No. 18-4013

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Ute Indian Tribe of the Uintah and Ouray Reservation, et al.

Plaintiffs-Appellants

v.

Honorable Judge Barry G. Lawrence, et al.

Defendants and Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
THE HONORABLE JUDGE CLARK WADDOUPS
NO. 2:16-CV-00579-RJS

BRIEF OF APPELLEE LYNN D. BECKER

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ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

There are six prior or related appeals: (1) *Becker v. Ute Indian Tribe*, 13-4172, 770 F.3d 944 (10th Cir. 2014); (2) *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017); (3) *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017); (4) *Becker v. Ute Indian Tribe*, 18-4019 (10th Cir. 2018); (5) *Becker v. Ute Indian Tribe*, 18-4030 (10th Cir. 2018); (6) *Becker v. Ute Indian Tribe*, 18-4072 (10th Cir. 2018).

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. §§ 1331 and 1362.[1]

Becker agrees that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's denial of appellants' ("Tribe") motions for preliminary injunction – Dkt 54 and the preliminary injunction portions of Dkts 52 and 53.

Becker disputes that this Court has jurisdiction to review summary judgment motions and motions for permanent injunction that the district court did not address (Dkts 56 and portions of Dkts 52 and 53) or jurisdiction to review the district court's denial of the Tribe's motion for sanctions (Dkt 134).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does a state court have jurisdiction to adjudicate claims for breach of a commercial contract against an Indian tribe where the tribe has covenanted

[1] *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017).

that state law governs the contract and has waived sovereign immunity and tribal court exhaustion and consented to state court jurisdiction?

II. Does Utah state law support Becker's claims and bar Tribal defenses?

III. Did the Agreement clearly waive tribal sovereign immunity?

IV. Does federal law create a judicial or statutory barrier to Becker's claims?

V. Does this Court have jurisdiction to review the denial of the Tribe's motion for sanctions?

VI. Does a Rule 12 motion delay the deadline to answer a complaint?

STATEMENT OF THE CASE

This appeal will impact the future of commercial contracting between Indian tribes and non-Indians throughout the United States. State courts are often the only fora for adjudication of such commercial contracts. The Tribe's positions here – that a detailed commercial contract drafted by the Tribe's counsel should be held void or unenforceable for a passel of reasons – would deprive Becker of promised payments and would cripple commercial contracting for the Tribe, for other tribes, and for future non-tribal member contractors, all for the short-term sake of avoiding the Tribe's debt on this one contract.

Besides state courts, the other two theoretically possible fora to adjudicate such contracts – federal courts and tribal courts – are insufficient alternatives. As to tribal courts, for multiple reasons, few non-tribal members are willing to enter into

contracts that could be enforced only in a tribal court. This is partly because complex, publicly-available, tribal commercial law does not exist at all, and in any event is not as developed as are the centuries-old common law and uniform commercial statutes applied by state courts under state law.

Nor can federal courts reliably fill the need for a forum to adjudicate disputes arising from such contracts. This is partly because diversity jurisdiction does not exist for cases to which an Indian tribe is a party. And partly because, as this case shows, there is rarely a Section 1331 jurisdiction-creating federal question arising from commercial contracts between tribes and commercial contractors. Because of the well-pleaded complaint rule affirmed by this Court in the previous appeal of this action, even the presence of relevant federal issues cannot predictably assure federal question jurisdiction for Indian/non-Indian contract disputes.[2]

The pivotal dispute is the Tribe's contention that the Tribe's contractual and resolution-approved waivers and consents must fail in the face of an asserted general rule against state court jurisdiction over tribes. In the name of strong tribal quasi-

[2] Because of its tortuous history, this case is the rare exception. The Tribe brought this federal action to enjoin the State Court Action, and because this Court has affirmed Section 1331 federal question jurisdiction of this action, the federal district court here would have jurisdiction to adjudicate Becker's claims that he can raise as counterclaims in the district court should this Court stop the State Court Action and remand to the district court. This result would be inefficient and costly, however, and the exception would prove the rule for future potential Indian and non-Indian contractors: such contracts are likely to be practically unenforceable unless they can be enforced in state courts.

sovereignty, the Tribe argues that such strength includes a curious weakness – that despite every intention and solemn promise, a tribe lacks the power to enter into a contract that can be adjudicated and enforced in a state court under state law. This contention is contrary to the crisp, dispositive and well-established principle that tribes have the power to consent to state court jurisdiction to adjudicate such contracts.

This appeal and the related federal, state and tribal actions arise from what should have been a simple contract claim under an unambiguous independent contractor agreement governed by Utah law. Becker and the Tribe entered into an Independent Contractor Agreement approved by a Ute Tribal Resolution in 2005 ("Agreement").[3] Becker agreed to provide services and the Tribe agreed to pay him a monthly fee plus "two percent (2%) of net revenue distributed" ("2 % Interest") to Ute Energy Holding, LLC, a Delaware limited liability company ("Ute Holdings"), from Ute Energy, LLC, another Delaware LLC originally owned by the tribe and non-Indians ("Ute Energy").[4] Though the Tribe repeatedly characterizes Becker as a former employee of the Tribe, he was not. The Agreement clearly created an independent contractor relationship for Becker's services and expressly disclaimed an employment relationship. Contrary to the Tribe's claim that the Agreement

[3] Agreement, Aplt Appx Vol V, pp. 852 – 866.
[4] Agreement, Exh B, Aplt Appx Vol V, p. 866.

created an interest in Tribal trust assets and therefore required approval by the U.S Secretary of the Interior ("Secretary"), it did not. The Agreement did not create or include any deed, lien, conveyance, encumbrance or interest in any tribal property, including any natural resources, energy assets, trust property or real property.

Applicable distributions of net revenue were made in 2005 and 2012. The Tribe demonstrated the validity of the Agreement and the Tribe's understanding of the 2% Interest by paying Becker the agreed-upon 2% for the 2005 distribution[5] but refused to pay the required 2% of the 2012 distributions. Though the Agreement and related agreements proved wildly successful, resulting in the realization by 2012 of over $1 billion in gross revenue and the relevant distribution of over $378 million of net revenue from Ute Energy to Ute Holdings (2% of which is the approximately the $7.5 million in principal that Becker claims),[6] the new members of the Ute tribal business committee ("Business Committee") in power in 2012 refused this to make this payment.

Tellingly, though this is a contract dispute, the Tribe's opening brief ignores the contract. The sole provision of the Agreement cited is Exhibit B, which creates the 2% Interest.[7] The Agreement is a detailed, unambiguous, integrated written

[5] Becker Decl. Dated June 10, 2016, Aplt Appx Vol V, p. 880 ¶5
[6] Becker Decl. Dated June 10, 2016, Aplt Appx Vol V, p. 882 ¶21
[7] Agreement, Exhibit B, Aplt Appx V, p. 866.

contract negotiated for more than a year and drafted by the Tribe's reputable Denver law firm Davis, Graham and Stubbs.[8] But the Tribe finds – and cites -- no support in the Agreement for a single issue asserted in this appeal. To the contrary, the clear contract terms confound the Tribe's arguments, including the following material provisions:[9]

> **Article 21. Governing Law and Forum.** This Agreement and all disputes arising hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah. All disputes arising under or relating to this Agreement shall be resolved in the United States District Court for the District of Utah.
>
> **Article 23. Limited Waiver of Sovereign Immunity; Submission to Jurisdiction.** If any Legal Proceeding (definition follows) should arise between the Parties hereto, the Tribe agrees to a limited waiver of the defense of sovereign immunity, to the extent such defense may be available, in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. For purposes of this Agreement, a "Legal Proceeding" means any judicial, administrative, or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement…. The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding.
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> The Parties hereto unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts. The court or courts so designated shall have, to the extent that Parties can so provide, original and exclusive jurisdiction, concerning all such Legal Proceedings, and the Tribe waives any

[8] Becker Depo Transcript. Dated November 10, 2016, Aplt. Appx Vol V p. 931 ¶5
[9] Agreement pp. 8-9. Aplt Appx Vol V, pp. 861 - 862.

