CASE NO. 18-4013

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally recognized Indian tribe, et al.,	)
Plaintiffs/Appellants,	)
v.	)
HONORABLE BARRY G. LAWRENCE, et al.,	)
Defendants/Appellees.	)

On Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Clark Waddoups
No. 2:16-cv-00579

APPELLANTS' OPENING BRIEF

Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
Thomasina Real Bird
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. Rule 26.1, Appellants Ute Indian Tribe of the Uintah and Ouray Reservation (Ute Tribe) and Ute Energy Holdings LLC submit the following corporate disclosure statements:

The Ute Indian Tribe is a sovereign Indian tribe and has no parent corporation or other parent entity, and no publicly held corporations owns 10% or more of its stock.

Ute Energy Holdings LLC is a wholly owned tribal enterprise of the Ute Tribe and no publicly held corporation owns 10% or more of its stock.

FREDERICKS PEEBLES & MORGAN LLP

/s/ Frances C. Bassett

Frances C. Bassett
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: fbassett@ndnlaw.com

The Ute Indian Tribe of the Uintah and Ouray Reservation, appearing in its dual capacities as a federally-recognized Indian tribe and a federal corporation, and the Tribe's Business Committee and Ute Energy Holdings LLC, a wholly tribally-owned entity (collectively the "Tribe" or "Ute Tribe"), respectfully submit the Tribe's opening brief.

STATEMENT OF RELATED CASES

The Tribe brought the underlying civil suit to enforce prior federal precedents on the state and tribal jurisdiction, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072, 1157 (D. Utah 1981) (*Ute I*); *aff'd in part, rev'd in part, Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc) (*Ute III*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*); and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*).

This case involves a dispute between the Ute Tribe and one of the Tribe's former employees, the defendant/appellee Lynn D. Becker (Becker). Last year, the Tenth Circuit decided two interlocutory appeals in this case and a companion case, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539 (10th Cir. 2017) (*Lawrence*), and *Becker v. Ute Indian Tribe of the Uintah and*

Ouray Reservation, 868 F.3d 1199 (10th Cir. 2017) (*Becker*). Before that, in 2014, the Tenth Circuit affirmed the district court's dismissal of Mr. Becker's federal court suit against the Tribe for breach of contract. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770 F.3d 944 (10th Cir. 2014).

The case was remanded to the district court on November 29, 2017. Aplt. App. II, 333.[1] On remand, proceedings in the district court have resulted in three new interlocutory appeals, case numbers 18-4013, 18-4030, and 18-4072. The Tenth Circuit *sua sponte* joined appeals 18-4030 and 4072 for all procedural purposes on May 17, 2018. Five days later, on May 22, 2018, the Court granted the Tribe's unopposed motion to join appeal 18-4013 with appeals 18-4030 and 4072 for procedural purposes.

STATEMENT OF JURISDICTION

In *Lawrence*, the Tenth Circuit ruled that federal question jurisdiction exists in this case under 28 U.S.C. §§ 1331 and 1362 to rule on Counts 1 and 4 of the Tribe's First Amended Complaint:[2]

> We hold that the Tribe's claim—that federal law precludes state-court jurisdiction over a claim against Indians arising on the reservation—presents a federal question that sustains federal jurisdiction.

Lawrence, 875 F.3d at 540.

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[1] References to the Appendix are "Aplt. App.," with the volume (by roman numeral) and page number.

[2] Aplt. App. I, 17.

> The only remaining question is whether the Tribe's suit seeking an injunction to halt the proceedings in state court is an action "arising under" federal law (so that there is jurisdiction under 28 U.S.C. § 1331) or whether "the matter in controversy [in this suit] arises under" federal law (so that there is jurisdiction under 28 U.S.C. § 1362) … We hold that the jurisdiction predicate is satisfied.
>
> The federal courts generally have jurisdiction to enjoin the exercise of state regulatory authority (which includes judicial action) contrary to federal law.
>
> * * * *
>
> The equitable jurisdiction under § 1331 has repeatedly been employed to police the boundaries between state and tribal authority.

Id. at 543. (emphasis added)

The Tribe filed its notice of appeal on January 25, 2018, after the district court refused initially on remand to exercise original jurisdiction over the case. Aplt. App. VIII, 1506. On February 16, 2018, this Court abated the appeal, issued a limited remand, and directed the district court to "decide the Tribe's request for injunctive relief." Aplt. App. VIII, 1540. On April 30, 2018, the district court entered a Memorandum Decision and Order denying the Tribe's motions for injunctive relief. Aplt. App. XV, 3713. The following day, May 1, 2018, this Court entered an order lifting the abatement. The Tenth Circuit has jurisdiction over the appeal under 28 U.S.C. § 1292(a)(1) and the collateral order doctrine.[3]

[3] Orders rejecting the defense of sovereign immunity and other immunities are appealable collateral orders. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (denial of state sovereign immunity); *Bonnet v.*

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the district court erred in denying the Tribe's request for injunctive relief based on the judicial precedent of the *Ute Tribe v. Utah* cases; alternatively, whether the district court erred in denying injunctive relief on grounds of federal preemption, infringement on tribal sovereignty, the state of Utah's lack of territorial and subject-matter jurisdiction, and/or the absence of minimum contacts between the state of Utah and the Ute Tribe/Becker dispute.

2. Whether the district court erred in effectively overruling and in failing to give comity and/or preclusive effect to the Ute Indian Tribal Court's determination that the Becker contract is illegal and hence unenforceable under the Tribe's constitution and federal corporate charter. Alternatively, whether the undisputed material facts establish the illegality of the Becker contract under both federal and tribal law.

3. Whether the district court erred in denying the Tribe's motions to exclude evidence under Federal Rules of Evidence 402, 403, 802, 901 and 902.

4. Whether the Tenth Circuit should direct entry of a permanent injunction based on the undisputed evidence in the record submitted as part of the Tribe's summary judgment motions.

Harvest (U.S.) Holdings, Inc., 741 F.3d 1155, 1158-59 (10th Cir. 2014) (denial of tribal sovereign immunity).

5. Whether the district court erred in denying the Tribe's motion to sanction Mr. Becker and his counsel for baseless attacks upon the integrity of the Tribe and the Ute Indian Tribal Court.

STATEMENT OF THE CASE

For more than three years, the Tribe has defended against breach of contract claims brought by Becker in a Utah state court, *Becker v. Ute Indian Tribe*, case number 140908394, Third Judicial District Court, Salt Lake County (*Becker* state suit).[4] After the state court denied the Tribe's motion to dismiss the state suit, the Tribe filed this federal lawsuit on June 13, 2016, seeking to enjoin the state suit on grounds of stare decisis (the judicial precedent of the *Ute Tribe v. Utah* cases), federal preemption, infringement on tribal sovereignty, lack of state territorial and subject-matter jurisdiction, and the lack of minimum contacts over the Ute Tribe/Becker dispute. Alternatively, the Tribe sought a declaration that the contract between Becker and the Tribe is illegal and unenforceable under both federal law

[4] Mr. Becker's state complaint names as defendants (*i*) the Ute Tribe in its capacity as a tribal government, (*ii*) the Ute Tribe in its capacity as a federally-chartered corporation, (*iii*) the Tribal Business Committee, and (*iv*) Ute Energy Holdings LLC, a wholly-tribally owned commercial entity. Aplt. App. VII, 1426.

and Ute Indian tribal law, and a declaration that the Tribe has sovereign immunity against Mr. Becker's claims.[5]

The federal district court dismissed the Tribe's complaint for lack of federal question jurisdiction. Aplt. App. II, 326. Thereupon, the Tribe instituted a lawsuit against Becker in the Ute Indian Tribal Court, *Ute Indian Tribe v. Becker*, case number CV-16-2553, seeking, *inter alia*, declaratory relief and monetary damages. Aplt. App. V, 886.

