

Frances Bassett, *Pro Hac Vice Admission*  
Jeremy J. Patterson, *Pro Hac Vice Admission*  
Jennifer S. Baker, *Pro Hac Vice Admission*  
**FREDERICKS PEEBLES & PATTERSON LLP**  
1900 Plaza Drive  
Louisville, Colorado 80027-2314  
Telephone: (303) 673-9600  
Facsimile: (303) 673-9839  
Email: fbassett@ndnlaw.com  
Email: jpatterson@ndnlaw.com  
Email: jbaker@ndnlaw.com

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

*Attorneys for Plaintiff*

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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

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UTE INDIAN TRIBE OF THE UINTAH )  
AND OURAY INDIAN RESERVATION, )

Plaintiff, )

v. )

GREGORY D. MCKEE, T & L LIVESTOCK, )  
INC., MCKEE FARMS, INC., AND )  
GM FERTILIZER, INC., )

Defendants. )

Case No. 2:18-cv-00314-CW

**Oral Argument Requested**

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**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND BRIEF IN SUPPORT**

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Pursuant to Federal Rule of Civil Procedure Rule 56 and District of Utah Civil Rule 56-1, Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation (“Ute Indian Tribe” or “Tribe”), hereby submits this Motion for Summary Judgment and Brief in Support requesting that the Court enter summary judgment on behalf of Plaintiff recognizing, domesticating, and enforcing the Ute Indian Tribal Court (“Tribal Court”) judgment in *Ute Indian Tribe v. Gregory D. McKee et al.*, Case No. CV12-285 (2015).

### **REFERENCES TO THE RECORD**

Evidentiary materials for this Motion for Summary Judgment are contained in a four-volume appendix. References are to the volume and page number(s) in the Appendix, i.e., “Appendix, IV, 1-10.”

### **I. INTRODUCTION AND RELIEF SOUGHT**

Plaintiff requests that the Court grant this Motion for Summary Judgment because there is no genuine dispute of material facts and the law demands a finding of summary judgment in Plaintiff’s favor. A court shall grant a motion for summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” F.R.C.P. Rule 56(a). Summary judgment is “properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy, and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 327 (1986) (internal citation omitted). To defeat a motion for summary judgment, the non-movant must point to specific evidence that establishes a dispute over facts that

might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In this action, the Tribe requests that the Court enter an order to recognize, domesticate, and enforce, under principles of comity, a judgment against Defendants that has been issued by the Ute Indian Tribal Court. Plaintiff obtained a judgment in its favor from the Tribal Court against Defendants, recovering, *inter alia*, damages based on Defendants' misappropriation, theft, and/or conversion of water from the Tribe's federally protected water right held by the U.S. government in trust. Defendants have refused to comply with and pay Plaintiff the monetary judgment issued by the Tribal Court.

"Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court." *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903-03 (9th Cir. 2002). The only issues before this Court are matters of law as set forth in the Argument below.

## **II. STATEMENT OF APPLICABLE LAW**

The United States Congress confirmed the Ute Indian Tribe's rights to water resources on the Uintah and Ouray Indian Reservation ("Reservation") in the Indian Appropriations Act of 1899, Act of March 1, 1899, 30 Stat. 941 ("1899 Act"). Appendix, I, 18. The Act authorized the Secretary of the Interior to grant rights-of-way for the construction of ditches and canals through the Reservation for the purpose of diverting and appropriating surface waters, specifying that:

all such grants shall be subject at all times to the paramount rights of the Indians on said reservation to so much of said waters as may been

appropriated, or may hereafter be appropriated or needed by them for agriculture and domestic purposes; and it shall be the duty of the Secretary of the Interior to proscribe such rules and regulations as he may deem necessary to secure to the Indians the quantity of water needed for their present and prospective wants, and to otherwise protect the rights and interests of the Indians and the Indian service.

The 1899 Act establishes the Ute Indian Tribe's water rights as "paramount" to that of any appropriator.

Seven years later, in 1906, Congress authorized the construction of irrigation systems to irrigate "the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah." Appendix, I, 25 (Act of June 21, 1906, 34 Stat. 375). That Indian irrigation project is now known as the Uintah Indian Irrigation Project (hereafter "UIIP" or the "Project").

Two years later, in 1908, the United States Supreme Court issued its seminal decision in *Winters v. United States*, 207 U.S. 564 (1908), a ruling now known as the "Winters Doctrine"—a doctrine that was subsequently reaffirmed by the Supreme Court in another seminal ruling, *Arizona v. California*, 373 U.S. 546, 598-601 (1963). The *Winters* Doctrine holds that when the United States establishes an Indian reservation, it impliedly reserves enough water to fulfill the purpose of the reservation. The *Winters* decision altered the previous understanding that Indian water rights had to be obtained in compliance with state law of the particular state in which the Indian reservation was

located.<sup>1</sup> *Winters* makes clear that “*Winters Reserved Water Rights*” or “*Indian Reserved Water Rights*” are rights vested in Indians under *federal law*—not state law.

The Ute Indian Tribe’s Reserved Water Rights—established at the creation of the Tribe’s Reservation and before the allotment of land to individual Indians—are Tribal trust assets held by the United States, as trustee, for the benefit of the Tribe. *Hackford v. Babbit*, 14 F.3d 1457, 1467 (10th Cir. 1994) (“though the individuals with irrigable land [within the UIIP] may have a right of user [sic] to the water, the water right itself is a tribal right.”).

In 1905, before the *Winters* decision, the United States had applied for, and the Utah State Engineer had granted, a [state law] Certificate of Appropriation of Water from the Whiterocks River, Certificate of Appropriation of Water, No. 1234. The waters appropriated under Certificate No. 1234 were for irrigating Indian lands under the UIIP. Appendix, I, 94-95 (1905 Certificate of Appropriation of Water, Tribal Court Trial Ex. 5); see also Appendix, I, 42 (Ute Tribal Court’s Findings of Fact and Conclusions of Law).

In 1916, as conflicts mounted between the Ute Indians and their non-Indian neighbors over water allocations in the Lakefork, Yellowstone, Uinta, and Whiterocks Rivers, the United States filed suit in federal district court to protect the Tribe’s water rights. *United States v. Cedarview Irrigation Company et al.*, No. 4427 (D. Utah), and *United States v. Dry Gulch Irrigation Company et al.*, No. 4418 (D. Utah).