> requirement of Tribal law stating that the Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.

After the Tribe refused to make the 2% payment for the 2012 distributions of net revenue, Becker brought an action in February 2013 in the United States District Court for the District of Utah ("First Federal Action"), as required by the above forum selection provision of the Agreement. That court dismissed that action for lack of Section 1331 federal question jurisdiction under the well-pleaded complaint rule. This Court affirmed in 2014,[10] holding that though Becker's complaint alleged numerous federal issues, the complaint merely anticipated federal defenses, which did not support Section 1331 jurisdiction.[11]

In December 2014, Becker therefore brought his claims in the Third District Court for the State of Utah ("State Court Action") pursuant to the above Article 23 covenant that if federal jurisdiction were lacking, the contract dispute was to be brought in "any court of competent jurisdiction" and that that court would have "original and exclusive jurisdiction" of the contract dispute.

In June 2016, after 18 months of state court litigation, and facing a motion for terminating sanctions for discovery failures, the Tribe filed this action in the federal

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[10] *Becker v. Ute Indian Tribe*, 770 F.3d 944 (10th Cir. 2014).

[11] As noted above, the federal district court would now have jurisdiction to adjudicate Becker's claims as counterclaims in this action if the state court doors slam shut.

district court in Utah ("Second Federal Action") seeking to enjoin the State Court Action. Notably, the Tribe's complaint in federal court did not assert that the tribal court could adjudicate the dispute, but only that the state court could not.

On August 16, 2016, Judge Robert Shelby dismissed the Second Federal Action for lack of Section 1331 jurisdiction. To that date, the Tribe's answer to the question as to what court *had* jurisdiction to adjudicate, interpret and enforce the Agreement was the same as that of another tribe in another case: "'no court,' on earth or even on the moon.'"[12]

Two days later, however, on August 18, 2016, the Tribe filed an action in tribal court ("Tribal Court Action") seeking to kibosh the State Court Action. Until that day, despite 3 ½ years of federal and state court litigation, the Tribe had never ventured to suggest that, in the face of the above waivers, consents and prohibitions, the tribal court could or must adjudicate the dispute.

In September 2016, Becker brought an action in the Utah federal court ("Third Federal Action" or "Companion Case") (Judge Clark Waddoups) to enjoin the Tribal Court Action. Judge Waddoups enjoined the Tribal Court Action, but this Court stayed the injunction pending appeal, and Tribal Court Action therefore proceeded.

[12] *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001). The Supreme Court responded that the correct answer was that the state courts of Oklahoma had such jurisdiction, and that holding requires the answer here that the Utah courts have such jurisdiction.

On appeal, this Court reversed and remanded.[13] On the remand of the Third Federal Action, and after numerous rulings by the tribal court and further motions and hearings in the Third Federal Action, Judge Waddoups again preliminarily enjoined the Tribal Court Action. That preliminary injunction halting the Tribal Court Action is the subject of the companion appeal in this Court, 18-4030 & 4072 ("Companion Appeal"). Becker will address tribal court issues primarily in the Companion Appeal.

On the same day that this Court reversed and remanded the Third Federal Action, this Court held that the federal district court in this action -- the Second Federal Action -- had jurisdiction and reversed and remanded. On remand, Judge Shelby recused himself, and the case was assigned to Judge Waddoups, with the result that both the Second and Third Federal Actions are now assigned to Judge Waddoups.

[13] In remanding, this Court stated: "In denying rehearing we note, however, that the panel did not decide the merits of the issues of exhaustion or the need for federal approval of the Becker contract. To the extent we addressed those issues, we did so only in the context of reviewing a preliminary injunction on the record before the district court. Upon remand to the district court, the parties are free to address those or other issues on the merits." Becker fully addressed the issue of Secretarial approval on remand, and the district court's order reflects the extensive materials provided to the district court.

After further orders from this Court, Judge Waddoups preliminarily enjoined the State Court Action. The state court judge, Honorable Barry Lawrence, has ordered that the State Court Action will not proceed until this Court so orders. After further proceedings, including an evidentiary hearing, Judge Waddoups reversed and lifted his preliminary injunction of the State Court Action, and this appeal followed. The ultimate issue here is whether Judge Waddoups' ultimate denial of a preliminary injunction to stop the State Court Action should be affirmed.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that is granted only when the movant's right to relief is clear and unequivocal.[14] This Court reviews a denial of a preliminary injunction for an abuse of discretion.[15]

SUMMARY OF THE ARGUMENTS

This memorandum shows that the Agreement is governed and must be interpreted under Utah state contract law. That law undercuts most of the Tribe's arguments and claims.

Contrary to the Tribe's position, tribal law does not govern a single issue here.

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[14] *Brooks v. Colorado Dep't of Corrections*, 2018 U.S. App. LEXIS 9031, ** 6 – 7 (10th Cir., April 11, 2018).

[15] *Id.*

The remaining substantive issues are federal, and fall into two categories: (1) whether the Tribe validly waived tribal sovereign immunity and consented to state court jurisdiction within the meaning of *C&L Enterprises;*[16] and (2) given the waivers and consents of the Agreement, is there any federal barrier, whether judicial or statutory, to enforcement of Becker's claims under the Agreement in state court, including: (a) whether Becker's claims "arose" in Indian country or within the exterior boundaries of the reservation; (b) whether the district court was required to use the term "infringement barrier" in its order denying a preliminary injunction; (c) whether the *Ute v. Utah* cases prohibit state court jurisdiction here; (d) whether Becker's claims are barred by lack of approval by the Secretary of the Interior; and (e) whether Public Law 280 bars state court jurisdiction of Becker's claims.

Finally, this brief shows that the district court's jurisdiction is not barred by lack of minimum contacts. The brief then shows that this Court lacks jurisdiction to consider the district court's denial of the Tribe's motion for sanctions and that Becker was not required to answer the complaint because, by his Rule 12 motion to dismiss, the deadline to answer has not occurred.

[16] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

ARGUMENT

Many issues here can be informed or resolved by being precise as to what law applies as among federal, state and tribal. The Tribe wholly ignores Utah state law, which governs the interpretation of the Agreement and many of the issues on this appeal. The Tribe melds tribal and federal law on several issues, but there is not a single issue of tribal law relevant to this appeal. Federal law clearly provides that the Agreement single-handedly constitutes a waiver of sovereign immunity and enforceable consent to state court jurisdiction. No federal barrier bars Becker's claims.

I. The Tribe's Arguments Are Contrary to Utah Law

The Agreement provides that "all disputes arising hereunder shall be subject to, governed by and construed in accordance with" Utah law.[17] The following provisions of the Agreement under Utah law are contrary to the Tribe's arguments.

A. State Law Governs the Agreement, Not Tribal Law

Given that the parties agreed that state, not tribal, law would govern "any judicial … proceeding … relating to the interpretation, breach, or enforcement of this Agreement,"[18] the Tribe's arguments based upon tribal law must be rejected. The Tribe repeatedly mixes federal and tribal law and at one point argues that the

[17] Agreement p. 8, Aplt Appx Vol V, p. 861
[18] Agreement, Article 23, Aplt Appx Vol V, p. 861.

two are "intertwined."[19] Federal law is not tribal law. There is and should be no confusion here as to what law is tribal and what federal. The Tribe's argument that federal and tribal law are "intertwined" obscures, not focuses, light.