On the Tribe's appeal from the dismissal of its federal lawsuit, the Tenth Circuit reversed and remanded the case to district court. *Lawrence*, 875 F.3d at 548. The mandate issued on November 29, 2018. Aplt. App. II, 333. During the fifteen month interim that *Lawrence* was on appeal, litigation in the *Becker* state suit had proceeded, and a nine-day jury trial was scheduled to begin on February 20, 2018; thus when the mandate issued, the Tribe was facing imminent deadlines under the state court jury pretrial order. On December 7, 2017, the Tribe filed in this case:

a) Plaintiffs' Expedited Motion for Summary Judgment and for Interim and Permanent Injunctions on Grounds of Federal Preemption, Infringement on Tribal Sovereignty, and Lack of Subject Matter Jurisdiction. Aplt. App. II, 361 (Dkt. 52);

b) Plaintiffs' [alternative] Expedited Motion for Summary Judgment and for Interim and Permanent Injunctions on Grounds of Illegality Under Federal

[5] The Tribe's complaint names as defendants Mr. Becker and the Utah state judge who is presiding over the *Becker* state suit, the Honorable Barry G. Lawrence (Judge Lawrence).

and Tribal Law, Infringement on Tribal Sovereignty, and Federal Preemption, Aplt. App. II, 394 (Dkt. 53);

c) Plaintiffs' Verified Emergency and Expedited Motion for Injunctive Relief – a Temporary Restraining Order and/or Preliminary Injunction and a Permanent Injunction Entered Under Fed. R. Civ. P. 56, Aplt. App. II, 440 (Dkt. 54); and

d) Plaintiffs' Verified Motion to Expedite Briefing and Rulings on the Ute Tribe's Motions for a Temporary Restraining Order and Preliminary Injunction, Aplt. App. II, 485 (Dkt. 55).

The Tribe contends that the undisputed material facts identified in its motions for summary judgment establish unequivocally the Tribe's right to injunctive relief. Initially, however, on remand the district court refused to even exercise its original jurisdiction to consider the Tribe's motions. Aplt. App. VIII, 1513. The Tribe appealed and requested emergency injunctive relief from the Tenth Circuit. In response, the Tenth Circuit abated the Tribe's appeal, issued a limited remand, and directed the district court to "decide the Tribe's request for injunctive relief." Aplt. App. VIII, 1540. Thereupon, the district court entered an order temporarily staying the state court suit and scheduled a hearing. Aplt. App. 1554. At the evidentiary hearing on February 28, 2018, the Tribe presented testimony from two of the Tribe's six expert witnesses and introduced two exhibits; the Tribe further relied on the evidentiary materials the Tribe had submitted with its three summary judgment

motions. Aplt. App. XI, 2342-45, 2473-2515.[6] Defendants Becker and the Honorable Barry G. Lawrence presented no witnesses at the 2/28/2018 hearing. Aplt. App. XI, 2515:11-14. Parenthetically, it should be noted that neither Becker nor Judge Lawrence has even bothered to file answers to the Tribe's First Amended Complaint in this case.[7]

On February 28, 2018, the tribal court granted the Tribe's motion for partial summary judgment and entered a declaratory ruling that the Becker contract is illegal and hence unenforceable under both tribal law and federal law. Aplt. App. XV, 3838.[8] The Tribe promptly notified the federal district court of the tribal court ruling. Aplt. App. XV, 3838. The Tribe also asked the district court to give preclusive effect to the tribal court ruling and to consolidate the ruling on the Tribe's motions for preliminary and injunctive relief. Aplt. App. XI, 2355, Dkt. No. 110.

On April 5, 2018, the district court sent the parties a tentative ruling delivered under seal; the court scheduled a hearing for the following week, April 13, 2018, at

[6] The transcript from the 2/28/2018 hearing is included as an attachment to the Tribe's Opening Brief.

[7] Under Rule 12(a)(4)(A), of the Federal Rules of Civil Procedure, Becker and Judge Lawrence had until December 13, 2017, in which to file answers to the Tribe's First Amended Complaint, Aplt. App. I, 17; having failed to answer the Tribe's complaint, Becker and Judge Lawrence have both waived any affirmative defenses.

[8] A copy of the tribal court's ruling is included as an attachment to the Tribe's Opening Brief.

which time the parties would be allowed, without "oral argument," to being "any factual or legal errors to the court's attention before the ruling is finalized." Aplt. App. XII, 2753. The hearing on the tentative ruling occurred on April 13, 2018. Aplt. App. XIII, 2757. Two weeks later the district court issued an 83-page Memorandum Decision and Order denying the Tribe's motions for injunctive relief. Aplt. App. XV, 3713. The district court denied the preliminary injunction solely on the ground that the Tribe had not shown a likelihood of success on the merits; the court did not address the other relevant factors.

STATEMENT OF FACTS

A. Facts Pertinent to the Ute Indian Tribe

The Ute Tribe is a federally recognized Indian tribe composed of three band of the greater Ute Tribe—the Uintah Band, the White River Band, and the Uncompahgre Band—who today occupy the Uintah and Ouray Reservation in northeastern Utah. The Tribe has nearly four thousand enrolled members and over half its members live on its reservation. The Tribe operates its own tribal government and oversees approximately 1.3 million acres of trust lands, some of which contain significant oil and gas deposits. Revenue from the development of the Tribe's oil/gas resources is the primary source of money used to fund the Tribe's government and its health and social welfare programs for tribal members.[9]

[9] Aplt. App. V 774, Cuch Declaration, ¶ 2.

The Ute Indians once "ranged from the Wasatch Front all the way to the Colorado Front Range—from present-day Salt Lake City to Denver."[10] In return for the Ute Indians' cession of vast tracts of valuable land to the federal government, the United States executed treaties with the Utes which guarantee the Tribe a tribal homeland established under federal law and set apart and protected from outside infringement "except … [as] authorized by the United States."[11] (underscore added)

> Implicit in these treaty terms, as it was in the treaties with the Cherokees … was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

State ex rel. Peterson v. Dist. Court, 617 P.2d 1056, 1062 (Wyo. 1980) (quoting *Williams v. Lee*, 358 U.S. 217, 221-222 (1959)).

Since Congress ratified the Ute Treaties of 1863 and 1868, the United States has never authorized the state of Utah to exercise jurisdiction over the Ute Tribe for actions undertaken by the Tribe inside the boundaries of its own reservation. To the contrary, in 1894, when the state of Utah applied for admission to the Union, the Utah Enabling Act, passed by Congress, expressly required the state of Utah to

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[10] Charles Wilkinson, Fire on the Plateau, Conflict and Endurance in the American Southwest, 128 (1999).

[11] Aplt. App. V 791, art. 2; 803, art. V; Ute Treaty of 1863 (13 Stat., 673); Ute Treaty of 1868 (15 Stat., 619); Act of April 29, 1874, Chapter 136 (18 Stat., 36).

"forever disclaim all right and title to … all lands … owned or held by … Indian tribes." Act of July 16, 1894, Chapter 138 (28 Stat. 107). The disclaimer is repeated verbatim in the Utah Constitution, art. III, §2.[12] The foregoing language constitutes the State of Utah's disclaimer of both proprietary and governmental authority over the Ute Indian Tribe. *See McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 173-74, 179-80 (1973) (by virtue of the disclaimer in the Arizona Enabling Act, which is identical to the Utah Enabling Act, the Arizona tax code could not be extended extra-territorially inside the Navajo Reservation to apply to Navajo Indians); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (interpreting the disclaimer in the Oklahoma Enabling Act which is identical to the Utah Enabling Act).

The Ute Tribe has never consented to state civil or criminal jurisdiction over its reservation under any law, state or federal, including Public Law 280, codified, as pertinent here, at 25 U.S.C. §§ 1321-1326. Indeed, the Tribe amended Section 1-2-1 of the Tribe's Law and Order Code in 2014 to make clear that the Tribe has never consented to state jurisdiction in accordance with the Congressionally-

[12] Beginning in 1836, it was "the congressional practice in most organic acts establishing new territories . . . to include clauses expressly preserving Indian rights and federal control over tribes." Cohen's Handbook of Federal Indian Law, §6.01[4], at 510. Congress followed that policy in the Kansas Statehood Act of 1861, and in the enabling acts for each state that was admitted to the union between 1889 and 1959, including the State of Utah. *Id*.

mandated process required by 25 U.S.C. § 1326:

> [T]he Ute Indian Tribe has never consented to the State of Utah having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within the State of Utah pursuant to 25 U.S.C. § 1322(a), nor has the Ute Indian Tribe ever consented to or agreed to allow the State of Utah to assume criminal jurisdiction over Indians and Indian territory … within the State of Utah in accordance with 25 U.S.C. § 1321(a). The Tribe … has never conducted a special election of adult Indians of the Tribe to allow the State of Utah to assume civil or criminal jurisdiction over the Tribe and its lands under PL-280….

