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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, Plaintiff, v. GREGORY D. MCKEE; T & L LIVESTOCK, INC.; MCKEE FARMS, INC.; AND GM FERTILIZER, INC., Defendants.	**UTE INDIAN TRIBE'S VERIFIED MOTION TO RECUSE** Civil Case No. 2:18-cv-00314-CW Judge Clark Waddoups

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Pursuant to 28 U.S.C. §§ 144 and 455(a), the Ute Indian Tribe moves to recuse the assigned judge, Hon. Clark Waddoups, from this case. The motion is both timely and sufficiently supported by an affidavit.[1] Pursuant to 28 U.S.C. § 144, the Tribe requests that Judge Waddoups proceed no further on this motion or in this action, and that another district court judge be assigned to hear and decide both this motion and all further proceedings in this case.

I. INTRODUCTION – RELIEF SOUGHT

This case involves the theft of water belonging to the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe" or "Ute Tribe") from the canals and irrigation ditches of the Ute Indian Irrigation Project ("UIIP"), a property that the United States holds in trust for the benefit of the Tribe in the Uintah Basin.[2] To stop the ongoing theft of its tribal waters and to recover damages for the stolen water, the Tribe instituted a lawsuit in the Ute Indian Tribal Court against Defendants Gregory McKee and three corporations through which McKee operates a farm and cattle feedlot on fee land within the exterior boundaries of the Tribe's Reservation ("the McKee defendants"). Following a bench trial, on August 3, 2015, the Ute Indian Tribal Court entered findings of fact and conclusions of law, and a monetary judgment in the Tribe's favor in the amount of $149,745.73. To date, the judgment remains unsatisfied. The Tribe filed this federal lawsuit to recognize, register, and enforce the 2015 judgment. The case necessarily centers on the sovereign

[1] App. 1-18, Declaration of Frances C. Bassett, Esq. The declaration and other evidentiary materials are contained in a separate Appendix; references are to page numbers in the "App."

[2] A 1906 Act of Congress provides for the Secretary of Interior to hold title to the Tribe's water rights and the UIIP in trust for the Tribe. Pub. L. 59-258, 34 Stat. 325, 375.

authority of the Ute Tribe and the legitimacy and enforceability of the judgment issued by the Ute Indian Tribal Court. The key legal issues before the federal court will be (*i*) whether the Ute Indian Tribal Court had jurisdiction over the tribal court suit against the McKee Defendants; (*ii*) whether the Tribal Court provided the McKee Defendants with due process of law; and (*iii*) whether the federal court will grant comity to the tribal court judgment.[3] As discussed herein, no dispassionate observer would believe that Judge Waddoups is capable of presiding over these issues with neutrality and impartially.

In every case in which the Ute Tribe has appeared as a litigant before Judge Waddoups, the Judge has demonstrated bias against the Tribe and hostility towards both the doctrine of Indian tribal sovereignty and the federal policy of supporting tribal self-governance.[4] Judge Waddoups' bias against the Ute Tribe and his hostility towards the tenets of Federal Indian law and policy is manifested through his actions and his judicial rulings.[5] In every case in which the Tribe has appeared before him, Judge Waddoups has ruled against the Tribe.[6] Further, on each occasion, Judge Waddoups has abandoned the role of an impartial jurist and has taken on the mantle of an advocate for the Tribe's adversaries, advancing arguments against the Tribe and citing legal authorities that the Tribe's opponents themselves have not advanced or cited.[7] After reviewing both Judge Waddoups' rulings and transcripts of the Tribe's hearings before

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[3] *Burrell v. Armijo*, 456 F.3d 1159, 1167-68, 1171-72 (10th Cir. 2006).

[4] App. 2-18. Declaration of Attorney Bassett.

[5] *Id*.

[6] *Id*. at 2, ¶ 5.

