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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 REPLY MEMORANDUM IN SUPPORT OF RECUSAL** Case No. 2:18-cv-00314-CW Judge Clark Waddoups

The Ute Tribe respectfully submits its reply in support of the Tribe's motion for recusal.

INTRODUCTION

A "straw man" is an exaggerated misrepresentation of an opponent's argument—a distortion of the argument that is more easily defeated than the opponent's actual argument.[1] Here, the McKee Defendants' have distilled the Tribe's asserted grounds for recusal down to a straw man—the assertion that the Tribe is accusing Judge Waddoups of being a "racist." McKee Resp., 2. However, that straw man is a gross distortion and oversimplification of the Tribe's asserted grounds (yes, "grounds" *plural*) for recusal. The greater part of the Tribe's recusal motion is directed not to Judge Waddoups' disparate treatment of the Tribe—which, significantly, is *substantiated* with *specific* examples—but to Judge Waddoups' hostility to the Tribe and to Federal Indian law and policy. The "Argument and Supporting Facts" section of the Tribe's motion is 4,965 words in length; of this total, fifty-three percent (53%) of the text is devoted to a discussion of Judge Waddoups' demonstrated *non-racial* hostility and bias against the Ute Tribe and against Federal Indian law, policy and precedents. It is axiomatic that a judge's "inappropriate hostility toward the law he is charged to apply" is a ground for questioning the judge's impartiality.[2] A case on point is the Ninth Circuit's recent reassignment of cases away from District Court Judge Robert Clive Jones based, *inter alia*, on the Judge's "well-established and inappropriately strong" sentiments against the United States and the

[1] American Heritage New Dictionary of Cultural Literacy (3rd ed. 2005).

[2] *Verniero v. Air Force Academy Sch. Dist. No. 20*, 705 F.2d 388, 395 (10th Cir. 1983) (McKay, J., dissenting).

federal law he was charged to apply. *United States v. Walker River Irrigation Dist.*, No. 15-16478, slip op. at 28-31 (9th Cir., May 22, 2018), citing *United States v. Estate of Hage*, 810 F.3d 712, 722-24 (9th Cir. 2016); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1045-46 (9th Cir. 2015). *See also, e.g., United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (reassignment was warranted because the "judge from the bench questioned the wisdom of the substantive law he had to apply").

The Tribe's motion and supporting affidavit cite multiple instances in which Judge Waddoups has failed to adhere to federal law, policy and precedents pertaining to Indians in general and to the Ute Indian Tribe in particular. These specific instances of failing to apply federal law constitutes *evidence* of bias and prejudice. The proposition can be stated in the inverse: if a lower court's persistent failure to apply federal law and controlling precedents is not evidence of bias and prejudice, what is it? And how do the McKee Defendants respond to the Tribe's cited instances of bias and prejudice, whether racially-motivated or not? The McKee Defendants have no response; they simply *ignore* the specific instances of bias and prejudice that are evidenced by Judge Waddoups' otherwise inexplicable failure to adhere to existing federal law, policy, and precedents pertaining to Indians in general and the Ute Tribe in particular.

ARGUMENT

I. The Court has ***not*** "already considered and rejected the Tribe's claims and argument."

Without citation to any authority, the McKee Defendants suggest that the denial of the Tribe's 2/13/2018 motion to recuse Judge Waddoups in a separate pending case is,

for some reason, dispositive of the Tribe's motion to recuse here.[3] It is not—not as a matter of law, nor as a matter of fact. *See, e.g., Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quoting 18 James W. Moore et al., *Moore's Federal Practice* § 134.02[I][d], at 134-26 (3d ed. 2011)).

In the other case, the district court (Chief Judge David Nuffer) denied the Tribe's motion to recuse on the very same day the motion was filed, February 13, 2018.[4] In retrospect the denial can be seen to be *premature* insofar as the denial came just three days *before* the Tenth Circuit found it necessary to *order* Judge Waddoups to comply with the Tenth Circuit's appellate mandate in the companion case:

> [T]he district court shall exercise its original jurisdiction in accord with the mandate in our decision in *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017), and decide the Tribe's request for injunctive relief against the state court proceedings.[5]

In fact, much of the evidentiary support for the Tribe's allegations of bias and hostility is based on Judge Waddoups' conduct *after* the 2/13/2018 denial of recusal in the *Becker* case. It was after the 2/13/2018 denial that much of Judge Waddoups' more unprecedented and dubious conduct occurred, i.e., the unprecedented rewriting of state and federal statutes, the failure to adhere to Tenth Circuit and U.S. Supreme Court

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[3] Tribe's Verified Motion to Recuse, ECF No. 101, *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, case no. 2:16-cv-00958.

