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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' EXPEDITED MOTION FOR SUMMARY JUDGMENT AND FOR INTERIM AND PERMANENT INJUNCTIONS ON GROUNDS OF FEDERAL PREEMPTION, INFRINGEMENT ON TRIBAL SOVEREIGNTY, AND LACK OF SUBJECT MATTER JURISDICTION** CASE No. 2:16-cv-00579 Judge Clark Waddoups **Oral Argument Requested**

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COMES NOW the Plaintiffs, the Ute Indian Tribe and affiliated parties (the "Tribe" or "Ute Tribe"), and moves the Court for summary judgment on grounds of federal preemption, infringement on tribal sovereignty, and lack of subject-matter jurisdiction. The Tribe also seeks interim and permanent injunctive relief based on a separate motion for injunctive relief that is being filed contemporaneously with this summary judgment motion.

REFERENCES TO THE RECORD

Plaintiffs are filing two motions for summary judgment on the substantive merits (in the alternative), and one motion for issuance of interim injunctive relief and a permanent injunction issued under Rule 56. Evidentiary materials for all three motions are contained in a three-volume Appendix. References are to the Volume and page number(s) in the Appendix, i.e., "Appendix, VI, 1-10."

INTRODUCTION

For nearly three years, the Tribe has defended against breach of contract claims brought by Defendant Lynn D. Becker ("Becker") in a Utah state court, *Becker v. Ute Indian Tribe, et al.*, case number 140908394, Third Judicial District Court, Salt Lake County ("state court case"). Despite the Tribe's repeated challenges to subject-matter jurisdiction, the state court has scheduled a nine-day jury trial that is set to begin on February 20, 2018. The Tribe filed this federal lawsuit more than one year ago on June 13, 2016, seeking, *inter alia*, *(i)* to enjoin the state court case on grounds of federal preemption, infringement on tribal sovereignty, and lack of state adjudicatory (subject

matter) jurisdiction over Mr. Becker's claims; or alternatively, (*ii*) to declare the contract between the Tribe and Becker a nullity under both federal law and Ute Indian tribal law; and (*iii*) to declare that the Tribe has tribal sovereign immunity against Mr. Becker's claims. This Court dismissed the Tribe's complaint for lack of federal question jurisdiction under 28 U.S.C. § 1331. The Tenth Circuit, however, reversed this Court's dismissal of the Tribe's complaint.[1] The Tribe now seeks declaratory relief and entry of a permanent injunction against prosecution of the state court case. Summary judgement should be granted because the undisputed material facts establish unequivocally that (*i*) Mr. Becker's claim arose inside the exterior boundaries of the Tribe's Uintah and Ouray Reservation; (*ii*) the Utah state court lacks subject-matter jurisdiction and federal law otherwise preempts, precludes, and bars the State of Utah from exercising adjudicatory jurisdiction over Mr. Becker's claims; or (*iii*) alternatively, the Independent Contractor Agreement (IC Agreement) between Becker and the Ute Tribe is void *ab initio* under both federal law and Ute tribal law. The grounds for entry of a permanent injunction are set forth in a separate motion. The motion herein is devoted to the undisputed facts and substantive law that support summary judgment on grounds of federal preemption, infringement on tribal sovereignty, and lack of state court adjudicatory jurisdiction.

BACKGROUND STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A court's subject-matter jurisdiction "is derived from the law, particularly the law that creates and organizes the courts, and is vested in the courts by the constitution or

[1] *Ute Indian Tribe v. Lawrence*, No. 16-4154, 2017 WL 5150265 (10th Cir. November 7, 2017); *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017).

statutes." 21 C.J.S. *Courts* § 15 (1955). Separately, there are two "independent but related" federal law barriers to the exercise of state jurisdiction over Indians for legal claims arising inside an Indian reservation. State jurisdiction may be preempted by federal law, or alternatively, the exercise of state jurisdiction may impermissibly infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). In *Bracker*, the Supreme Court explained that although the two federal law barriers are related, the barriers are separate and "independent" of one another:

> The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to *activity undertaken on the reservation* or by tribal members. (emphasis added)

Bracker, 448 U.S. at 143. In the case at bar, Plaintiffs seek entry of summary judgment under both federal barriers, as well as the state court's lack of subject-matter jurisdiction.

A. Elements of Infringement on Tribal Sovereignty

In 1959, the United States Supreme Court ruled that state courts lack adjudicatory jurisdiction over civil suits brought by non-Indians against Indians when the cause of action arises on an Indian reservation. In language that could apply just as easily to Lynn Becker, the defendant here, the Supreme Court said in *Williams v. Lee*:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. [citations omitted] The

> cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.