[7] *Id*. at 2-18.

him, any dispassionate observer would be dismayed at the extraordinary lengths to which the Judge Waddoups is willing to go in order to rule against the Tribe. In past cases, Judge Waddoups has gone so far as:

- to disregard and refuse to follow controlling Tenth Circuit and United States Supreme Court precedents;[8]
- to judicially "rewrite" state and federal statutes in order to bolster his rulings against the Tribe—an act of judicial activism that contravenes both constitutional separation of powers and the dictates of federalism;[9]
- to *sua sponte* take judicial notice of matters that are not properly subject to judicial notice and to improperly notice materials not properly subject to judicial notice *for the truth of the matter asserted*;[10] and
- to *sua sponte* order the Ute Tribe to show cause why the Tribe should not be sanctioned for simply exercising the Tribe's due process right to seek reconsideration of one of the Judge's judicial rulings against the Tribe.[11]

In short, Judge Waddoups has engaged in a pattern and practice of discriminatory actions and rulings against the Tribe to such a degree that any reasonable observer would conclude that Judge Waddoups is heavily biased against both the Ute Tribe and the fundamental tenets of Federal Indian law and policy. The purpose of recusal is to preserve the actual and the *apparent* impartiality of the federal courts. American citizens, particularly members of federally recognized Indian tribes, are entitled to, and have a great need for, impartial federal judges who are capable of fulfilling their duty to uphold

[8] App. 6, ¶ 25; 8, ¶ 29; 9-10, ¶¶ 33-37; 11, ¶ 44, Declaration of Attorney Bassett.
[9] *Id*. at 10-11, ¶¶ 40-42.
[10] *Id.* at 14-15, ¶¶ 57-64; *see Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006).
[11] *Id*. at 4-5, ¶¶ 10-14.

and enforce federal law and policy with essential neutrality.

Separately, and alternatively, Judge Waddoups' unabashedly disparate treatment of the Ute Tribe violates the Tribe's right to equal protection under the Fifth Amendment—a violation that constitutes an independent ground for Judge Waddoups' recusal. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (invalidating racial segregation in the District of Columbia public schools under the Fifth Amendment),*supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955)); *U.S. v. Titley*, 770 F.3d 1357, 1359 (10th Cir. 2014) ("The Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause provide generally the same equal protection … against federal and state government interference, respectively.").

II. ARGUMENT and SUPPORTING FACTS

A. JUDGE WADDOUPS SHOULD NOT HEAR OR PRESIDE OVER THIS CASE BECAUSE A REASONABLE PERSON WITH KNOWLEDGE OF ALL THE CIRCUMSTANCES WOULD CONCLUDE THAT JUDGE WADDOUPS HOLDS A PERSONAL BIAS OR HOSTILITY AGAINST BOTH THE UTE TRIBE AND THE TENETS OF FEDERAL INDIAN LAW AND POLICY TO SUCH A DEGREE OF ANTAGONISM THAT A FAIR JUDGMENT APPEARS IMPOSSIBLE.

The law on judicial disqualification is relatively simple, as is the application of that law to the facts here. Litigants have a fundamental due process right to appear before a judge who, from an *objective* viewpoint, is not biased. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3541 (3d ed.). The issue in a motion to recuse is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *Caperton v. A.T. Massey Coal, Co., Inc.*,

556 U.S. 868, 872 (2009). *See also Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 150, (1968) ("any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"); *ABA Model Code of Judicial Conduct* Canon 1 ("A judge . . . shall avoid impropriety and the appearance of impropriety in all of the judge's activities."); *id.* at cmt. 1 ("Public Confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.").

The requirement that a judge be recused if, from an objective perspective, the risk of bias is too great, is grounded in due process of law, and is codified in two federal statutes, 28 U.S.C. § 144 and 28 U.S.C. § 455. Section 144 of Title 28 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of the adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Section 455(a) of Title 28 states:

> Any justice, judge, or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The Tribe moves to disqualify Judge Waddoups under both of these statutes.

To "promote public confidence in the integrity of the judicial process," Section 455(a) was broadened in 1974 to replace the subjective standard of bias with an objective test. *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988)). "What matters is not the reality of bias or prejudice but its appearance." *Id*. (quoting *Liteky v. United States*, 510 U.S. 540, 548

(1994)). "Given the statutory parameters, we must determine 'whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.'" *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (collecting and comparing cases) (quoting *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992)).

"In applying this objective standard, the initial inquiry is whether a reasonable factual basis exists for questioning the judge's impartiality." *Nichols*, 71 F.3d at 351. Further, the United States Supreme Court has clarified that a party seeking to recuse a judge is not required to present extrajudicial evidence of bias. *Liteky*, 510 U.S. at 554-55. The Court explained in *Liteky* that judicial remarks and opinions may provide a basis for recusal if the remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id*. Here, there is a "reasonable factual basis" for questioning Judge Waddoups' impartiality. *Nichols*, 71 F.3d at 351. Over the past seven years, in every case in which the Tribe has appeared before him, Judge Waddoups has engaged in a pattern and practice of conduct that would lead any reasonable person to conclude that Judge Waddoups holds a deep-seated hostility against both the Ute Tribe and Federal Indian law and policy. Further, for purposes of equal protection analysis, the Ute Tribe is a member of a protected class on the basis of race, national origin, and religion. The public record of Judge Waddoups' comments and rulings demonstrates that the Judge has impermissibly discriminated against the Ute Tribe in violation of the Fifth Amendment to the U.S. Constitution. The Tribe's motion to recuse is timely filed, and is supported by the affidavit of the Tribe's undersigned counsel, as well as the established

public record of cases in which the Tribe has appeared before Judge Waddoups.