For example, the Tribe's discussion of the "Royal Proclamation of 1763" might shed light on the Indian Nonintercourse Act of 1790 (NIA), but the NIA is federal law, not Ute tribal law as the Tribe suggests. The cited Indian Mineral Development Act (IMDA) is federal, not tribal, law, and does nothing to prohibit a contract between an Indian tribe and a non-Indian from selecting state law instead of tribal law to govern the contract.

The Tribe's argument that "the Becker contract is illegal and hence unenforceable under the Tribe's constitution and federal corporate charter" and the Tribe's defense of "illegality of the Becker contract under … tribal law"[20] are entirely beside the point. The Agreement simply does not depend upon, and cannot be attacked under, tribal law.

Even if the Agreement were void *ab initio* for illegality under tribal law because the Tribe lacked capacity under its ordinances or constitution or for other tribal law reasons, the legality of the Agreement is simply not determined by tribal law. The parties selected state law, and rejected tribal law, to govern this dispute.

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[19] Opening Brief p. 43.
[20] Opening Brief p. 5

Thus, tribal law simply has no bearing on the legality of the Agreement or any other issue here.

1. Under Utah Law, the Alleged Illegality of the Agreement Would Not Render the Agreement Void Ab Initio but only Voidable

Even if the Agreement were illegal under state law because of the Tribe's alleged lack of capacity, the Agreement would not thereby become void, but only voidable. The Utah Supreme Court recognizes that "[t]he distinction between void and voidable is important, although the terms are not always used precisely. A contract or a deed that is void cannot be ratified or accepted, and anyone can attack its validity in court. In contrast, a contract or deed that is voidable may be ratified at the election of the injured party. Once ratified, the voidable contract or deed is deemed valid."[21] Importantly "by the great weight of judicial authority it is well recognized that there is a distinction between an illegal or void contract and one merely ultra vires," which could become enforceable by ratification or estoppel.[22] The issue in *Millard County* cited in *Ockey was* identical to the issue in this case: "whether the bank acted in excess of its statutory power by issuing securities that

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[21] *Ockey v. Lehmer*, 189 P. 3d 51, 56 (Utah 2008).

[22] *Ockey*, 189 P. 3d at 57 (quoting *Millard County School District v. State Bank of Millard County*, 14 P. 2d 967 (Utah 1932)). *See also Wittingham LLC v. TNE Limited Partnership*, 380 P.3d 397, 399 (Utah App. 2016) ("'The distinction between void and voidable is important' because a voidable contract 'may be ratified at the election of the injured party' while a void contract may not."

were different from those that the bank was statutorily authorized to issue. Acknowledging that the bank exceeded its authority by issuing the securities, we disagreed that this ultra vires act rendered the securities void."[23] Thus, under Utah law, the Agreement would not be void even if the Tribe lacked the capacity to contract, and is valid under the clear rules of the next section.

2. Under Utah Law, the Agreement Is Valid Even if Voidable

Several equitable doctrines of Utah law render the Agreement valid here as against the Tribe's arguments based upon the Tribe's alleged lack of capacity.

First, the Agreement, even if voidable, is enforceable by the parties' ratification. As the Utah Supreme Court noted in 2006, there is "over a hundred years of Utah [ratification] case law. From early in this state's existence, [the Court has] relied on the doctrine of ratification in cases raising questions regarding corporate authority." [24] "The availability of equitable relief [such as ratification] helps to ensure that justice is met and prevents parties from avoiding valid obligations due to technicalities. Particularly in contract cases, [the Utah Supreme Court has] relied on the principle of ratification to establish the validity of an act even though certain, express formalities have not been met."[25]

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[23] *Ockey,* 189 P. 3d at 57.
[24] *Swan Creek Village Homeowners v. Warne,* 134 P. 3d 1122, 1128-29 (Utah 2006).
[25] *Swan Creek,* 134 P.3d at 1129.

This result is likewise mandated by the doctrine of equitable estoppel, which mandates that a person by acceptance of benefits may be estopped from questioning the existence, validity and effect of a contract.[26]

Finally, the parties' prior performance of the payment of Becker's 2% Interest in 2005 shows that the Tribe believed that the Agreement was valid and required a 2% payment upon the distribution of net revenue from Ute Energy to Ute Holdings.[27] In addition to paying Becker for over two years, the Tribe paid Becker $68,000 representing 2% of the 2005 distribution of such net revenue.[28] The Tribe did not object to the Agreement or its obligations until 8 years after its effective date. The Tribe's arguments of voidness for lack of capacity are contrary to Utah law and should be rejected.

B. Under Utah Law, Becker Was an Independent Contractor, Not a Tribal Employee

The Tribe, sometimes vaguely and sometimes clearly, argues that Becker was an employee of the Tribe under tribal law within the meaning of a tribal ordinance. No tribal law, however, defines whether Becker was an employee of the Tribe because this issue is governed by the Agreement and state law. Under Utah state

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[26] *Tanner v. Provo Reservoir Co*., 289 P. 151, 154 (Utah 1930).

[27] *ASC Utah, Inc. v. Wolf Mt. Resorts, L.C.,* 245 P.3d 184 fn. 8 (Utah 2010) (under Utah law, performance can be considered under some circumstances to interpret a written contract).

[28] Becker Decl. dated June 10, 2016, Aplt Appx Vol V, p. 880 ¶5

law, Becker was clearly an independent contractor and not an employee. For example, Becker is referred to as "Contractor," not "Employee." The Agreement is titled "Independent Contractor Agreement" and provides that "Contractor and the Tribe understand and intend that Contractor shall perform the Services as an independent contractor and not as an employee of the Tribe."[29] Article 6E provides that "Contractor is not an employee of the Tribe, and, therefore, shall not be entitled to any benefits, coverages or privileges, including, without limitation, social security, unemployment, workers' compensation, medical or pension payments, made available to employees of the Tribe." Article 3, titled "Independent Contractor Status," provides that "Contractor [Becker] and the Tribe understand and intend that the Contractor shall perform the Services as an independent contractor and not as an employee of the Tribe" and Article 4A stated that "The Tribe does not have the right to control the manner and means by which these goals are to be accomplished." [30]

[29] Agreement, Article 3, Aplt Appx Vol V, p. 855

[30] See generally Becker's Report in Response to February 20 Order and the attached Becker Declaration in the Companion Case, *Becker v. Ute Indian Tribe*, 2:16-cv-958, Appellee's Appendix pp. 1 - 21. These documents were admitted in the Companion Case, *Becker v. Ute Indian Tribe et al.*, Case No. 2:16-cv-958, and the district court held without the parties' objection that evidence admitted in either case was admissible in both cases. Order Denying Preliminary Injunction, Dkt 136 p. 7, Aplt Appx Vol XV p. 3719.

Contrary to the Tribe's contention that the Agreement was to be performed within the boundaries of the reservation,[31] the Agreement provides (Article 4B) that "Contractor shall determine when, where and how to perform those activities necessary to fulfull [sic] the responsibilities of the Position…. There shall be no requirement that Services be performed upon the Tribe's premises."

