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IN THE 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.	**DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM; MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Case No. 2:18-cv-00314-CW Honorable Howard C. Nielson, Jr.

Defendants Gregory D. McKee ("**McKee**"), T & L Livestock, Inc. ("**T&L**"), McKee Farms, Inc. ("**McKee Farms**"), and GM Fertilizer, Inc. ("**GM**) (collectively "**Defendants**"), by and through their undersigned counsel, respectfully submit Defendants' Cross Motion for Summary Judgment, together with their Supporting Memorandum ("**McKee's Motion**") and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (the "**Tribe's Motion**").

CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants hereby move for summary judgment and an order of this Court dismissing the Tribe's Complaint on the grounds that (1) the Ute Indian Tribal Court of the Uintah and Ouray Reservation ("**Tribal Court**") lacked subject matter jurisdiction to enter the judgment dated September 29, 2015, Tribe's Appendix IV, at 749–52, which the Ute Indian Tribe of the Uintah and Ouray Reservation ("**Tribe**") seeks to have domesticated and enforced by this Court ("**Tribal Court Judgment**"); (2) due to the lack of a federal question, this Court lacks subject matter jurisdiction to hear this case; and (3) it would be inequitable for this Court to enforce the Tribal Court Judgment.

INTRODUCTION AND RELIEF SOUGHT

This Court should grant McKee's Motion, deny the Tribe's Motion, and dismiss the Tribe's Complaint, which seeks only to domesticate and enforce the Tribal Court Judgment. First, this Court cannot enforce the Tribal Court Judgment because the Tribal Court lacked subject matter jurisdiction to enter the Tribal Court Judgment. Pursuant to the decision of the United States Supreme Court in *Montana v. United States*, and its progeny, there is a presumption against tribal civil jurisdiction over non-Indians. *See Montana*, 450 U.S. 544, 564 (1981); *Crowe v. Dunlevy , P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011); *Ute Indian Tribe of Uintah v. Lawrence*, 312 F. Supp. 3d 1219, 1243 (D. Utah 2018). This presumption is especially applicable where, as here, a tribe seeks to regulate non-Indian conduct on non-Indian fee land. *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008). "Tellingly, with only one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over

nonmembers *on non-Indian land*." *Id.* at 333 (internal quotation marks omitted) (emphasis in the original).

The presumption *against* tribal court civil jurisdiction may only be overcome if a tribe meets its burden to show that one of two exceptions, known as the "*Montana* exceptions," apply: "First, [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Plains Commerce Bank,* 554 U.S. at 329. (internal quotation marks omitted). "Second, a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 329–30 (internal quotation marks omitted). The Tribe has failed to satisfy its burden of demonstrating that either of the *Montana* exceptions gave the Tribal Court jurisdiction to enter the Tribal Court Judgment.

Second, this Court does not have subject matter jurisdiction over the Tribe's Complaint to domesticate the Tribal Court's judgment because the Complaint fails to raise a federal question pursuant to 28 U.S.C. § 1331. *E.g., Miccosukee Tribe v. Kraus-Anderson Construction Co.*, 607 F.3d 1268, 1275 (11th Cir. 2010). "A suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law." *Id.* "Similarly, an appeal to comity does not, standing alone, create federal question jurisdiction under 28 U.S.C. § 1331." *Id.* at 1276. Because the Tribe's Complaint seeks only to have this Court enforce the Tribal Court's judgment against Defendants, this Court does not have federal question jurisdiction to hear and decide the

Tribe's Complaint. The appropriate venue for the Tribe's Complaint is in state court, which is a court of general jurisdiction. *Id.* at 1277, n.16.

Finally, even if one were to overlook the lack of jurisdiction, it would be inequitable and unjust to enforce a judgment against Defendants by invalidating decades-old Agreements with the Bureau of Indian Affairs (the "**BIA**"), from which the Tribe has benefitted through Defendants' and Defendants' predecessors-in-interests' payment of assessments. *E.g., Wilson*, 127 F.3d at 810 (explaining that a court may refuse to enforce a tribal court judgment on equitable grounds).