B. JUDGE WADDOUPS' STATEMENTS AND CONDUCT IN CASES INVOLVING THE UTE TRIBE REVEAL SUCH A HIGH DEGREE OF ANTAGONISM TOWARDS THE TRIBE AND TOWARDS FEDERAL INDIAN LAW AND POLICY THAT A REASONABLE OBSERVER WOULD CONCLUDE THAT JUDGE WADDOUPS' ANTAGONISM MAKES A FAIR JUDGMENT IMPOSSIBLE.

1. Judge Waddoups' Failure to Abide by Federal Law, Precedents, and Policy.

a. Tribal Self-Governance

> The United States Supreme Court has "*consistently guarded the authority of Indian governments over their reservation*," and has held that actions that "*undermine the authority of the tribal courts over Reservation affairs … infringe on the right of the Indians to govern themselves*."[12]

Federal law, policy, and judicial precedents support tribal self-governance, but Judge Waddoups does not. Judge Waddoups' hostility to tribal self-governance is demonstrated, *inter alia*, in his handling of two companion cases, *Ute Tribe v. Lawrence, et. al.*, case number 2:16-cv-00579 ("*Lawrence*"), and *Becker v. Ute Tribe*, case number 2:16-cv-00958 ("*Becke*r"). Lynn D. Becker, the plaintiff in *Becke*r, was employed by the Ute Tribe inside the boundaries of the Uintah and Ouray Reservation for several years. The parties are in litigation, the Tribe suing Becker in the Ute Indian Tribal Court, and Becker suing the Tribe in a Utah state district court. Because the "equitable jurisdiction" under 28 U.S.C. § 1331 has been repeatedly "employed to police the boundaries between state and tribal authority,"[13] the dispute between Becker and the Tribe is also before this federal court in the two above-referenced cases.

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[12] *Williams v. Lee*, 358 U.S. 217, 223 (1959).
[13] *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017).

Long-standing Supreme Court and Tenth Circuit precedent mandates that this federal district court *mus*t stay its hand until the Tribe's suit against Becker in the Ute Indian Tribal Court is completed, i.e., until there has been an "exhaustion" of tribal court remedies.[14] Judge Waddoups, however, has ignored the Supreme Court and Tenth Circuit precedents requiring tribal court exhaustion—*not once but twice*. In September 2016, Judge Waddoups granted Becker a preliminary injunction enjoining the Tribe's suit against him in the Ute Indian Tribal Court. The Tribe immediately appealed and asked the Tenth Circuit to stay Judge Waddoups' injunction. The Tenth Circuit granted the stay on December 30, 2016, finding, *inter alia*, the Tribe had "shown a likelihood of success on the merits."[15] Eight months later, on August 25, 2017, the Tenth Circuit issued a decision reversing Judge Waddoups' preliminary injunction on that same ground, i.e., that Becker had failed to establish a likelihood of success on the merits.[16] Thereafter, Becker filed—and the Tenth Circuit denied—a petition for rehearing and rehearing *en banc*. The Tenth Circuit mandate issued on December 21, 2017. Within five months, however, Judge Waddoups had once again enjoined the Tribal Court suit, once again issuing a *preliminary* injunction against the Tribal Court action, this time doing so (*i*) without even bothering to conduct an evidentiary hearing, and (*ii*) without allowing for the exhaustion of tribal court proceedings. Once again the Tribe has appealed to the Tenth Circuit,

[14] *E.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 15, 17 (1987); *Norton v. Ute Indian Tribe*, 862 F.3d 1236 (10th Cir. 2017).

[15] App. 49-52.