In addition to its terms, the performance of the Agreement shows an independent contractor relationship inconsistent with an employment relationship.[32] For example, Becker performed numerous services outside the reservation; the manner and details of his performance were determined by him, not the Tribe; and Becker paid taxes and provided his own insurance as an independent contractor, and not as an employee. The Tribe issued 1099s to Becker, not employee W-2s.[33]

The Tribe's employment-based arguments therefore fail.

For example, the Tribe argues that the Ute tribal court had jurisdiction of claims by the Tribe against Becker under the section of Tribal Ordinance 13-010, Section 1-2-3(2)(A), that provides for tribal court jurisdiction over "any person …

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[31] Opening Brief, p. 14.

[32] *See, e.g.*, *Dayton v. Free*, 148 P. 408 (Utah 1914) (discussing factors relevant to the difference between an employee and an independent contractor, emphasizing the right to control the work performed). *See generally Mallory v. Brigham Young University*, 332 P.3d 922, 928 – 29 (considering similar factors under worker's compensation statute).

[33] See footnote 30 above.

employed … within the Tribe's territorial jurisdiction….[34] This ordinance cannot create tribal court jurisdiction over Becker because Becker was not an employee of the Tribe under the Utah state law governing the Agreement.[35] The Tribe's argument[36] that the state court's exercise of jurisdiction interferes with the Tribe's relationship to a tribal employee therefore fails.

C. Utah Rules of Contract Construction Bar the Tribe's Arguments Based Upon Parol Evidence

The Tribe argues that Becker was an employee and had a "participation interest" in specified geographical areas requiring Secretarial approval because early negotiations beginning in 2003 used those terms.[37] Under Utah's parol evidence and contract construction rules, this evidence is inadmissible both because the language under negotiation at the time these statements were made materially changed over

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[34] Opening Brief p. 24.

[35] Becker, as does the Tribe, plans to address tribal court-related issues in more detail in his appellee's brief in the Companion Appeal, 18-4030 & 72, including issues such as tribal court preclusion of state or federal court adjudication, tribal court exhaustion, tribal court jurisdiction.

[36] Opening Brief p 24.

[37] Opening Brief pp. 14 – 16; Aplt Appx V, 848 – 849. The Tribe argues that early discussions between Becker and a John Jurrius included references to a possible employment relationship. Those early negotiations that occurred more than a year before the Agreement was executed. The Tribe's statement that the Tribe sued Jurrius is obviously intended to disparage Jurrius even though the Tribe gives no detail and no information about the outcome of the action. The fact that the Tribe sued Jurrius, of course, is no evidence against Jurrius or, by implication, against Becker.

the months of negotiation[38] and because the Agreement is integrated and the language actually used is unambiguous.[39]

The Tribe argues that the parties intended that the Ute tribal court was the "court of competent jurisdiction" that was to adjudicate the Agreement if federal jurisdiction failed. Under Utah law, contract language is unambiguous if not susceptible of reasonable, tenable contrary interpretations.[40] Here, the phrase "court of competent jurisdiction" unambiguously refers to state courts and excludes the Ute tribal court because the Agreement is to be construed under state law – not tribal law -- and because the following three provisions point cleanly away from tribal court. Having defined "Legal Proceeding" as "any judicial … proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement,[41] the Tribe (1) "waive[d] any requirement of Tribal law stating that the Tribal courts have exclusive original jurisdiction over all matters involving the Tribe;" (2) "waive[d] any requirement that such Legal Proceedings be brought in Tribal Court; and (3) "waive[d] any requirement … that Tribal remedies be

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[38] The early discussions of employment were rejected in favor of the Agreement language that clearly stated that Becker "is not an employee of the Tribe and, therefore, shall not be entitled to any benefits, coverages or privileges…." Agreement, Article 6E, Aplt Appx V, 857.

[39] *Tangren Family Trust v. Tangren*, 182 P.3d 326, 332 (Utah 2008).

[40] *E.g.*, *Daines v. Vincent*, 190 P.3d 1269, 1277 (Utah 2008).

[41] Agreement, Article 23, Aplt Appx Vol V, 862.

exhausted."[42] The parties cannot possibly have intended to mean "the Ute tribal court" when they agreed to litigate in a "court of competent jurisdiction" in the context of this unambiguous language.

Even if this language were deemed ambiguous, however, evidence of the parties' performance would become admissible. Here, that evidence affirms that the parties did not intend to allow or require tribal court adjudication. The evidence includes the fact that Becker did not sue in tribal court, and the fact that the Tribe litigated for 3 ½ years in state and federal courts without asserting any right to be in tribal court.

II. The Tribe's Arguments Are Contrary to Federal Law

As shown above, the Tribe ignores state law, and tribal law is inapplicable. The Tribe focuses on federal law. This section shows that under federal law the Agreement validly waives the Tribe's sovereign immunity and other defenses to state court jurisdiction. It then shows that no federal barrier to state court jurisdiction overcomes the clear contractual waivers and consents of the Agreement.

[42] *Id.*

A. Federal Law Affirms that the Tribe's Waivers and Consent Support State Court Jurisdiction

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe[43] cuts through all the Tribe's federal arguments and provides independent, dispositive Supreme Court authority that state courts have jurisdiction here. The Tribe's efforts to distinguish *C & L Enterprises* fail.

C & L Enterprises upheld the jurisdiction of Oklahoma state courts to adjudicate a tribal contract on the sole ground that the tribe was held to have consented to state court jurisdiction by entering a contract subject to arbitration. The contract provided that any arbitration award could be enforced in any court of competent jurisdiction in the place of contracting.

The unanimous *C&L Enterprises* Supreme Court affirmed its prior *Kiowa*[44] holding that Indian tribes are subject to the plenary jurisdiction of state courts if "Congress has authorized the suit ***or*** the tribe has waived its immunity."[45] Thus, the rule of *C&L Enterprises/Kiowa* recognizes that, even without Congressional approval, state courts have inherent jurisdiction of commercial disputes to which

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[43] C & L *Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe,* 532 U.S. 411 (2001).

[44] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754 (1998).

[45] C&L *Enterprises, Inc.,* 532 U.S. at 414 quoting *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998).

Indian tribes are parties if the tribe has clearly waived sovereign immunity and consented to state court jurisdiction.[46]

The waivers and consents here are clearer than in *C&L Enterprises.* For example, there the contract was a standard form construction contract whose terms were not subject to negotiation,[47] where here the contract was negotiated for more than a year and drafted by the Tribe. There, there was no express waiver of sovereign immunity, and waiver had to be inferred from the arbitration clause. [48] but here a crystalline, express waiver. That contract lacked any reference to tribal court or tribal law, but here are three clear disavowals of tribal law and jurisdiction. There, consent to state court was inferred from an arbitration provision of the contract and of an Oklahoma statute that authorized "any court of competent jurisdiction" of Oklahoma to enforce an arbitration award. Here, the same phrase, "any court of competent jurisdiction," clearly refers to state courts, given the elimination of tribal court jurisdiction, the contractual provision requiring contract interpretation and enforcement under state law, and the context that the phrase applied where federal jurisdiction was lacking.

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[46] The *C&L Enterprises* Supreme Court used "consent to state court jurisdiction" and "waiver of sovereign immunity" interchangeably. As there, the terms are equivalent in the context of this appeal because the waiver of sovereign immunity was made in the context of the Tribe's clear consent to state court jurisdiction.

[47] *C&L Enterprises*, 523 U.S. at 415.

[48] *C&L Enterprises*, 523 U.S. at 421.

The Tribe asserts that *C&L Enterprises* does not apply here because of two asserted distinctions.[49] These are distinctions without a difference.