BACKGROUND

It is undisputed that none of the Defendants are Tribal members. Tribe's Appendix I, at 39 (Findings of Fact and Conclusions of Law). It is further undisputed that the property at issue is land that was diminished from the Uintah and Ouray Reservation ("**Reservation**") and never subsequently restored. *Id.* at 41–42. The property was first acquired in 1914 by McKee's predecessors in interest by Patent No. 159817, and is now owned by McKee in fee. *Id.* at 41.

Further, it is undisputed that McKee's right to receive water is not the product of any "consensual relationship" with the Tribe, but rather a contractual arrangement with the United States government. Tribe's Appendix II, at 214–20 (Agreements). McKee's right to receive water derives from two agreements first entered into by McKee's predecessor, Dewey McConkie, with the United States—the first in 1943 and the second in 1946 (the "**Agreements**")— that requires the United States to deliver water to the property now owned by McKee ("**McKee's Property**") in exchange for the payment of annual assessments. *Id.*

Since the 1940s, McKee, his family, and his family's predecessors-in-interest have annually purchased water from the BIA pursuant to the Agreements and paid assessments for the

same. McKee's Appendix I, at 77 ¶¶ 7, 9, 10 (Decl. of Gregory McKee). The assessments are used to fund the construction, maintenance, and repair of the Uintah Indian Irrigation Project ("**UIIP**"), which Congress authorized in 1906, that includes the Deep Creek Canal and Lateral No. 9 that traverse McKee's Property. Even after the Tribal Court entered judgment against Defendants, the BIA has continued to recognize and perform under the Agreements by delivering water to Defendants and charging Defendants assessments, which Defendants continue timely to pay. *Id.* at ¶ 16; McKee's Appendix I, at 79–88 (Invoices). The Defendants are only one of many contract holders, both Indian and non-Indian, who presently purchase, and for decades purchased, water from the BIA.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

Defendants dispute any reference or inference that the delivery of water by the BIA in accordance with the 1940's Agreements with the BIA is a "theft" of water. Defendants further dispute any assertion that the Tribe's Complaint raises a federal question pursuant to 28 U.S.C. § 1331. Defendants also dispute any suggestion or inference that the Tribal Court had subject matter jurisdiction to enter judgment against Defendants, as all activities associated with receiving water from the BIA occurred entirely on non-Indian fee owned land, and the Tribe cannot satisfy its burden that one of the *Montana* exceptions apply.

Finally, Defendants dispute any assertion that enforcing the Tribal Court Judgment is equitable or supported by public policy. It ignores longstanding case law that required the joinder of the United States before the Agreements with the United States could be terminated. Similarly, the judgment ignores elementary principles of contract law that provide that agreements that benefit land run with the land, and ignored straightforward and clear evidence that the invoices

Defendants receive from the BIA are for the water they receive pursuant to the Agreements on Defendants' property.

STATEMENT OF ADDITIONAL MATERIAL FACTS TO TRIBE'S MOTION FOR SUMMARY JUDGMENT

1. McKee owns approximately 121 acres of land in Uintah County, Utah. ("**McKee Property**"). Tribe's Appendix I, at 41 (Findings of Fact and Conclusions of Law); McKee's Appendix I, at 90–91 (Maps of the McKee Property).

2. The McKee Property was diminished from the Tribe's Reservation in the early 1900s when the Reservation was opened for settlement and the United States conveyed the McKee Property by patent to McKee's predecessor-in-interest via Patent No. 159817. *See Hagen v. Utah*, 510 U.S. 399 (1994); Tribe's Appendix I, at 40–42 (Findings of Fact and Conclusions of Law).

3. Defendants are entitled to receive water on the McKee Property pursuant to two separate sources: (1) Utah State Water Right 43-3202, which is titled in McKee's name, and which is not implicated by the Tribal Court Judgment, and (2) the 1943 Agreement and 1946 Agreement with the United States. The Agreements provide Defendants a small portion of the water under Water Right 43-3011, which is also appropriated under the Laws of the State of Utah and which is owned and titled in the name of USA Indian Irrigation Services ("**UIIS**").

Water Right 43-3011 (Owned by UIIS)

4. On June 21, 1906, Congress passed an act to authorize and fund the construction of "irrigation systems to irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah." Act of June 21, 1906, ch. 3504, 34 Stat. 325 (the "**1906 Act**").