Williams v. Lee, 358 U.S. at 223. Seventeen years later, the United States Supreme Court reversed the Montana Supreme Court and ruled that Montana state courts lack jurisdiction over an adoption proceeding that arose on the Northern Cheyenne Indian Reservation:

> No federal statute sanctions this interference with tribal self-government. Montana has not been granted, nor has it assumed, civil jurisdiction over the Northern Cheyenne Indian Reservation, either under the Act of Aug. 15, 1953, 67 Stat. 588 [*the original Public Law 280*], or under Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U.S.C. § 1321 et seq [*the amendments to Public Law 280*].

Fisher v. District Court, 424 U.S. 382, 388 (1976).

B. Elements of Federal Preemption in Federal Indian Law

"Absent clear federal authorization, state courts lack jurisdiction to hear actions against Indians arising within Indian country." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §7.03[1][a][ii], p. 608 (2012 ed.). Consistent with this principle, the U. S. Supreme Court ruled in *Kennerly v. District Court* that state adjudicatory jurisdiction is preempted by federal statutes that prescribe the exclusive means by which states may obtain civil and criminal adjudicatory jurisdiction over Indians within Indian country. *Kennerly v. District Court*, 400 U.S. 423 (1971) (holding that the Blackfeet Tribe's consent to state jurisdiction through passage of a tribal resolution was a nullity because it circumvented the requirements of Public Law 280, 25 U.S.C. §§ 1321-1326); *see also Fisher v. District Court*, 424 U. S. at 386 (same).

The process established by Congress under Public Law 280—codified, as pertinent here, at 25 U.S.C. §§ 1321-1326—mandates that tribal consent to state jurisdiction can only be conferred through a majority vote of the enrolled Indians of the Indian tribe in question:

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

25 U.S.C. § 1326.

C. Elements of Lack of Subject Matter Jurisdiction

As expressed by the United States Supreme Court, "Subject matter jurisdiction defines the court's authority to hear a given type of case, … it represents 'the extent to which a court can rule on the conduct of persons or the status of things.'" *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (quotation omitted). "Subject matter jurisdiction … is the authority of the court to decide the case." *Johnson v. Johnson*, 2010 UT 28, ¶ 18, 234 P.3d 1100 (citation omitted). "Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

> Unlike a court's exercise of jurisdiction over a person or a party, subject matter jurisdiction cannot be created or conferred on the court by consent or waiver. [citations omitted]
>
> The fundamental and initial inquiry of a court is always to determine its own jurisdictional authority over the subject matter of the claims asserted. Upon a determination by the Court that its jurisdiction is lacking, its authority

extends no further than to dismiss the action. [citations omitted]

Thompson v. Jackson, 743 P.2d 1230, 1232 (Utah Ct. App. 1987).

Under 28 U.S.C. § 1360(b) and 25 U.S.C. 1322(b), Congress has expressly prohibited state courts in all fifty states from adjudicating "in probate proceedings or otherwise" the ownership or right to possess "any real or personal property" or "any interest therein" belonging "to any Indian or any Indian tribe." *See Bryan v. Itasca Cty.*, 426 U. S. 373, 388-89 (1976).

As a federally-recognized Indian tribe, the Ute Tribe is entitled "to the immunities and privileges available to ... federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.2.

D. Undisputed Material Facts Relating to Federal Preemption, Infringement on Tribal Sovereignty, and the Utah State Court's Lack of Subject-Matter Jurisdiction

1. The Ute Indian Tribe of the Uintah and Ouray Reservation is a federally recognized Indian tribe composed of three band of the greater Ute Tribe—the Uintah Band, the White River Band, and the Uncompahgre Band—who today reside on the Uintah and Ouray Reservation in northeastern Utah. Appendix, VI, 1.

2. 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, VI, 3-9, Declaration of Irene Cuch, ¶ 2.

3. The Ute Indians once "ranged from the Wasatch Front all the way to the Colorado Front Range—from present-day Salt Lake City to Denver."[2] In return for the Ute Indians' cession of vast tracts of tribal lands to the federal government, the United States executed treaties with the Utes which guarantee the Tribe a tribal homeland established under federal law and set apart and protected from outside infringement "except … [as] authorized by the United States." Ute Treaty of 1863 (13 Stat., 673), Ute Treaty of 1868 (15 Stat., 619), and Act of April 29, 1874, Chapter 136 (18 Stat., 36) (emphasis added). Appendix, VI, 13-34.