[16] *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 868 F.3d 1199, 1206 (10th Cir. 2017).

appeal no. 18-4072,[17] and is again asking the Tenth Circuit to stay, reverse, and vacate Judge Waddoups' injunction. In addition, this time the Tribe is asking the Tenth Circuit to disqualify Judge Waddoups and to reassign the case to a different district court judge pursuant to the Court's discretionary authority under 28 U.S.C. § 2106.

b. Federal Courts Have No Authority to Decide Issues of Tribal Law

> "*[N]either, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations*."[18]

Federal courts have no legal authority to decide issues of tribal law.[19] Judge Waddoups, however, ignores this restraint on his judicial power. In the litigation between Becker and the Tribe, the Ute Indian Tribal Court granted partial summary judgment in the Tribe's favor, finding as a matter of law that (*i*) the contract between the Tribe and Becker was illegal under tribal law and (*ii*) that there was no valid waiver of the Tribe's sovereign immunity under tribal law.[20] Ignoring the federal law restraints on his judicial

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[17] The Tribe asks the Court to take judicial notice of the record before the Tenth Circuit in appeal numbers 18-4013, 18-4030, and 18-4072, scheduled for oral argument on November 14, 2018. When a party asks a court to take judicial notice of adjudicative facts and supplies the necessary information, Federal Rule of Evidence 201 "requires the court to comply with the request." *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997).

[18] *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 135 (10th Cir. 1959).

[19] *Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding that interpretation of tribal laws is "solely a matter within the jurisdiction of the [tribal] Courts" of the Cherokee Nation."); *Wheeler v. United States*, 811 F.2d 549, 551 (10th Cir. 1987) ("[T]he Supreme Court has uniformly recognized that one of the fundamental aspects of tribal existence is the right to self-government."); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004) (we "defer to the tribal courts' interpretation" of tribal law."); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("[F]ederal courts may not readjudicate questions – whether of federal, state or tribal law - already resolved in tribal court[.]"); *Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 68 (2nd Cir. 1997) ("Plaintiffs invite us to [interpret tribal law and] enter into this interpretative thicket. We decline to do so. These constitutional questions are, for good reason, matters of tribal law reserved to the tribal judiciary to resolve.").

[20] App. 53-69.

power, Judge Waddoups' entered a memorandum decision and order in case no. 16-579, and ruled explicitly—in direct contravention to the Tribal Court's ruling on the same issues—that the Becker contract and the waiver of sovereign immunity are both legal *under the Tribe's tribal law*.[21]

c. Judge Waddoups Ignores Federal Law Barriers to State Court Jurisdiction Over the Ute Tribe

The United States Supreme Court recognizes two "independent but related" federal law barriers to the exercise of state jurisdiction over Indians for claims arising on an Indian reservation. The first barrier is when state jurisdiction is preempted by federal laws; the second barrier is when the exercise of state jurisdiction would 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) (citation and quotation omitted). Either barrier is sufficient, by itself, to bar state jurisdiction over Indians for claims arising within Indian country:

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

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). In case no. 2:16-cv-579, Judge Waddoups drafted an 83-page memorandum decision denying the Tribe's motion to enjoin Mr. Becker's state court suit against the Tribe—yet, nowhere in the 83-page ruling did Judge Waddoups ever *once* address or analyze the federal law infringement barrier to Becker's suit in state court.

[21] *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 312 F. Supp. 3d 1219, 1258-70 (D. Utah 2018) (*Lawrence*), case no. 2:16-cv-579, ECF 136, pp. 62-79.

2. Judge Waddoups' Improper Judicial Amendment of Statutes.

In order to rule against the Tribe in 2:16-cv-579, Judge Waddoups went so far as to "twist and contort and distort—and judicially rewrite" both a federal statute and a state statute—Public Law 280 ("PL 280"), 25 U.S.C. § 1326 and UTAH CODE ANN. § 9-9-202.[22] Judge Waddoups' brash act of judicial activism violates both constitutional separation of powers[23] and the dictates of federalism.[24] It is one of multiple grounds the Tribe has cited in its motion to the Tenth Circuit seeking reassignment of case nos. 2:16-cv-579 and 2:16-cv-958 to a different district court judge. Parenthetically, Judge Waddoups' judicial rewriting of PL 280 was an act of futility insofar as the U. S. Supreme Court has consistently ruled that PL 280 has no application to Indian tribes.[25] This means that Judge Waddoups' judicial rewriting of PL 280 not only violates constitutional separation of powers and the dictates of federalism, but additionally, Judge Waddoups' ruling also contravenes established Supreme Court precedents.