Aplt. App. V, 807-08.

B. The Ute Tribe's Organization Under the Indian Reorganization Act

In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. § 5101 *et seq*. (IRA). The IRA is "a statute specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976). The IRA implements a federal policy of reestablishing tribal governments, reconstituting tribal land bases, and revitalizing tribal economies and cultures. *See* Cohen's Handbook of Federal Indian Law §4.04[3][a], p. 256 (Nell Jessup Newton ed., 2012). The Ute Tribe is organized in two ways under the IRA, both as a tribal government and as a federal corporation.[13] Under its federal charter, the individual

[13] The Tribe is organized as a tribal government under Section 16 of the IRA, now codified at 25 U.S.C. § 5123; it is organized as a federal corporation under Section 17 of the IRA, now codified at 25 U.S.C. § 5124 (such tribal corporations are often referred to as "Section 17 corporations"). *See* Aplt App. VI, 1224-25, Expert Report of Pilar Thomas, 6-7.

tribal members are all members of the federal corporation and the Tribe's governing body, the tribal Business Committee, exercises "all the corporate powers." Aplt. App. VI, 837-38.

Like the Northern Cheyenne Tribe in *Fisher*, the Ute Tribe adopted a constitution and bylaws pursuant to the IRA; then, pursuant to its Tribal constitution and bylaws, the Tribe enacted a Law and Order Code. Under its Law and Order Code, the Tribe established the Ute Indian Tribal Court and granted its Tribal Court jurisdiction over all persons employed by the Tribe and any person "who transacts, conducts, or performs any business or activity within the Tribe's territorial jurisdiction." Aplt. App. V, 817-818.

C. Mr. Becker's Employment for the Ute Tribe

Mr. Becker is a non-Indian who worked inside the exterior boundaries of the Tribe's reservation as the Director of the Tribe's Energy and Mineral Department from March 2004 through October 2007.[14] The Tribe's complaint alleges that Mr. Becker was one of several unscrupulous non-Indians who insinuated themselves into the Tribe's government and its Energy and Minerals Department in the early 2000s and through a pattern of fraud, subterfuge and bullying, attempted to secure for themselves an interest in the Tribe's oil and gas mineral estate.[15] The Tribe alleges

[14] Aplt. App. V 775, Cuch Declaration, ¶ 7.

[15] Aplt. App. I, 20 ¶¶ 11-13.

that other unscrupulous individuals and entities included the Tribe's former financial consultant, John P. Jurrius, and his business entities, the Jurrius Group LLP and Jurrius Ogle Group LLC, whom the Ute Tribe sued in 2008 on multiple counts of civil wrongdoing, including fraud and conversion, in a suit captioned *Ute Indian Tribe v. Jurrius, et al.*, case number 1:08-cv-01888, in the U. S. District Court for the District of Colorado.[16]

Mr. Becker testified in his deposition that it was Mr. Jurrius who asked him to work for the Tribe.[17] Becker sent Jurrius a written proposal for employment with the Tribe on December 30, 2003. The proposal 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.[18] 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*."[19] In his deposition, Becker testified that Brundage Canyon and NOSR 2 are both "geographical areas" within the Uintah and Ouray Indian Reservation that were

[16] Aplt. App. I, 21, ¶ 13.
[17] Aplt. App. V, 933.
[18] Aplt. App. V, 848-49.
[19] Aplt. App. V, 849.

slated for oil-and-gas development.[20]

Mr. Jurrius responded to Mr. Becker's written employment proposal with a written memo dated February 2, 2004. 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.[21]

The Independent Contractor Agreement (contract) 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)

[20] Aplt. App. V, 935-936.
[21] Aplt. App. V, 844-45.

> 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)22

The Becker contract was approved by the Tribal Business Committee at a meeting on April 27, 2005; however, the contract was made retroactive to March 1, 2004.[23]

With its effective date of March 1, 2004, the Becker contract *predates* the creation of Ute Energy Holdings LLC and Ute Energy LLC—both of which were formed on May 4, 2005.[24] The Tribe simultaneously organized the two LLCs on the recommendation of Mr. Becker and Messrs. Jurrius and Ogle. 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."[25] 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

[22] Aplt. App. V, 866.

[23] Aplt. App. V, 854.

[24] Aplt. App. V, 937, 946.

[25] Aplt. App. V, 929.

> 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.[26]

The Ute Tribe was a member of Ute Energy LLC through its membership in Ute Energy Holdings LLC.[27] Since October 1, 2008, Ute Energy Holdings LLC has been wholly owned by the Ute Tribe.[28]

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.[29]

Under assignments dated May 4, 2005 and May 10, 2007, the Tribe capitalized Ute Energy Holdings LLC and Ute Energy LLC with the Tribe's working

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[26] Aplt. App. V, 958-67, Brownstein Declaration and excerpts from Ute Energy LLC Financial Statements.

[27] Aplt. App. V, 968, Bales Declaration, ¶ 13.

[28] Aplt. App. V, 972-79. 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 Tribe after the Tribe's suit against Jurrius Ogle Group and other parties, *Ute Indian Tribe v. Jurrius, et al.*, case number 1:08-cv-01888, U. S. District Court for the District of Colorado.

[29] Aplt. App. V, 983, Bassett Declaration, ¶ 9; Aplt. App. VII, 1482-86, Becker Declaration, ¶¶ 4-20.

interest in the EDAs and with other mineral assets that the United States holds in trust for the Tribe.[30]

Mr. Becker's last day of employment for the Ute Tribe was October 31, 2007.31 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.[32] The sale of the two subsidiaries was a liquidating event under the terms of the Ute Energy LLC Operating Agreement.[33]

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.[34] Mr. Becker is suing the Tribe for more than $7.5 million dollars, which

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[30] Aplt. App. VI, 1131-33, schedule of tribal assets assigned to Ute Energy Holdings LLC and Ute Energy LLC; Aplt. App. V, 983, Bassett Declaration, ¶¶ 8, 9; Aplt. App. V, 986-91, Trulock Declaration, ¶ 5.

[31] Aplt. App. V, 782.

32 During its first five years of operation, Ute Energy LLC struggled financially. Trulock Declaration, Aplt. App. V, 989, ¶¶ 9-11.

[33] Aplt. App. V, 969-70, Bales Declaration, ¶¶ 9-10. 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. Aplt. App. VI, 1134-59, Declaration, Resume and Expert Report of Ronald L. Seigneur, MBA, CVA, ASA, CPA/ABV/CFF.

[34] Aplt. App., V, 970, Bales Declaration, ¶¶ 13-14; Aplt. App., V, 990, Trulock Declaration, ¶ 18.

he contends is two percent (2%) of the value of the tribal assets that were distributed back to the Ute Tribe following the liquidation of Ute Energy LLC.[35]

STANDARD OF REVIEW

This Court reviews a district court's denial of a preliminary injunction to determine whether the district court based its ruling on legal errors or clearly erroneous factual findings. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) (reversing the district court's erroneous conclusion that the tribe failed to establish irreparable harm).