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<sup>1</sup> That previous understanding is reflected in the Act of 1906 authorizing the construction of the UIIP, which stated that the Ute Indian “irrigation systems shall be constructed and . . . water appropriated under the laws of the State of Utah.” Act of June 21, 1906, Pub. L. 59-258, Stat. 325, 375. See, e.g., *Hackford v. Babbit*, 14 F.3d 1457, 1467 (10th Cir. 1994).



The waters that the McKee Defendants misappropriated—that is, waters conveyed through the Deep Creek Canal and Lateral No. 9—were adjudicated and decreed to be Indian water by the United States District Court for the District of Utah in 1923, Docket Number 4427. Appendix, I, 96-102 (Docket No. 4427 Decree, Tribal Court Trial Ex. 6). The 1923 Decree states that the United States and the Secretary of the Interior, “as Trustees of the [Ute] Indians,” have “the first and exclusive right . . . to divert from the Uintah River and its tributaries,” by certain “ditches and canals,” including, expressly, “the Deep Creek Canal,” which was a part of the UIIP. Furthermore, the 1923 Decree contains an express injunction against non-Indian appropriators, stating:

The [non-Indian] defendants and their agents and employees, officers, successors, and assigns . . . are hereby perpetually enjoined from in any way hindering, preventing on interfering with the diversions or uses of the waters of said river herein decreed to the [United States as trustee for the Indians], or their assigns.

Appendix, I, 101 (Docket No. 4427 Decree, Tribal Court Trial Ex. 6).

In 1910, the property now owned by Defendant McKee was conveyed to Defendant McKee’s predecessor in interest by a 1910 patent. Appendix, I, 41 (Ute Tribal Court’s Findings of Fact and Conclusions of Law). The 1910 patent conveyed title to the property subject to

. . . any vested and accrued water rights . . . and rights to ditches and reservoirs used in connection with such water rights . . . and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States . . . .

Appendix, I, 85 (BLM Certified Record of Patents, Patent No. 159817, Tribal Court Trial Ex. 3). Defendant McKee therefore received the property with notice that the property was burdened by the easement for the UIIP ditches and canals that traverse the property.

Defendants' property is not entitled to receive water through the Deep Creek Canal or Lateral 9 under either the 1905 Certificate of Appropriation of Water or the 1923 Decree in *United States v. Cedarview Irrigation Company et al.*, No. 4427. Appendix, I, 35-64 (1905 Certificate of Appropriation of Water, Tribal Court Trial Ex. 5); Appendix, I, 43 (Ute Tribal Court's Findings of Fact and Conclusions of Law).

### **III. STATEMENT OF UNDISPUTED MATERIAL FACTS**

#### **A. The Underlying Tribal Court Proceeding**

1. On September 6, 2012, the Tribe filed its original complaint against Defendants in the Tribal Court along with a motion for issuance of a temporary restraining order and request for an expedited hearing. Appendix, I, 63-196; II, 197-393 (Ute Indian Tribe's Compl. Against Defendants, as amended and with attached exhibits).

2. Service of process was made on all Defendants. Appendix, II, 394-406 (Proofs of Service for Gregory D. McKee, T&L Livestock, Inc., McKee Farms, and GM Fertilizer).

3. Defendants filed an answer to the amended complaint. Appendix, III, 407-11 (Def.'s Answer to Tribal Ct. Compl.).

4. A preliminary injunction hearing was held on March 26, 2013, at which time the Tribal Court took testimony from Defendant McKee and Dr. Woldezian Mesghinna, Ph.D. and P.E., the Tribe's Water Engineer. The Tribal Court also admitted various exhibits into evidence at that time. Appendix, III, 412-634 (Prelim. Inj. Hr'g Tr. March 26, 2013).

5. On April 15, 2013, Defendants filed a motion to dismiss the Tribal Court action, which motion was denied. Appendix, IV, 635-42 (Defs.' Tribal Ct. Mot. to Dismiss); Appendix, IV, 643-45 (Tribal Ct. Order Denying Mot. to Dismiss).

6. The Tribal Court conducted a trial on the matter on July 13, 2015. Answer ¶ 17, ECF No. 20; see *generally* Appendix, I, 35-62 (Ute Tribal Court's Findings of Fact and Conclusions of Law); Appendix, IV, 646-739 (Trial Tr. July 13-14, 2015).

7. Despite having filed an answer, appearing at the preliminary injunction hearing, and receiving notice of the trial, Defendants failed to appear at or participate in the trial. Answer ¶ 17, ECF No. 20. Appendix, IV, 740-48 (Scheduling Order & Order Vacating Hr'g).

8. Plaintiff established in the Tribal Court, by clear and convincing evidence, that Defendants misappropriated tribal waters from the Deep Creek Canal and Lateral No. 9. Appendix, I, 44 (Ute Tribal Court's Findings of Fact and Conclusions of Law).

9. The Tribal Court found that Defendants had unlawfully taken water from the UIIP, a federally managed Indian irrigation project held by the United States in trust for the Tribe. Appendix, I, 35-62 (Ute Tribal Court's Findings of Fact and Conclusions of Law).

10. The Tribal Court entered a Final Judgment for Damages and Permanent Injunction on September 29, 2015.

11. The Tribal Court Corrected Decree of Judgment, Appendix, IV, 749-53, was sent to the address provided for Defendant McKee in his counsel's motion to withdraw from the Tribal Court action filed on June 10, 2015, Appendix, IV, 754-56.

12. Upon his receipt of the Corrected Decree of Judgment or any time thereafter, Defendant McKee could have sought extensions of time under Rule 3(b) of the Ute Indian Rules of Procedure, Appendix, IV, 757-58, to file a motion for reconsideration and/or a notice of appeal. Alternatively, he could have sought relief from judgment under Rule 30 of the Ute Indian Rules of Civil Procedure (“Relief from Judgment”), Appendix, IV, 759-60. Defendant McKee never availed himself of any of these opportunities.

13. No payment on account of the Tribal Court judgment has ever been made, nor has a *supersedeas* bond been posted to stay enforcement of the judgment. Answer ¶ 19, ECF No. 20.

14. Pursuant to Rule 37 of the Ute Indian Rules of Civil Procedure, Appendix, IV, 761-62, the deadline for Defendants to appeal the Tribal Court judgment has expired. See Answer ¶ 19, ECF No. 20.