3. Judge Waddoups' Improper Use of Judicial Notice to Bolster His Rulings.

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 at 1265 n.24. But that limitation does not

[22] App. 10, ¶¶ 40-42; the Tribe also asks the Court to take judicial notice of the Tribe's briefs to the Tenth Circuit in *Ute Indian Tribe v. Lawrence*, appeal number 18-4013, which is available through Pacer at https://pacer.login.uscourts.gov/ (last visited on 10/8/2018).

[23] U.S. Const. art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress") (emphasis added).

[24] U.S. CONST. amend. X; THE FEDERALIST NO. 51 (James Madison).

[25] *California v. Cabazon Band of Indians*, 480 U.S. 202, 208 (1987) (PL 280 applies only "to *private* civil litigation in state court.") (emphasis added); *Bryan v. Itasca Cty.*, 426 U.S. 373, 386 (1976) ("there is notably absent" from PL 280 "any conferral of state jurisdiction over the tribes themselves"). Judge Waddoups ignored these holdings.

faze Judge Waddoups in actions involving the Ute Tribe. When the Tribe appears before him, Judge Waddoups employs judicial notice as a "springboard" to go beyond merely assuming the truth of the matters asserted to indulging in sheer conjecture and speculation based on the matters judicially noticed. To bolster his ruling against the Tribe in 2:16-cv-579, Judge Waddoups *sua sponte* took judicial notice of *unproven allegations* contained in a complaint that was filed in a wholly unrelated lawsuit to which the Tribe is not a party.[26] Not only did Judge Waddoups assume the truth of the *unproven allegations* in the unrelated complaint, but he 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.[27] (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;" Judge Waddoups then speculated that that law firm must have "fully advised" the Tribe of the consequences of entering into the Ute Energy LLC transactions.[28] Parenthetically, of course, it was not the "Ute Energy LLC transactions" that were at issue in case number 2:16-cv-579; rather the issue before the court was the legality of the Becker contract.

4. Judge Waddoups' Failure to Apply the Law Even-Handedly.

Examples of Judge Waddoups' failure to apply the law even-handedly are described *infra* under section C.

[26] App. at 14-15, ¶¶ 57-63.
[27] *Id*. at 15, ¶¶ 59-63.
[28] *Id*. at 15, ¶ 64.

C. VIOLATION OF THE FIFTH AMENDMENT – JUDGE WADDOUPS' FLAWED DECISIONS AGAINST THE UTE TRIBE ESTABLISH A CONSISTENT PATTERN OF ACTIONS BASED ON IMPERMISSIBLE DISCRIMINATION.

While the Fifth Amendment to the U.S. Constitution does not contain the same explicit equal protection language as the Fourteenth Amendment, the Fifth Amendment nonetheless prohibits the Federal Government—including federal *judges*—from denying litigants equal protection of the law. *Bolling v. Sharpe*, 347 U.S. at 499-500; *U.S. v. Titley*, 770 F.3d at 1359. To establish a case of racial discrimination under Fifth Amendment, the Tribe must show that: 1) the Tribe is a member of a cognizable racial group, 2) that Judge Waddoups treated the Ute Tribe different from other non-minority litigants before the court, and 3) that Judge Waddoups acted with discriminatory intent or effect. *See Johnson v. City of Fort Wayne*, 91 F.3d 922 (7th Cir. 1996); *Assoc. of Residential Resources in Minnesota, Inc. v. Gomez*, 51 F.3d 137 (8th Cir. 1995); *Cross v. Ala., State Dept. of Mental Health & Mental Retardation*, 49 F.3d 1490 (11th Cir. 1995).

> Factors probative of whether a [party] was motivated by discriminatory intent include (1) evidence of a consistent pattern of actions by a [party] disparately impacting members of a particular class of persons; (2) the historical background of the decision, which may take into account any history of discrimination by the [party]; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by the [party] on the record or in minutes of their meetings.

16B Am. Jur. 2d Constitutional Law § 837; *Southside Fair Housing Committee v. City of N. Y.*, 928 F.2d 1336 (2d Cir. 1991); *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810 (4th Cir. 1995). "However, discriminatory intent may be found even where the record contains no direct evidence of bad faith, ill will, or any evil motive on the part of public officials." 16B Am. Jur. 2d Constitutional Law § 837 (*citing Elston v. Talladega Cty. Bd. of*

Educ., 997 F.2d 1394, 84 Ed. Law Rep. 122 (11th Cir. 1993).