SUMMARY OF THE ARGUMENT

The district court's 83-page ruling is an open attempt to spurn existing federal Indian law precedent and forge new law. However, the district court's analysis is patently untenable under (*i*) stare decisis (the law of judicial precedent), including the *Ute Tribe v. Utah* cases, (*ii*) constitutional jurisprudence and separation of powers, (*iii*) the rules of statutory interpretation, (*iv*) the dictates of federalism, (*v*) federal Indian non-intercourse and Indian property non-alienation law, and (*vi*) limitations on federal judicial power under the doctrine of tribal court exhaustion. The district court's 83-page ruling upends judicial precedents in each of these areas of settled law. The Tribe's motions for interim and permanent injunctive relief establish that there is no Congressional act that vests the Utah state court with

[35] Aplt. App. V, 882, Becker Declaration, ¶ 21.

jurisdiction over the Becker suit, and that the state court's exercise of jurisdiction over the *Becker* state suit is otherwise barred by federal law and offends constitutional due process because there were no minimum contacts between the Ute Tribe and the state of Utah in relation to the Becker contact. The undisputed material facts also establish the Tribe's alternative motion for injunctive relief on the ground that the Becker contract is void *ab initio* under federal and tribal law. Under long-standing Supreme Court precedent, the federal courts are bound by the tribal court's ruling that the Becker contract is void *ab initio* under the Tribe's constitution and corporate charter.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF ON GROUNDS THAT THE STATE OF UTAH HAS JURISDICTION OVER THE BECKER SUIT AND THAT STATE JURISDICTION IS NOT PROHIBITED BY STARE DECISIS, NOR FEDERAL PREEMPTION, NOR INFRINGEMENT ON TRIBAL SOVEREIGNTY, NOR THE ABSENCE OF MINIMUM CONTACTS BETWEEN THE STATE OF UTAH AND THE BECKER CONTRACT DISPUTE.

Three requirements must be satisfied before a court may properly undertake an adjudication. First, the court must have territorial jurisdiction of the controversy. Restatement (Second) of Judgments 2 Intro. Note (Am. Law Inst. 1982). Second, the court must have "*authority to adjudicate the type of controversy presented to it. This authority is generally referred to as subject matter jurisdiction and is sometimes*

referred to as competence or *competency*."[36] *Id*. (emphasis added) A court's subject-matter jurisdiction "is derived from the law, particularly the law that creates and organizes the courts, and is vested in the courts by the constitution or statutes." 21 C.J.S. Courts § 15 (1955). Third, there must be sufficient minimum contacts between the forum state and the defendant—in this case the Ute Tribe—to satisfy traditional notions of fair play and substantial justice. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). All three requisites are missing here.

Separately, there are two "independent but related" federal law barriers to the exercise of state jurisdiction over Indians for legal claims arising within Indian country. State jurisdiction may be preempted by federal law, or alternatively, the exercise of state jurisdiction may impermissibly infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Although the preemption and infringement barriers are related, the barriers are separate and independent of one another:

The two barriers are independent because either, standing alone, can be

[36] In fact, "competency" is the word that is used in article 23 of the Becker contract which recites that disputes can be heard by any court of "competent" jurisdiction. Aplt. App. V, 105. Utah state courts obviously are not courts of competent jurisdiction insofar as there is no act of Congress that authorizes the state of Utah to exercise adjudicatory jurisdiction over the Ute Tribe for actions the Tribe undertakes within the exterior boundaries of its reservation.

> a sufficient basis for holding state law inapplicable to *activity undertaken on the reservation* or by tribal members. (emphasis added)

Bracker, 448 U.S. at 143.

A. The District Court Failed to Analyze the Infringement Barrier

If the circuit judges or their law clerks view the district court's 4/30/2018 decision in pdf format and enter the word "infringement" on the "find" function of their Adobe software, they will see that the word "infringement" appears *nowhere* in the district court's 83-page decision. At no point in 83 pages did the district court ever analyze whether the *Becker* state suit impermissibly infringes on the "right of [the Ute Tribe] to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. at 220. The Tribe's attorneys alerted the district court to the omission, advising the court at the hearing on 4/13/2018 that the court's tentative decision failed to address "the infringement barrier." Aplt. App. XIII, 2773:1 – 2774:3. But the Tribe's alert was for naught because the memorandum decision entered on 4/30/2018 also fails to analyze infringement. It is astonishing, frankly, that a memorandum opinion that runs to 83-pages would fail to consider one of the two federal law barriers to state jurisdiction over Indians for claims arising within Indian country. That is reversible error. Further, it is obvious that the Utah state court's exercise of concurrent jurisdiction over the Becker case indisputably infringes on tribal sovereignty. The Supreme Court decisions in *Williams v. Lee* and *Fisher v. District Court* are dispositive on this question. "We view *Fisher* as indicating that

where a tribal court is established to handle a dispute involving reservation Indians, concurrent state jurisdiction is an interference with tribal self-government." *Peterson*, 617 P.2d at 1068.

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

Williams v. Lee, 358 U.S. at 223. Like the Northern Cheyenne Tribe in *Fisher*, the Ute Tribe adopted its constitution and bylaws pursuant to the IRA (Indian Reorganization Act), and then, pursuant to its tribal constitution and bylaws, the Tribe adopted a Law and Order Code that encompasses both criminal and civil law. The tribal Code establishes a tribal court and grants the tribal court jurisdiction over all persons "employed" by the Tribe and any person who "transacts, conducts, or performs any business or activity within the Tribe's territorial jurisdiction." Aplt. App. V, 817, 813-16, Ordinance No. 13-001, Section 1-2-3(2)(A) and (C). The Ute Tribe is suing Mr. Becker in its tribal court. Aplt. App. V, 886. Therefore, the Utah state court's continuing exercise of concurrent jurisdiction over the Becker case is indisputably an interference with tribal self-government.

B. The Tribe Is Entitled to Injunctive Relief Under the Judicial Precedent of the *Ute Tribe v. Utah* Cases.

The Ute Tribe adopted its tribal Law and Order Code in 1975. The Code was

established for the purposes of

> strengthening Tribal self-government, providing for the judicial needs of the Reservation, and thereby assuring the maintenance of law and order on the Reservation.[37]

The federal government approved the Law and Order Code as a legitimate exercise of tribal sovereignty. Nonetheless, the state of Utah and its counties and municipalities moved immediately to thwart the Tribe's implementation of the Code.[38] In October 1975, the Tribe sued in federal court seeking both injunctive relief and a declaratory judgment that the state of Utah and its counties and municipalities "have no jurisdiction or authority to in any way interfere with [the Tribe's] sovereign powers or with any activities or business of the [Tribe] on the Uintah and Ouray Reservation."[39] The pretrial order described the Tribe's legal claims as asserting, *inter alia*, that:

> … the [Utah state, county and municipal] defendants may not exercise jurisdiction over members of the plaintiff Tribe for any criminal offense committed [within the reservation] … *and that the Tribe may exercise the full panoply of its governing powers within those*

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[37] Aplt. App. V, 811; *see* Preamble to the Law and Order Code of the Ute Indian Tribe, publically available online at the National Indian Law Library, http://www.narf.org/nill/codes/ute_uintah_ouray/index.html. (last visited on 6/11/2018).

[38] Aplt. App. VII, 1411-12; Tribe's complaint in *Ute Tribe v. Utah*, case number 2:75-cv-00408, U. S. District Court for the District of Utah, ¶¶ 7-12.

[39] Aplt. App. VII, 1409; Tribe's complaint in *Ute Tribe v. Utah*, ¶ 1.

> *same boundaries free from interference by the [state] defendants*. (emphasis added)

Ute I, 521 F. Supp. at 1078. In June 1981, the district court entered an 85-page opinion that recognized the Tribe's sovereign right to implement its Law and Order Code and to exercise the full panoply of its sovereign authority over tribal lands, including, specifically, civil jurisdiction within the scope of *Montana v. United States*, 450 U.S. 544, 565-66 (1981). *Ute I*, 521 F. Supp. at 1156. Although the federal district court denied injunctive relief, the court said:

> The denial of injunctive relief at this point is, however, a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, this Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary in order to effectuate its judgment, or as needed in aid of its jurisdiction. …[citations omitted]… The defendants are reminded that a refusal of their officers to recognize legitimate tribal judicial and governmental authority on the reservation is … [an] interference with tribal sovereignty.

