Frances C. Bassett, *Admitted Pro Hac Vice*
Jeremy J. Patterson, *Admitted Pro Hac Vice*
Thomasina Real Bird, *Admitted Pro Hac Vice*
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027-2314
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: fbassett@ndnlaw.com
Email: jpatterson@ndnlaw.com
Email: trealbird@ndnlaw.com

J. Preston Stieff (4764)
J. PRESTON STIEFF LAW OFFICES
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@stiefflaw.com

Attorneys for Plaintiffs

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 ILLEGALITY UNDER FEDERAL AND TRIBAL LAW, INFRINGEMENT ON TRIBAL SOVEREIGNTY, AND FEDERAL PREEMPTION** 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 that the Independent Contractor Agreement between Becker and the Tribe is *void ab initio* under both federal law and Ute Indian tribal law. The Tribe seeks immediate interim and permanent injunctive relief based on a separate motion for injunctive relief that is being filed contemporaneously with its summary judgment motions.

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 under Rule 56. Evidentiary materials for all three motions are contained in a three-volume exhibit appendix. References are to the volume and page number(s) in the appendix, i.e., "Appendix, VI, 1-10." The undisputed facts material to the summary judgment are enumerated below under the Statement of Elements and Undisputed Material Facts. To the extent that there are additional facts that are immaterial to the motion, but nonetheless useful because they provide necessary context or helpful background information, the useful but *non-material* facts are included in footnotes. To avoid an unduly voluminous appendix, some of the exhibits (commercial instruments that pertain to Ute Energy LLC and Ute Energy Holdings LLC), are limited to excerpts from the instruments. If Court wishes to review a complete copy of any commercial instrument that is included in a condensed form in the appendix, Plaintiffs are happy to provide the Court with a complete copy of that instrument.

INTRODUCTION

The Tribe's first and *primary* summary judgment motion is based on the Tribe's contention that the Utah state court lacks subject-matter jurisdiction over *Becker v. Ute Indian Tribe, et al.*, case number 140908394, or alternatively, that Utah state courts are barred from adjudicating *Becker* on grounds of federal preemption and impermissible infringement on tribal sovereignty. As a separate and alternative ground for entry of summary judgment and injunctive relief, the Tribe contends the Becker Independent Contractor Agreement ("IC Agreement") is void *ab initio* under both federal law and Ute Indian tribal law. Summary judgement should be granted because the undisputed material facts establish unequivocally that the IC Agreement between Becker and the Ute Tribe is void *ab initio* under both federal law and Ute Indian tribal law. The grounds for entry of injunctive relief are set forth in a separate motion.

BACKGROUND STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. Elements of Invalidity Under Federal Law

The common law restraints on the alienation of Indian property date back more than two hundred and fifty years to the "Royal Proclamation of 1763." In that year, Great Britain defeated France in the Seven Years' War and expelled the French from the eastern seaboard of North America. The Royal Proclamation of 1763, issued by King George III:

- "reserved" all country west of the Appalachian mountains to the Indians;
- prohibited non-Indians from going into "Indian county," without permission from the British government and the Indians, and made clear that non-

> Indians who went into Indian country would be subject to Indian law and authority;
>
> - prohibited non-Indians from "taking possession" of Indian property.

Appendix, VI, 146-51. The Royal Proclamation states, in pertinent part:

> We do hereby strictly forbid on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the [Indian] Lands above reserved, without our especial leave and Licence for that Purpose first obtained.
>
> And we do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon any [Indian] Lands … above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
>
> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do … strictly enjoin and require that no private Person do presume to make any purchase from the said Indians or any Lands reserved to the said Indians … but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians.

Appendix, VI, 149-51. The above-described proscriptions would come to be known as Indian "non-intercourse" laws, and Indian property "non-alienation" laws. Soon after the United States gained its independence from Britain, the new federal government adopted its own Indian "non-intercourse" and Indian property "non-alienation" laws.

The Indian Nonintercourse Act of 1790 ("the NIA")—now codified at 25 U.S.C. § 177—states in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, *or of any title or claim thereto*, from any Indian nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention

> entered into pursuant to the Constitution." (emphasis added)

The NIA makes it "unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land *or any interest therein* held by the United States in trust for such Indian." (emphasis added) 25 U.S.C. § 202. The NIA places the burden of proof in such cases on the non-Indian:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U.S.C. § 194. Another federal non-alienation statute is the Indian Mineral Development Act, ("IMDA"), 25 U.S.C. §§ 2101-2108. Section 2102(a) of IMDA requires federal approval for, *inter alia,* any joint venture, production sharing, service or managerial agreements, and "any other" agreements that involve the "exploration," "development" of or "the sale or other disposition" of the "production or products of" Indian mineral resources.

The Indian Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, grants the federal government authority over Indian affairs, to the exclusion of the states, meaning that the regulation of trade and intercourse between Indian tribes and non-Indians is exclusively the province of federal law. The Indian Commerce Clause is "a broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.02[3] (2012 ed.).

B. Elements of Invalidity Under Ute Indian Tribal Law

In addition to federal law restraints, the Ute Indian Tribe's constitution and federal corporate charter also contain express and unequivocal prohibitions against the alienation of tribal property. The Tribe's constitution, article VI, section 1, delegates only limited power to the Tribal Business Committee and it makes those limited powers "*subject to any limitations imposed by the statutes* or Constitution of the United States, *and subject further to all express restrictions upon such powers contained in this Constitution and By-laws* . . . ." (emphasis added). Article VI, section 1(c) of the constitution restricts the powers of the Ute Indian 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, commissioner of Indian Affairs, or any other official or agency of* [the federal] *government….*

Appendix, VI, 55. 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." Appendix, VI, 56. 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. Appendix, VI, 67-71.

The corporate charter authorizes the Tribe to "hold, manage, operate and dispose of property of every description, real and personal," 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). Appendix, VI, 68.

The charter also authorizes the Tribe to "make and perform contracts and agreements of every description, not inconsistent with law," provided that any contract that requires payment from the corporation "shall not exceed $10,000 in total amount except with the approval of the Secretary of the Interior." Sec. 5(f) (underscore added). Appendix, VI, 69.

Finally, the 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 or his duly authorized representative." Sec. 5(g) (underscore added). Appendix, VI, 69.

C. Undisputed Material Facts as to Invalidity Under Federal and Tribal Law

1. Defendant Lynn D. Becker ("Mr. Becker") testified that he is a certified professional landman through the American Association of Petroleum Landmen, and that he was "a member of many professional oil and gas organizations during the '80s and '90s and the 2000s." Appendix, VI, 154:24 - 155:5.

2. Black's Law Dictionary defines a "landman" as a "person responsible for acquiring oil and gas leases, negotiating arrangements for development of leases, and managing leased properties." Black's Law Dictionary (8th ed. 2004).

3. Mr. Becker submitted a written proposal for employment with the Ute Tribe on December 30, 2003. Becker sent his proposal to John P. Jurrius, of the Jurrius Group, who was then serving as the Tribe's "Financial Consultant." Appendix, VI, 78-80; Appendix, VI, 163:10-13 (Deposition of Lynn Becker).