The Ute Tribe consists entirely of Native Americans, a protected class on the basis of race, national origin, and religion. Further, as described above and in the Tribe's supporting affidavit, whenever the Tribe appears before Judge Waddoups as a litigant, Judge Waddoups consistently abandons his role as neutral arbiter. Judge Waddoups treats the Tribe differently from other similarly situated parties before him.

> [D]isqualifying judges for outward manifestations of what could reasonably be construed as bias obviates making subjective judgment calls about what is actually going on inside a judge's heart and mind.[29]

Although the Ute Tribe cannot prove the inner workings of Judge Waddoups' heart and mind, the Tribe can reasonably infer that Judge Waddoups' demonstrated hostility towards the Tribe and to federal laws and policies applicable to Indians is a function of *implicit*, if not *explicit*, racial bias. In this section, the Tribe addresses (*i*) implicit racial bias in the justice system, (*ii*) the documented fact of institutional racial bias against Indians in the State of Utah, and (*iii*) evidence in the public record of Judge Waddoups' unequal treatment of the Ute Indian Tribe in proceedings before him.

1. Implicit Racial Bias in the Justice System.

According to the American Bar Association, "[t]he problem of implicit bias affects all participants in the justice system," including judges.[30] Implict bias is described as:

… attitudes or stereotypes that affect our understanding, decisionmaking,

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[29] *Judicial Disqualification: An Analysis of Federal Law*, 17-18, Federal Judicial Center (2d ed. 2010).

[30] App. 88-89. The Tribe asks the Court to take judicial notice of the ABA's Mission Statement upon announcement of the ABA's Implicit Bias Initiative. The statement is available on the Internet at https://www.americanbar.org/groups/litigation/task-force-implicit-bias.html (last viewed on 10/9/2018).

and behavior, without our even realizing it.

Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012). Over the past decade, the state and federal courts, the U.S. Department of Justice, and the American Bar Association all have taken action to acknowledge and counter the effects of implicit racial bias in the justice system.[31] Studies have shown that judges harbor the same kinds of implicit biases as others, and that these biases can affect their judgment and treatment of litigants. Jeffrety J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1205-08 (2009). In bench trials, implicit bias may affect the judge's fact-finding and legal analysis, and even the ultimate determination of the case. A judge's implicit bias may also influence the outcome of the trial in more subtle ways, such as a judge's rulings on procedural matters and the admissibility of evidence. *Id*.

2. Documented Racial Bias in the State of Utah.

Racial bias against American Indians exists in the State of Utah. From 2014 through 2017, the Public Policy Clinic at the University of Utah S.J. Quinney College of Law released a series of reports that contain some disturbing and eyebrow-raising statistics: (*i*) From Fingerpaint to Fingerprints: The School to Prison Pipeline in Utah, October 2014; (*ii*) Disparities in Discipline: A Look at School Disciplinary Actions for Utah's American Indian Students, May 2015; and (*iii*) Misbehavior or Misdemeanor? A

[31] App. 70-90. The Tribe asks the Court to take judicial notice of the materials included in the Appendix from the U.S. Department of Justice, which in 2016 instituted an "implicit bias" training program for its law enforcement officers, prosecutors, and other personnel; the National Center for State Courts; the American Bar Association, and the U.S. District Court for the Western District of Washington.

Report on the Utah School to Prison Pipeline, 2017.[32] The 2015 report documents, *inter alia*, that although American Indians comprise only 1.3 percent of the student population in Utah,[33] (*i*) American Indians students in Utah are four times more likely than white students to be disciplined at school, and seven times more likely than white students to be expelled from school; (*ii*) American Indians are also the single most likely student population in Utah to be referred to law enforcement. American Indian students are three times more likely to be referred to law enforcement than all other students of color and almost eight times more likely to be referred to law enforcement than white students.[34]

3. Judge Waddoups' Unequal Treatment of the Ute Tribe.

In every case in which the Tribe has appeared before him, Judge Waddoups has ruled against the Tribe and in favor of the Tribe's non-Indian, white-majority race opponents. To do so, Judge Waddoups has at times resorted to twisting and bending, and contorting and distorting applicable statutes and judicial precedents. Most disturbingly, as illustrated in the examples below, Judge Waddoups has openly discriminated against the Ute Tribe in rulings large and small, both procedural and substantive.

TWO PARTIES SIMILARLY SITUATED BEFORE JUDGE WADDOUPS THE JUDGE'S OPENLY UNEQUAL HANDLING OF INJUNCTION MOTIONS	
MR. BECKER	**UTE INDIAN TRIBE**

[32] App. 91-123. The Tribe asks the Court to take judicial notice of these reports, one of which is included in the Appendix to this motion, and all of which are available on the Internet.