Id. at 1157, *aff'd in relevant part*, *Ute III*, 773 F.2d at 1093 (en banc).[40] In the thirty-three years since *Ute III's* en banc ruling, the Tenth Circuit has repeatedly reaffirmed the continuing force of the *Ute* precedent under the doctrines of res

[40] The en banc decision in *Ute III* was authored by Circuit Judge William E Doyle, who had noted in *Ute II*, that "[w]hat is at stake … in this appeal is jurisdiction, civil, criminal, regulatory, and taxation, over Indians and over non-Indians who have transactions with Indians" within the exterior boundaries of the Uintah and Ouray Reservation. *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 716 F.2d 1298, 1317 (10th Cir. 1983) (Doyle, J. dissenting) (*Ute II*).

judicata, collateral estoppel, and stare decisis:

- *Ute VII*, 835 F.3d at 1260 (we are here "*yet again with the Tribe and the federal government asking us to give effect to Ute V's mandate by overturning the district court's ruling. We are of course obliged to do exactly that*.") (Gorsuch, J.) (emphasis added);
- *Ute VI*, 790 F.3d at 1012 ("*The district court's decision denying the preliminary injunction request is reversed and that court is directed to enter appropriate injunctive relief forthwith*.") (Gorsuch, J.) (emphasis added);
- *Ute V*, 114 F.3d at 1531 ("*[W]e … REMAND with instruction that the district court consider the Tribe's request for permanent injunctive relief in light of this opinion*." (Tacha, J.) (emphasis added).

Indeed, in *Ute V*, the Tenth Circuit emphasized that:

> In *Ute Indian Tribe III*, our en banc opinion … left nothing for the district court to address beyond the "ministerial dictates of the mandate." [citation omitted] In other words, the case was no longer sub judice after December 9, 1986. As of that date, the district court was without authority to depart from an appellate mandate based on a later change in the law.

Ute V, 114 F.3d at 1521. The Tribe's complaint and motions for injunctive relief in this case expressly invoke the *Ute* precedent as grounds for issuance of injunctive relief. Aplt. App. I, 26-27, ¶¶ 34-35; Aplt. App. I, 33, ¶ 59; Aplt. App. II, 389, 446-49, 464-65. Yet, the district court refused to recognize and enforce that precedent. Aplt. App. XV, 3725-26. The district court's refusal is reversible error.

The doctrine of stare decisis requires lower federal courts "to abide by, or adhere to, decided cases." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). This means that lower federal courts are required to follow the precedential decisions of higher courts on questions of law. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (lower federal courts must follow precedential decisions of higher courts "no matter how misguided the judges of those courts may think it to be"). "[P]recedent … includes not only the narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law." *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1279 (10th Cir. 2001) (citation omitted). *See generally* Bryan A. Garner et al., The Law of Judicial Precedent, 27-37 (2016) ("Lower courts must strictly follow vertical precedents—decisions of higher courts in the same jurisdiction.").

C. The District Court Cannot Twist and Contort and Distort—and Judicially Rewrite—Federal Statutes and Utah State Statutes in Order to "Force" Public Law 280 to Apply to the Becker Lawsuit.

To justify an end-run around the *Ute Tribe v. Utah* precedent, the district court judge sought to identify an act of Congress that conferred jurisdiction on the state of Utah. *See, e.g., California v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987) (state jurisdiction may be extended to Indian country only where "Congress has expressly so provided.") *see generally* Cohen's Handbook §7.03[1][a][ii], p. 608.

Since neither Becker nor Judge Lawrence had located such an act of Congress,[41] the district court decided to cast about, *sua sponte*, for a Congressional act that would do the job. Finding nothing other than Public Law 280 (currently codified, as pertinent here, at 25 U.S.C. §§ 1321-1326), the district court set about to twist and bend and jerry-rig PL 280 to make it do. Instead of reading 25 U.S.C. §§ 1321-1326 *in pari material*, the district court cherry-picked select language from select sections, deliberately ignored other sections, and then judicially *rewrote* 25 U.S.C. § 1326 to insert language never enacted by Congress—language that would, in fact, effectively nullify Congress' 1968 amendment of Public Law 280.[42] The district court then undertook the same twisting and bending and jerry-rigging of the Utah analogue to PL 280, Utah Code §§ 9-9-201–9-9-209.[43] It must be emphasized that in *Lawrence* the Tenth Circuit Panel cautioned that "sovereign immunity and a court's lack of subject-matter jurisdiction are different animals." *Lawrence*, 875 F.3d at 545. Yet, while the district court paid lip service to the Tenth Circuit's

[41] Aplt. App. VIII, 1637 (Lawrence Opp. Mem.); Aplt. App. IX 1643 (Becker Opp. Mem.).

[42] Congress amended PL 280 in 1968 to explicitly make tribal consent "a condition to further state assumptions of jurisdiction" under PL 280. *Bryan v. Itasca Cty.*, 426 U.S. 373, 386 (1976).

[43] Attached to the Opening Brief are the original Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588-590; the 1968 amendment, Civil Rights Act of 1968, 82 Stat. 78; the current codification of the applicable provisions of PL 280, 25 U.S.C. §§ 1321-1326; and UTAH CODE ANN. §§ 9-9-201-9-9-209.

caveat, the district court plainly does not understand the difference between sovereign immunity and subject-matter jurisdiction (or chose deliberately to ignore the distinction).[44] The district court "judicially rewrote" 25 U.S.C. § 1326 to insert an alternative method of providing the tribal consent that is required by § 1326, as that statute was written by Congress. Under the district court's judicial amendment of § 1326, tribal consent can now be supplied through a tribal government's waiver of sovereign immunity; in other words, the district court has judicially rewritten § 1326 to insert the language highlighted in yellow:

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

[44] The Supreme Court has emphasized that the issue of subject matter jurisdiction is "wholly distinct" from the defense of sovereign immunity. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-87 n.4 (1991); *see also United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 923-24 (9th Cir. 2009) (discussing the relationship between sovereign immunity and subject matter jurisdiction and commenting on the court's "imprecision in our language" in mistakenly treating "jurisdiction and sovereign immunity as though they were the same inquiry," noting that "sovereign immunity and subject matter jurisdiction present distinct issues."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) ("To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction."); *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1574-75 (Fed. Cir. 1995) ("The inquiry … is not whether there is one, jurisdiction, or the other, a waiver of immunity, but whether there is both….").

> 20 per centum of such enrolled adults.

The district court's analysis of PL 280 and the Utah analogue is patently untenable on many, many grounds.

First, PL 280 does not vest states with jurisdiction over Indian *tribes*. As explained by the United States Supreme Court, "there is notably absent" from the statutory text of PL 280 "any conferral of state jurisdiction over the tribes themselves." *Bryan v. Itasca Cty.*, 426 U.S. 373, 388-89 (1976).[45] The Court went on to note that the language under 28 U.S.C. § 1360(c)—and 25 U.S.C. § 1322(c)—"providing for the 'full force and effect' of any tribal ordinances or customs 'heretofore or hereafter adopted by an Indian tribe' … contemplates the continuing vitality of tribal government." *Id.*

> [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than " 'private, voluntary organizations.' "

Id. at 388 (citation and quotation omitted)

Secondly, contrary to the district court's ruling here, the Supreme Court has

[45] The phrase "Indian tribe, band or community" is not used in the subsections that grant Congressional consent to state assumption of jurisdiction over individual Indians, 25 U.S.C. §§ 1321(a) and 1322(a). However, the phrase "Indian tribe, band or community" is used in the subsections that expressly restrict the scope of jurisdiction that states can assume under PL 280, 25 U.S.C. § 1321(b) and 25 U.S.C. § 1322(b) and (c).

expressly ruled that federal law does not permit a tribe's governing body to unilaterally confer state jurisdiction over Indians within Indian country by the adoption of a tribal resolution. *Kennerly v. District Court*, 400 U.S. 423, 426-29 (1971) (holding that the Blackfeet Tribe's consent to state jurisdiction through passage of a tribal resolution was a nullity because it circumvented the "special election" requirement of 25 U.S.C. § 1326).

Third, a lower federal district court cannot judicially rewrite federal statutes as the district court did here; judicial amendment of statutes violates constitutional separation of powers. U.S. CONST. art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress") (emphasis added); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says ….When the words of a statute are unambiguous, then the first canon [of statutory interpretation] is also the last: 'judicial inquiry is complete.'") (quotation omitted)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in this the absence of clear indications of legislative intent."); *Lindsay v. Thiokol Corp.*, 112 F.3d 1068, 1070 (10th Cir. 1997) ("The exceptions to our obligation to interpret a statute according to its plain language are 'few and far between.'") (quotation omitted)).