5. The 1906 Act stated "[t]hat such irrigation systems shall be constructed and completed and held and operated, and water therefore appropriated under the laws of the State of

Utah, and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians, and he may sue and be sued in matters relating thereto." *Id.*

6. With the passage of the 1906 Act, the UIIP was implemented, and the Secretary of the Interior was tasked with the responsibility to manage and oversee the UIIP, which task continues to the present. *Id.*

7. The UIIS has appropriated numerous water rights under the laws of the State of Utah, McKee Appendix I, at 92–93 (UIIS Water Rights), including Water Right 43-3011,[1] which provides water to McKee's Property pursuant to the Agreements.

8. The USA Indian Irrigation Service filed an Application to Appropriate Water Right 43-3011 with the Utah State Engineer on June 12, 1905. McKee's Appendix I, at 101–107 (Water Right 43-3011 Application to Appropriate.)

9. On November 3, 1922, the Utah State Engineer issued a Certificate of Appropriation of Water for Water Right 43-3011 to the USA Indian Irrigation Service. McKee's Appendix I, at 108–110 (WR 43-3011Certificate of Appropriation).

1943 and 1946 Agreements

10. In 1943 and 1946, Defendants' predecessors-in-interest entered into the Agreements with the United States to receive water through the Deep Creek Canal and Lateral No. 9 pursuant to Water Right 43-3011, which is part of the UIIP. Appendix II, at 214–20 (Agreements).

[1] The Findings of Fact and Conclusions of Law mistakenly refer to Water Right 43-3004. Tribe's Appendix I, at 43 (Findings of Fact and Conclusions of Law). Although Water Right 43-3004 supplies water to other land in the area close to the McKee Property, Water Right 43-3011 supplies the water to the McKee Property pursuant to the Agreements with BIA. McKee's Appendix I, at 114 (Water Right 43-3011 Map).

11. The 1943 Agreement recites that the "Contractors," Defendants' predecessor-in-interest, owned land that was "situated within the Uintah Irrigation Project of the United States Indian Irrigation Service," and which "land is entitled to a proportionate part of the White Rocks River water available for the irrigation of the project lands under the United States Whiterocks Canal." Tribe's Appendix II, at 214 (1943 Agreement).

12. Nothing in this Agreement conveyed or transferred an interest in the UIIS's underlying Water Right 43-3011; rather, the 1943 Agreement requires that the UIIS deliver water to Defendants and that Defendants to pay "their proportionate share of the cost of operating and maintaining the Deepcreek Canal of the Uintah Irrigation Project." *Id.* at 215.

13. The 1946 Agreement similarly states that "Contractors [now the Defendants] are the owners in fee of the following described land, for the purpose of this agreement . . . , which land is situated within the Uintah Irrigation Project of the United States Indian Service." Tribe's Appendix II, at 218 (1946 Agreement).

14. Like the 1943 Agreement, the 1946 Agreement required Defendants' predecessors-in-interest, and now Defendants, to pay the regular assessments. *Id.* at 219.

15. On April 7, 1943 and on July 11, 1947, Defendants' predecessor-in-interest, with permission from the United States, filed Change Application a1639 and Change Application a2107, respectively, with the Utah State Engineer to add the McKee Property as an approved place of use in addition to the lands described in the Certificate of Appropriation approved for Utah State Water Right 43-3011 to McKee's Property. McKee's Appendix I, at 5–9 (Change Applications a1639 and a2107).

16. Defendants are current in paying the assessments pursuant to the Agreements, and even after the Tribal Court's decision in 2015, the UIIS continues to provide water to Defendants and to issue assessments pursuant to the Agreements, which Defendants have timely paid. McKee's Appendix I, at 77–78 ¶¶ 9, 16 (Decl. of Gregory McKee).

The Tribe's Water

17. The Tribe is entitled to water sufficient to satisfy the original purposes of its reservation. *E.g., Winters v. United States*, 207 U.S. 564, 577 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963).

18. However, the amount of water the Tribe is entitled to has not yet been quantified. The Utah Legislature and Congress have passed the Utah Indian Water Compact, which would entitle the Tribe to divert 470,594 acre-feet of water and deplete 248,943 acre-feet of water each year. Utah Code Ann. § 73-21-103.