[33] App. 124-25. The Tribe asks the Court to take judicial notice of U.S. Census reports.

[34] App. 95-96, 100-109.

Becker - Case no. 2:16-cv-00958	Ute Tribe - Case no. 2:16-cv-00579
On 9/14/2016, at 9:07 a.m. Becker filed a complaint and motion for TRO and a preliminary injunction, seeking to enjoin the Tribe's suit against him in the Ute Indian Tribal Court, case no. 16-cv-00958. ECF 2. By 1:23 p.m. that same day, 9/14/2016, Judge Waddoups had scheduled a TRO hearing later that same afternoon at 4 p.m. ECF 6. By 4:56 p.m. that same day, 9/14/2016, Judge Waddoups had issued a TRO, enjoining the Tribe's suit against Becker in the Ute Indian Tribal Court, granting the injunction on grounds of *comity*, not the absence of tribal court jurisdiction. ECF 7, 12. Two weeks later to the day, Judge Waddoups entered a preliminary injunction enjoining the suit in the Ute Indian Tribal Court. ECF 48, 49. On appeal, Tenth Circuit granted a stay of the preliminary injunction. The Tenth Circuit later reversed the preliminary injunction. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 868 F.3d 1199, 1204 (10th Cir. 2017). On April 30, 2018, Judge Waddoups again granted Becker's motion for a preliminary injunction against the Tribe—and he did so on the very same ground that the Tenth Circuit had earlier rejected and reversed in *Becker v. Ute Indian Tribe*, 868 F.3d at 1204-05. ECF 148. The Tribe has again appealed Judge Waddoups' ruling to the Tenth Circuit, ECF 156. The Tribe is also asking the Tenth Circuit	On 12/7/2018, following the Tenth Circuit remand in *Ute Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017), the Tribe filed motions for a TRO, preliminary injunction, and a permanent injunction based on alternative motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. ECF 52, 53, 54 and 55. Three times over the next several days, the Tribe's attorneys contacted Judge Waddoups' chambers to schedule a TRO hearing but were told by Judge Waddoups' chambers that Judge Waddoups had "not decided what to do" about the Tribe's motions. A week after the Tribe's TRO motion was filed, Judge Waddoups issued an order establishing a one-month briefing schedule for the parties to brief the question of whether the Court "*has supplemental jurisdiction under 28 U.S.C. § 1367 and if so, whether the court should decline to exercise supplemental jurisdiction under subsection (c).*" That question, however, was entirely superfluous in view of the Tenth Circuit's explicit holding in *Lawrence* that the district court possessed jurisdiction under 28 U.S.C. §§ 1331 and 1362 to rule on the Tribe's motions for injunctive relief. On 1/17/2018—41 days after the filing of the Tribe's emergency TRO motion—Judge Waddoups entered a minute order that effectively *reversed* the Tenth Circuit's jurisdictional rulings in *Lawrence*, and, in the alternative, denied the Tribe's emergency motion for interim injunctive relief. ECF 70. On 2/16/2018, the Tenth Circuit issued an

to reassign the case to a different district court judge on remand.	order directing Judge Waddoups to "exercise its original jurisdiction in accord with the mandate in our decision *Ute Indian Tribe v. Lawrence* … **and decide the Tribe's request for injunctive relief against the state court proceedings**." (emphasis added) ECF 81. An evidentiary hearing was held on 2/28/2018. The Tribe presented testimony from two expert witnesses. The Tribe also relied on the deposition testimony and declarations of its four other experts and additional lay witnesses. The Tribe's opponents—Mr. Becker and Judge Barry Lawrence—presented no witnesses. On 4/30/2018—145 days after the Tribe's emergency TRO and other injunction motions were filed, Judge Waddoups entered a Memorandum Decision and Order denying the Tribe's request for injunctive relief. ECF 136. The Tribe has appealed the ruling. ECF 73. The Tribe is also asking the Tenth Circuit to reassign the case to a different district court judge on remand.