First, the Tribe argues that *C&L Enterprises* does not apply here because those claims "did not arise within Indian country."[50] Neither did Becker's claims. More importantly, the *C&L Enterprises* Court clarified that, like *Kiowa*, the *C&L Enterprises* holding applied to tribal commercial contracts "whether those contracts involve governmental or commercial activities and *whether they were made on or off a reservation*."[51] Thus, *C&L Enterprises* upholds the power of an Indian tribe to waive its sovereign immunity and consent to state court jurisdiction for actions to interpret and enforce the commercial service contracts of Indian tribes whether the subject matter of such contracts is partially or wholly on or off reservation.

Second, the Tribe argues that *C&L Enterprises* does not apply because that contract "did not involve real property or other tribal assets held by the federal government in trust for the Tribe."[52] There, the contract was for improvement of a building owned by the tribe outside the boundaries of the reservation.[53] But, as shown above, the Supreme Court did not limit its holding by whether the subject of

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[49] Opening Brief pp. 35 – 36.
[50] Opening Brief pp. 35 – 36.
[51] C&L *Enterprises, Inc.,* 532 U.S. at 416 quoting *Kiowa,* 523 U.S. at 760 (1998) (emphasis added).
[52] Opening Brief p. 36.
[53] *C&L Enterprises,* 532 U.S. at 414.

the commercial services contract was owned by the tribe or was on the reservation. Rather, the Court focused only upon the contract and the substance of the tribe's consents and waivers.

In sum, the Tribe has been unable to cite (and Becker has been unable to find) a single case depriving state courts of jurisdiction over Indian tribes in the face of a valid waiver of sovereign immunity and consent to state court jurisdiction. This Court should reject the Tribe's unsubstantiated argument and apply the clear holding of *C&L Enterprises* here.

The remainder of this section shows that there are no federal barriers that overcome the clear waivers and consents of the Agreement.

B. Becker's Claims Did Not "Arise" within the Exterior Boundaries of the Reservation

As shown above, the Tribe's waiver of sovereign immunity and consent to state court jurisdiction is valid whether the subject matter of a commercial services contract is within the exterior boundaries of the reservation or not. Thus, the question whether Becker's claim "arose" on the reservation is immaterial to the second (waiver) prong of *C&L Enterprises,* without regard to whether Congress has authorized state court jurisdiction or there is a barrier to such jurisdiction. This Court

has held that whether a claim arose on the reservation is a factor to be considered as to these latter issues.[54]

Some categories of claims clearly arise, and must arise, within reservation boundaries for state court jurisdiction to be precluded, such as criminal claims.[55] As to claims under commercial contracts between an Indian tribe and a nonmember, the impact of whether any of the performance of the contract touches Indian country is more nuanced. The following factors show that Becker's claims did not "arise on the reservation" in any sense that deprives the state court of jurisdiction.[56]

Here, the Agreement itself provided[57] that "[t]here shall be no requirement that Services be performed upon the Tribe's premises." This fact alone should preclude the conclusion that Becker's claims arose on the reservation.

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[54] Judge Waddoups' ruling did not depend upon whether Becker's claims "arose" on the reservation since he applied the stricter standard in his analysis that would apply if the claims arose on the reservation. Order Denying Preliminary Injunction, Dkt 136 fn. 7, Aplt Appx 3713, 3721.

[55] *Muscogee*, 669 F.3d 1159, 1181 (10th Cir. 2012) citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (though the reservation boundary is not absolute, reservation boundaries can be an important factors in weighing the reach of state law with respect to Indian tribes).

[56] The district court below did not rely upon Becker's showing that his claims did not arise on the reservation, but assumed without deciding "that the stricter standards applicable to on-reservation conduct apply." Order Denying Preliminary Injunction, Dkt 136 fn. 7, Aplt Appx 3713, 3721.

[57] Agreement, Article 4B, Aplt Appx Vol V, 855.

In any event, Becker estimates that 45% of his activities occurred off-reservation.[58] He often worked from his office in Colorado and an off-reservation office in Vernal, Utah. His contract duties required him to travel extensively, including to Salt Lake City, Dallas, Houston, Oklahoma City, Phoenix, Park City, Mesa, San Antonio, Albuquerque and Washington D.C. The services performed off-reservation included numerous negotiations of numerous agreements, raising private equity funds, consultation, and promotional, technical, financial, governmental, federal and other meetings at various business, federal, state, county and other offices in various states off the reservation.

Moreover, the reasons often articulated by courts for focusing on whether a claim arises on or off reservation do not exist here. For example, the Supreme Court emphasized that state court jurisdiction might be prohibited if "state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[59]

C. The Tribe's "Infringement Barriers" Argument Is Purely Semantic and Obscures the Real Issues

The Tribe's complaint that the district court failed to analyze the Tribe's "infringement barrier" arguments is purely semantic. For example, though the Tribe correctly notes that Judge Waddoups' detailed opinion does not include the specific

[58] Order Denying Preliminary Injunction, Dkt 136 fn. 7, Aplt Appx 3713, 3721.
[59] *Williams v. Lee*, 358 U.S. 217, 220 (1959).

phrase "infringement barrier," the opinion does include the phrase "federal barrier to state court jurisdiction" in analyzing one of the precise issues that the Tribe urges by its "infringement barrier" argument.[60] More importantly, Judge Waddoups dealt extensively with the two substantive principles that compose the "infringement barrier:" (1) the federal preemption of state court jurisdiction; and (2) whether "the exercise of state jurisdiction may impermissibly infringe on the 'right of reservation Indians to make their own laws and be ruled by them.'"[61] In analyzing substance, of course, the district court was not required to use a specific phrase. Were it so, the principal case cited for the "infringement barrier" argument, *Williams v. Lee*,[62] would be similarly flawed because that Supreme Court opinion does not use this purportedly required phrase. Indeed, a Lexis search shows that the Supreme Court has never used this phrase, and this Court only once, in *Muscogee (Creek) Nation v. Pruitt ("Muscogee")*.[63]

Muscogee shows that Judge Waddoups' analysis of the issues signaled by the phrase "infringement barrier" was spot on, even without using the phrase. For example, *Muscogee* teaches that, while Indian tribes are "sovereign for some purposes," the view of long ago that state law cannot pierce reservation boundaries

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[60] Order Denying Preliminary Injunction, Dkt 136 fn. 15, Aplt Appx 3713, 3731.
[61] Opening Brief p. 22.
[62] *Williams v. Lee*, 358 U.S. 217 (1959).
[63] *Muscogee (Creek) Nation v. Pruitt ("Muscogee")*, 669 F.3d 1159 (10th Cir. 2012).

is gone and the "trend has been away from the idea of inherent sovereignty as a bar to state jurisdiction."[64] The two "barriers" that the Tribe urges do not, alone or together, create a "rigid rule by which to resolve whether a particular state law may be applied to an Indian reservation…."[65] Federal law does not preempt the application of state law to Indian tribes in the same way that federal law can preempt state law and vice versa, and "courts should not apply a traditional preemption analysis to state law as applied to 'tribal reservations and [tribal] members.'"[66]

As to the preemption barrier, Judge Waddoups correctly noted that the doctrine of tribal immunity can preempt some disputes as to which an Indian tribe is a party, and that "the scope of such immunity and preemption have evolved and continue to evolve, both by congressional action and court decisions."[67] The district court also analyzed the impact of *Fisher v. District Court of Montana*[68] upon the Tribe's preemption argument and properly concluded that it did not. The court also analyzed whether state court jurisdiction is preempted in light of the court's ruling

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64 669 F.3d at 1169 quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 165 fn. 1 (1980).