19. While the State of Utah and Congress have passed the Utah Indian Water Compact, Utah Code Ann. § 73-21-103, the Tribe has chosen not to ratify the Compact.

20. Instead, the Tribe recently filed an action in the United States District Court for the District of Columbia, seeking a judgment awarding the Tribe more water than what the Tribe would be entitled to pursuant to the Utah Indian Water Compact. McKee's Appendix I, at 13–75 (Complaint).

Operation of the UIIP

21. Since 1906, the Department of the Interior has operated and managed the UIIP, including the UIIS and each of the appropriated water rights titled in the UIIS pursuant to Utah's water law. Act of June 21, 1906, ch. 3504, 34 Stat. 325.

22. For example, the Utah Division of Water Rights' database lists approximately 50 water rights located in the Uintah Basin that are owned by the UIIS. McKee's Appendix I, at 92–93 (Water Rights Spreadsheet).

23. The priority dates for these water rights range from 1861 to 1933, meaning that the UIIS continued to file Applications to Appropriate water pursuant to Utah law even after *Winters v. United States*, 207 U.S. 564, 577 (1908) was issued. *See id.*

24. In addition, the UIIS has filed change applications with the Utah State Engineer to change the point of diversion, place of use, and/or manner of use of the water rights as recently as 2008. McKee's Appendix I, at 10–12 (2008 Change Application).

25. In 1994, the Tenth Circuit Court of Appeals acknowledged that "[t]oday, more than one-third of the land served by the [UIIP] is held in fee by non-Indian successors to Indian allottees." *Hackford v. Babbitt*, 14 F.3d 1457, 1461 n .2 (10th Cir. 1994).

26. The BIA, through the UIIS, manages the UIIP, including the Deep Creek Canal and Lateral No. 9 that delivers water to McKee's Property pursuant to the Agreements.

27. Pursuant to the Agreements, and in accordance with the BIA direction and authorization, McKee opens and closes the headgates on Deep Creek Canal and Lateral No. 9 to deliver water to McKee's Property, subject to the BIA's irrigation schedule and instructions. McKee's Appendix I, at 77 ¶¶ 12, 14 (Decl. of Gregory McKee).

28. Defendants receive only the amount of water to which they are entitled pursuant to the Agreements. McKee's Appendix I, at 78 ¶ 15 (Decl. of Gregory McKee).

29. The headgates are located on property owned in fee by Eric and Gabrielle Anderson. McKee's Appendix I, at 77 ¶ 13 (Decl. of Gregory McKee); McKee's Appendix I, at

1 (Anderson Property Record); Tribe's Appendix I, at 142 (Engineer Report) (showing serial number for property where point of diversion on Deep Creek Canal is located).

30. All of Defendants' actions relating to the Tribal Court's ruling that Defendants are "stealing" water occurred on non-Indian fee-owned property. McKee's Appendix I, at 77 ¶ 14 (Decl. of Gregory McKee).

Leased Land

31. Defendants lease land (the "**Leased Land**") from the BIA pursuant to Lease No. 8FP0007852 (the "**BIA Lease**"). Tribe's Appendix IV, at 763–71 (Lease).

32. The Leased Land, however, is over a half mile away from the McKee Property where Defendants receive water pursuant to the Agreements. McKee's Appendix I, at 89 (Leased Land Map).

33. The BIA does not deliver water to the Leased Land pursuant to the Agreements. *See* Tribe's Appendix II, at 214–20 (Agreements).

Tribal Court's Mistakes

34. In the preliminary stages of the case, in Tribal Court, Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to join the United States and Bureau of Indian Affairs as necessary and indispensable parties. Tribe's Appendix IV, at 635–42 (Motion to Dismiss).

35. The Tribal Court refused to require the Tribe to join the Department of the Interior and the United States to the action, even though the United States—and not the Tribe—was a party to the Agreements. Tribe's Appendix I, at 37 (Findings of Fact and Conclusions of Law).

36. The Tribal Court also relied on irrelevant facts to determine that Defendants were not entitled to receive water pursuant to the Agreements because Defendants' property chain of title does not convey the water to Defendants. Yet, the Agreements do not convey title to the water; the Agreements are merely agreements to purchase water from the BIA. Tribe's Appendix II, at 215–20 (Agreements).