Judge Waddoups' unequal treatment of the Ute Tribe is also apparent when the Judge's rulings are considered in relation to the markedly different evidentiary records that the Tribe and Mr. Becker marshalled for the court. The chart below illustrates the stark differences in Judge Waddoups' rulings given the gross disparities in the parties' respective evidentiary records. The Tribe marshalled and presented overwhelming evidence that Judge Waddoups refused to credit. Mr. Becker, on the other hand, presented only scant evidence; yet Judge Waddoups nonetheless credited Becker's scant evidence 100-percent:

JUDGE WADDOUPS' OPENLY UNEQUAL TREATMENT OF THE PARTIES IN RELATION TO THE EVIDENCE EACH PARTY MARSHALLED	
MR. BECKER Case no. 2:16-cv-00958	**UTE INDIAN TRIBE** Case no. 2:16-cv-00579
Judge Waddoups granted Mr. Becker's motion for a preliminary injunction against the Tribe, not once but twice. Each time Judge Waddoups ruled in Mr. Becker's favor without ever: • conducting an evidentiary hearing; • receiving sworn statements from any witness other than Mr. Becker. The second time, Judge Waddoups granted Becker a preliminary injunction on the very same ground that the Tenth Circuit had earlier rejected and reversed Judge Waddoups' first injunction in *Becker v. Ute Indian Tribe*, 868 F.3d 1199, 1204-05 (10th Cir. 2017). *See Becker v. Ute Indian Tribe*, 311 F. Supp. 3d 1284, 1286 (D. Utah 2018) ("because the [Becker] contract is valid, tribal exhaustion … is both unnecessary and futile."). The Tribe has appealed Judge Waddoups' issuance of the second preliminary injunction. The Tribe is also asking the Tenth Circuit to reassign this case to a different district court judge on remand.	The Tribe sought both interim and public injunctive relief in the form of Rule 56 motions for summary judgment. The Tribe's motions were supported by deposition testimony and/or declarations and written reports from multiple witnesses, including six experts on Federal Indian law, oil-and-gas law, and oil-and-gas/business accounting. Judge Waddoups refused to even conduct a hearing on the Tribe's motions UNTIL HE WAS ORDERED TO DO SO BY THE TENTH CIRCUIT. An evidentiary hearing was held on 2/28/2018. The Tribe presented testimony from two expert witnesses. The Tribe also relied on the deposition testimony and declarations of its four other experts and additional lay witnesses. The Tribe's opponents—Mr. Becker and Judge Barry Lawrence—did not present any witnesses. On 4/30/2018, Judge Waddoups entered a Memorandum Decision and Order denying the Tribe's request for injunctive relief. ECF 136. Judge Waddoups rejected the testimony of all six of the Tribe's expert witnesses on the ground that their testimony was nothing more than "legal argument." ECF 136, p. 44. He did so notwithstanding that two of the Tribe's six experts are not attorneys, and therefore, there was no factual basis for Judge Waddoups

	to summarily reject their testimony as "legal argument."

III. CONCLUSION

> Every federal judge is sworn into office by taking the oath mandated by law:
>
> I, [name], do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [position] under the Constitution and laws of the United States. So help me God."

28 U.S.C. § 453. Any reasonable observer would conclude that Judge Waddoups is not faithful to his oath in relation to the Ute Indian Tribe. Over the past seven years, in every case in which the Tribe has appeared before him, Judge Waddoups has engaged in a pattern and practice of conduct that would lead any reasonable person to conclude that Judge Waddoups holds a deep-seated hostility against both the Ute Tribe and Federal Indian law and policy. Furthermore, the Ute Tribe is a member of a protected class on the basis of race, national origin, and religion. The public record of Judge Waddoups' comments and rulings demonstrate that Judge Waddoups impermissibly discriminates against the Ute Tribe in violation of the Fifth Amendment to the U.S. Constitution. He has done so in rulings large and small—ranging from procedural and evidentiary rulings to ultimate adjudicatory rulings. Wherefore, based on the facts and authorities set forth herein and in the attached Attorney Declaration and exhibit appendix, the Tribe respectfully prays that the Court will order the recusal of Judge Waddoups under 28 U.S.C. § 144 or 28 U.S.C. § 455(a).

DATED this 9th day of October, 2018.

FREDERICKS PEEBLES & MORGAN LLP

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CERTIFICATE OF COUNSEL

Pursuant to 28 U.S.C. § 144, the undersigned counsel of record certifies that the Ute Indian Tribe's Verified Motion for Recusal is made in good faith.

s/ Frances C. Bassett
Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2018, I electronically filed the foregoing **UTE INDIAN TRIBE'S VERIFIED MOTION TO RECUSE** with the Clerk of Court using the CM/ECF system, which caused a true and correct copy of the foregoing to be served upon the counsel of record, as follows:

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