4. Since Congress ratified the Ute Treaties of 1863 and 1868, the United States has never authorized the State of Utah to exercise jurisdiction over the Ute Indian Tribe for actions undertaken by the Tribe inside the boundaries of its own Reservation. To the contrary, in 1894, when the State of Utah applied for admission to the Union, the Utah Enabling Act, passed by Congress, expressly required the State of Utah to "forever disclaim all right and title to … all lands … owned or held by … Indian tribes." Act of July 16, 1894, Chapter 138 (28 Stat. 107). The disclaimer is repeated verbatim in the Utah Constitution, art. III, §2.[3] Appendix, VI, 35-6. The foregoing language constitutes the

[2] CHARLES WILKINSON, FIRE ON THE PLATEAU, CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST, 128 (1999).

[3] Beginning in 1836, it was "the congressional practice in most organic acts establishing new territories . . . to include clauses expressly preserving Indian rights and federal control over tribes." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §6.01[4], p. 510. Congress followed that policy in the Kansas Statehood Act of 1861, and in the enabling acts for each state that was admitted to the union between 1889 and 1959, including the State of Utah. *Id*.

State of Utah's disclaimer of both proprietary and governmental authority over the Ute Indian Tribe. *See McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 173-74, 179-80 (1973) (based on the disclaimer in the Arizona Enabling Act, which is identical to the Utah Enabling Act, the Arizona tax code could not be extended extra-territorially inside the Navajo Reservation to apply to Navajo Indians); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (interpreting the disclaimer in the Oklahoma Enabling Act which is identical to the Utah Enabling Act).

5. The Ute Indian Tribe has never consented to state civil or criminal jurisdiction over the Ute Indian Reservation of the Uintah and Ouray Indian Reservation under Public Law 280, 25 U.S.C. §§ 1321-1326. Indeed, in 2014, the Ute Indian Tribe amended Section 1-2-1 of the Tribe's Law and Order Code to make clear that the Ute Tribe has never consented to state jurisdiction in accordance with the Congressionally-mandated process required by 25 U.S.C. § 1326:

> [T]he Ute Indian Tribe has never consented to the State of Utah 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 the State of Utah pursuant to 25 U.S.C. § 1322(a), nor has the Ute Indian Tribe ever consented to or agreed to allow the State of Utah to assume criminal jurisdiction over Indians and Indian territory, country, and lands or any portion of lands within the State of Utah in accordance with 25 U.S.C. § 1321(a). The Tribe hereby proclaims that the Ute Indian Tribe has never conducted a special election of adult Indians of the Tribe to allow the State of Utah to assume civil or criminal jurisdiction over the Tribe and its lands under PL-280 and will never consent to the State of Utah assuming civil or criminal jurisdiction over the Ute Indian Tribe pursuant to the requirements of PL-280.

Appendix, VI, 37-9.

6. In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. § 5101

et seq. ("the IRA"). The IRA is "a statute specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. at 387. The IRA implements a federal policy of reestablishing tribal governments, reconstituting tribal land bases, and revitalizing tribal economies and cultures. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §4.04[3][a], p. 256. The Ute Tribe is organized in two ways under the IRA, both as a tribal government and as a federal corporation. Appendix, VI, 51, 66.

7. Like the Northern Cheyenne Tribe in *Fisher*, the Ute Tribe adopted a constitution and bylaws pursuant to the IRA, and then pursuant to its Tribal constitution and bylaws, the Tribe enacted a Law and Order Code. The Law and Order Code was established

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

Appendix, VI, 41 (Preamble to the Tribe's Law and Order Code).

8. Under its Law and Order Code, the Tribe established the Ute Indian Tribal Court and granted its Tribal Court jurisdiction over all persons "employed" by the Tribe and any person "who transacts, conducts, or performs any business or activity within the Tribe's territorial jurisdiction." Appendix, VI, 43-4, 47, Ordinance No. 13-001, Section 1-2-3(2)(A) and (C).

9. Defendant Lynn Becker is a resident of Colorado who was employed by the Ute Tribe inside the territorial boundaries of the Uintah and Ouray Reservation from March 1, 2004 through October 31, 2007. Becker submitted a written proposal for employment with the Ute Tribe on December 30, 2003. He sent his proposal to the

attention of John P. Jurrius, of the Jurrius Group, who was then the Tribe's Financial Consultant. Appendix, VI, 78-80; 163:10-13 (Deposition of Lynn Becker).

10. Becker began work for the Tribe on March 1, 2004, without a written employment contract. More than a year later on April 27, 2005, at a meeting of the Tribe's governing body at tribal headquarters inside the Uintah and Ouray Reservation, the Tribal Business Committee approved a written "Independent Contractor Agreement" ("IC Agreement") between the Tribe and Becker. The Agreement was made retroactive to March 1, 2004. Appendix, VI, 84.