37. Specifically, the Tribal Court mistakenly held that because water shares were not specifically mentioned in some of the deeds in Defendants' chain of title, there was no indication that the water delivered pursuant to the Agreements could be used by Defendants on McKee's Property. Tribe's Appendix I, at 51–53 (Findings of Fact and Conclusions of Law).

38. The Agreements in fact run with the land, permitting Defendants to receive water in exchange for assessments payments, and do not convey water rights or water shares to Defendants. *See* Tribe's Appendix II, at 214–20 (Agreements).

39. Furthermore, in determining that Defendants were not entitled to receive water on Parcel 3 of the McKee Property pursuant to the Agreements, the Tribal Court made several plain errors.

40. For example, the Tribal Court determined that because Defendants' chain of title did not include specific conveyances of the water pursuant to the Agreements, that Defendants were not entitled to use that water pursuant to the Agreements. Tribe's Appendix I, at 51–53 (Findings of Fact and Conclusions of Law).

41. Defendants' predecessors-in-interest could not have conveyed any water to Defendants because they did not own a water right—they only had a contractual right to receive water from the BIA pursuant to the Agreements.

42. In addition, notwithstanding the fact that the property descriptions in the assessment invoices lined up perfectly with the land described in the Agreements, *compare* Tribe's Appendix II, at 215–20 (Agreements), *with* McKee's Appendix I, at 79–88 (Invoices), the Tribal Court erroneously determined "that the billing invoices are not particularly probative." Tribe's Appendix I, at 54 (Findings of Fact and Conclusions of Law).

STATEMENT OF UNDISPUTED FACTS RELEVANT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. The Tribe's Complaint seeks only to enforce the Tribal Court judgment against Defendants. (ECF No. 2.)

2. McKee is not a tribal member and the Defendant entities are corporations incorporated under the laws of the State of Utah and are solely held by McKee. McKee's Appendix I, at 76 ¶¶ 2–4 (Decl. of Gregory McKee).

3. The McKee Property is non-Indian fee land that was diminished from the Reservation in 1914 through Patent No. 159817 and never restored to the Reservation. Tribe's Appendix I, at 41–42 (Findings of Fact and Conclusions of Law); *Hagen v. Utah*, 510 U.S. 399 (1994).

4. Defendants' predecessor-in-interest entered into the Agreements with what is now the BIA to receive water on what is now the McKee Property in exchange for assessments. Tribe's Appendix I, at 215–20 (Agreements).

5. As successors-in-interest, Defendants continue to receive water pursuant to the Agreements. McKee's Appendix I, at 78 ¶ 16 (Decl. of Gregory McKee); McKee's Appendix I, at 79–88 (Invoices).

6. Defendants have no easements or other property interest to deliver water to McKee's property. The United States holds the easements over which water is delivered by the BIA to McKee's property. Tribe's Appendix I, at 83 (Patent).

7. Defendants do not enter tribal land in order to receive water pursuant to the decades-old Agreements with the BIA, and the Tribal Court made no finding that Defendants enter tribal land to receive or use any such water. McKee's Appendix I, at 77 ¶ 14(Decl. of Gregory McKee); *see* Tribe's Appendix I, at 35–62 (Findings of Fact and Conclusions of Law).

8. Defendants have not entered into any contracts with the Tribe or any tribal members with respect to Defendants' receipt of water pursuant to the Agreements. McKee's Appendix I, at 77 ¶ 8 (Decl. of Gregory McKee).

9. Pursuant to the Agreements, the BIA delivers approximately 108 acre-feet of water to McKee's Property each year. Tribe's Appendix II, at 215–20 (Agreements)

10. Water Right 43-3011, the water right that supplies water to Defendants and many others, permits the UIIS to divert a flow of 68.8 cfs of water to irrigate 4,820.35 acres, which is a total diversion of 14,461.05 acre-feet of water each year. McKee's Appendix I, at 111–113 (Water Right 43-3011 Description).

11. Water Right 43-3004, the water right the Tribal Court mistakenly believed was the water right that supplies water to Defendants pursuant to the Agreements, permits the UIIS to divert a flow of 73.6774 cfs of water to irrigate 6,732.95 acres of land, which is a total diversion of 20,198.85 acre-feet of water each year. McKee's Appendix I, at 96–100 (Water Right 43-3004 Description).