Fourth, federal courts cannot judicially rewrite *state* statutes as the district court did here; doing so violates both federalism *and* separation of powers. As noted *supra*, in footnote 42, Congress amended PL 280 in 1968 in order to make any future assumptions of state jurisdiction over Indians within Indian county conditioned upon the consent of a tribe's membership as determined through a federally-supervised "special election held for that purpose." 25 U.S.C. § 1326. *See Bryan v. Itasca Cty.*, 426 U.S. at 486. Cohen's Handbook of Federal Indian Law, § 6:04[3][a], at 538. Cohen's notes that:

> Only one state acceptance has occurred since the [1968] amendment, and no tribes in that state have consented to the state's jurisdiction.

Id. That state is Utah. As noted in Cohen's Handbook:

> Utah has a post-1968 statute accepting jurisdiction *where tribes consent*. Utah Code §§ 9-9-201-9-9-213. No tribe has consented.

Id., n.47. (emphasis added) The Utah state statutes faithfully tract the requirements of the 1968 amendments to PL 280. However, the district court judge "judicially rewrote" Section 9-9-202 of the Utah Code in the same way that he "judicially rewrote" 25 U.S.C. § 1326, that is, to provide that tribal consent can now be supplied through a tribal government's waiver of sovereign immunity. Think about this: a federal district court in Utah has undertaken to judicially rewrite the Utah *state* statute by inserting the highlighted language noted below, so that Utah Code § 9-9-202 now reads:

> State jurisdiction acquired … pursuant to this chapter … shall be applicable in Indian country only where (*i*) an Indian tribe has waived sovereign immunity, or (*ii*) the enrolled Indians residing with the affected area of the Indian country accept state jurisdiction … by a majority vote of the adult Indians voting at a special election held for that purpose.

As he did with the federal statutes, the district judge refused to read the state statutes *in pari material*, and instead cherry-picked select language from select sections while deliberately ignoring other sections. As an example, the district court rationalized that the tribal resolution approving Mr. Becker's IC Agreement was a resolution that *implicitly* cedes jurisdiction to the state of Utah within the meaning of Utah Code § 9-9-206.[46] That is impossible, however, because Section 9-9-203 makes clear that a tribal resolution within the meaning of the state code is:

> … a resolution signed by the majority of any tribe, tribal council, or other governing body duly recognized by the Bureau of Indian Affairs of any tribe, community, band or group in the state *certifying the results of a special election expressly ceding criminal or civil jurisdiction of the Indian tribe … to the state of Utah within the limits authorized by federal law ….*

Utah Code § 9-9-203(2) (emphasis added). The tribal resolution that approved Mr. Becker's employment contract does none of the things specified under § 9-9-203(2). Aplt. App. V, 852.

Fifth, notwithstanding the enactment of Utah Code §§ 9-9-201 *et seq.*, the citizens of Utah have not amended the state constitution to repeal the disclaimer of

[46] Mem. Decision and Order, Aplt. App. XV, 3724-25, n.11.

jurisdiction contained in the constitution. UTAH CONST., art. III, § 2. The Supreme Court has held that, "if under state law a constitutional amendment is required" to remove a legal impediment to the state assumption of jurisdiction over Indian country under PL 280, then "that [state] procedure must—as a matter of state law—be followed."[47] In Utah, the state constitution can be amended only through the process specified under Article XXIII of the state constitution. *Proulx v. Salt Lake City Recorder*, 297 P.3d 573 (Utah 2013); *Lee v. State*, 367 P.2d 861 (Utah 1962); *White v. Welling*, 57 P.2d 703 (Utah 1936). Hence, in Utah the legal impediment to state assumption of jurisdiction over Indian country continues in force and effect notwithstanding the enactment of Utah Code §§ 9-9-201 *et seq*. It is axiomatic that a "constitution overrides a statute." Benjamin N. Cardozo, The Nature of the Judicial Process, 14 (1921); *see also, e.g. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it").

Finally, the judicial precedent cited by the district court is readily distinguished. In particular, *C&L Enter's, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U. S. 411 (2001), is inapposite and thus not authoritative. In contrast to Mr. Becker's claims here, the claim against the Potawatomi Tribe in *C&L* did not

[47] *Wash. v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 493 (1979).

arise within Indian country, and did not involve real property or other tribal assets held by the federal government in trust for the Tribe. Indeed, the *C&L* Court emphasized these facts by noting that the property in question "is not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe." *Id.* at 415. Because the claim arose *off*-reservation, the state court suit in *C&L* did not violate federal law. To the contrary, the state court's jurisdiction over the *C&L* suit was fully consistent with the principle that "[a]bsent express federal law to the contrary," an Indian tribe that undertakes activity *outside* of its reservation boundaries is generally subject to state jurisdiction and the "nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148-49 (1973). Here, in contrast to the facts in *C&L*, it is undisputed that Mr. Becker was employed by the Tribe *inside* the Uintah and Ouray Reservation, and it was Becker's job to manage the Tribe's *on-reservation* oil/gas minerals—tribal assets that *are* held in trust by the United States for the Tribe. Because the facts in *Becker* are 180 degrees the opposite of the facts in *C&L*, the holding in *C&L* is inapposite and does not support a finding of state court jurisdiction over the *Becker* suit.[48]

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

D. The Ute Tribe Had No Contacts With the State of Utah Related to the Becker Contract.

The state of Utah's jurisdiction over the *Becker* suit violates constitutional due process. Becker, a resident of the State of Colorado, solicited employment with the Tribe from his home in Colorado, and Becker's job duties consisted of managing the development of the Tribe's on-reservation oil and gas minerals. At no time did the Ute Tribe intentionally invoke, or benefit from, the protection of Utah state law in relation to Becker's on-reservation employment. *J. McIntyre Machinery*, 564 U.S. at 879-87.[49] Therefore, state jurisdiction over the *Becker* suit offends traditional notions of fair play and substantial justice. *Id*. at 886-87.

II. THE DISTRICT COURT IS BOUND BY THE TRIBAL COURT'S RULING THAT THE BECKER CONTRACT IS ILLEGAL UNDER THE TRIBE'S CONSTITUTION AND CORPORATE CHARTER; ALTERNATIVELY, THE UNDISPUTED MATERIAL FACTS ESTABLISH THE ILLEGALITY OF THE BECKER CONTRACT UNDER FEDERAL AND TRIBAL LAW.

If the Tenth Circuit concludes that federal law bars the Utah state court from exercising jurisdiction over the *Becker* state suit, then there is no need for the Tenth Circuit to address the legality of the Becker contract in this appeal (since Mr. Becker

[49] This issue was raised under the Tribe's motions for interim and permanent injunctive relief and supported by the evidence submitted with those motions. Aplt. App. II, 374-75, ¶¶ 9-12; 456, ¶ 21; Aplt. App. V, 848-51; Aplt. App. VII, 1473; Aplt. App. X, 2203-04._

filed no counterclaim in this case, 2:16-cv-579).[50] Therefore, in this appeal the Tribe will condense its discussion of the contract's legality under federal and tribal law, and the district court's errors in addressing that question. The Tribe will address the issue more comprehensively in the Tribe's consolidated brief in the companion appeals, nos. 18-4030 and 4072, which raise the question of tribal court exhaustion. With the Court's permission, the Tribe asks that the more comprehensive treatment of this issue in its briefs in appeal nos. 18-4030 and 4072 be incorporated by reference and considered by the Panel, if necessary, in this appeal.