**B. General Facts**

15. Defendant McKee is a non-Indian. Appendix, I, 39 (Ute Tribal Court’s Findings of Fact and Conclusions of Law).

16. The remaining Defendants are corporations in which Defendant McKee is the sole shareholder. *Id.*

17. The Findings of Fact and Conclusions of Law made by the Ute Indian Tribal Court include a detailed discussion of the land status of Defendant McKee’s property. Appendix, I, 39-42, ¶¶ 3-10 (Ute Tribal Court’s Findings of Fact & Conclusions of Law).

18. The McKee property originally belonged to the Ute Indians as part of the Tribe’s Uintah Valley Reservation; however, the property was “diminished” from the

Reservation after the Reservation was opened to non-Indian settlement in 1905. See *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*).

19. In litigation to determine the Reservation's boundaries, the Tenth Circuit determined that the non-Indian settlement—and the resulting diminishment of the Uintah Valley Reservation—“did not erase the [exterior] boundaries” of the Reservation; the Tenth Circuit explaining that the Reservation was “‘diminished’—not ‘disestablished,’ ‘eliminated,’ or ‘terminated.’” *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513, 1530 (10th Cir. 1997) (*Ute V*) (quoting *Hagen v. Utah*, 510 U.S. 399, 414 (1994)).

20. In its Findings of Fact and Conclusions of Law, the Tribal Court found that:

The McKee Property is land that was diminished from the Uintah Valley Reservation, i.e., “lands that passed from [Indian] trust to fee status.” However, the McKee Property is situated in a checker-board area of the Reservation and is immediately adjacent to tribal trust lands to the east and south. The McKee Property is depicted as essentially surrounded by Indian County on the *Jurisdictional Map* approved by the U.S. District Court in *Ute Tribe v. Utah*, case no. 75-CV-408.

Appendix, I, 42 ¶ 10 (Ute Tribal Court's Findings of Fact & Conclusions of Law).

21. Defendant McKee's property is traversed by the Deep Creek Canal and Lateral No. 9, both of which are conveyance channels for the UIIP. Appendix, I, 42 (Ute Tribal Court's Findings of Fact & Conclusions of Law).

22. At the time of the water theft, including during the Tribal Court proceeding, Defendant McKee also leased Ute tribal land through the Bureau of Indian Affairs.

Appendix, IV, 763-71 (U.S. Dep't of the Interior Assignment of Agric. Lease, Lease No. 8FP0007852); see also Appendix, I, 54 (Ute Tribal Court's Findings of Fact and Conclusions of Law).

#### IV. ARGUMENT

Under this Court's precedent, the decision of a federal court to enforce a tribal court judgment is a matter of discretion under the principles of comity. See *McArthur v. San Juan County*, 497 F.3d 1057, 1060 (D. Utah 2007). In furtherance of a court's discretion to enforce a tribal court judgment, the importance of tribal courts and the dignity their decisions are to be afforded weigh in favor of enforcing a tribal court judgment pursuant to the doctrine of comity. *Id.* at 1067.

"As a general policy, '[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-cv-489, 2017 U.S. Dist. LEXIS 161387 at 26 (D. Idaho 2017), quoting *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997). The interest of the United States includes "(1) furthering the congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary," *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), all of which would be supported by this Court's recognition and enforcement of the Tribal Court judgment. Furthermore, it is "a general principle [that] federal courts should recognize and enforce tribal court judgments." *Wilson*, 127 F.3d at 810 (emphasis added).

In addition, Defendants have shunned the doctrine of exhaustion of tribal court remedies. As a matter of federal law and Utah law, tribal court remedies must be exhausted before a party may bring a suit in federal court or assert a defense challenging tribal court jurisdiction. “For reasons of comity, federal courts should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted.” *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169-70 (10th Cir. 1992). This is because “[Congress’] policy of supporting tribal self-government and self-determination favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.” *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1988). “At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.” *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 17 (1987). Here, Defendants failed to participate in the trial or to exercise their right to an appeal from the final judgment through the Ute Indian Appellate Court. Therefore, Defendants’ present challenge to tribal court jurisdiction—made as part of Defendants’ argument against granting comity to the Tribal Court judgment—has to be viewed through the familiar lens of voluntary waiver and equitable estoppel. Defendants voluntarily waived their right to challenge tribal court jurisdiction through the Ute Indian Appellate Court and should now be equitably estopped from challenging tribal court jurisdiction in this enforcement proceeding.

**A. The Only Issues Before this Court are Matters of Law**

The Court must recognize and enforce the Tribal Court judgment as a matter of comity. A presumption exists that a federal court will recognize and enforce a tribal court judgment pursuant to comity. *Wilson*, 127 F.3d at 809-10; see also *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir.1971) (“Comity should be withheld **only** when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.”) (emphasis added). This is partly because “[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) (internal citations omitted).

There are only certain circumstances under which a court should refuse to recognize and enforce a tribal court judgment, i.e., (1) if the tribal court lacked either personal or subject matter jurisdiction or (2) if the tribal court did not afford due process of law. *McArthur*, 497 F.3d at 1067. In addition, a court may, at its discretion, choose to not enforce tribal court judgments: (1) if the judgment was obtained by fraud, (2) if the judgment conflicts with another final judgment entitled to recognition, (3) if the judgment is inconsistent with the parties’ contractual choice of forum, or (4) if recognition of the judgment would be against the public policy of the United States or the forum state. *Id.* (citing *Wilson*, 127 F.3d at 810). None of those circumstances are present here and, as a result, the judgment of the Tribal Court is entitled to recognition and enforcement by this Court. *Burrell v. Armijo*, 456 F.3d 1159, 1169 (10th Cir. 2006) (“Unless the district court



finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.”) (internal citations omitted).

**B. The Tribal Court had Both Personal and Subject Matter Jurisdiction**

The Tribal Court had both personal and subject matter jurisdiction over Defendants. The Tribe has the burden of proving that it had proper jurisdiction over Defendants. See *FMC Corp.*, 2017 U.S. Dist. LEXIS 161387 at 27-28. As demonstrated below, the Tribal Court did have proper jurisdiction over Defendants and the Tribal Court’s jurisdiction is derived independently from each of the following: the Law and Order Code of the Ute Indian Tribe (“Tribal Code”), the *Montana* exceptions, and the Tribe’s inherent sovereign powers over its tribal property and its power to exclude non-members.