[4] ECF No. 102, case no. 2:16-cv-00958.

[5] ECF No. 81, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, case no. 2:16-cv-00579.

precedents on state court jurisdiction and tribal court exhaustion, and the improper judicial notice of matters not subject to judicial notice. In sum, there is no basis in fact or law for holding Judge Nuffer's ruling in case no. 2:16-cv-00958 to be dispositive of the Tribe's separate and distinct motion to recuse in this case.

II. The Tribe has met its burden of establishing grounds for recusal under 28 U.S.C. § 144.

The U. S. Supreme Court has observed that while due process guarantees "an absence of actual bias" on the part of a judge, "[b]ias is easy to attribute to others and difficult to discern in oneself." *Williams v. Pennsylvania*, __ U.S. __, 136 S. Ct. 1899, 1905 (2016). Separately, as noted by legal commentators, it is well-established that white citizens often do not perceive conduct and statements through the same prism as minorities:

> [S]urveys and other studies of ordinary citizens reveal there are significant differences between the perceptions of white citizens and African Americans and other people of color as to the frequency and pervasiveness of racially-biased conduct in American today." … "There is a common saying among whites that a black person is 'playing the race card,' a comment generally used to suggest that that person is making an illegitimate demand because anti-black racism is no longer thought of as a serious obstacle in the United States."
>
> On the other hand, African Americans perceive racial discrimination as frequent and pervasive. ….
>
> One factor that contributes to the difference in perceptions is that racism today is often subtle and concealed, as compared to the direct, in-your-face type of racism that has been declared illegal by federal and state civil rights statutes, and branded immoral by most citizens in America today.[6]

[6] Frank M. McClellan, *Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias*, 78 TEMP. L. REV. 351367-68 (Summer 2005) (citation omitted).

Insofar as racial bias in today's society is "subtle and concealed," how then is a litigant to establish it? The McKee Defendants point out that a supporting affidavit must contain more than mere "conclusions, rumors, beliefs and opinions." McKee Resp., 4 (citation omitted). The Tribe's supporting affidavit meets this threshold *in spades*. The Tribe's 15-page single-spaced affidavit contains much more than mere conclusions, rumors, beliefs and opinions. The Tribe's affidavit identifies each case in which the Tribe has appeared before Judge Waddoups and describes the pertinent facts of each case. The Tribe's affidavit details how, over a period of eight years, Judge Waddoups has demonstrated a consistent *pattern* of disparate and unfair treatment of the Tribe, one in which "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." Tribe's Motion, 3.

The dispositive inquiry is not whether the Tribe's affidavit contains sufficient *facts* to support the Tribe's "belief that bias or prejudice exists." 28 U.S.C. § 144. Rather, the dispositive inquiry is whether the facts recited in the Tribe's affidavit establish "bias or prejudice" within the meaning of 28 U.S.C. § 144 and 28 U.S.C. § 455(a).

The McKee Defendants incorrectly suggest that the Tribe must establish "*personal* bias" as distinguished from some other kind of "official" or unspecified bias. In support of that argument, the McKee Defendants cite a Tenth Circuit decision from 1984. McKee Resp., 5. However, since that 1984 Tenth Circuit decision was rendered, the Supreme Court has expressly rejected a distinction between "*personal* bias" and "official" or other bias:

> Bias and prejudice seem to us not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. As generally used,

> these are pejorative terms, describing dispositions that are *never* appropriate. It is common to speak of "personal bias" or "personal prejudice" without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice, and certainly without implying that there is some other "nonpersonal," benign category of those mental states. … Secondly, interpreting the term "personal" to extrinsically acquired bias produces results so intolerable as to be absurd. Imagine, for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be "official" rather than "personal bias, and would provide no basis for the judge recusing himself.

Liteky v. United States, 510 U.S. 540, 549-50 (1994). The Court in *Liteky* then discussed at length the meaning of the words "bias or prejudice" as those words are found in §§ 144 and 455(a). The Court explained that:

> The words [bias and prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the [actor] ought not to possess … or because it is excessive in degree.