11. 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 inside the exterior boundaries of the Tribe's U&O Reservation. The IC Agreement states that Becker's services to the Tribe were to include the "restructuring and development of the Tribal Energy and Minerals Department as set forth in Tribal Ordinance 03.003," which was attached to the Becker IC Agreement as Exhibit C. Appendix, VI, 97-106.

12. The IC Agreement was executed at the Tribe's headquarters in Fort Duchesne, and Becker's office was located inside tribal headquarters in Fort Duchesne. Appendix, VI, 4-5, Declaration of Irene Cuch, ¶¶ 6-7.

13. The IC Agreement purports to grant Mr. Becker an "interest of two percent two-percent (2%)" of net revenue distributed to Ute Energy Holding, LLC (sic) from Ute Energy, LLC (sic)." Appendix, VI, 96; VII, 383-99, Declaration, Resume, and Expert of Michael J. Wozniak.

14. The Becker IC Agreement was never authorized or approved by the Secretary of the Interior, or the Secretary's duly-authorized designee. Indeed, in the parallel state-court litigation between the parties, Mr. Becker has admitted that his IC Agreement "was never approved by the U.S. Congress or the Secretary or Department of Interior." Appendix, VI, 107-09.

15. Mr. Becker is suing the Tribe in the Utah state court action to enforce his claim to a two percent (2%) net revenue interest under the IC Agreement. Appendix, VI, 110-12, Declaration of Lynn Becker, ¶ 21.

16. The Utah state court has denied the Tribe's motions to dismiss the state court suit on grounds of federal preemption, infringement on tribal sovereignty, and lack of subject matter jurisdiction, and the state court has scheduled a nine-day jury trial on Mr. Becker's complaint, set to begin February 20, 2018. Appendix, VI, 113, 125-45.

17. The Tribal Plaintiffs are prosecuting their own legal claims against Mr. Becker in a lawsuit pending in the Ute Indian Tribal Court, *Ute Indian Tribe, et al. v. Becker*, case number CV-16-2553, seeking, *inter alia*, a declaratory judgment from the Tribal Court that the agreement is void *ab initio* and that there was no valid waiver of sovereign immunity under Ute Indian tribal law. Appendix, VI, 116-17.

LEGAL ARGUMENT

I. LEGAL STANDARDS GOVERNING THE MOTION

The Court's determination of this motion must be guided by three overarching legal principles. First, the binding authority of United States Supreme Court precedents on questions of federal law. Secondly, adherence to the United States Supreme Court's Indian law canons of construction. And third, the legal standards governing motions for summary judgment. As to the first principle, it is axiomatic that lower courts have no discretion to ignore the United States Supreme Court's application of federal law. *E.g., James v. City of Boise*, __ U.S. __, 136 S. Ct. 685, 686 (2016) (once the Supreme Court has spoken, "it is the duty of other courts to respect that understanding of the governing rule of law."). Controlling Supreme Court precedent consists not only of the "narrow holdings" of its cases, "*but also the reasoning underlying those holdings*, particularly when such reasoning articulates a point of law." *See United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (emphasis added); *see also McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 169 (1973) ("Although *Worcester* on its facts dealt with a State's efforts to extend its criminal jurisdiction to [Indian] reservation lands, the rationale of the case plainly extended to state taxation within the [Indian] reservation as well.").

As to the second principle, the United States Supreme Court has developed and repeatedly insisted that lower courts must apply the "Indian law canons of construction"—a rule of federal law that requires all treaties, agreements, statutes, and executive orders with Indians to be liberally construed in favor of Indians. "When we are faced with … two possible constructions [of a statute or other instrument] our choice between them must

be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor the Indians, with ambiguous provisions interpreted to their benefit.'" *Cty. of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68 (1985)). *See also Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be construed generously in order to comport with … traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence."). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 2.02 (2012 ed.).

As to the third principle, Rule 56 of the Federal Rules of Civil Procedure states that a court "shall" grant summary judgment if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." As explained by the United States Supreme Court:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1, *see* Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). …

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

II. LACK OF SUBJECT-MATTER JURISDICTION, FEDERAL PREEMPTION, AND IMPERMISSIBLE INFRINGEMENT ON UTE TRIBAL SOVEREIGNTY

A. Lack of Subject-Matter Jurisdiction

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 342 U.S. 786, 789 (1945). In a landmark case nearly two centuries ago, Chief Justice John Marshall ruled that the attempt to extend state adjudicatory jurisdiction over Indian country was "repugnant to the constitution, treaties, and laws of the United States." *Worcester v. Georgia*, 31 U.S. 515, 561-63 (1832). In doing so, the Marshall court struck down the State of Georgia's attempt to extend its state laws extra-territorially inside the Cherokee Nation to prosecute two white missionaries who were living in Cherokee territory with the consent of the Cherokees and federal authorities. The two white men were arrested, convicted, and sentenced to four years of hard labor in the Georgia state penitentiary for violating a state law that, *inter alia*, made it a crime for non-Indians to live inside Cherokee territory without the state of Georgia's permission.