65 669 F.3d at 1170 quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980).

66 *Muscogee,* 669 F.3d at 1170 quoting *Bracker,* 448 U.S. at 142-43.

67 Preliminary Injunction Order p. 3, Dkt 136, Aplt Appx Vol XV p. 3715.

68 *Fisher*, 424 U.S. 382 (1976).

that the Agreement did not involve trust property, and properly concluded that for that additional reason, state court jurisdiction was not preempted.

As to the second type of recognized potential "infringement barrier" – impact upon tribal self-governance – Judge Waddoups analyzed the issue at length. He recognized that "tribal sovereign immunity … support[s] tribal self-governance …."[69] He analyzed the relationship between an interest in tribal self-governance and the doctrine of tribal court exhaustion.[70] Indeed, the principal focus of Judge Waddoups' ruling is whether any barrier, judicial or congressional, to state court jurisdiction exists.

The Tribe fails to cite a single case that applies either the preemption or the self-governance prongs of the "infringement barrier" to facts akin to this case, and numerous cases show that these barriers do not apply here. For example, the self-governance issues are completely different here than in *Muscogee*. There, the self-governance issue was whether a state law over which the tribe had no say or control impermissibly impacted the Oklahoma tribe's power to govern its people. There, this Court held that the state statute did not have any impermissible impact upon the tribe's ability to govern. Here, self-governance would be positively diminished if the Tribe's voluntary, resolution-approved, written, clear election to enter into a

[69] Preliminary Injunction Order p. 3, Dkt 136, Aplt Appx Vol XV p. 3715

[70] Preliminary Injunction Order pp. 36-37, Dkt 136, Aplt Appx Vol XV pp. 3748-3749

contract governed by state law with a covenant selecting state and federal courts as fora and disavowing the application of tribal law and tribal court exhaustion and jurisdiction were found to be beyond the Tribe's discretion and power.

D. The Cited *Ute v. Utah* Cases Do Not Bar State Court Jurisdiction

The Tribe argues that that the *Ute v. Utah* cases form a barrier to state court jurisdiction here, and that the Tribe brought this action "to enforce prior federal precedents on … state [court] jurisdiction."[71] Those "prior federal precedents" are the seven appellate and district court opinions in the federal actions brought by the Tribe against the State of Utah referred to as *Ute (I – VII)* or the "*Ute Cases.*" The Tribe argues that the *Ute Cases* mean that the state court lacks jurisdiction here and compel Tribe-favoring results in this action under the doctrines of res judicata, collateral estoppel and stare decisis. They do neither.

1. The Ute v. Utah Cases Do Not Deprive the Utah Courts of Jurisdiction

The *Ute Cases* do not expressly address the jurisdiction of Utah state courts over the Tribe. To the extent those cases have any bearing upon the pivotal issue of state court jurisdiction here, however, those cases support such jurisdiction.

The *Ute Cases* are reservation boundary disputes in federal court that clarified certain rights and duties of the State of Utah and the Tribe at various locations

[71] Opening Brief p. 2

depending upon whether the disputed area was within the exterior boundaries of the Ute reservation. There is no boundary dispute here.

None of those cases expressly addressed the jurisdiction of any state court (including Utah state courts) over the Tribe or any other tribe. The *Ute Cases* were brought by the Tribe in federal court, and there was no dispute that the federal court had jurisdiction, and no claim or denial that any state court (including Utah state courts) had or lacked jurisdiction over the Tribe for any purpose.

Indeed, far from undercutting state court jurisdiction here, the *Ute Cases* support such jurisdiction because they affirm that the Utah state courts *have* jurisdiction to adjudicate tribal issues, including reservation boundary issues. In 1992, the Utah Supreme Court issued two opinions on the same day, *Hagen* and *Perank,*[72] regarding the exterior boundaries of the Ute reservation.[73] The Utah Supreme Court held that precedent of the United States Supreme Court and other courts conflicted with this Court's 1985 opinion in *Ute III*[74] on pivotal reservation boundary issues; "that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by" specified congressional acts; and "that the

[72] *State v. Hagen,* 858 P.2d 925 (Utah 1992); *State v. Perank,* 858 P.2d 927 (1992).
[73] *See generally United States v. Questar Gas Management Co.,* 2011 U.S. Dist. LEXIS 51409, ** 6 – 11 (D. Utah, May 11, 2011).
[74] *Ute Indian Tribe v. Utah,* 773 F.2d 1087 (10th Cir. 1985) (en banc).

Reservation boundaries were diminished by that restoration."[75] The United States Supreme Court granted *certiorari* in *Hagen*[76] "to resolve the direct conflict between these decisions of the Tenth Circuit[77] and the Utah Supreme Court[78] on the question whether the Uintah Reservation had been diminished.[79] The United States Supreme Court then affirmed the Utah Supreme Court, rejecting the application of contrary holdings of this Court in *Ute III*.

Returning to this Court in 1997 in *Ute V*, the Tribe urged that, under principles of collateral estoppel and stare decisis, this Court should reject the holdings of the United States Supreme Court in *Hagen*. Rejecting the Tribe's argument, this Court adopted the boundary rulings of the Utah Supreme Court that the United States Supreme Court had affirmed, and rejected the prior contrary holdings of *Ute III*. None of the courts involved in the *Ute Cases* or *Perank* or *Hagen* – the Utah state district court, the Utah Supreme Court, the federal district court, this Court or the United States Supreme Court – held or suggested that the Utah state courts lacked jurisdiction to adjudicate any of the tribal matters involved. Far from supporting the

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75 *State v. Perank,* 858 P.2d at 953.
76 *Hagen v. Utah,* 510 U.S. 399 (1994).
77 "These decisions" included *Ute Indian Tribe v. Utah,* 773 F.2d 1087 (1985), cert. denied, 479 U.S. 994 (1986).
78 *I.e., Hagen* and *Perank. Hagen,* 510 U.S. at 409.
79 *Id.*

Tribe's argument that the *Ute Cases* bar state court jurisdiction here, those cases support state court jurisdiction here.

2. The Ute v. Utah Cases Do Not Constitute Claim Preclusion, Issue Preclusion or Stare Decisis

Absent any explanation as to how collateral estoppel (issue preclusion), res judicata (claim preclusion) and stare decisis could apply the *Ute v. Utah* cases to this case, the Tribe simply asserts that they do. They clearly do not.

Issue preclusion would bar an issue asserted by Becker only if "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."[80] Elements 1, 3 and 4 fail: (1) the Tribe has failed to identify a single issue material here that was presented and decided in the *Ute Cases*; (3) Becker was neither a party nor in privity with a party to the *Ute Cases*; and (4) Becker obviously had no full and fair opportunity – he had no opportunity – to litigate any issue in the *Ute Cases*.

Claim preclusion requires proof of all these elements: "(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties

[80] *Moss v. Kopp,* 559 F.3d 1155, 1161 (10th Cir. 2009).

or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action."[81] Elements 2 and 3 are lacking: (2) Becker was not a party nor privy before; and (3) this action is not based upon the same claims as before.

The Tribe offers no clue as to how stare decisis could apply here.

E. No Secretarial Approval of Becker's Claims Was Required

The Tribe's argument that the Agreement required approval by the Secretary of the Interior simply ignores the plain terms included in – and missing from – the Agreement. The Agreement is a services contract that requires payment of a percentage of the net revenue distributed from one Delaware LLC to another. The Agreement does not create any interest in Becker or impose any requirement upon the Tribe that implicates approval by the Secretary. In a word, the Agreement did not create or include any deed, lien, conveyance, encumbrance or interest in any tribal property, including any natural resources, energy assets, trust property or real property.