4. Becker testified in his deposition that Mr. Jurrius had asked him to come work for the Tribe. Becker also testified that Jurrius was identified as the Tribe's representative for the discussions involving Mr. Becker's possible employment for the Tribe. Appendix, VI, 163-64.

5. Mr. Becker's written proposal for employment with the Tribe included a section captioned "Compensation," under which Becker proposed that he would receive an annual salary of $200,000.00; a signing bonus of $15,000.00; and expense reimbursement, including his living and traveling expenses and use of a tribal vehicle. Appendix, VI, 79.

6. Under a separate section captioned "Participation in Success and Growth (quarterly dividend)," Becker proposed that he would have the "*right to participate for 2% in the NOSR 2 transaction, and the Brundage Canyon Project on the same terms as the Tribe*." Appendix, VI, 79. In his deposition, Becker testified that Brundage Canyon and NOSR 2 are both "geographical areas" in the Uintah and Ouray Indian Reservation that were slated for oil-and-gas development. Appendix, VI, 165:20 – 166:1.

7. Mr. Jurrius responded to Mr. Becker's written employment proposal with a written memo dated February 2, 2004, addressed to Becker and Brett Painter, an attorney with the law firm of Davis Graham & Stubbs. Appendix, VI, 73-76.

8. In place of the "Participation in Success and Growth" section of Becker's proposal, Mr. Jurrius counter-proposed an "Incentive Plan," that provided in pertinent part:

> Mr. Becker would have the right to participate for 2 % in the NOSR 2 transaction and the Brundage Canyon Project on the same terms as the Tribe. For example, if the Tribe had a 33% working interest and Mr. Becker could participate for 2 % of that interest (2%x33%).

> Mr. Becker would have the right to participate for 5% in future projects subject to the same terms and conditions that the Tribe receives. In other words if the Tribe is provided financing Mr. Becker could piggyback that financing if the Tribe has to put up capital so would Mr. Becker.

Appendix, VI, 74-75.

9. The Independent Contractor Agreement ("IC Agreement") that was later signed by Becker and the Tribe contains a provision captioned "Participation Plan," that states in relevant part:

> Contractor [Becker] shall receive a beneficial interest of two percent (2%) of **net revenue** distributed to Ute Energy Holding, LLC from Ute Energy, LLC … ("Contractor's Interest").
>
> * * * *
>
> In the future, a) if the Tribe participates in any projects involving the development, exploration and/or exploitation of minerals in which the Tribe has any **participating interest and/or earning rights** … and Contractor [Becker] is providing services under this agreement, and b) the Tribe elects not to place such interests in Ute Energy Holding, LLC, then Contractor [Becker] shall receive a two percent (2%) beneficial **net revenue interest** in such assets ….
>
> * * * *
>
> If, at any time, Contractor [Becker] wishes to sell the Contractor Rights, Contractor [Becker] agrees to notify the Tribe of his intention. The Tribe shall have 60 days to exercise this preferential right to purchase with a bona fide, market value offer to purchase on the same terms and conditions that any legitimate offer would entail. (emphasis added)

Appendix, VI, 96.

10. The IC Agreement was approved by the Tribal Business Committee at a meeting on April 27, 2005; however, the Agreement was made retroactive to March 1, 2004. Appendix, VI, 84.

11. With its effective date of March 1, 2004, the Becker IC Agreement predates the creation of both Ute Energy Holdings LLC and Ute Energy LLC—both of which were formed on May 5, 2005. Appendix, VI, 167, 176.

12. Mr. Becker testified in his deposition that Ute Energy LLC was "intended to be" a "tribally owned" company that would be "partnered with" non-tribal oil/gas "industry" operators to create "a multibillion dollar company." Appendix, VI, 159:6-16.

13. The Financial Statements for Ute Energy LLC described the company as follows:

> Ute Energy, LLC (the Company) … was formed on May 4, 2005 for the purpose of actively leveraging the mineral and surface estate of the Ute Indian Tribe (the Tribe) through participation in oil and gas exploration and development, as well as gas gathering and transportation opportunities. … The Company's properties are located on the Uintah and Ouray Reservation in northeastern Utah.

Appendix, VI, 188-97, Declaration of Melissa Brownstein and excerpts from Ute Energy LLC Financial Statements.

14. The Ute Tribe was a member of Ute Energy LLC through its membership in Ute Energy Holdings LLC. Appendix, VI, 198-201, Declaration of Laurie Bales, ¶ 13.

15. Since October 1, 2008, Ute Energy Holdings LLC has been wholly owned by the Ute Tribe.[1] Appendix, VI, 210-15, Declaration of Frances C. Bassett, ¶ 11.

[1] Initially, the Jurrius Ogle Group, LLC was a member of Ute Energy Holdings LLC; however, the Jurrius Ogle Group, LLC assigned its interest in Ute Energy Holdings LLC to the Ute Tribe after the Tribe filed suit against John Jurrius, the Jurrius Ogle Group and other parties for, *inter alia*, fraud and conversion, *Ute Indian Tribe v. Jurrius, et al.*, case number 1:08-cv-01888, U. S. District Court for the District of Colorado. Appendix, VI, 202-09.

16. During the early 2000s, the Tribe was a party to several "Exploration and Development" Agreements ("EDAs") with various oil and gas companies. The Tribe had a dual legal status under the EDAs; not only was the Tribe the lessor of its oil/gas minerals but, in addition, the Tribe had the option to participate (with the oil/gas company "partners") as a working interest owner in the drilling and production of oil and gas from wells drilled on tribal lands under the EDAs. Appendix, VI, 210-15, Declaration of Frances C. Bassett, ¶ 9; Appendix, VIII, 698-702, Declaration of Lynn Becker, ¶¶ 4-20.

17. Both Ute Energy Holdings LLC and Ute Energy LLC were capitalized with the Tribe's interests in the EDAs and with other property assets that the United States holds in trust for the Tribe. Appendix, VI, 210-15, Declaration of Frances C. Bassett, ¶¶ 8, 9; Appendix, VI, 216-21, Declaration of Scott S. Trulock, ¶ 5; Appendix, VII, 354-56, Schedule of Tribal assets assigned to Ute Energy Holdings LLC and Ute Energy LLC.

18. Under Assignments dated May 4, 2005 and May 10, 2007, the Tribe assigned multiple real property and mineral interests, first to Ute Energy Holdings LLC, and then to Ute Energy LLC:

- The Tribe's 33 percent (33%) membership interest in Ute/FNR, LLC;[2]

[2] The Operating Agreement for Ute/FNR LLC recites that the LLC's purpose was, *inter alia*, to "jointly own, explore, develop, produce … [and] market Mineral production" under, *inter alia*, an oil/gas "Exploration and Development Agreement, as amended and superseded, between the Tribe and other parties." Appendix, VI, 226, art. 2.5. *See* excerpts from the Amended and Restated Exploration and Development Agreement for Oil and Gas between the Tribe, Northern Ute Partners LLC, and Dominion Exploration & Production, Inc., Appendix, VI, 230-42.