12. Even according to the Utah Indian Water Compact passed by Congress and ratified by the State of Utah, the Ute Tribe is entitled to divert at least 470,594 acre-feet of water per year and deplete 248,943 acre-feet of water per year. Utah Code Ann. § 73-21-103.

13. Beyond a broad conclusion that "[t]he importance of water to the survival of the Ute Indians is beyond dispute," Tribe's Appendix I, at 58 (Findings of Fact and Conclusions of Law), the Tribal Court made no findings that Defendants' use of approximately 108 acre-feet of water pursuant to the Agreements caused any harm to the Tribe. *See id.* at 35–62.

ARGUMENT

I. THIS COURT CANNOT ENFORCE A TRIBAL COURT JUDGMENT WHERE THE TRIBAL COURT LACKED SUBJECT MATTER JURISDICTION.

The Tribal Court lacked subject matter jurisdiction, making its judgment void and unenforceable. This alone precludes the domestication and enforcement of the Tribal Court's void judgment by this Court.

As a preliminary issue, the Tribe argues, without citation to any legal authority, that "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 lens of voluntary waiver and equitable estoppel," and that "Defendant 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." (Mot. for Summary Judgment, at 11.)

Not only does the Tribe's argument fail to comport with elementary principles that a challenge to subject matter jurisdiction is not subject to either waiver or estoppel and can be first raised and decided at any stage of litigation even on appeal, *e.g.,* Fed. R. Civ. P. 12(h)(3), it is

contrary to the well-established rule that a federal district court "***must*** neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law." *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (emphasis added); *MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (10th Cir. 2007); *see also* Restatement (Third) of Foreign Relations Law § 482(2)(a). Thus, this Court's first and seminal inquiry is whether the Tribal Court had subject matter jurisdiction to enter the Tribal Court Judgment. If not, this action, to enforce a tribal court judgment, must be dismissed as this Court cannot domesticate or enforce a tribal court judgment where subject matter jurisdiction did not exist.

A. The Tribal Water Code Cannot Confer Subject Matter Jurisdiction over Non-Indian Activity Occurring on Fee Land if the *Montana* Exceptions Cannot be Shown.

The Tribe seems to suggest that its adoption of a water code gives the Tribal Court jurisdiction over Defendants and Defendants' contract with the BIA. (*See* Mot. for Summary Judgment, at 14–15.) For obvious reasons, this argument is untenable. It has long been held, that absent two narrow exceptions, that Indian tribes have been divested of any jurisdiction over non-Indians. *E.g., Montana*, 450 U.S. at 564–65. Due to the strong presumption that the Tribe cannot exercise jurisdiction over non-Indians, on or off the Reservation, the Tribe cannot manufacture jurisdiction over non-Indians through their Tribal Code. *E.g., Plains Commerce Bank*, 554 U.S. at 329. Otherwise, any tribe would be able to easily accomplish an end run around the requirements of the *Montana* exceptions. Despite any provision of the Tribal Code, the Tribe must

prove that the Tribal Court has subject matter jurisdiction to enforce the code or ordinance under one of the *Montana* exceptions.[2]

Similarly, amendments to the Tribe's Law and Order Code cannot retroactively supplant the *Montana* exceptions and enlarge the Tribal Court's subject matter jurisdiction over non-Indian conduct on non-Indian land, although that is precisely what the Tribe has argued. (*See* Mot. for Summary Judgment, at 15–17.) Prior to the Tribe amending its Tribal Code in March 2013, the Tribe, pursuant to its Law and Order Code, could not exercise jurisdiction over Defendants' receipt of water pursuant to the Agreements with the BIA. *See Lawrence*, 312 F. Supp. 3d at 1241–42. And the Tribe cannot exercise jurisdiction over Defendants now because the Tribe cannot satisfy its burden of demonstrating that the *Montana* exceptions apply, as explained below. Thus, applying the amendments to the Tribal Code retroactively does not cure the fatal flaws of failing to prove that a *Montana* exception applies and gave the Tribal Court subject matter jurisdiction.