Id. at 550 (emphasis in original). The Court then said:

> It is wrong in theory … to suggest, as many [judicial] opinions have, that "extrajudicial source" is the *only* basis for establishing disqualifying bias or prejudice. It is the only *common* basis, but not the exclusive one, since it is not the *exclusive* reason a predisposition can be wrongful or inappropriate. A favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.

Id. at 551. The Court explained that the "extrajudicial source doctrine" is so narrow that "there is not much doctrine to the doctrine. *Id*. at 554. Indeed, the Court said that the "doctrine" was so narrow that "it would be better to speak of a[n] … 'extrajudicial source' *factor*, than of an 'extrajudicial source' doctrine in recusal jurisprudence." *Id*. at 554-55 (emphasis in original). The Court then ruled that a judge's judicial conduct *can* by itself

be held to show recusable bias, provided the judge's conduct displays "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*. at 555. Of course, this is precisely what the Tribe's recusal motion alleges here: that since Judge Waddoups has been on the federal bench, in every case in which the Tribe has appeared before him, Judge Waddoups has demonstrated a "deep-seated hostility" towards the Ute Tribe and towards Federal Indian law, policy and precedents; further, that Judge Waddoups has demonstrated that bias to such a degree that a "fair judgment" in the case at bar would be "impossible."

It is true, as the McKee Defendants argue, that the *Liteky* Court said that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"—unless, of course, the rulings reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* The Court explained that the basis for this limitation is that, generally speaking, judicial rulings "are proper grounds for appeal, not for recusal." *Id*. That limitation and supporting rationale, however, cannot be segregated out and applied in isolation from the Court's observation earlier in *Liteky* that

> The words [bias and prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the [actor] ought not to possess … or because it is excessive in degree.

Id. at 550 (emphasis in original). Most judicial rulings are rendered in good faith. And a judicial ruling that is rendered in good faith can, obviously, later be determined to be erroneous on appeal. Judicial rulings rendered in good faith are properly addressed through appeal, not recusal. But what about a judicial ruling that is not rendered in good faith? A judicial ruling that is rendered in *bad* faith is an animal of a different stripe from

a judicial ruling rendered in *good* faith. And to the Tribe's mind, Judge Waddoups' rulings involving the Ute Tribe are rendered in bad faith. As detailed in the Tribe's recusal motion and supporting affidavit, when the Ute Tribe appears as a litigant before him, Judge Waddoups does not rule on the basis of the federal law and the controlling judicial precedents that he is charged with applying. There is, instead, no good faith basis for the rulings: Judge Waddoups resorts to shenanigans, to bending and twisting and contorting and distorting applicable federal statutes and controlling precedents, to taking judicial notice of matters that are not properly subject to judicial notice, to rejecting the Tribe's evidence on grounds not permitted by the Federal Rules of Evidence, and other actions of that nature. Judge Waddoups' resort to shenanigans such as this is reflective of bias and prejudice within the meaning of § 144 and § 455:

> … a favorable or unfavorable disposition … that is somehow *wrongful* or *inappropriate*, either because it is undeserved … or because it is excessive in degree.

Liteky, 510 U.S. at 550.

III. The Tribe has met its burden to establish grounds for recusal under 28 U.S.C. § 455(a).

A "reasonable person, knowing all the relevant facts," would clearly harbor doubts about Judge Waddoups' impartiality. The Tribe's recusal motion and supporting affidavit cite specific facts showing Judge Waddoups has ruled against the Tribe in every case in which the Tribe has appeared before him. The Tribe's supporting affidavit also cites specific facts to show that in cases involving the Tribe Judge Waddoups abandons the role of an impartial jurist and takes 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. Most damning of all, the Tribe has given a glaring examples of Judge Waddoups' unfair and disparate treatment of the Tribe—one example of which the McKee Defendant refuse even to mention:

MR. BECKER Becker - Case no. 2:16-cv-00958	**UTE INDIAN TRIBE** 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	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

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 to reassign the case to a different district court judge on remand.	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 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.

CONCLUSION

The purpose of recusal is to preserve the actual and the *apparent* impartiality of the federal courts. The Tribe's recusal motion and its 15-page single-spaced supporting affidavit contain detailed and specific facts sufficient to require recusal under 28 U.S.C. § 144 and 28 U.S.C. 455(a).

DATED this 6th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2018, I electronically filed the foregoing **UTE INDIAN TRIBE'S REPLY MEMORANDUM IN SUPPORT OF RECUSAL** 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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