- The Lake Canyon Exploration and Development Agreement ("EDA") between the Tribe, Bill Barrett, and Berry Petroleum;[3]
- The Wolf Flat EDA between the Tribe and Questar Exploration;[4]
- The Monument Butte EDA between the Tribe and Newfield;[5]
- The Little Canyon EDA between the Tribe and Bill Barrett;[6]
- The Tribe's right to develop minerals through the land exchange with SITLA (State of Utah School & Institutional Trust Lands Administration);[7]
- The Dominion Little Canyon EDA between the Tribe and Dominion Exploration;[8]
- The Tribe's thirty-three percent interest in Ute/FRN, LLC's interest in the Uintah Basin Field Services, LLC (construction and ownership in pipeline, gas gathering systems and natural gas compressor station);[9] and
- The Tribe's fifty percent (50%) interest in the Three Rivers Gathers Pipeline, LLC.[10]

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[3] Appendix, VII, 243-52.
[4] Appendix, VII, 253-64.
[5] Appendix, VII, 265-84.
[6] Appendix, VII, 285-99.
[7] Appendix, VII, 300-08.
[8] Appendix, VII, 309-23.
[9] Appendix, VII, 324-41.
[10] Appendix, VII, 354-56, Schedule of Tribal assets assigned to Ute Energy Holdings LLC and Ute Energy LLC.

Appendix, VII, 324-341 (UTBC Resolution 05-283); Appendix, VII, 342-44 (UTBC Resolution 05-116); Appendix, VII, 345-47 (UTBC Resolution 07-124); Appendix, VII, 348-53 (UTBC Resolution 07-183).

19. The Becker IC Agreement states that Mr. Becker's services to the Tribe were to include the "restructuring and development of the Tribe's Energy and Minerals Department as set forth in Tribal Ordinance 03.003." Appendix, VI, 84 (Art. 1). Tribal Ordinance 03.003 was attached as Exhibit C to the Becker IC Agreement. Appendix, VI, 97-106.

20. 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.

21. Mr. Becker's last day of employment for the Ute Tribe was October 31, 2007. Appendix, VIII, 698, Becker Declaration, ¶ 4.

22. More than five years later, on November 29, 2012, Ute Energy LLC closed the sale of its two operating subsidiaries, Ute Energy Upstream and Ute Energy Midstream.[11] The sale of the two subsidiaries was a liquidating event under the terms of

[11] During its first five years of operation, Ute Energy LLC struggled financially. See Declaration of Scott Trulock, Appendix, VI, 219, ¶¶ 9-11.

the Ute Energy LLC Operating Agreement.[12] Appendix, VI, 198-200, Declaration of Laurie Bales, ¶¶ 9-10.

23. Following the liquidation of Ute Energy LLC on November 29, 2012, Ute Energy LLC distributed back to the Ute Tribe (through Ute Energy Holdings LLC) the Tribe's capital contributions to Ute Energy LLC and the appreciation of that capital. Appendix, VI, 198-200, Declaration of Laurie Bales, ¶¶ 13-14.

24. Mr. Becker is suing the Tribe in the parallel state court suit to enforce his claim to two percent (2%) of the "net value" of the tribal assets that were distributed back to the Ute Tribe following the liquidation of Ute Energy LLC on November 29, 2012. Appendix, VI, 112, Declaration of Lynn Becker, ¶ 21.

25. The Utah state court has ruled that the validity of the IC Agreement under the Ute Indian Tribe's constitution and corporate charter is an issue that will be decided as a question of fact by a Utah state jury. Appendix, VI, 144, ¶ 2.

26. The Tribal Plaintiffs are prosecuting their own legal claims against Mr. Becker in a lawsuit pending before 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.

[12] During Ute Energy LLC's seven years of existence—from May 5, 2005 through November 29, 2012—there was only one year in which Ute Energy LLC distributed revenues to Ute Energy Holdings LLC, and that year was 2010, when Ute Energy LLC distributed $500,000.00 to Ute Energy Holdings LLC. Appendix, VII, 357-82, Declaration, Resume and Expert Report of Ronald L. Seigneur, MBA, CVA, ASA, CPA/ABV/CFF.

LEGAL ARGUMENT

I. ILLEGALITY OF THE BECKER IC AGREEMENT UNDER FEDERAL AND TRIBAL LAW

A. Federal Law Restraints on the Alienation of Interests in Tribal Assets

Federal law imposes restraints on the ability of Indian tribes to alienate or encumber tribal assets. The federal law restraints are discussed 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.). The breadth of the federal restraints on alienation of Indian property is apparent from the United States Supreme Court's decision in the Oneida cases.[13] In those cases the Supreme Court recognized that the Oneida Nation's 1795 conveyance of 100,000 acres to the State of New York was a legal nullity because the conveyance was never approved by the federal government. *See also Woodenware Co. v. U.S.*, 106 U.S. 432, 435 (1882) (Indian timber at all stages of conversion remained trust property and its purchase by a third party did not divest title or the right of possession); *Starr v. Campbell*, 208 U.S. 527, 534 (1908) (same); *see also Chippewa Cree Tribe v. U.S.*, 73 Fed. Cl. 154, 162 (Fed. Cl. 2006) (proceeds from the sale of tribal property still remain tribal property despite their conversion to money)

[13] *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 667-75 (1974), (*Oneida I*), and *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*).

(quoting *Eastern Band of Cherokee Indians v. U.S.*, 7 Ind. Cl. Comm'n 140,154 (1958)).

The federal power to impose restraints on the alienation of Indian property rests on "the peculiar duty of the Federal Government to safeguard [Indian] interests and protect them against the greed of others and their own improvidence," and this power "justifies the interposition of the strong shield of federal law to the end that [Indians] be not overreached or despoiled in respect of their property of whatsoever kind or nature." *Sunderland v. U.S.*, 266 U.S. 226, 233-34 (1924) (citing *U.S. v. Kagama*, 118 U.S. 375, 383-84 (1886)); *see also U.S. v. Peterson*, 231 F. 270, 281-82 (D.S.D. 1916) (cattle issued to Indians by the federal government and their offspring were personal property held in trust by the United States, subject to federal restrictions on alienation).

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.

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).[14]

[14] *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*

The question of whether a contract with an Indian tribe is subject to federal approval is a question of law. *Id.*

B. The Becker IC Agreement Required Federal Approval

Every first-year law student learns that property can be viewed as a collection, or "bundle," of legal rights, akin to a bundle of sticks, with "each stick in the bundle representing a different right that is inherent in the ownership of the physical thing that we typically think of as property, such as a parcel of land."[15] The bundle-of-legal-rights analogy at the macro-level of property ownership applies with equal force to the micro-level world of property interests in oil and gas and other minerals:

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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.

[15] Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 OCT Fed. Law 30 (October, 2007).

> A mineral interest includes various rights, interests, or attributes…. [and] … Each attribute is an independent property right which may be severed into a separate interest and may be separately conveyed or reserved by the owner.