**1. Law and Order Code of the Ute Indian Tribe**

The Tribal Court properly exercised personal and subject matter jurisdiction over Defendants pursuant to the Tribal Code. Appendix, IV, 772-95 (Title I, Ute Indian Law and Order Code, Amended and Restated).

a) Personal Jurisdiction

The Tribal Court had personal jurisdiction over Defendants pursuant to § 1-2-3 of the Tribal Code. Appendix, IV, 775-76 (Ute Indian Tribe Law and Order Code § 1-2-3). Section 1-2-3 sets forth the Tribal Court’s personal jurisdiction, which extends to “[a]ny person who directly or indirectly causes an environmental hazard or degradation of the air, waters, flora, fauna, cultural artifact or other resources within the Tribe’s territorial jurisdiction, for any civil cause of action or charge of criminal offense prohibited by this

Code or other ordinance of the Tribe arising from or related to such environmental hazard or degradation.” § 1-2-3(2)(F).

Defendants themselves established the second basis for the Tribal Court’s personal jurisdiction when they appeared before the Tribal Court to defend themselves because, under § 1-2-3(2)(A)(i), the Tribal Court has jurisdiction over any person located or present within the Reservation for any civil cause of action. Defendants did not *speciallly* appear in Tribal Court for the purpose of responding and never challenged the Tribal Court’s personal jurisdiction over them in the underlying case. Pursuant to § 1-2-3(A)(i), the Tribal Court’s exercise of personal jurisdiction was proper.

Finally, the Tribal Court had personal jurisdiction over Defendants under § 1-2-3(2)(E) because Defendants caused a tortious injury to the Tribe, to tribal members, and to property within the Tribe’s territorial jurisdiction by stealing tribal waters. See Appendix, I, 35-62 (Ute Tribal Court’s Findings of Fact and Conclusions of Law). Therefore, in addition to §§ 1-2-3(2)(F) and 1-2-3(2)(A)(i), Section 1-2-3(2)(E) vested the Tribal Court with personal jurisdiction over Defendants.

*b) Subject Matter Jurisdiction*

The Tribal Court had subject matter jurisdiction over Defendants pursuant to §§ 1-2-2, 1-2-4, and 1-2-5 of the Tribal Code. Appendix, IV, 775-78 (Title I, Ute Indian Law and Order Code, Amended and Restated). Section 1-2-2 sets forth the Tribe’s territorial jurisdiction, which extends to all “waters, water storage facilities and irrigation works owned by or held in trust for the Ute Tribe and Ute Indian allottees” and to all property owned in fee or held in trust for the Tribe. Section 1-2-4 reiterates the Tribe’s jurisdiction

over its property, noting that “the Courts of the Ute Indian Tribe shall have jurisdiction over any real or personal property located within the Tribe’s territorial jurisdiction.” Similarly, § 1-2-5 provides the Tribe’s courts with general subject matter jurisdiction “over all civil causes of action, and over all criminal offenses prohibited by [the Tribal Code] . . . .” Defendants committed crimes dealing with the waters and irrigation works of the Tribe and committed offenses against the Tribe’s property held in trust by the United States. The Tribe’s Law and Order Code therefore provided multiple grounds for the tribe to exercise subject matter jurisdiction under the Tribe’s own jurisdictional laws.

c) *Retroactive Application of Jurisdictional Statutes*

Although this Court has previously suggested that jurisdictional statutes are not to be applied retroactively, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, 312 F. Supp. 3d 1219, 1241-1242 (D. Utah 2018),<sup>2</sup> the jurisdictional provisions cited above do apply to Defendants’ actions which were commenced prior to the 2013 update to the Tribe’s jurisdictional laws through Tribal Resolution 13-010, and which actions are continuing to date. Appendix, IV, 772-95 (Ute Indian Tribe’s Tribal Resolution 13-010 (adopting Title I, Ute Indian Law and Order Code, Amended and Restated)).

The tribal law provisions at issue are applicable specifically because they are jurisdictional statutes. It is well-established that an amendment to a jurisdictional statute applies to all existing and future cases to which the statute applies. The leading case on this point is *United States v. Alabama*, 362 U.S. 602 (1960) (*per curiam*). In that case,

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<sup>2</sup> That decision is currently on appeal to the U.S. Court of Appeals for the Tenth Circuit, appeal nos. 18-4013, 18-4030 and 18-4072.

the federal district court ruled that it lacked jurisdiction to entertain a civil rights action brought by the United States against the State of Alabama. The United States Supreme Court granted *certiorari*. While the appeal was pending, Congress passed the Civil Rights Act of 1960, an Act that authorized federal civil rights lawsuits against states. *Id.* at 604. Relying on “familiar principles,” the Supreme Court held that “the case *must* be decided on the basis of law *now controlling*, and the provisions of [the new statute] are applicable to this litigation.” *Id.* (emphasis added) (internal citations omitted). The Court ruled that “the District Court has jurisdiction to entertain this action against the State,” leading the Court to reverse the dismissal and remand the case for litigation. *Id.*

Similarly, in *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), the Supreme Court ruled that because the general federal question jurisdiction statute had been amended in 1976 to eliminate the amount-in-controversy requirement for suits against the United States, “the fact that, in 1973, respondent, in its complaint, did not allege \$10,000 in controversy *is now of no moment.*” *Id.* at 608, n. 6 (emphasis added). The federal court for the District of Colorado applied the same principle in *Smith v. Putnam*, 250 F. Supp. 1017 (D. Colo. 1965). That case involved an automobile accident that occurred on September 11, 1963, in Colorado, and the tortfeasor was a resident of Alabama. On May 10, 1965, the Colorado legislature amended the state’s jurisdiction statutes to include a “long-arm” provision, which extended the jurisdiction of Colorado courts to persons who commit tortious acts in Colorado regardless of “whether or not” the tortfeasor was “a resident of the state of Colorado.” *Id.* at 1017-18. The plaintiff in *Smith* sued under the new long-arm statute, and the issue before the federal district court was

whether the new long-arm statute could be applied retroactively to the 1963 automobile accident. The court ruled that the jurisdictional statute was “procedural” in substance and, therefore, could be applied retroactively:

That this statute, an example of one of the many new “long arm” statutes, is “procedural” rather than “substantive” cannot be seriously questioned. Its effect is not to create a right or liability where none existed before; its only effect is to broaden the procedure whereby one seeking redress against an alleged tortfeasor may compel him to answer in the forum initially determined by the plaintiff to be the most convenient.

