court adjudication … is not a federal jurisdiction-creating issue," citing *Oklahoma Tax Commissioner v. Graham* and *Oklahoma v. Wyandotte Tribe of Oklahoma*.[12] Yet, this contention is also directly contrary to what the Tenth Circuit just got finished adjudicating, holding, clearly and unequivocally:

> [I]t is clear that whether the state court has jurisdiction to hear Mr. Becker's claim is a matter of federal law.

Ute Indian Tribe v. Lawrence, 875 F.3d at 543. Further, the Tenth Circuit distinguished *Graham* (and inferentially *Wyandotte*), stating:

> [T]here are two significant differences between *Graham* and our case. To begin with, sovereign immunity and a court's lack of subject-matter jurisdiction are different animals.

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[10] Becker Opposition, 8.

[11] The Tenth Circuit writing, "*Stifel* itself did not question that circuit's decision four years earlier that a contract not approved as required by IGRA was void ab initio and not severable despite a severability clause in the contract. *See 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). We agree with *Wells Fargo*."

[12] Becker Opp. 24.

> * * * *
> More importantly, *Graham* and Mr. Becker's appeal considered suits seeking declarations that federal law did not override state law, whereas the Tribe contends that state law must yield to federal law. "[F]or reasons involving perhaps more history than logic," *Franchise Tax Board v. Construction Laborers*, 463 U.S. 1, 4, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), whether a case arises under federal law can depend on which party to a dispute raises the federal issue.

Id. These holdings have become the law of the case, and Mr. Becker is barred from rehashing them over and over again.

In a separate part of his memorandum, Becker again invokes *Stifel* as authority for the proposition that he "*should be allowed to proceed with his claims in State Court, the only other court of competent jurisdiction (other than this [federal] court) able to decide his claims*."[13] One of the multiple differences between this case and *Stifel*—(differences the Tribe has had to reiterate over and over because Becker stubbornly refuses to acknowledge them)—is that *Stifel* was litigated in Wisconsin, one of the six PL-280 states vested by Congress with subject matter jurisdiction over Indian lands.[14] In contrast, there is no act of Congress that vests the State of Utah with adjudicatory authority over the Ute Indian Tribe for actions undertaken by the Tribe within the exterior boundaries of its reservation. And in the absence of such a Congressional delegation of jurisdiction, the Utah state court is *not* a *competent* court.

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[13] Becker Opp. 27.

[14] Becker incorrectly asserts that the transactions in *Stifel* occurred on "Indian lands in Wisconsin." As explained in the predecessor case to *Stifel*, the commercial transactions involved a riverboat casino, hotel and bed and breakfast in Natchez, Mississippi, located some 1100 miles south of the Tribe's lands in Wisconsin. *Wells Fargo Bank*, 658 F.3d at 688-89.

Finally, Becker disingenuously asserts that the Ute Indian Tribal Court lacks jurisdiction over the Tribe's suit against him, *Ute Indian Tribe v. Becker*, case number CV-16253.[15] As Becker well knows, this is a question for the Tribal Court to determine, and at this time, there has been no exhaustion of Tribal Court remedies.

III. DEFENDANTS HAVE FAILED TO REBUT THE TRIBE'S PRIMA FACIE SHOWING OF IRREPARABLE HARM

Neither Judge Lawrence nor Mr. Becker has submitted any evidence or legal authority to defeat the Tribe's prima facie showing of irreparable harm.

IV. DEFENDANTS HAVE FAILED TO REBUT THE TRIBE'S PRIMA FACIE SHOWING THAT THE EQUITIES WEIGH IN FAVOR OF THE TRIBE

Neither Judge Lawrence nor Mr. Becker has submitted any evidence or legal authority to defeat the Tribe's prima facie showing that the equities weigh in the Tribe's favor.

V. DEFENDANTS HAVE FAILED TO REBUT THE TRIBE'S PRIMA FACIE SHOWING THAT THE PUBLIC INTEREST WILL NOT BE HARMED IF AN INJUNCTION IS GRANTED

Neither Judge Lawrence nor Mr. Becker has submitted any evidence or legal authority to defeat the Tribe's prima facie showing that there will be no harm to the public interest if the preliminary injunction is issued. As emphasized *supra*, pp. 10-11, there are no minimum contacts whatsoever between the forum state, Utah, and the Ute Tribe in relation to Mr. Becker's on-reservation employment for the Tribe.

[15] Becker Opp. 28-29.

VI. DEFENDANTS HAVE FAILED TO ESTABLISH ANY GROUNDS FOR ABSTENTION OR FOR OTHERWISE DENYING THE INJUNCTION

Neither Judge Lawrence nor Mr. Becker has submitted any evidence or legal authority to defeat the Tribe's prima facie showing that there are no legal grounds for denying a preliminary injunction.

CONCLUSION

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

Respectfully submitted this 26th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2018, I electronically filed the foregoing **PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF** 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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