58 C.J.S. *Mines and Minerals* § 202 (1955).

> The ownership of land prima facie includes the soil or earth, and also the minerals in or on the ground….

2 TIFFANY REAL PROPERTY § 587 (3d ed.) (September 2016 Update).

A landowner—or Indian tribe—whose land contains oil/gas deposits can, of course, drill its own subsurface wells and pump the raw oil/gas product to the surface. However, when as here, the landowner or Indian tribe lacks either the expertise or the financial wherewithal to drill its own oil/gas wells, the Indian tribe can grant an oil/gas lease or other contractual arrangement to a company that possesses both the expertise and the financial wherewithal that the individual landowner or Indian tribe lacks. The landowner or Indian tribe is then the lessor and the oil/gas company is the lessee.[16] The lessee is granted an "operating" or "working interest" in the oil/gas deposits—that is, the right to "work" or drill and produce the oil and gas—and the landowner/lessor is reimbursed through a fractional "royalty interest" in the produced oil and gas. A "royalty interest" is defined by a leading treatise on Oil and Gas Law as:

> The property interest created in oil and gas after a severance. Its duration is like that of common law estates, namely, in fee simple, in fee simple determinable, for life or for a fixed term of years. It is distinguishable from a mineral interest by the absence of operating rights. The owner of a royalty interest is entitled to a share of production, if, as and when there is

[16] When evaluating contracts for the production and development of Indian minerals, federal courts employ an expansive definition of the word "lease." *E.g., State of Utah v. Babbitt*, 53 F.3d 1145 (10th Cir. 1995) (holding that an oil/gas development and operating agreement is the legal equivalent of an oil/gas "lease" under federal law).

> production, free of the costs of production.

8 Howard R. Williams and Charles J. Meyers, *Oil and Gas Law*, 925 (2016).[17]

> In oil and gas terminology, a working interest is defined as:
>
> > The operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land; the interest may exist in concurrent ownership with others.

Williams and Myers, *Oil and Gas Law* at 1155.[18] "A working interest owner has the right to explore and develop the lease for oil and gas and generally pays the costs of drilling and completing a well." *Elm Ridge Expl. Co., L.L.C. v. Engle*, 721 F.3d 1199, 1204 (10th Cir. 2013). As noted above, the Ute Tribe had the right to participate as a working interest owner under each of the EDAs (Exploration and Development Agreements) the Tribe assigned, first to Ute Energy Holdings LLC and then to Ute Energy LLC.[19] The Participation Plan under Becker's IC Agreement granted Becker a "net revenue interest" in the Tribe's oil/gas mineral interests that were assigned to the two LLCs.[20] The term "net revenue interest" is a term of art in the oil and gas business—a term that Becker, a certified petroleum landman, would have known and understood:

> **Net Revenue Interest ("NRI")** – A share of production for oil and gas wells after all burdens, such as royalty and overriding royalty, have been deducted from the working interest. It is the percentage of production that each [working interest] party actually receives.

Appendix,VII, 398, ¶ 6, Declaration, Resume and Expert Report of Michael J. Wozniak,

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[17] Appendix, VII, 400.

[18] Appendix,VII, 401.

[19] Statement of Material Facts Not Subject to Genuine Dispute, *supra*, ¶¶ 16-18.

[20] Appendix,VI, 96.

Appendix VII, 383-399. *See also* 8 Howard R. Williams and Charles J. Meyers, *Oil and Gas Law*, 291 (2016), Appendix, VII, 402-04; Schlumberger Oilfield Glossary, Appendix, VII, 405.

A net revenue interest can be cost or non-cost bearing. *Id*. If it is non-cost bearing, the term "net revenue interest" means "a share of the working interest not required to contribute to, or liable for, any portion" of the expenses of production." Williams and Meyers, *Oil and Gas Law*, p. 291, Appendix, VII, 404. The calculation of net revenue interest is illustrated in this case in a contract summary of the Lake Canyon EDA between the Tribe and Bill Barrett Corporation and Berry Petroleum. The contract summary shows that the Tribe had a 25% working interest under the Lake Canyon EDA, and that after deducting the 18.75% royalty, the Tribe's net revenue interest under the EDA was 20.31%. Appendix, VII, 243-45.

The Tribal Parties have retained attorney Michael Wozniak as the Tribe's expert witness on the subject of oil and gas property interests, and on "the custom and usage related to various written instruments used in the oil and gas industry including assignments, working and revenue interests, and participation plans." Appendix, VII, 383-99. Mr. Wozniak has opined that the Becker IC Agreement implicates both the Tribe's mineral estate and the alienation of a portion of the Tribe's mineral estate. As Mr. Wozniak explained, "The only way net revenue interest is distributed is through production from oil and gas wells."[21] In particular, the Participation Plan under the IC Agreement

[21] Appendix, VII, 394, no. 6 and 397, no. 19, Declaration and Expert Report of Michael J. Wozniak.

purports to grant Becker both cost-bearing and non-cost bearing interests in the Tribe's oil/gas minerals:

> The interests created by the Participation Plan include cost-bearing working interests if Mr. Becker elected to participate with the Tribe in any project costs and expenses. This gave Mr. Becker the right to assert a claim against the working interest of the Tribe. Mr. Becker would then be entitled to receive the net revenue interest attributable [to] such participation interest.
>
> Moreover, Mr. Becker was entitled to receive a beneficial interest of 2% of the net revenue distributed to Ute Energy Holding, LLC under paragraph 1 of the Participation Plan. As evidenced by the negotiations between the parties, it is abundantly clear that the only way Ute Energy Holding, LLC received net revenue was through leases, development agreements or prospects in which Ute Energy LLC drilled and distributed production revenue. One familiar with the custom and practices in the industry would understand that the Participation Plan was in essence a net revenue interest in leases, wells or projects through which one party would participate and Mr. Becker then would be entitled to his proportionate revenue share.

Appendix, VII, 396, ¶¶ 14, 15. Because Becker's 2% net revenue interest is derived from the Tribe's net revenue (i.e., working) interests in all of the EDAs the Tribe assigned to the two Ute Energy LLCs, Becker effectively became a participating party on the Tribe's working interest in the EDAs that were assigned to the Ute Energy LLCs.[22] *See* Testimony of Kevin Gambrell, Appendix, VIII, 503:2-6; 505:6-16; 508:22 - 509:1.

A cardinal rule in interpreting written contracts is that the contract "must be read as a whole, and every part … interpreted with reference to the whole." *Vulcan Steel Corp. v. Markosian*, 462 P.2d 166, 168 (Utah 1969) (quoting 4 WILLISTON ON CONTRACTS (3d

[22] Or to quote John Jurrius, the Tribe's former financial consultant, "[I]f the Tribe had a 33% working interest … Mr. Becker could participate for 2% of that interest (2%x33%)." Appendix,VI, 74-75.

ed.)). As pertinent here, Section 4 of the Participation Plan under the Becker IC Agreement specifies that:

> If, at any time, Contractor [Becker] wishes to sell the Contractor Rights, Contractor [Becker] agrees to notify the Tribe of his intention. The Tribe shall have 60 days to exercise this preferential right to purchase with a bona fide, market value offer to purchase on the same terms and conditions that any legitimate offer would entail. (emphasis added)

As noted by Mr. Wozniak, the importance of Section 4 is its recognition that Sections 1 and 2 of the Participation Plan purported to convey a freely alienable property interest to Becker, meaning the Tribe would have to *reacquire* the *alienated interest* at market value. In short, Section 4 represents the *sine qua non* of a property interest: Section 4 indicates that the Participation Plan purported to grant Becker a property interest, not merely a "stream of revenue." Appendix,VII, 393-94, ¶ 4, Expert Report of Michael Wozniak.