*Id.* at 1018.

As the case law shows, changes to procedural statutes are applied retroactively to pending cases, and jurisdictional statutes are procedural. The Tribe’s jurisdictional statutes as set forth in Ordinance No. 13-010 therefore governed the Tribe’s Tribal Court complaint and vested the Tribal Court with jurisdiction over the Tribe’s claims against the Defendants. Because the Tribal Court possessed both personal jurisdiction over the Defendants and subject-matter jurisdiction over the Tribe’s cause of action, the Tribal Court’s judgment is entitled to recognition and enforcement by this Court.

## **2. Montana Exceptions**

Even assuming for the sake of argument that the Tribal Court did not have personal and subject matter jurisdiction under its own laws, federal courts determine whether a tribal court had personal and subject matter jurisdiction as a matter of federal law by determining whether the tribe had legislative (or regulatory) authority over the issue at bar. *McArthur*, 497 F.3d at 1068. This is because, in accordance with *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction . . . .” *Strate*, 520 U.S. at 440. In *Norton v. Ute Indian Tribe of the*

*Uintah and Ouray Reservation*, 862 F.3d 1236 (10th Cir. 2017), the court noted that tribal court jurisdiction turns upon whether the actions at issue in the litigation may be regulated by the tribe. *Norton*, 862 F.3d at 1245. The court relied on the general rule that where tribes possess authority to regulate certain activities, including the activities of nonmembers, then civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts. *Id.*

The Tribe has regulatory jurisdiction over Defendants' actions pursuant to the exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). "The *Montana* exceptions are rooted in the tribes' inherent power to protect certain sovereign interests." *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010). *Montana* recognizes the Tribe's inherent sovereign right to regulate (1) activities of all non-Indians who willingly enter into a consensual relationship with the Tribe or its members and (2) activities upon tribal lands that imperil the Tribe's political integrity, economic security, or health and welfare. The Tribe derives its jurisdiction over Defendants from both *Montana* exceptions.

a. *First Montana Exception*

The first *Montana* exception provides multiple grounds for jurisdiction based on Defendants' consensual relationship with the Tribe. Notably, "it is the consensual

relationship that triggers Tribal jurisdiction, regardless of whether separate agreement to submit to jurisdiction exists.” *FMC Corp.*, 2017 U.S. Dist. LEXIS 161387 at 30-31.

Defendant McKee’s land was conveyed to his predecessors in interest under an original U.S. Patent—Patent No. 159817. Appendix, I, 83-87 (Tribal Court Trial Ex. 5).

The Patent contains the following language:

“NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; **subject to any vested and accrued water rights** for mining, agricultural, manufacturing, or other purposes, and **rights to ditches and reservoirs used in connection with such water rights**, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and **there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States**; reserving, also, to the United States all coal in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of the Act of March 3, 1909, entitled “An Act for the protection of the surface rights of entrymen.”

*Id.* (emphasis added).

It has been established and proven in the Tribal Court that Defendant McKee was illegally diverting water from the Deep Creek Canal and Lateral 9. See Appendix, I, 44 (Ute Tribal Court’s Findings of Fact and Conclusions of Law). The Deep Creek Canal is an Indian irrigation canal that carries the Ute Indian Tribe’s waters through a parcel of Defendant McKee’s property, Appendix, I, 47 (Ute Tribal Court’s Findings of Fact and Conclusions of Law), pursuant to an easement reserved by the Patent for the property,

Appendix, I, 83-87 (BLM Certified Record of Patents, Patent No. 159817, Tribal Court Trial Ex. 5). Lateral 9, which diverts a portion of the Tribe's water from the Deep Creek Canal (Appendix, II, 568, 572(Prelim. Inj. Hr'g Tr. March 26, 2013)), crosses Defendant McKee's property pursuant to that same easement. Therefore, Defendant McKee was aware that his property was a servient estate burdened by the easement. This means that Defendant McKee consented to own land that is burdened by an easement for the "canals and ditches constructed by the authority of the United States" that carry the Tribe's water. *Id.*

In every easement there are two distinct estates: the dominant estate, to which the easement right belongs, and the servient estate, on which the obligation or burden of the easement rests. While the owner of land subject to an easement—the servient estate owner—retains the right to use the land burdened by the easement, this right only extends to such use of the property that is consistent with the rights of the holder of the easement—the dominant estate owner—and the servient owner may not take actions that interfere unreasonably with the dominant owner's use of the easement. See Am. Jur. 2d, Easements and Licenses in Real Property § 75. Based on the *Montana* consensual relationship exception, the Tribe had jurisdiction over Defendant McKee and his companies because there was a consensual relationship with the Tribe based on the U.S. Patent that put Defendant McKee on notice that his land was subject to the vested and accrued water rights of the Tribe and the rights-of-way for ditches and canals, including the Deep Creek Canal and Lateral 9. If Defendant McKee did not wish to own land that is burdened by an easement for UIIP canals and ditches carrying the Tribe's water, he



could have sold that land, but he chose not to do so. In other words, McKee consented to own property that is a servient estate, that is burdened by an easement for UIIP ditches and canals, and in which the water carried through the ditches and canals is water that has been *decreed* to be Indian water. Appendix, I, 96-102 (U.S. Dist. Ct. for the Dist. of Utah Decree, Docket No. 4427, Tribal Court Trial Ex. 5).

Defendant McKee and Defendant McKee Farms, Inc. also established a consensual relationship with the Tribe by leasing tribal land. Appendix, IV, 763-71 (U.S. Dep't of Interior Assignment of Agric. Lease, Lease No. 8FP0007852). Settled law dictates that a lease is one means by which a nonmember can enter into a consensual relationship with a tribe. *Montana*, 450 U.S. at 565–66. The lease assignment agreement between the Department of Interior and Defendant McKee for the lease of Ute tribal lands, Lease No. 8FP0007852 dated March 25, 2008, explicitly notes that the lease is subject to the lessee (Defendant McKee) complying with “all applicable laws, ordinances, rules, regulations, and other legal requirements, ***including tribal laws and leasing policies.***” Appendix, IV, 767 (U.S. Dep't of Interior Assignment of Agric. Lease, Lease No. 8FP0007852) (emphasis added). Defendant McKee was on notice that he was subject to Tribal Court jurisdiction and tribal law.