Justice Marshall's eloquent words in striking down the Georgia state law ring down through the centuries with a simple clarity as appropriate to the *Becker* case as it was to the *Worcester* case in 1832:

> The defendant [Georgia] is a state, a member of the union, which has exercised the powers of government over a people [the Cherokee Nation] who deny its jurisdiction, and are under the protection of the United States.
> ….
> The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of . . . [the Georgia law] . . . is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction.
> ….

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.
>
> ….
>
> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.
>
> ….
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.
>
> ….
>
> The act of the state of Georgia under which the plaintiff in error was prosecuted, is consequently void, . . . [The Georgia state laws] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the [federal] government . . . [The Georgia state laws] are in direct hostility with treaties repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to [the Cherokees] all the land within their boundary; solemnly pledge the faith of the United States to restrain [its] citizens from trespassing on it; and recognize the pre-existing power of the [Indian] nation to govern itself.

31 U.S. at 521-562.

Since *Worcester v. Georgia*, numerous decisions have reaffirmed its holding. And the Supreme Court early on rejected the argument that white settlement inside of Indian country vitiated the exclusivity of tribal and federal law in Indian country:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the [federal] government as existing, then they are a 'people distinct from others' . . . separated from the

> jurisdiction of Kansas, . . . their property is *withdrawn from the operation of State laws*. (emphasis added)

The Kansas Indians, 72 U.S. 737, 755-57 (1867); *see also The New York Indians*, 72 U.S. 761 (1867) (both cases invalidating state efforts to tax Indian lands); *United States v. Kagama*, 118 U.S. 375 (1886) (rejecting the argument that the State of California had jurisdiction to prosecute a murder occurring on an Indian reservation).

According to COHEN'S treatise on Federal Indian law:

> [T]he Supreme Court repeatedly has affirmed the *Worcester* decision. Thus, as a general rule, matters affecting Indians in Indian country are excepted from the usual application of state law to the ordinary affairs of state inhabitants. . . . [and] . . . both [the Congress and the Supreme Court] have largely adhered to the basic holding of *Worcester* despite the vast changes that have taken place in American society since 1832.
> ….
>
> The limitation on state power in Indian country stems from the Indian Commerce Clause, which vests exclusive legislative authority over Indian affairs in the federal government. This constitutional vesting of federal authority vis-à-vis the states allows tribal sovereignty to prevail in Indian country, unless Congress legislates to the contrary. Because of plenary federal authority in Indian affairs, there is no room for state regulation.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §§ 6.01[2], pp. 492-94; § 6.03[1], p. 512.

Thus *Worcester's* principle of tribal autonomy in Indian country was adopted with approval by Congress, and since then all three branches of the federal government have "assumed the continued force of *Worcester's* principle of Indian self-government within tribal territory." *Id*. at § 6.01[4], p. 500. For its part, the United States Supreme Court has repeatedly made clear that state courts are prohibited from exercising adjudicatory jurisdiction over tribal Indians for activity undertaken inside their reservations unless the "*Congress has expressly so provided*." *California v. Cabazon Band of Indians*, 480 U.S.

202, 207 (1987) (emphasis added) (upholding an injunction to enjoin the application of California law inside California Indian reservations); *see also Williams v. Lee*, 358 U.S. at 220; *State ex rel. Peterson v. Dist. Court*, 617 P.2d 1056, 1060-70 (Wyo. 1980).

B. Federal Preemption and Impermissible Infringement on Tribal Sovereignty

In the absence of "clear federal authorization, state courts lack jurisdiction to hear actions against Indians arising within Indian country." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §7.03[1][a][ii], p. 608. Consistent with this principle, the United States Supreme Court ruled in *Kennerly v. District Court* that state adjudicatory jurisdiction is preempted by federal statutes that prescribe the *exclusive* means by which states may obtain civil and criminal adjudicatory jurisdiction over Indians within Indian country. *Kennerly v. District Court*, 400 U.S. 423 (1971) (holding that the Blackfeet Tribe's consent to state jurisdiction through passage of a tribal resolution was a nullity because it circumvented the requirements of PL 280, 25 U.S.C. §§ 1321-1326). The *Kennerly* Court emphasized that adherence to the Congressionally-mandated process under 25 U.S.C. §§ 1322 and 1326 is not discretionary with *either* state courts or with an Indian tribe's elected governing body: "The unilateral action of the [Blackfeet] Tribal Council was insufficient to vest [the State of] Montana" with adjudicatory jurisdiction over civil causes of action involving Indians that arise within the boundaries of the Blackfeet Indian Reservation. *Id.* at 427.