C. Without Federal Approval, the Entire Becker IC Agreement is Void *Ab Initio*

Without federal approval, the entire Becker IC Agreement is void *ab initio*, both under federal law and under the tribal law of the Ute Tribe. Importantly, the Tribal Parties' are not asking this Court to decide a question of first impression or "to write on a blank slate." Rather, the Tribal Parties' are asking the Court to abide by long-standing federal law and Supreme Court precedents that are directly on point and, thus, dispositive.

a. The Becker IC Agreement is Void *Ab Initio* Under Federal and Tribal Law

Federal courts have long recognized that it requires an act of the federal sovereign to extinguish Indian title and possessory rights in Indian property. This principle—which traces to the Royal Proclamation of 1763—was first codified in the Indian Nonintercourse

Act of 1790 ("the NIA"). *Oneida II*, 470 U.S. at 245-46. The NIA, as subsequently amended, is now codified at 25 U.S.C. § 177. It states in pertinent part:

> No purchase, grant, lease, or other conveyance of lands, *or of any title or claim thereto*, from any Indian nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (emphasis added)

The NIA makes it "unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument purporting to convey any land *or any interest therein* held by the United States in trust for such Indian." (emphasis added) 25 U.S.C. § 202. The NIA places the burden of proof in such cases on the non-Indian:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U.S.C. § 194. Further, because statutes passed for the benefit of Indians tribes must be construed in favor of the Indians, any doubt as to the applicability of the NIA must be resolved in favor of the Indians. Because the NIA is so exacting—because it prohibits any alienation of Indian property except pursuant to "treaty or convention"—the United States Congress has subsequently enacted a handful of statutes that allow the NIA to be by-passed, but only pursuant to prior approval by the Secretary of the Interior (or the Secretary's duly-authorized designee) as expressly authorized by Congress. One such Congressional authorization is the Indian Mineral Development Act, ("IMDA"), 25 U.S.C.

§§ 2101-2108. The legislative history of IMDA is preserved under Senate Report 97-472 and House Report 97-746, both of which are included in the exhibit appendix.[23]

Section 2102(a) requires federal approval for, *inter alia,* any joint venture, production sharing, service or managerial agreements, and "any other" agreements that involve the "exploration," "development" of and "the sale or other disposition" of the "production or products of" Indian mineral resources. Before IMDA was enacted in 1982, tribes were limited to developing their mineral assets through leasing agreements authorized by the 1938 Indian Mineral Leasing Act ("IMLA"). *See* Senate Rep. 97-472, Appendix, VII, 406-417; H.R. Rep. 97-746, Appendix, VII 418-31. To remedy this limitation, Congress enacted IMDA for the express purpose of granting Indian tribes flexibility to enter into "various kinds of commercial agreements" for the "development and disposition of their energy and non-energy mineral resources." *Id*. Under the statute's express language, IMDA agreements can span a broad spectrum, ranging from "joint venture" and "production sharing" agreements to "service" and "managerial" agreements, and "any other" agreements involving the "exploration," "development," or "the sale or other disposition" of the "production or products of such [Indian] mineral resources." 25 U.S.C. § 2102(a). Senate Report 97-472 makes clear that by "enumerating various kinds of agreements" in the text of IMDA, Congress was not limiting the "scope" of the "non-lease" agreements that IMDA authorizes.[24] The Report explained that the types of

[23] The Tribal plaintiffs ask the Court to take judicial notice of Senate Report No. 97-472 and H. R. Report 97-746, as well as the Schlumberger Oilfield Glossary, *infra* at 6.

[24] Senate Rep. 97-472, Appendix, VII, 410; H.R. Rep. 97-746, Appendix, VII, 420.

"permissible agreements" authorized by IMDA may be "more clearly identified by the use of terms commonly used in the parlance of the mining industry"—as here, for instance, by the use of the term "net revenue interest" under the Becker IC Agreement. Congress' intent under IMDA is to allow tribes to "realize a greater return" from their mineral resources by enabling them to enter into "innovative, flexible business arrangements"—a flexibility that is subject only to the approval of the Secretary of Interior. Absent federal approval, there is no enforceable agreement under IMDA. *Quantum Exploration, Inc. v. Clark*, 780 F.2d at 1459.

In light of the commercial flexibility that IMDA not only allows, but encourages, it is immaterial in this case that the Ute Tribe placed its oil/gas assets into one or more limited liability companies. The federal government's trust responsibility followed the Tribe's oil/gas assets into Ute Energy Holdings LLC and Ute Energy LLC. That point is made clear in *Long Royalty Company, Appellant*, MMS-87-0244-IND (FE), 1989 WL 1712513 (September 22, 1989), Appendix, VII, 429-31. In *Long*, the United States Department of Interior ("Department") ruled that the federal government's trust responsibility to Indians extends to the collection of revenues from Indian oil/gas minerals—even when an Indian tribe's oil/gas assets are placed into a joint venture with non-Indians. In *Long*, the Department denied Long's appeal from a departmental decision requiring Long to pay additional proceeds to the Cheyenne and Arapaho Tribes on an Indian oil/gas lease in Oklahoma following an audit conducted by the Department's Minerals Management Service ("MMS"). The Department soundly rejected Long's argument that the federal

government's trust responsibility to Indians does not extend to and encompass "revenue collection" from oil/gas wells on Indian lands:

> This contention is wholly without merit.
>
> The Federal courts have long recognized the existence of a trust relationship between the Federal Government and Indians. [citations omitted]
>
> Most recently, the Congress has provided a clear and specific statutory basis for the trust responsibility of the Secretary of the Interior (Secretary) with respect to the collection of all oil and gas revenues earned from covered lands. … [T]he Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1701(a)(4) (1982) directs that the Secretary should "aggressively carry out his trust responsibility in the administration of Indian oil and gas." Congress states therein that the purposes of FOGRMA … are in relevant part … (to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources; * * *.
>
> It is evident by its terms that **FOGRMA's requirements apply to working interest revenues as well as to royalties payable under this Indian lease**. … Moreover, section 3(13) thereof 30 U.S.C. 1702(14) (1982) prescribes that for these purposes:
>
> > "royalty" means any payment based on the value or volume of production which is due to the United States or an Indian tribe or an Indian allottee on production of oil or gas from the Outer Continental Shelf, Federal, or Indian lands, or any minimum royalty owed to the United States or an Indian tribe or an Indian allottee under any provision of a lease; ***.
>
> It is evident from this authority that it is well within the Secretary's trust responsibilities to oversee the collection of revenues earned from a lessor's working interest in Indian oil and gas leases. The Appellant has provided no basis whatsoever for its contention that the working interest or "joint venture" arrangement authorized by this lease falls outside these responsibilities. (emphasis added)

Appendix, VII, 430-31. Not only is the Becker IC Agreement void under federal law, it is

also void *ab initio* under the Ute Tribe's constitution and federal corporate charter. It is black-letter law that when, as here, a contract with a corporation is obtained through an *ultra vires* act, the contract itself is void *ab initio*. As explained so eloquently by the U.S. Supreme Court in an early case holding a contract to be void *ab initio*, and in language and logic that is fully applicable here:

> [T]he charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of everyone contracting with a corporation to take notice of the legal limits of its powers, the interest of the stockholders not to be subjected to risks which they have never undertaken, and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law.