All distributed net revenue of which Becker was to receive 2% came from Ute Energy and was created by operation of the amended Ute Energy Operating

[81] *UET RR, LLC v. Comis,* 2018 U.S. App. LEXIS 16481 *6 (10th Cir., June 19, 2018).

Agreement ("Amended Operating Agreement").[82] The Secretary specifically determined and certified that the Amended Operating Agreement did not require Secretarial approval.[83] The Tribe has failed to show how revenue derived from the performance of an agreement not requiring Secretarial approval can require Secretarial approval further downstream.

In 2007, the Tribe provided the Amended Operating Agreement to the Secretary's agent for that purpose, BIA acting superintendent Dinah Peltier.[84] In consultation with attorney Stephen Simpson of the Office of the U.S. Solicitor, the BIA examined whether Secretarial approval of the Amended Operating Agreement was required. By a letter dated July 2, 2007 addressed to the Chairman of the Ute Tribal Business Committee -- with copies to Solicitor attorney Simpson, Becker and the Tribe's general counsel Scot Anderson – the Secretary certified that Secretarial approval of the Amended Operating Agreement was not required. The Secretary noted that the Amended Operating Agreement "provides for distribution of [Ute Energy's] profits and liabilities."[85] For his conclusion that no approval was required, the Secretary pointed to the facts that the Ute Energy Operating Agreement: (1)

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[82] Order Denying Preliminary Injunction, Dkt 136, pp. 59 – 60, Aplt Appx. 3771 - 72.

[83] BIA Letter dated July 2, 2007, Aplt Appx, Vol IX-A, pp. 1724-25.

[84] *Id.*

[85] BIA Letter dated July 2, 2007, Aplt Appx, Vol IX-A, p. 1724. These "profits" were the source of the distribution of the net revenues that were required to be paid to Becker.

provided for the distribution of Ute Energy's profits and losses, including Ute Energy's net revenues, but did not convey or encumber any trust assets; (2) created no interest (including liens, deeds, encumbrances or mortgages) in lands or minerals subject to approval by the Secretary; (3) did not provide for the exploration or development of minerals in which the Tribe owned a beneficial or restricted interest; (4) did not involve utilizing the Tribe's surface or mineral estates for collateral; and (5) did not grant any interest in the Tribe's trust assets.

The Tribe understandably does not want the Court to consider this July 2, 2007 Secretarial certification. The Tribe moved to exclude this letter, the district court denied the motion, and the Tribe has appealed the denial of that motion. The Tribe urges two grounds for exclusion.

First, the Tribe argues without explanation that the letter's conclusion that the Secretary's analysis of why the Amended Operating Agreement did not require approval has no bearing on an analysis of the lack of need for Secretarial approval of the Agreement. As shown above, the relationship is that the two agreements are closely connected in general and absolutely connected as to the distribution of net revenue relevant here -- the distributed net revenue was solely derived from performance of the Amended Operating Agreement.[86]

[86] Order Denying Preliminary Injunction, Dkt 136, pp. 59 – 60, Aplt Appx 3771 - 72.

Second, the Tribe argues that the fact that the state court had excluded the letter suggests that the district court should exclude the letter. The district court correctly noted, however, that the reason that the state court excluded the letter was that the state court had previously decided on a summary judgment motion that the Agreement did not involve Tribal trust property and did not require Secretarial approval.[87] Thus, the state court's exclusion of the letter does not weigh against considering the letter to determine whether Secretarial approval was required because the exclusion emphasized that the state court had already determined that approval was not required.

On the other hand, the Tribe proffers what it characterizes as "evidence on the contract's illegality" in the form of the testimony of persons that the Tribe tendered as experts.[88] None of this testimony was admitted as evidence by the district court, but only considered as additional legal argument.[89]

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[87] Preliminary Injunction Order pp. 20-21 fn. 5, Dkt 136, Aplt Appx Vol XV pp. 3719-3720

[88] Opening Brief pp. 45 – 46.

[89] Order Denying Preliminary Injunction, Dkt 136, p. 44, Aplt Appx. 3756. The Tribe also relies on the declaration of trial counsel Frances Bassett for her testimony and legal conclusion that "[T]he 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." Opening Brief p. 18, fn. 29. Ms. Bassett was not qualified or accepted as an expert.

The district court below carefully analyzed over 5,000 pages of documents – including numerous exploration and development agreements, assignments, the Amended Operating Agreement and other operating agreements; considered multiple memoranda filed by both parties in this case, the Companion Case and the tribal court; held hearings in this case and the Companion Case; and reviewed the tribal court record of over 3,600 pages and the transcript of an extensive hearing in the tribal court in reaching its conclusion that the Agreement did not convey, encumber or impact any tribal trust property, and therefore was not required to be approved by the United States Secretary of the Interior ("Secretary").[90] The district court noted that "key pages in dispositive documents happen to be missing from the tribal parties' appendix."[91] Based on this review, the district court concluded that the Tribe's assertions of "facts" were "not entirely consistent factual representations of the facts themselves, either because they tell an incomplete story or because they assume conclusions not expressed in the materials."[92] Based upon this thorough review, and analysis of the law, the district court concluded that Secretarial approval was not required, and that the Agreement was therefore not invalidated by lack of Secretarial review or approval.

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[90] Preliminary Injunction Order p. 5, Dkt 136, Aplt Appx Vol XV p. 3717. The Tribe has not included these materials in the record on appeal and is not challenging these underlying facts.

[91] Preliminary Injunction Order p. 45, Dkt 136, Aplt Appx Vol XV p. 3757

[92] Preliminary Injunction Order p. 44, Dkt 136, Aplt Appx Vol XV p. 3756

On this appeal, the Tribe fails to show how the district court's 23-plus pages of legal analysis of the lack of need for Secretarial approval was wrong. Indeed, the only legal argument that the Tribe appears to make about Secretarial approval on this appeal is based upon tribal, not federal law. Becker has shown above the tribal law does not apply to any issue on this appeal.

The district court's analysis of the Secretarial approval issue is thorough and correct.

F. PL 280 Does Not Deprive the Utah State Courts of Jurisdiction over Indian Tribes Under the Circumstance of this Case

The Tribe argues that Public Law 280 ("PL 280")[93] and *Williams v. Lee*, affirmatively deprive the state court of subject matter jurisdiction. The Tribe's refusal to accept the clear waivers and consents of the Agreement validated by *C&L Enterprises* and *Kiowa* causes the Tribe to reverse the onus of showing state court jurisdiction here. *C&L Enterprises* means that state court jurisdiction exists with a proper tribal waiver of sovereign immunity unless a federal judicial or congressional barrier affirmatively bars that jurisdiction. The Tribe's opposing view – that a state court cannot exercise jurisdiction over an Indian tribe without a specific showing of the affirmative grant of state court jurisdiction by congress – simply ignores the

[93] Act of Aug. 15, 1953, c. 505, §§ 2, 4, 6–7; 67 Stat. 590 (hereinafter Public Law 280, or PL-280).

second prong of the *C&L Enterprises* test – namely, that state court jurisdiction over Indian tribes exists by proper waiver without any Congressional action. Indeed, *Williams*[94] itself plainly holds that Public Law 280 does not prevent state court jurisdiction where a tribe "assents" to such jurisdiction. In the nearly sixty years since *Williams* was decided, the Supreme Court and other courts have held that state courts have jurisdiction over Indian matters where tribes and tribal entities that are otherwise immune have waived sovereign immunity and/or consented to such jurisdiction.