Five years later, in an Indian adoption case, the Supreme Court reaffirmed its *Kennerly* holding in in an even more emphatic and more broadly reasoned rationale:

> Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive.
>
> * * * *
>
> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe [in 1935], a question we do not decide, that jurisdiction has now been pre-empted.

Fisher v. District Court, 424 U.S. 382, 389-90 (1976).[4] *See also Peterson v. District Court*, 617 P.2d at 1068 ("We view *Fisher* as indicating that where a tribal court is established to handle a dispute involving reservation Indians, concurrent state jurisdiction is an interference with tribal self-government.").

Congress has never "expressly so provided" for the State of Utah to exercise adjudicatory jurisdiction over the Ute Indian Tribe for actions undertaken by the Tribe inside the boundaries of its Uintah and Ouray Reservation. Indeed, Congress has expressly done exactly the opposite—Congress has enacted federal statutes that *prohibit* the Utah state court from exercising jurisdiction over *Becker v. Ute Tribe*: first, by imposing a disclaimer of jurisdiction in the Utah Enabling Act of 1894, 28 Stat. 107; secondly, by preempting state adjudicatory jurisdiction except as specifically authorized under the provisions of 25 U.S.C. §§ 1321-1326; and thirdly, by expressly prohibiting state courts in all fifty states from adjudicating "in probate proceedings, or otherwise, the ownership, or right to possess tribal trust property, "*or any interest therein*." (emphasis

[4] The Indian Reorganization Act has been recodified at 25 U.S.C. 2§ 5101 *et seq*.

added). 25 U.S.C. § 1322(b); 28 U.S.C. § 1360 (b).

The question of whether federal law preempts Utah state adjudicatory jurisdiction over the *Becker* case is a question of law. *E.g., In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986) (holding on the basis of federal preemption that Utah state courts lack subject-matter jurisdiction over the adoption of an Indian baby domiciled within the boundaries of the Navajo Nation).

> The Supreme Court has made it clear that where Indian affairs are concerned, a broad test of preemption is to be applied. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 … the Supreme Court stated: " 'The unique historical origins of tribal sovereignty' and the federal commitment to tribal self-sufficiency and self-determination make it 'treacherous to import … notions of pre-emption that are properly applied to … other [contexts].' " 462 U.S. at 334, 103 S.Ct. at 2386 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143….

Adoption of Halloway, 732 P.2d at 967.

Equally important to this case, the Supreme Court has long recognized that proceeds from Indian minerals retain their status as restricted trust assets. *United States v. Noble*, 237 U.S. 74, 80 (1915); *see also Bunch v. Cole*, 263 U.S. 250, 252 (1923) ("The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them …is beyond question, and of course it is not competent for a state to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose."); *United States v. Martin*, 45 F.2d 836, 841 (E.D. Okla. 1930) (same); *United States v. Apple*, 262 F. 200, 204 (D. Kan. 1919) (same).

Finally, the question of whether the United States holds a particular asset in trust for a tribe is itself a question of federal law that is beyond the purview of state courts. 28 U.S.C. § 1360(b); 25 U.S.C. 1322(b). *See, e.g., Hoopa Valley Tribe v. Blue Lake Forest*

Prods., Inc., 143 B.R. 563, 566-68 (N.D. Cal. 1992); *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1152 (Cal. 1990); *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977).

III. THE CASES RELIED UPON BY THE STATE COURT ARE INAPPOSITE

The Tribe contends that the Utah state court has erred in characterizing the issues of subject-matter jurisdiction and sovereign immunity as being "interwoven," and in concluding that the state court can adjudicate the *Becker* suit "if authorized by Congress to do so, *or* if the Tribe consents." (underscore and italic added) Appendix, VI, 131. Parenthetically, it should be obvious from the Tribe's continued challenge to the state court's subject-matter jurisdiction that the Tribe emphatically does not "consent" to state adjudicatory jurisdiction over Mr. Becker's suit.

A. A Waiver of Immunity Does Not Vest a State Court With Subject-Matter Jurisdiction Over Claims Against a Tribe Arising Within Indian Country.

The United States Supreme Court recognizes a distinction between subject matter jurisdiction and sovereign immunity. Thus, in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Supreme Court emphasized that the question of subject matter jurisdiction is "wholly distinct" from the defense of sovereign immunity. *Id.* at 786-87 n. 4. A number of federal circuit courts likewise have noted the distinction between sovereign immunity and subject-matter jurisdiction. *See, e.g., United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 923-24 (9th Cir. 2009) (discussing the relationship between sovereign immunity and subject matter jurisdiction and commenting on the court's "imprecision in our language" in mistakenly treating "jurisdiction and sovereign immunity as though they

were the same inquiry," noting that "sovereign immunity and subject matter jurisdiction present distinct issues."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) ("To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction."); *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1574-75 (Fed. Cir. 1995) ("The inquiry … is not whether there is one, jurisdiction, or the other, a waiver of immunity, but whether there is both….").