Central Transp. Co. v. Pullman's Car Co., 139 U.S. 24, 32 (1891). The same result is required in relation to the Uintah and Ouray Tribal Business Committee. The proposition that a constitutional body such as the Ute Indian Tribal Business Committee is limited to its delegated powers is a tenet of constitutional jurisprudence that was first pronounced more than two centuries ago in the landmark case of *Marbury v. Madison*:

> The powers of [a constitutional body] are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is the limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may not alter the constitution by an ordinary act.

Marbury v. Madison, 5 U.S. (Cranch 1) 137, 176-77 (1803). *See also, e.g., Federal Crop*

Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (insurance policy issued in violation of federal law was void *ab initio* because the federal corporation lacked legal authority to issue the policy); *The Floyd Acceptances*, 74 U.S. 666, 671, 681 (7 Wall.) (contract between Secretary of War and supply company was null and void because "the secretary was acting wholly beyond the scope of his authority" in making the contract).

The conveyance of a "Participation Interest" in the Tribe's oil and gas assets to Mr. Becker was an *ultra vires* act, committed in contravention of the express limitations imposed by both the Tribe's constitution and its corporate charter. The Tribe's constitution, article VI, section 1, delegates only limited power to the Tribal Business Committee and it makes those limited powers "*subject to any limitations imposed by the statutes* or Constitution of the United States, *and subject further to all express restrictions upon such powers contained in this Constitution and By-laws* . . . ." (emphasis added). The constitution contains an express, unequivocal restriction on the power of the Business Committee to alienate tribal property, providing that the Business Committee may only "approve ... *any* sale, *disposition*, lease *or encumbrance of* tribal lands, interests in tribal lands, or other *tribal assets*" if the transaction is first "authorized or executed by the Secretary of the Interior, Commissioner of Indian Affairs." (emphasis and underscore added). Appendix, VI, 55-56. Similarly, the Tribe's corporate charter prohibits the Business Committee from undertaking various specified actions relating to tribal assets without those actions being first approved by the Secretary of the Interior or his designee: (*i*) selling or encumbering any tribal realty or personalty "including mineral rights," (*ii*) entering into contracts that require payments of more than $10,000.00; and (*iii*) pledging

or assigning "chattels or future tribal income." Appendix, VI, 68-69. Indeed, all four of the Tribe's expert witnesses on Indian mineral development and/or Federal Indian law have opined that Mr. Becker's IC Agreement was subject to federal review and approval, either under IMDA, or if not IMDA, then under the Non-Intercourse Act, 25 U.S.C. § 177, as well as the Tribe's constitution and federal corporate charter.

Pilar Thomas

Attorney Pilar Thomas has extensive experience in the fields of Federal Indian law and energy development on Indian lands. Ms. Thomas is a 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. Appendix, VII, 432-57. The Ute Tribe retained Ms. Thomas initially in the parallel state court litigation to rebut the testimony of Becker's oil/gas expert witness, Attorney Kelly Williams.[25] In that litigation, Attorney Williams worked with Mr. Becker's attorney, David Isom, in a process that can only be described as "*reverse engineering*." Attorney Williams and Attorney Isom first devised a list of seventeen (17) oil/gas instruments or interests. Appendix, VII, 453. Attorney Williams then testified that, in her opinion, the Becker IC Agreement does not constitute any of the 17 oil/gas instruments or interests enumerated on the list that she and Attorney Isom had devised; therefore, Williams opined that federal law is not implicated by the Becker IC Agreement.[26] Appendix, VIII, 469:16 – 472:24. When the

[25] The Tribe is using Pilar Thomas as a primary expert witness in this federal litigation.

[26] What is most notable about the list of 17 instruments and/or oil/gas interests that Attorney Williams and Attorney Isom prepared is that "net revenue interest"—the precise

Tribe's attorneys asked Ms. Williams if she had considered the Indian Mineral Resources Development Act (IMDA), 25 U.S.C. §§ 2101-2108, or IMDA's implementing regulations, 25 CFR 225.1 – 225.22, in arriving at her opinion, Ms. Williams said she did not look to federal law because to her mind it was not necessary to consider any federal law or regulation in arriving at her conclusion that the Becker IC Agreement falls outside the scope of federal regulation. Appendix, VIII, 469:16 – 472:24. When the Tribe's attorneys asked Ms. Williams if she knows what the Non-Intercourse Act is, she replied, "I don't believe I do specifically." Appendix, VIII, 479:11-12.

In her rebuttal report, Attorney Thomas notes that the approach taken by Ms. Williams is an approach that elevates form over substance, and more importantly, it is patently antithetical to the Indian law canons of construction (of which Ms. Williams was unaware).[27] "Federal case law consistently makes clear that agreements with Indian tribes that implicate or may implicate federal laws should be interpreted based on the substance of the agreement," not its form. Appendix, VII, 445. In fact, by its terms IMDA *expressly* requires federal approval for *any* agreement of *any* nature, kind, or description that relates to the "sale or other disposition of the production or products of … [Indian] mineral resources." 25 U.S.C. § 2102(a) (underscore added). Further, Congress made clear that by "enumerating various kinds of agreements" in the text of IMDA, Congress

term used in the Becker IC Agreement—is glaringly absent from the list. Appendix, VII, 459.

[27] When the Tribe's attorneys asked Ms. Williams if she had ever heard of the Indian law canons of construction, Attorney Williams said, "No, not that I recall." Appendix, VII, 481:4-10.

was not limiting the "scope" of the "non-lease" agreements that the Act authorizes. Senate Rep. 97-472, Appendix, VII, 410; H.R. Rep. 97-746, Appendix, VII, 420.

In her written report, Attorney Thomas opines, *inter alia*, that:

- The Becker Agreement should be interpreted in the context of federal Indian laws because it implicates real property mineral interests owned directly by the Ute Indian Tribe, and because federal law requires that the substance of an agreement, and not the form of the agreement, determines whether the agreement complies with federal law.

- The Becker Agreement is subject to the Non-Intercourse Act, 25 U.S.C. § 177, because it creates a claim against the mineral interests owned directly by the Ute Indian Tribe.