In *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011), a nonmember had entered into a lease with the Colorado River Indian Tribes (“CRIT”). *Id.* at 818. The lease explicitly stated that the nonmember lessee had to comply with all CRIT laws, regulations, and ordinances. *Id.* The court found that the nonmember lessee could have reasonably anticipated that the CRIT could and would exercise their

jurisdictional authority over him and he had thereby established a consensual relationship with the tribes. *Id.* The same situation exists here. Defendant McKee entered into a consensual relationship with the Tribe through the leasing of tribal lands. His lease explicitly notified him that he was subject to all tribal laws and leasing policies. Therefore, Defendant McKee had notice that he was subject to the Tribe's jurisdiction and that the Tribal Court could exercise jurisdiction over him. Not only was Defendant McKee on notice, but he clearly had a consensual relationship with the Tribe through a variety of dealings. In fact, Defendant McKee himself described his relationship with the Tribe as "good" until recently during the Tribal Court preliminary injunction hearing. Appendix, II, 497 (Prelim. Inj. Hr'g Tr. March 26, 2013, p. 67, ln 16-19). As Defendant McKee himself admitted before the Tribal Court, he has a consensual relationship with the Tribe. He therefore availed himself of the Tribe's jurisdiction pursuant to the first *Montana* exception.

*b. Second Montana Exception*

Pursuant to the second *Montana* exception, a tribe can exercise civil authority over activities that threaten or have some direct effect on the tribe's political integrity, economic security, or health and welfare. *Montana*, 450 U.S. at 566. The Tenth Circuit has recognized that water rights constitute one of the "four critical elements necessary for tribal sovereignty"—the other three essential elements being land, mineral rights, and tribal jurisdiction over its land and natural resources. *City of Albuquerque v. Browner*, 97

F.3d 415, 418 and n.2 (10th Cir. 1996) (affirming an Indian tribe's adoption of water quality standards under the Clean Water Act).

The conduct challenged in the Tribal Court is Defendant McKee's act of illegally diverting and stealing tribal waters. Tribal reserved water rights, also known as *Winters* rights, are of vital importance to tribes, but of exceptional importance to tribes in the arid American West. *Ute Indian Tribe v. Utah*, 521 F. Supp. at 1134 (quoting 48 Cong. Rec. 9101-9102, 9107 (July 15, 1912) LD 144 (statement of Rep. Howell) ("The Uintah Indian Reservation is an arid region . . . ."). The very basis of *Winters* rights is the implied reservation of water rights that accompanied the establishment of Indian reservations because reservations were meant to be permanent homelands for tribes and a homeland would not be possible without water. See *Winters*, 207 U.S. 564.

Indian water rights are reserved rights because they are deemed "an essential part of the tribe's reservation." *Arizona v. California*, 373 U.S. at 600. Water is nothing less than the lifeblood of tribes. The importance of water to the survival of the Ute Indians is beyond dispute.<sup>3</sup> Before the Uintah and Ouray Reservation was opened to non-Indian settlement, the Commissioner of Indian Affairs cautioned that "[t]he future of these Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate." *Ute Indian Tribe v. Utah*, 521 F. Supp.

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<sup>3</sup> Before the Uintah Valley Reservation was established by Executive Order in 1861, Brigham Young, Territorial Governor of the Territory of Utah and President of the Mormon Church, dispatched a survey team to determine whether the proposed reservation lands would instead be suitable for Mormon settlement. The team's "unanimous and firm" verdict was that the proposed reservation lands were "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians and to hold the world together." Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004).

at 1126 (quoting Rep. of the Comm. of Ind. Aff., 1905, JX 328 at 1893). Taking into account the importance of water to tribes, Defendant McKee, by diverting and stealing tribal waters, committed the most egregious and damaging harm to the Tribe, thereby invoking the second *Montana* exception. As in *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 2019 WL 1781404, the McKee Defendants' theft of tribal waters was "of long duration and had a great [negative] impact upon the Tribe," such as to qualify for jurisdiction under *Montana's* second prong. No. 17-15515, 2019 WL 1781404 at 13 (9th Cir. April 24, 2019) (for publication). Maintaining the integrity of the Tribe's tribal waters is essential to the Tribe's economic well-being and security, and to the health and welfare of its tribal members. It is critical for the Tribe to be able to protect and secure its waters and its irrigation channels and ditches. Thus, tribal courts must be allowed to address instances in which a nonmember, or anyone for that matter, trespasses onto tribal property and misappropriates tribal waters, whether on- or off-reservation. Furthermore, the Tribal Court is the best judicial forum to address such issues insofar as it is a vital right of the Tribe that is at stake.

In *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), the Ninth Circuit ruled that tribal exhaustion was required when a nonmember was charged with trespass in the tribal court. "Trespass regulations plainly concern a property owner's right to exclude, and regulations prohibiting destruction of natural resources . . . are related to an owner's right to occupy." *Id.* at 850. "Because the trespass destroyed the tribe's natural resources, the suit was 'intended to secure the tribe's political and economic well-being' and thus fit within the second *Montana* exception." *Norton*, 862

F.3d at 1245 (emphasis added), quoting *Elliott*, 566 F.3d at 850. Here, Defendants trespassed against the Tribe's property interests to steal the Tribe's natural resources. Deprivation of natural resources and destruction of natural resources cause the same harm to the Tribe. As in *Elliott*, the Tribal Court action here was intended to secure the Tribe's political and economic well-being through protection of its water and thus fits within the second *Montana* exception.

Because Defendants had a consensual relationship with the Tribe, and because the intent of the Tribal Court suit was to stop theft of the Tribe's water, thereby securing the Tribe's political and economic well-being, the Tribal Court had subject matter jurisdiction under both of the *Montana* exceptions.