Indeed, the Tenth Circuit properly recognized the distinction between subject-matter jurisdiction and sovereign immunity in its reversal of this Court's dismissal of *Ute Indian Tribe v. Lawrence*:

> [S]overeign immunity and a court's lack of jurisdiction under Public Law 280 are different animals. *See, e.g., Blatchford v. Native Village of Noahtak*, 501 U.S. 774, 786 n.4 (1991); *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 923-24 (9th Cir. 1991). The Tribe's complaint asserts that several laws, including Public Law 280, deprived the state court of subject-matter jurisdiction regardless of any waiver of sovereign immunity. And ordinarily subject-matter jurisdiction is not waivable or can be waived only through specified procedures. For example, Public Law 280 requires certain prelitigation action by the state or the tribe for there to be state-court jurisdiction. *See* 25 U.S.C. § 1322(a); *Kennerly*, 407 U.S. at 425, 427-29; William C. Canby, Jr., American Indian Law in a Nutshell 211 (6th ed. 2015) (Under *Kennerly*, "the parties cannot confer [subject-matter] jurisdiction on the state by consent."). Tribal sovereign immunity, in contrast, is a waivable defense. *See Graham*, 489 U.S. at 841 (tribal immunity is a defense); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 760 (1998) (tribe can waive immunity). And it can be raised in any court with jurisdiction to consider the tribe's dispute. *See Bay Mills*, 134 S. Ct. at 2028 ("Indian tribes have immunity even when a suit arises from off-reservation commercial activity."). Thus, Public Law 280 might be invoked when tribal sovereign immunity is not at issue (because the defense has been waived or the Indian party—say an individual member of a tribe—is not entitled to claim tribal immunity). *See Kennerly*, 400 U.S. at 425, 427-29 (state court lacked jurisdiction despite an unambiguous consent from the tribe, because the consent did not comply with Public Law 280). And sometimes tribal

> sovereign immunity can be invoked when Public Law 280 is not at issue (because, say, the dispute did not arise in Indian country, *see Bay Mills*, 134 S. Ct. at 2028). *See* Cohen § 7.05[1][b], at 640 n.27 ("The sovereign immunity inquiry is solely concerned with whether the tribe itself is being sued and whether the tribe or Congress has explicitly waived immunity, **and is unrelated to factors such as tribal, federal, or state interests relevant to the state jurisdiction question**."). (emphasis added)

Ute Indian Tribe v. Lawrence, No. 16-4154, slip op. 12-14 (10th Cir. Nov. 7, 2017). Accordingly, it should be obvious that, contrary to the Utah state court's memorandum decision and order of 2/9/2017, a waiver of sovereign immunity is insufficient, by itself, to vest the Utah state court with subject-matter jurisdiction over Mr. Becker's claims.

B. The Cases Cited by the Utah State Court are Inapposite

The cases on which the Utah state court relies for subject-matter jurisdiction are also distinguishable, both factually and legally. First is *C&L Enter's, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U. S. 411 (2001). *C&L* is factually inapposite and therefore not authoritative. Most significantly, in contrast to Mr. Becker's claims here, the claim against the Potawatomi Tribe in *C&L* did not arise inside the Tribe's reservation, and did not involve real property or other tribal assets held in trust for the Tribe by the federal government. Indeed, the *C&L* Court emphasized these facts by noting that the property in question "is not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe." *Id.* at 415. Because the claim arose *off*-reservation, the holding in *C&L* did not violate federal law. To the contrary, the holding in *C&L* is fully consistent with the principle that "[a]bsent express federal law to the contrary," an Indian tribe that undertakes activity *outside* of its 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).