- The Becker Agreement is subject to the Indian Mineral Development Act, 25 U.S.C. § 2101 *et seq*., because it is a Mineral Agreement under the Act that creates a claim against Indian mineral interests.

- The Ute Business Committee lacked the authority to enter into the Becker Agreement without the Secretary's approval because the Tribe's constitution and corporate charter requires Secretarial approval to convey interests in tribal assets.[28]

Kevin Gambrell

Mr. Gambrell holds a Master's of Science in Mineral Economics from the Colorado School of Mines, and has extensive experience with oil and gas development on Indian and federal lands. For eight years, Mr. Gambrell was the Regional Director of the Federal Indian Minerals Office with the U.S. Department of Interior in the oil/gas rich Four Corners area, Farmington, New Mexico. Appendix, VIII, 485-90. Mr. Gambrell described the two-percent "net revenue interest" under Becker's IC Agreement as "providing Becker with a 2 percent working interest in the tribal interest" in the EDAs that the Tribe assigned to Ute

[28] Appendix, VII, 444.

Energy Holdings LLC and to Ute Energy LLC.[29] Mr. Gambrell repeatedly referred to Becker's "beneficial net-revenue interest" as an interest that 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.

Appendix, VIII, 511:1-9.

> Gambrell: If Becker's contract, which was not reviewed by the [Department of Interior] Solicitor, had a 50 percent control of [the] Indian interest, that's a significant portion of the tribal participating interest. The Secretary of Interior should have reviewed those documents and made – approved those. And should have done a background check on Becker. Becker held the position of [the Tribe's] division of mineral resource[s] manager. He had control over drilling permits, reviewing accounting standards within those drilling blocks, what type of drilling would occur and other things.
>
> Having a participating interest in those agreements and also being a regulatory person who oversees those lease agreements, could be considered a conflict of interest. And if I were in a regional director's position I would question that.
>
> Had they done that, they could have made the determination if there was a conflict of interest in his role as division manager of an [Indian] mineral program. Is he bonded? Does he have the background that they want to deal with when he's working on Indian leases? Does he have any prior outstanding issues in Indian country that may not allow him to be on Indian leases?

[29] Appendix,VIII, 503:2-6; 505:6-16; 508:22 - 509:1.

Appendix,VIII, 515:4 – 516:3.

> Mr. Isom: Do you see the Becker [IC] Agreement as creating any interest in trust – Indian trust assets?
>
> Gambrell: It's the working interest portion of the Agreement. It's having an active role in developing the oil and gas leases on Indian country in the working interest side. It's not – if, for example, we had a case where a company chose to participate in a lease and they had issues in other Indian leases throughout Indian country where there were audit findings, and they failed to make payments on those and failed to comply with the orders that are sent out to them, we would not approve them on as a working interest in an Indian lease.
>
> We are concerned with who is operating within that trust land area. We are concerned with how they operate. Who they are. Are they bonded? Are there any conflicts of interest.
>
> In the situation here [with Becker], if I was reviewing this as a federal manager and I saw that Becker had somewhat of a regulatory responsibility as a manager of a division within the Tribe, I would question him being a participating interest in the working interest side. I would think he had a conflict of interest. And he may do things that benefit his economic interest that may not benefit the tribe's economic interest.

Appendix, VIII, 518:1-24. In fact, IMDA seeks to avoid such conflicts of interest by requiring the Secretary of Interior to review and approve agreements such as the Becker IC Agreement. 25 U.S.C. § 2103. Senate Report 97-472 explains that by requiring the Secretary of Interior to evaluate "non-lease agreements" for the "best interests" of a tribe, Congress intended for the Secretary to "assure that no one individual or faction of a tribe should gain an unfair advantage or be unjustly enriched at the expense" of the Tribe as a whole. Appendix, VII, 411, Senate Report 97-472; Appendix, VII, 421, H.R. Rep. No. 97-746. And that is precisely what the Becker IC Agreement does—the IC Agreement allows Becker individually to be unjustly enriched at the expense of the Ute Tribe as a whole.

Alexander Skibine

Alexander Tallchief Skibine, a professor of law at the University of Utah's S. J. Quinney College of Law, was deposed as an expert witness for the Ute Tribe in the parallel state-court litigation.[30] Professor Skibine traced the evolution of the trust relationship between the Federal government and Indian tribes, explaining that for nearly three hundred years, from the 1700s through most of the 1900s, the federal government was "completely in charge" of Indian lands and mineral resources. "[B]asically the federal government was in charge of … selling and leasing Indian land. They didn't even ask the Indians if the Indians wanted to" sell or lease tribal lands and minerals. Appendix, VIII, 544:12 – 547:1. And although IMDA now grants Indian tribes wide latitude in negotiating agreements for the development and disposition of tribal minerals, all such "non-lease" or "mineral" agreements authorized by IMDA still must be approved by the federal government. 25 U.S.C. § 2102. Professor Skibine explained that there are two reasons for requiring federal approval, first because "legal title [to tribal lands and minerals] is in the federal government and [only] beneficial title is in the Indians." Appendix, VIII, 545:5 - 547:4. Secondly, because of the trust relationship that exists between the Federal government and Indian tribes. Appendix, VIII, 546:18 – 547:1. Professor Skibine noted that instead of a two-percent (2%) net revenue interest, the Becker IC Agreement could just as easily have granted Becker one-hundred percent (100%) of the Tribe's pro-rata share of oil/gas revenues from Ute Energy LLC, in which case the Tribe would have received *none* of the net revenues from its working interest in the EDAs that were

[30] Appendix, VIII, 523-32.

assigned to Ute Energy Holdings LLC and Ute Energy LLC. Appendix, VIII, 554:22 – 555:11. Such a result would patently "circumvent IMDA," *Id.*, and would frustrate Congress' intent under IMDA of insuring that Indian tribes are able to "maximize the financial return" and receive "fair and reasonable financial returns" from the sale of "their valuable mineral resources." (emphasis added) Senate Report 97-472.

Robert J. Miller

Robert J. Miller is a professor of law at the Sandra Day O'Connor College of Law at Arizona State University, whom the Tribe retained as an expert on the subject of Indian tribal constitutions. Appendix, VIII, 570-77. Article VI, Section 1 of the Tribe's constitution enumerates the powers that are delegated to the Tribal Business Committee; however, Section 1 explicitly makes the Business Committee's delegated powers "subject to any limitations imposed by [federal] statutes…." Appendix, VI, 55.

It is Professor Miller's opinion that the Becker IC Agreement is void *ab initio*:

Mr. Isom: [I]s your opinion, therefore, that the agreement is void or voidable?

Miller: Without approval of the Secretary of Interior, it's void *ab initio*.

Mr. Isom: And not merely voidable, right?

Miller: Exactly.

Mr. Isom: And now you're talking about secretarial approval. I'd asked a question about the [Ute Tribe's] Constitution.

Are you grounding your opinion in the [Tribe's] Constitution or in the light of Secretarial approval or both?

Miller: Well, both, because the [Tribe's] Constitution requires Secretarial approval, as did federal law. And as Article VI, Section 1 says, the

> Tribal Business Committee cannot do anything beyond the limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon its power in this Constitution.