### **3. Tribe's Inherent Sovereign Power to Exclude**

Finally, this Court must recognize and enforce the Tribal Court's judgment because, in addition to the *Montana* exceptions, the Tribe's inherent sovereign power of exclusion vested the Tribal Court with jurisdiction over Defendants. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Elliott*, 566 F.3d 842. "[A] hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 at 141 (1982); see also *Norton*, 862 F.3d at 1244. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335-36, the U.S. Supreme Court found that "[the Supreme Court has] held that tribes have the power to manage the use of their territory and resources by both members and nonmembers." 462 U.S. at 335-36 (emphasis added) (citing *Montana*, 450 U.S. 544; *Merrion*, 455 U.S. 130; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). "Tribal civil authority

is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner,” *Attorney’s Process and Investigation Services*, 609 F.3d at 940, as the Tribe did here in the Tribal Court. The Tribe simply exercised its power and jurisdictional authority to manage its resources by enforcing the Tribe’s water right and deterring nonmembers from stealing the Tribe’s invaluable resource on which its membership depends.

The Tribe’s inherent sovereign power to exclude nonmembers from its land and resources is well established. In the case of *Merrion v. Jicarilla Apache Tribe*, the Supreme Court held that

[n]on-Indians who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.

450 U.S. at 144-45. The Deep Creek Canal and Lateral 9 are trust property of the Tribe running on the Tribe’s easement (a real property interest), placing Defendants’ entry and water theft from the Canal and Lateral 9 within the purview of the Tribe’s inherent sovereign power to exclude. See Appendix, I, 42-43 (Ute Tribal Court’s Findings of Fact and Conclusions of Law).

The right to exclude has been held to constitute an independent basis for jurisdiction, separate and apart from the *Montana* exceptions. *Duro v. Reina*, 495 U.S. 676, 696–97 (1990) (noting that even where tribes lack criminal jurisdiction over a non-Indian defendant, they “possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands . . . .”); *Knighton*, 2019 WL

1781404 at 11 (“ . . . an Indian tribe has power to regulate nonmember conduct on tribal land incident to its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied.”); *Water Wheel*, 642 F.3d 802. As the Ninth Circuit explained in *Window Rock Unified School District v. Reeves*, 861 F.3d 894 (9th Cir. 2017),

[federal] case law has long recognized two distinct frameworks for determining whether a tribe has jurisdiction over a case involving a non-tribal-member defendant: (1) the right to exclude which generally applies to nonmember conduct on tribal land; and (2) the exceptions articulated in *Montana v. United States* . . . which generally apply to nonmember conduct on tribal land.

*Id.* at 898. The Court in *Water Wheel* went so far as to say that,

where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe’s inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe’s status as landowner is enough to support regulatory jurisdiction without considering *Montana*. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositive and would improperly limit tribal sovereignty without clear direction from Congress.

642 F.3d at 814.

The Tribe’s exclusionary power “is a fundamental sovereign attribute intimately tied to a tribe’s ability to protect the integrity and order of its territory and the welfare of its members . . . .” *Cohen’s Handbook of Federal Indian Law* § 4.01[2][e], 221 (Nell Jessup Newton et al. eds., 2012). The Deep Creek Canal and Lateral 9, as tribal trust property, and the easement they occupy, as tribal trust real property, are essentially an extension of the Tribe’s Reservation. They carry the Tribe’s reserved water right, which exists by virtue of the establishment of the Tribe’s Reservation to accomplish the purpose for which

the Reservation was established. *Hackford*, 14 F.3d at 1469. By virtue of the relationship between an Indian reservation and the corresponding Indian water right, that Indian water right is tied to the reservation. The rationale behind the right to exclude extends to these unique circumstances, as does the Tribe's jurisdiction.

A tribe's "right to exclude non-Indians from tribal land includes the power to regulate them unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government." *Water Wheel*, 642 F.3d at 812. The Tribe's right to exclude extends to its off-reservation trust property, or at a minimum, its off-reservation property interests. This exclusion power entails the authority to regulate. See *Merrion*, 455 U.S. at 144 (a tribe's power to exclude "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct."). Because the Tribe has regulatory jurisdiction over the property and conduct at issue in the Tribal Court case, the Tribal Court presumptively possessed jurisdiction over the Tribe's Tribal Court claim to protect its water. See *Strate*, 520 U.S. at 453 ("... 'where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'"); *Knighton*, 2019 WL 1781404 at 13 (citation omitted); *Norton*, 862 F.3d at 1245 "[A] Tribe's right to exclude non-tribal members from its land imparts regulatory and adjudicative jurisdiction over conduct on that land." *Window Rock Unified Sch. Dist.*, 861 F.3d at 899.

As explained above, Defendants' theft of tribal water, an invaluable tribal resource crucial to the Tribe's very survival, occurred from tribal property on an easement held in trust for the Tribe by the United States, thereby implicating the Tribe's inherent sovereign



power to exclude. The Tribe's power to exclude, therefore, acts as an independent basis on which the Tribal Court exercised jurisdiction over Defendants regardless of the applicability of the *Montana* exceptions.

"Given the existence of regulatory authority, the sovereign interests at stake, and the congressional interest in promoting tribal self-government . . . the Tribal Court has jurisdiction over the Tribe's claims in this case." *Knighon*, 2019 WL 1781404 at 14. In light of the Tribe's multiple bases for jurisdiction derived 1) from its own laws, 2) under the *Montana* exceptions, and 3) pursuant to its sovereign power to exclude, the Tribal Court possessed clearly jurisdiction over Defendants.

**C. The Ute Indian Tribal Court Provided Due Process to Defendants**

The Tribal Court provided Defendants with due process throughout the Tribal Court litigation, and Defendants had a meaningful opportunity to participate in the trial and throughout the underlying proceeding. Defendants bear the burden of proving that due process was lacking, see *FMC Corp.*, 2017 U.S. Dist. LEXIS 16381 at 28, but Defendants have made no such showing.

For purposes of comity analysis, due process requires

that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws.

*Wilson*, 127 F.3d at 811; see also *FMC Corp.*, 2017 U.S. Dist. LEXIS 16381 at 37.