The district court analyzed in detail whether any federal or state statute precludes state court jurisdiction, and properly concluded that none does. Judge Waddoups specifically analyzed whether PL-280[95] prohibits such jurisdiction and properly held, consistent with *Kennerly v. Dist. Court of Ninth Judicial District*[96] that Utah state courts have such jurisdiction here. Indeed, PL-280 was an offer to the states and to Indian tribes to *expand* state court jurisdiction of Indian matters, not constrict it. The acceptance of the invitation of PL-280 by the State of Utah pursuant to Utah Code Ann. §9-9-201 provided an invitation to the Tribe to accept broader state court jurisdiction. Though the Tribe did not accept that invitation tendered by

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94 *Williams*, 358 U.S. 217 (1959).

95 Act of Aug. 15, 1953, c. 505, §§ 2, 4, 6–7; 67 Stat. 590 (hereinafter Public Law 280, or PL-280).

96 *Kennerly v. Dist. Court of Ninth Judicial District*, 400 U.S. 423. 426-29 (1971).

the Congress together with the State of Utah, neither did the Tribe's nonacceptance restrict state court jurisdiction otherwise existing by the Tribe's specific, selective contractual waiver of sovereign immunity and consent to the jurisdiction of Utah state courts to adjudicate Tribal commercial contracts that consent to and invite state court jurisdiction. This is made clear in the *Kennerly* majority's footnote 6 that a Tribe's nonacceptance of the expansion of state court jurisdiction under PL 280 is not to imply that "selective tribal consent to state exercise of jurisdiction"[97] (such as by a proper contractual consent to state court jurisdiction to adjudicate a specific commercial contract) is thereby in any manner precluded or barred. The Tribe's spirited criticism of this ruling and scant mention of *Kennerly* without analysis fails to invalidate Judge Waddoups' reasoning or the clear import of *Kennerly*.

Judge Waddoups also correctly held that the Tribe's PL-280 arguments are contrary to the independent ground for state court jurisdiction of Tribal contract disputes established by *C&L Enterprises.*[98] Thus, Judge Waddoups did not, as the Tribe argues, "rewrite" Section 9-9-202 of the Utah Code or any federal statute, but faithfully and correctly applied them in line with *Kennerly* and *C&L Enterprises* and other precedent of the Supreme Court and this Court.

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[97] *Kennerly* , 400 U.S. 423, 430 fn. 6.
[98] Preliminary Injunction Order p. 20, Dkt 136, Aplt Appx Vol XV p. 3732

III. The Tribe Has Not Shown a Lack of Minimum Contacts Between the State of Utah and the Tribe

The Tribe has cited only one case, *Nicastro*,[99] and only for the abstract principle of the need for minimum contacts. The Tribe's argument that the district court lacks jurisdiction for lack of minimum contacts between the Tribe and the State of Utah is otherwise wholly unsupported by fact or law. The Tribe cites no authority for the following minor premises of its argument, and Becker has been unable to find any such authority: that (1) a party that enters a contract governed by a state's law with a forum selection clause that selects the state court and the federal district court of that state to adjudicate the contract can lack minimum contacts with that state; (2) that an Indian tribe located within a state can lack minimum contacts with that state; (3) that the parties to this Agreement in fact avoided minimum contacts with the State of Utah; or (4) that state-owned land within the exterior boundaries of the reservation are irrelevant to the analysis of minimum contacts.

The Tribe has simply failed to show how the Tribe can have lacked minimum contracts with Utah, the state within which the Tribe resides.

IV. This Court Lacks Jurisdiction to Review the Denial of the Tribe's Motion for Sanctions

The Tribe charges that a memorandum submitted by Becker's counsel to the district court below was racist. The Tribe has made several unfortunate and

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[99] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

erroneous claims of racism against various people connected with this dispute. In this action, for example, the Tribe alleges that Becker is a member of a "cabal of unscrupulous non-Indians." In the Companion Case, the Tribe has moved to recuse Judge Waddoups on a charge of bias akin to alleged Southern racial bias of the 1950s.[100] In the State Court Action, the Tribe accused Becker's counsel of racism, only to withdraw the charge after the State Court stated that the charge of racism was "outrageous."[101]

On this appeal, the Tribe asks this Court to "address" its motion for sanctions in the underlying action because, says the Tribe, Becker's counsel made "statements [that] are suggestive of blatant racist stereotypes." Counsel's statements were neither racist nor intended to be racist in any way. Chief Judge Nuffer independently found that the recusal motion lacked merit and denied the recusal motion.

Where, as here, the underlying action is still pending, the denial of a motion for sanctions is not appealable.[102]

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[100] Chief Judge David Nuffer denied the motion, and the Tribe appealed to this Court. That appeal has been dismissed for lack of appellate jurisdiction. *Becker v. Ute Indian Tribe,* No. 18-4019.

[101] Transcript of State Court Hearing dated October 2, 2017, p. 6.

[102] Order dated March 14, 2018, *Becker v. Ute Indian Tribe*, No. 18-4019; *Howard v. Mall-Well Envelope Co.*, 90 F.3d 433, 435 – 36 (10th Cir. 1996).

V. The Tribe's Other Procedural Arguments Should Be Rejected

The Tribe argues[103] that Becker was required but failed to file an answer in the district court and has thereby waived all defenses and counterclaims. Rule 12(a)(4) plainly provides that a Rule 12 motion delays the deadline to file an answer until after the district court denies or postpones to the trial its disposition of the Rule 12 motion.[104] Here, Becker filed a timely Rule 12 motion to dismiss and the district court has neither denied the motion nor postponed disposition of the motion until trial. The deadline for Becker to file an answer and counterclaims therefore has not passed.[105]

Nor should this Court consider or rule upon the Tribe's motions for summary judgment, including a motion for a permanent injunction (except to the extent that the summary judgment motions sought a preliminary injunction). The district court ordered that Becker need not respond to the summary judgment motions except to

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[103] Opening Brief p. 9, fn. 7.

[104] "[S]erving a motion under this rule alters [the deadlines to answer] … [until after] the court denies the motion or delays its disposition until trial …."

[105] E.g., *Nationwide Bi-Weekly Admin, Inc. v. Belo Corp.*, 512 F.3d 137, 140 – 41 (5th Cir. 2007) (Rule 12(a)(4) postpones the deadline to answer until after denial of a Rule 12 motion or the postponement to trial of the disposition of a Rule 12 motion; since the district court had done neither in response to a Rule 12 motion, no answer was yet due).

address supplemental jurisdiction.[106] The district court then clarified that this order constituted a stay of briefing on the merits of the summary judgment motions.[107]

CONCLUSION

Becker respectfully requests that the Court affirm the Order Denying Preliminary Injunction.

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 24, Becker requests oral argument. Becker believes that the issues here will have a significant impact nationally upon the incentives and barriers to commercial contracts between Indian tribes and non-Indians, and that consideration of these important issues will be aided by oral argument.

Date: July 11, 2018

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[106] Order Requesting Supplemental Briefing, Dkt 58, Aplt Appx 503.
[107] Notice of Hearing, Dkt 66, Aplt Appx p. 14.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains 12065 words, excluding the parts of the brief exempted by Fed. R. App. P 32(a)(7)(B)(iii) and 10th Cir. Local Rule 32(b). I relied on my word processor using Microsoft Office Word 2013 to obtain the count.

This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14-point font.

/s/ David K. Isom

CERTIFICATE OF SERVICE

I certify that the foregoing Appellee's Brief was served upon all parties by ECF this 11th day of July 2018.

/s/ David K. Isom

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