Appendix, VIII, 591:12 – 592:4. Professor Miller brought to the deposition a copy of *On the Drafting of Tribal Constitutions*, (2006), edited by David E. Wilkins, a Professor of American Indian Studies at the University of Minnesota. Professor Miller explained that *On the Drafting of Tribal Constitutions* is the publication of Felix S. Cohen's "*Basic Memorandum on Drafting of Tribal Constitutions*." Cohen submitted the *Basic Memorandum*, together with a constitution template for Indian tribes, to the Department of Interior in November 1934, to assist nascent tribal governments in re-establishing governmental structures under the Indian Reorganization Act of 1934 (the "IRA"), 25 U.S.C. § 5101 *et seq*. Appendix, VIII, 620-24.

Section 13 of *Drafting of Tribal Constitutions* is the section that deals with "Powers of Tribal Self-Government." In Cohen's template Constitution, tribal governments are vested with only limited powers over tribal property and assets, this being the power

> *[t]o approve or veto any sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets, which may be undertaken by the Department of the Interior or by Congress or by any other agency or individual.*

Appendix, VIII, 623. The language adopted by the Ute Tribe under article VI, section 1(c) of its Tribal constitution contains the above-quoted limitation nearly verbatim. Under this subsection, the powers of the Ute Indian Tribal Business Committee are limited to "approv[ing] or veto[ing]" any transaction relating to 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, commissioner of Indian Affairs, or any other official or agency of government….*

Appendix, VI, 55, art. VI, Section 1(c); VIII, 623. In the *Basic Memorandum*, Felix Cohen explained what actions the foregoing constitutional language was intended both to permit and to prohibit. The language is

> … broad enough to cover all use of tribal lands, including the issuance of grazing permits, fishing and hunting permits agricultural and mining leases, permits for prospecting, grants of rights of way, and assignments of tribal land to individual Indians. It also includes all use of tribal moneys, whether used for administrative purposes, for the making of reimbursable loans, for per capita payments, or otherwise.
>
> **It will be seen, however, that this power, by itself, is only a veto power and does not give the tribe any authority to act without the approval of Congress or the Secretary of Interior**. (emphasis added)

On the Drafting of Tribal Constitutions, p. 57. Appendix, VIII, 623. As underscored by Professor Miller: "So here is [Felix S. Cohen] –the drafter of the constitutions, the IRA Constitutions. Here is the drafter and the father of 1(c) [art. VI, section 1(c) of the Ute Tribe's Constitution]. And he said it was the Secretary of the Interior's power *and requirement* to approve [Indian] contracts [relating to property interests]; **doing that is absolute**." (emphasis added) Appendix, VIII, 616:9-13.

b. The Becker IC Agreement is Also Void Under United States Supreme Court Precedents

Separate and apart from the non-alienation statutes and tribal law discussed above, the United States 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) (same); *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). In *United States v. Noble*, the Supreme Court reversed the lower court's dismissal of a suit brought by the United States to set aside various mining leases and assignments of royalties that had been executed by an Indian allottee without federal approval. Although the non-alienation statute at issue in *Noble* was specific to the Quapaw Indians, the controlling legal principle in *Noble* is fully applicable to, and indeed dispositive of, Mr. Becker's claims here. The *Noble* Court ruled that without federal approval, an Indian allottee's execution of mining leases and royalty assignments were "unauthorized and void." *Id*. at 84. In reaching that conclusion, the *Noble* Court expressly rejected a distinction between Indian trust minerals and the *proceeds* from the sale of Indian trust minerals:

> **The rents and royalties were profit issuing out of the land**. When they accrued, they became personal property; but rents and royalties to accrue [in the future] were a part of the estate remaining in the lessor…. It necessarily follows that the [Indian] in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties. It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but **the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land**. The further argument is made that the power to lease should be construed as implying the power to dispose of *rents to accrue*. This is wholly untenable. The one is in no way involved in the other; the complete exercise of the authority which the statute confers would still leave the rents and royalties to accrue as part of the estate remaining in the lessor. (emphasis added)

Id. at 80. The holding in *Noble* is on all fours with this case. The Becker IC Agreement purports to grant Becker two percent (2%) of the future "profits" that would issue out of

the Tribe's oil/gas minerals produced by Ute Energy LLC. However, when the Becker IC Agreement was executed on April 27, 2005, there were no revenues then in existence from Ute Energy LLC because Ute Energy LLC itself was not established until several days *later* on May 5, 2005. Appendix,VI, 176. As in *Noble*, the revenues that were "to accrue" in the future were, on April 27, 2005, still a part of the mineral estate that remained in the Ute Indian Tribe (as the beneficial owner) and the United States (as the legal owner). *Noble*, 237 U.S. at 80 ("rents and royalties to accrue [in the future] were a part of the [mineral] estate remaining in the [Indian] lessor"). In the absence of federal approval, the Becker IC Agreement is thus "unauthorized and void." *Id*. at 84.

c. The Waiver of Sovereign Immunity Within the IC Agreement is Likewise Void

Because the IC Agreement itself is void *ab initio*, so too, obviously, is the waiver of sovereign immunity contained in the Agreement. *E.g., Wells Fargo Bank*, 658 F.3d at 698-700 (trust indenture and waiver of sovereign immunity contained therein were void ab initio for lack of federal approval); *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. at 170-172, and cases cited therein.

III. CONCLUSION

Mr. Becker admits his IC Agreement "was never approved by the U.S. Congress or the Secretary or Department of Interior." VI, 261. Accordingly, Plaintiffs ask the Court to grant summary judgment and to enter a declaratory judgment that the Becker IC Agreement is void *ab initio* in its entirety under both federal law and Ute Indian tribal law.

Respectfully submitted this 7th day of December, 2017.

FREDERICKS PEEBLES & MORGAN LLP

s/ Frances C. Bassett
Frances C. Bassett, *Pro Hac Vice*
Jeremy J. Patterson, *Pro Hac Vice*
Thomasina Real Bird, *Pro Hac Vice*
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: fbassett@ndnlaw.com
Email: jpatterson@ndnlaw.com
Email: trealbird@ndnlaw.com

J. PRESTON STIEFF LAW OFFICES

s/ J. Preston Stieff
J. Preston Stieff (4764)
110 South Regent Street, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 366-6002
Email: jps@stiefflaw.com

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of DUCivR56-1(g)(1), because this brief contains 38 pages, 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.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: s/ *Frances C. Bassett*
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2017, **PLAINTIFFS' EXPEDITED MOTION FOR SUMMARY JUDGMENT AND FOR INTERIM AND PERMANENT INJUNCTIONS ON GROUNDS OF ILLEGALITY UNDER FEDERAL AND TRIBAL LAW, INFRINGEMENT ON TRIBAL SOVEREIGNTY, AND FEDERAL PREEMPTION** I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record as follows:

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

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

s/ Debbie A. Foulk
Debbie A. Foulk
Legal Assistant to Frances C. Bassett