A. The District Court Has No Authority to "Reverse" the Tribal Court

The Ute Indian Tribal Court has already determined that the Becker contract is illegal under federal and tribal law. Aplt. App. XV, 3838. The Tribe concedes

[50] The Utah state court ruled that a waiver of sovereign immunity is sufficient, by itself, to vest the state court with jurisdiction over Becker's claims against the Tribe. Aplt. App. V, 909 ("The Tribe argues … that only the tribal court has jurisdiction here. The Becker Contract, however, plainly states otherwise."). Because of that ruling, the Tribe in this case filed an alternative motion for interim and permanent injunctive relief based on the illegality of the Becker contract under federal and tribal law. Aplt. App. II, 394, Dkt. 53. The motion was filed in the alternative to the Tribe's motions for interim and permanent injunctive relief based on federal preemption, infringement on tribal sovereignty, and other federal law barriers to the state court suit, Dkt. 52. Aplt. App. II, 366-67 (The Tribe is "filing two motions for summary judgment on the substantive merits (in the alternative)"); Aplt. App. II, 395, Dkt. 53 ("As a separate and alternative ground for entry of summary judgment and injunctive relief, the Tribe contends the Becker [contract] is void *ab initio* under both federal law and Ute Indian tribal law.").

that the tribal court's determination of federal law is not binding on the federal courts; however, the tribal court's determination of tribal law *is* binding on federal and state courts. Just as federal courts are the arbiters of federal law, and state courts are the arbiters of state law, tribal courts are the arbiters of tribal law. *Talton v. Mayes*, 163 U.S. 376, 385 (1899) (tribal courts are the arbiters of tribal laws that are not "repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States."). Because the Ute Tribe's constitution and corporate charter were both enacted pursuant to federal law (the Indian Reorganization Act) and were approved by the Secretary of the Interior (Aplt. App. XV 835, 841), neither of these organic tribal laws is "repugnant" to federal law. Consequently, the federal district court was bound by the tribal court's ruling that the Becker contract is void *ab initio* under the Tribe's constitution and corporate charter. The district court had no authority to effectively overrule that determination:

> [F]ederal courts are not the general appellate body for tribal courts. As the Supreme Court has instructed, the federal policies promoting tribal self-government and self-determination instruct us to provide great deference to tribal court systems, their practices, and procedures. *See, e.g., Nat'l Farmers*, 471 U.S. at 856.

Burrell v. Armijo, 456 F.3d 1159, 1173 (10th Cir. 2006). Further, the Tribe maintains that the undisputed material facts establish unequivocally that the Becker contract is illegal and hence unenforceable under both federal and tribal law.

B. Federal and Tribal Restraints on the Alienation of Tribal Property

The common law restraints on the alienation of Indian property date back 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.[51]

These proscriptions came to be known as Indian "non-intercourse" and Indian property "non-alienation" laws. After the United States gained its independence from Britain, the Indian Nonintercourse Act of 1790 (NIA) was one of the first acts enacted by Congress. Now codified at 25 U.S.C. § 177, the NIA states:

> 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*

[51] Aplt. App. V 916-21.

interest therein held by the United States in trust for such Indian." (emphasis added) 25 U.S.C. § 202. The NIA also 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 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. Without federal approval, there is no enforceable agreement under IMDA. *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459-60 (9th Cir. 1986).

Mr. Becker admits that his Independent Contractor Agreement was never federally approved. Aplt. App. V 878.

In addition to federal law restraints, the Ute Indian Tribe's constitution and federal corporate charter contain additional 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 . . . ." (underscore 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….

Aplt. App. V 825.

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." Aplt. App. V 826. Thus, the Tribe's constitution incorporates by reference the terms and conditions contained in the Tribe's corporate charter. The Tribe's federally-approved 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). Aplt. App. V 838. 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). Aplt. App. V 839.

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). Aplt. App. V 839.

It is important for the Tenth Circuit to understand the intertwining of federal and tribal law on this issue. The Indian Mineral Development Act expressly incorporates the limitations that a tribal government is subject to under the terms of the tribe's constitution and corporate charter. 25 U.S.C. § 2102(a) states:

> Any Indian tribe, *subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter*, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Minerals Agreement") providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral

> resources.[52] (emphasis added)

When a contract with an Indian tribe or individual Indian requires federal approval, *no portion of the unapproved contract is enforceable*:

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

Smith v. McCullough, 270 U.S. 456, 463, 465 (1926) ("it was beyond the power [of the Indian allottee], on his own volition, to grant" the mineral lease in dispute).[53]

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[52] A copy of IMDA, 25 U.S.C. §§ 2101-2109 is included with the attachments to the Opening Brief.

[53] *See also Johnson v. M'Intosh*, 8 Wheat 543, 573-74 (1823) (where the requisite federal approval was never obtained and the Indians "annul[ed]" the agreement, "we know of no tribunal" that can enforce the [annulled] agreement); *Ewert v. Bluejacket*, 259 U.S. 129, 137 (1922) (the illegal alienation of Indian property confers no enforceable rights); *Wells Fargo Bank v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 698-700 (7th Cir. 2011) (trust indenture and waiver of sovereign immunity contained therein were void *ab initio* for lack of federal approval); *Catskill Dev., L.L.C. v. Park Place Entm't, Corp.*, 547 F.3d 115, 127-30 (2d Cir. 2008) (contracts with Mohawk Indian Tribe were void *ab initio* for lack of federal approval); *Black Hills Inst. of Geological Research v. S. D. Sch. of Mines and Tech.*, 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.

C. The Tribe's Evidence on the Contract's Illegality

The Tribe's evidence on the illegality of the Becker contract included, *inter alia*, the following:

1) The written report and testimony of Michael Wozniak, Esq., an oil-and-gas attorney. Mr. Wozniak opined that Becker's contract granted Becker "the right to assert a claim against the working interest of the Tribe" in the oil/gas assets assigned to Ute Energy LLC"—a fact that made the contract subject to federal approval under the IMDA, 25 U.S.C. § 2102(a). Aplt. App. VI 1168-76 (report); Aplt. App. XI 2472-92 (testimony); Aplt. App. XI, 2342-43 (demonstrative exhibit introduced at the 2/28/2018 hearing).

2) The written report and testimony of Pilar Thomas, Esq., former Deputy Solicitor for Indian Affairs at the U. S. Department of Interior, and former Deputy Director of the Office of Indian Energy Policy and Programs at the U. S. Department of Energy. Ms. Thomas opined that the Becker Contract required federal approval under both the Indian Nonintercourse Act, 25 U.S.C. § 177, and IMDA, 25 U.S.C. § 2102(a), and further opined that the Tribal Business Committee lacked authority under the Tribe's constitution and corporate charter to enter into the Becker contract without federal approval. Aplt. App. VI, 1219-28 (report); Aplt. App. XI, 2492-2514

3) Kevin Gambrell, former Regional Director of the Federal Indian Minerals Office, U.S. Department of Interior. Mr. Gambrell testified that the two-percent "net revenue interest" under the Becker contract granted Becker "a 2 percent working interest in the tribal interest" in the Tribe's EDAs that were assigned to Ute Energy LLC, making the Becker contract subject to federal approval. Aplt. App. VII, 1276-1306 (deposition testimony).

4) Robert J. Miller, professor of law at the Sandra Day O'Connor College of Law at Arizona State University. Mr. Miller testified that the Becker contract is void *ab initio* for lack of federal approval, both under federal law and under the restrictions contained in the Tribe's constitution and corporate charter. Aplt. App. VI, 1362-1402 (deposition testimony).

5) Alexander Skibine, professor of law at the University of Utah S. J. Quinney College of Law. Mr. Skibine testified that the Becker contract required federal approval under 25 U.S.C. § 2102(a), or alternatively, 25 U.S.C. § 177. Aplt. App. VI, 1317-53 (deposition testimony).

D. The District Court's Multiple Errors in Ruling on the Issue

Like the district court's analysis of state court jurisdiction under Issue I above, the district court's analysis of the legality of the Becker contract under federal and tribal law is patently untenable on many, many grounds. Moreover, in addressing this issue, the district court abandoned the role of an impartial jurist and took on the

mantle of an advocate for the Tribe's adversaries, advancing arguments for the first time in the memorandum decision that neither Becker nor Judge Lawrence had advanced—and for which neither the Tribe nor the Tribe's expert witnesses were afforded notice and a proper opportunity to respond to. Instead of focusing on the Becker contract itself and conducting a straight-forward analysis of the application of the NIA, 25 U.S.C. §§ 177, 194 and 202, and IMDA, 25 U.S.C. § 2102, the district court undertook an elaborate 12-page analysis of original and amended operating agreements of Ute Energy LLC.[54] The district judge unabashedly bolstered his conclusions by taking judicial notice *sua sponte*—and for the first time in the memorandum decision—to materials outside of the record.[55] It is axiomatic that a court may not judicially notice materials for the truth of the matters asserted. *See Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006). But that limitation did not faze the district court; indeed, the court employed judicial notice as a "springboard" to go beyond merely assuming the truth of the matters asserted to also indulging in sheer conjecture and speculation based on the matters judicially noticed. For example, the district judge recited a number of allegations that are contained in a complaint that has been filed in a wholly unrelated lawsuit to which the Tribe is not a party; not only did the district judge assume the truth of the unproven

[54] Aplt. App. XV 3761-73, Mem. Dec., 49-61.