Defendants were provided with all aspects of due process in the Tribal Court. The Tribal Court applies the Tribe's publicly available laws through well-trained, seasoned

judges. Appendix, IV, 798 (Decl. of Ute Tribal Chairman Luke J. Duncan ¶¶ 6-7). A quality, competent judge well-versed in federal Indian law and its jurisdictional intricacies presided over the case. Appendix, IV, 798-99 (Decl. of Ute Tribal Chairman Luke J. Duncan ¶¶ 11-14). As Defendants have admitted, service of process was made on all Defendants. Answer ¶ 15, ECF No. 20. Defendants had notice of the lawsuit and trial. See *Id.*; Appendix, IV, 743 (Scheduling Order & Order Vacating Hr'g). They had an opportunity to present witnesses and testimony, as well as an opportunity to cross-examine the Tribe's witnesses. See Appendix, I, 35-62 (Ute Tribal Court's Findings of Fact and Conclusions of Law); Appendix, IV, 742-43 (Scheduling Order & Order Vacating Hearing). They filed an answer and a motion to dismiss, neither of which indicated that Defendants were making a special appearance purely to object to the Tribal Court's jurisdiction over them. See Appendix, IV, 407-11 (Defs.' Answer to Tribal Ct. Compl.); Appendix, IV, 635-42 (Defs.' Tribal Ct. Motion to Dismiss). Then, even though Defendants had been afforded the opportunity to appear and defend themselves at trial, they voluntarily chose not to appear at the trial, Answer ¶ 17, ECF No. 20, and to abandon any valid defenses they may have had, indicating that Defendants likely had no valid defenses at all. In addition, nothing in the record suggests that the Tribe's Business Committee, its governing body, had any influence over the judge in the Tribal Court proceeding.

For these reasons, and because Defendants have failed to and cannot show that the Tribal Court did not afford them due process, there is no genuine dispute that the Tribal Court afforded Defendants due process.

**D. No Discretionary Reasons Exist to Deny Recognition and Enforcement**

None of the discretionary grounds available to courts to deny recognition and enforcement of tribal court judgments are present here. The judgment was not obtained by fraud, but is rather a judgment based purely on the facts and evidence presented to the Tribal Court. Defendants have never made allegations that the Tribal Court judgment was obtained by means of fraud due to the fact that Defendants cannot, in good faith, make such allegations. The judgment does not conflict with another final judgment entitled to recognition because there is no other final judgment entitled to recognition. This dispute between the Tribe and Defendants has only been addressed by the Tribal Court and, now, this Court. Additionally, the judgment is not inconsistent with the parties' contractual choice of forum because there is no contractual choice of forum between the Tribe and Defendants. Even Defendant McKee's lease of tribal land only specifies that he must comply with all tribal laws and leasing policies; it does not identify what forum would be utilized if there was a breach of the lease. Appendix, IV, 763-71 (U.S. Dep't of the Interior Assignment of Agric. Lease, Lease No. 8FP0007852).

Finally, recognition of the judgment would not be against the public policy of the United States or the State of Utah, as asserted in Defendants' Answer, but would, in fact, support those public policies. Federal law, policy, and judicial precedent support tribal self-governance. See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959). Pursuant to this policy, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).

The recognition and enforcement of the Tribal Court judgment is consistent with the United States' trust responsibilities with regard to protecting and preserving the Tribe's water right for use by the Tribe and its members.

The State of Utah likewise has public policies that strongly favor recognition and enforcement of tribal court judgments. The Utah Supreme Court has recognized three policies which support not only the exhaustion of tribal court remedies but also Plaintiff's request for comity. The State of Utah's public policies include: 1) supporting tribal self-government; 2) promoting judicial economy; and 3) explaining the basis of jurisdiction to parties and providing other courts with the benefit of tribal courts' expertise in the event of subsequent judicial review. *Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 416 P.3d 401, 420 (Utah 2017), *cert. denied*, 585 U.S. \_\_\_\_ (January 7, 2019). Despite the fact that Defendants were properly served and had notice of the underlying proceedings, they elected to not participate in the trial and failed to appeal the Tribal Court's decision, both of which are required to satisfy tribal exhaustion requirements. *Elliott*, 566 F.3d at 847. If Defendants were dissatisfied with the Tribal Court judgment, the proper course of action was to exhaust their tribal court remedies. Having failed to do so, Defendants are in no position to challenge that judgment now. *See AT&T Corp.*, 295 F.3d at 903-03 ("Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.").

The Tribal Court had personal and subject matter jurisdiction, the Tribal Court provided Defendants due process, and none of the discretionary reasons to deny

recognition and enforcement of a tribal court judgment apply. In light of the significant federal and state policy reasons that favor recognition and enforcement of the Tribal Court judgment, this Court should grant summary judgment in the Tribe's favor.

**V. CONCLUSION & PRAYER**

WHEREFORE, Plaintiff asks this Court for:

1. A finding that the Ute Indian Tribal Court judgment is entitled to recognition, registration, and enforcement in accordance with federal law;
2. An order recognizing, registering, and enforcing the Tribal Court judgment in this Court as a judgment of this Court;
3. A writ of execution commanding the United States Marshal to seize the nonexempt portion of Defendants' property sufficient to satisfy the judgment;
4. An order permitting post-judgment discovery for the purpose of identifying property from which the judgment can be satisfied;
5. An order forbidding any person from transferring, disposing of, or interfering with Defendants' property from which the judgment can be satisfied;
6. Costs and disbursements of this proceeding, including without limitation, attorneys' fees, expenses, expert costs, and all other costs; and

7. Such other and further relief as the Court shall deem just and proper.

Dated: May 16, 2019.

FREDERICKS PEEBLES & PATTERSON LLP

/s/ Jennifer S. Baker

Jennifer S. Baker, *Pro Hac Vice*  
Frances Bassett, *Pro Hac Vice*  
Jeremy Patterson, *Pro Hac Vice*  
1900 Plaza Drive  
Louisville, Colorado 80027  
Telephone: (303) 673-9600  
Facsimile: (303) 673-9155  
Email: [jbaker@ndnlaw.com](mailto:jbaker@ndnlaw.com)  
Email: [fbassett@ndnlaw.com](mailto:fbassett@ndnlaw.com)  
Email: [jpatterson@ndnlaw.com](mailto:jpatterson@ndnlaw.com)

J. PRESTON STIEFF LAW OFFICES

/s/ J. Preston Stieff

J. Preston Stieff (4764)  
110 South Regent Street, Suite 200  
Salt Lake City, Utah 84111  
Telephone: (801) 366-6002  
Facsimile: (801) 521-3484  
Email: [jps@stiefflaw.com](mailto:jps@stiefflaw.com)

*Attorneys for Plaintiff*