Here, in contrast to the facts in *C&L*, it is undisputed that Mr. Becker was employed by the Tribe ***inside*** the Uintah and Ouray Reservation, and it was Becker's job to manage the Tribe's ***on-reservation*** oil/gas minerals—tribal assets that ***are*** held in trust by the United States for the Tribe. Because the facts in *Becker* are 180 degrees the opposite of the facts in *C&L*, the holding in *C&L* is inapposite and does not support a finding of state court jurisdiction.[5]

The Utah state court also relies on *Outsource Services Management, LLC v. Nooksack Business Corp.*, 333 P.3d 380, 383 (Wash. 2014). Appendix, VI, 141. *Outsource* is both factually and legally inapposite in several important respects. In contrast to *Becker*, *Outsource* was a straight-up breach of contract case that did not involve a non-Indian's claims to federally-restricted tribal assets held in trust for the tribe by the United States. Secondly, the Indian tribe in *Outsource* had *both* waived its sovereign immunity *and* consented to suit in the Washington state court. That is not true here—the language in the Becker IC Agreement is consent to a court of "competent jurisdiction,"[6] and the Ute Tribe contends that a Utah state court is not a court of competent jurisdiction for the multiple reasons the Tribe has set forth in its complaint and legal arguments. Finally, in contrast to the Ute Tribe here, the Tribe in *Outsource* never alleged that its waiver of sovereign immunity was illegal under the Tribe's tribal law. Here,

[5] *See United States v. Park Place Assocs., Ltd.*, 563 F.3d at 928 (distinguishing *C&L* on the ground that *C&L* dealt with sovereign immunity, not subject matter jurisdiction).

[6] Appendix, VI, 91-2, Article 23.

conversely, the Ute Tribe contends that the Becker IC Agreement itself, as well as the purported waiver of immunity within the IC Agreement, are illegal under tribal law.

Outsource is legally distinguishable as well. In *Outsource* the Washington Supreme Court was deciding a question of first impression in that state. That is not true here. Under its rulings in *Ute Tribe v. Utah*, the Tenth Circuit has conclusively determined the scope of the Ute Tribe's territorial boundaries and the concomitant scope of the Tribe's jurisdictional authority within its reservation boundaries. The Court did so with express reference to the statutory definition of Indian country under 18 U.S.C. § 1151, holding that:

> . . . the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, the Uncompahgre Reservation, and the three categories of non-trust lands that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation.

Ute Indian Tribe v. Utah, 114 F.3d 1513, 1530 (10th Cir. 1997) ("*Ute V*"). The doctrines of issue preclusion and stare decisis preclude Mr. Becker and the Utah state court from relitigating those same questions anew in the Becker lawsuit. *See Ute Indian Tribe v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016). In *Myton*, the Tenth Circuit rejected Myton's attempt to relitigate the *Ute V* holding, noting that Myton does not "dispute that it is in privity with the parties to *Ute V* or identify any other reason that might prevent that decision from binding it not just as a matter of precedent but as a matter of issue preclusion too." *Id*. at 1262. The same is true of Mr. Becker here.

As the Tribe argued to the Tenth Circuit, the Washington Supreme Court's holding in *Outsource* is contrary to, and at odds with, the United States Supreme Court's

controlling precedents in *Kennerly* and *Fisher*. In fact, in *Outsource* the Washington Supreme Court failed to even acknowledge or distinguish *Kennerly* and *Fisher*. It is axiomatic that cases are not authority for propositions that were never considered, discussed or ruled upon by a court. *E.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Thus, insofar as the Washington Supreme Court failed to distinguish *Kennerly* and *Fisher*, that Court's holding in *Outsource* carries no persuasive weight whatsoever.

CONCLUSION

In return for the Ute Indians' cession of vast tracts of tribal lands to the federal government, the United States executed treaties with the Ute Indians that guarantee the Tribe a tribal homeland established under federal law and set apart and protected from outside infringement "except … [as] authorized by the United States." Since Congress ratified the Ute Treaties of 1863 and 1868, the United States has never authorized the State of Utah to exercise jurisdiction over the Ute Indian Tribe for actions undertaken by the Tribe inside the boundaries of its own Reservation. For its part, the Ute Tribe has never consented to state civil or criminal jurisdiction within its Reservation boundaries under 25 U.S.C. § 1326. Accordingly, the Tribe asks the Court to grant its motion for summary judgment and to enter a declaratory judgment that the Utah state court lacks subject-matter jurisdiction, and is otherwise barred by federal law, from exercising adjudicatory jurisdiction over *Becker v. Ute Indian Tribe, et al.*, case number 140908394, Third Judicial District Court, Salt Lake County.

Respectfully submitted this 7th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of DUCivR56-1(g)(1), because this brief contains 7464 words, excluding the parts of the brief exempted by DUCivR56-1 (g)(1). I relied on my word processor to obtain the count and it is Microsoft Office Word 2016.

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I hereby certify that on the 7th day of December, 2017, I electronically filed the foregoing **PLAINTIFFS' EXPEDITED MOTION FOR SUMMARY JUDGMENT AND FOR INTERIM AND PERMANENT INJUNCTIONS ON GROUNDS OF FEDERAL PREEMPTION, INFRINGEMENT ON TRIBAL SOVEREIGNTY, AND LACK OF SUBJECT MATTER JURISDICTION** 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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