[55] Aplt. App. XV 3755 n.33; 3761 n.37, Mem. Dec. 43 n.33; 49 n.37.

allegations in the unrelated complaint, but the judge then used the allegations as a springboard for speculating that "the tribal parties' assertions that the [Ute Energy LLC] oil and gas ventures … were a failure" were unfounded.[56] (Parenthetically, the Tribe never asserted that Ute Energy LLC was a "failure.") At another point, the district judge took judicial notice that the Tribe's former attorneys were from "an experienced law firm;" the district judge then speculated that the law firm must have "fully advised" the Tribe of the consequences of entering into the Ute Energy LLC transactions.[57]

Parenthetically, of course, it was *not* the Ute Energy LLC transactions that were before the district court for analysis, but rather, *the Becker Independent Contractor Agreement*, which was *not* a part of the Ute Energy LLC transactions.

Finally, the district court erred in rejecting the binding precedent of *United States v. Noble*, 237 U.S. 74, 80 (1915), which the Tenth Circuit cited with approval in *Becker*, 868 F.3d at 1204. The Supreme Court's reasoning in *Noble* is dispositive here. *Noble* expressly rejected the very conclusion that the district court adopted in this case, that is, that the net revenues payable to Becker were simply "sums of money," and not restricted trust property subject to protection. *Id*. The district court erred in not abiding by the holding and rationale of *Noble*.

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[56] Aplt. App. XV, 3755 n.33.

[57] Aplt. App. XV, 3761 n.37.

III. THE DISTRICT COURT ERRED IN RELYING ON A JULY 2007 LETTER FROM THE BIA TO THE UTE TRIBE AND IN NOT GRANTING THE TRIBE'S MOTION TO EXCLUDE THE 2007 LETTER FROM EVIDENCE.

The district court erred in denying the Tribe's motion in limine[58] to exclude a letter dated 7/2/2007 from the Bureau of Indian Affairs to the Tribe, and in relying upon that letter as support for its ruling.[59] The Tribe moved for exclusion of the letter under Evidence Rules 402, 403, 802, 901 and 902. The letter, relating to federal approval of the second amended operating agreement for Ute Energy LLC, has no bearing on the separate and independent issue of whether the Becker contract required federal approval.[60] Even the Utah state court had granted the Tribe's motion to exclude the letter from evidence.[61]

IV. THE TENTH CIRCUIT SHOULD DIRECT ENTRY OF A PERMANENT INJUNCTION BASED ON THE UNDISPUTED EVIDENCE IN THE RECORD SUBMITTED AS PART OF THE TRIBE'S SUMMARY JUDGMENT MOTIONS.

It is well established that appellate review in an interlocutory injunction appeal "properly extends to all matters inextricably bound up with the injunction decision … [and] may extend further to allow disposition of all matters appropriately raised by the record, perhaps leading to final disposition of the case." 16 Fed. Prac.

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[58] Aplt. App. X, 2109 (Dkt. 97).

[59] Aplt. App. XV, 3767-68 (Dkt. 136).

[60] Aplt. App. X, 2120-21.

[61] Aplt. App. XV, 3830.

& Proc. Juris. § 3921.1 (3d ed). *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272-74 (11th Cir. 2005) (and cases cited therein); *Amandola v. Town of Babylon*, 251 F.3d 339, 343-44 (2d Cir. 2001) (on appeal from denial of a preliminary injunction, the court reversed the denial and directed the district court to enter a permanent injunction for the plaintiffs). The record on appeal includes all of the pleadings related to the Tribe's pending summary judgment motions and the evidence that was submitted in support of the Tribe's summary judgment motions.[62] In view of the district court's open rejection of binding Supreme Court and Tenth Circuit precedents—and the district court's open advocacy on behalf of the defendants/appellees—the Tribe believes that a remand to the district court for a ruling on the Tribe's summary judgment motions will be counter-productive. Insofar as there is no genuine dispute as to any material fact, a remand is not necessary. Accordingly, the Tribe respectfully asks the Tenth Circuit to rule on the merits of the Tribe's summary judgment motions seeking entry of a permanent injunction.

[62] The Tribe's summary judgment motions (Dkt. Nos. 52, 53 and 56), are found at Aplt. App. II, 361, 394 and 440; the Tribe's testimonial and documentary evidence in support of the motions (Dkt. No. 55), is found at Aplt. App. V, VI and VII. Judge Lawrence's opposition memorandum (Dkt. No. 94), is found at Aplt. App. VIII, 1637. Mr. Becker's opposition memorandum (Dkt. No. 95), is found at Aplt. App. IX. The Tribe's reply (Dkt. No. 101) is found at Aplt. App. X 2189.

V. THE DISTRICT COURT ERRED IN DENYING THE TRIBE'S MOTION TO SANCTION MR. BECKER AND HIS COUNSEL FOR THEIR BASELESS ATTACKS UPON THE INTEGRITY OF THE TRIBE AND THE UTE INDIAN TRIBAL COURT.

On remand, Mr. Becker, through counsel, Attorney David Isom, made numerous baseless and unsupported statements that disparaged the integrity of both the Tribal plaintiffs and the Ute Indian Tribal Court. In some instances, the statements are suggestive of blatant racist stereotypes. The Tribe catalogued those statements and filed a motion asking the court to sanction Becker and his counsel under the applicable Rules of Professional Conduct. Aplt. App. XIII, 2845, Dkt. 134. The district court has never ruled on the Tribe's motion. The Tenth Circuit reviews a trial court's action on a motion for sanctions for rules violations for an abuse of discretion. *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1169 (10th Cir. 2003). Certainly it is an abuse of discretion for a district court to take no action on a party's motion for sanctions.

CONCLUSION

Based on the facts and authorities cited herein, the Tribe respectfully asks the Tenth Circuit to reverse the district court's 4/30/3018 Memorandum Decision and Order in its entirety. The Tribe further asks the Tenth Circuit to direct the district court to enter a permanent injunction in the Tribe's favor based on the undisputed facts set forth in the Tribe's summary judgment motions and the *Ute Tribe v. Utah* and other Supreme Court and Tenth Circuit authorities cited in the Tribe's brief.

The Tenth Circuit should also address the district court's failure to rule on the Tribe's motion for sanctions.

STATEMENT ON ORAL ARGUMENT

The Tribe respectfully requests oral argument. The Tribe submits that oral argument should be granted any time a district court enters an 83-page opinion that both (*i*) fails to adhere to existing Supreme Court and Tenth Circuit precedents, and (*ii*) attempts to vitiate, wholesale, an Indian tribe's right under federal law to be free from state infringements on its tribal sovereignty.

Respectfully submitted this 11th day of June, 2018.

FREDERICKS PEEBLES & MORGAN LLP

By: /s/ *Frances C. Bassett*

Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
Thomasina Real Bird
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839
Email Address: fbassett@ndnlaw.com
tfredericks@ndnlaw.com
jpatterson@ndnlaw.com
trealbird@ndnlaw.com

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 12,838 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 to obtain the count and it is Microsoft Office Word 2013.

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

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*
Frances C. Bassett

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 06/11/18, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2018, a copy of this **APPELLANTS' OPENING BRIEF**, was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

Brent M. Johnson
Nancy J. Sylvester
Keisa Williams
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

I hereby certify that on the 13th day of June, 2018, the original and six (6) copies of the foregoing **APPELLANTS' OPENING BRIEF**, was delivered by courier to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

By: /s/ *Debra A. Foulk*
Assistant to Frances C. Bassett