B. The Tribe does not have Regulatory or Adjudicatory Jurisdiction Over the UIIS Water Rights or Defendants' Water Right.

"Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56 (citing

[2] The Tribe belabors its argument that the water at issue is reserved water under the *Winters* Doctrine. However, although the Tribe is entitled to a yet to be determined amount of water to fulfill the original purposes of its reservation, *Winters v. United States*, 207 U.S. 564 1908, that amount of water has, despite the efforts of Congress and the State of Utah, never been quantified. For instance, the Tribe contends that, under the Ute Indian Water Compact, the water at issue here is part of the Tribe's reserved water. (Mot. for Summary Judgment, at 4, 23.) However, the Tribe has failed and refused to ratify the Ute Indian Water Compact precluding quantification. In fact, the Tribe recently filed a lawsuit in the United States District Court for the District of Columbia alleging that the Tribe is entitled to more water than what is allocated in the Ute Indian Water Compact. McKee's Appendix I, at 13–75 (Complaint). Until or unless the Tribe's reserved water is quantified, the Tribe's water code is seeking to regulate an unknown quantity of water and is unenforceable against non-Indians off the reservation.

United States v. Kagama, 118 U.S. 375, 379–81 (1886). "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).

When Congress created the UIIP in 1906 it provided that the "irrigation systems shall be constructed and completed and held and operated, and water therefore appropriated under the laws of the State of Utah." 34 Stat. 325. Accordingly, Congress expressly intended that the UIIP and all of the water appropriated for the UIIP, including Water Right 43-3011, be subject to the laws of the State of Utah. Congress affirmed this intent when it passed the Act of May 29, 1941. 55 Stat. 209. The Tribe presented no evidence in the Tribal Court, and the Tribal Court did not find, that Congress repealed the 1906 Act. (*See* Findings of Fact and Conclusions of Law.)

The BIA, through the UIIS, has continued to operate under the jurisdiction of the Utah State Engineer with respect to the UIIS water rights, including Water Right 43-3011. In fact, the UIIS has approximately 50 water rights that it appropriated under the laws of the State of Utah, with priority dates that range from 1861 to 1933. McKee's Appendix I, at 92–93 (UIIS Water Rights). Furthermore, as recently as 2008, the UIIS has filed change applications with the Utah State Engineer, seeking permission to change the point of diversion, place of use, or manner of use of one of its water rights. McKee's Appendix I, at 10–12 (2008 Change Application).

Indeed, the BIA's actions of operating the UIIP pursuant to the laws of the State of Utah is in accordance with the current regulations for the UIIP: "We administer our irrigation facilities by enforcing the ***applicable statutes***, regulations, Executive Orders, directives, Indian Affairs Manual, the Irrigation Handbook, and other written policies, procedures, directives, and practices to ensure the safe, reliable, and efficient administration, operation, and maintenance, and

rehabilitation of our facilities." 25 C.F.R. § 171.110 (emphasis added). One of the "applicable statutes" is 34 Stat. 325, which Congress has never repealed.

Utah's water code provides a comprehensive process for appropriating and administering water rights in the state. (Utah's water code is found in Title 73 of the Utah Code.) Among other things, Utah defines what constitutes beneficial use of water, Utah Code Ann. § 73-1-3; provides a process to appropriate water, *id.* at § 73-3-1; provides a process for changing points of diversion, places of use, and types of beneficial use, *id.* at § 73-3-3; provides for judicial review of the State Engineer's decisions on applications, *id.* at 73-3-14; provides enforcement authority to the State Engineer to combat illegal water use, *id.* at 73-2-25; and provides general adjudication authority to the state that includes adjudicating Tribal water rights and reserved water rights. *Id.* at § 73-4-1 *et seq.* Put simply, if there were an issue with McKee's water rights or their use—under either his water right or the BIA's water right, both of which are state appropriated water rights—the State of Utah, and not the Tribe nor the Tribal Court, has regulatory and adjudicative authority.

Congress has exercised its plenary authority in expressly designating that the UIIP beheld and operated under the laws of the State of Utah and that the water in the UIIP be appropriated and administered under the laws of the State of Utah. 34 Stat. 325. Accordingly, the State of Utah rather than the Tribe has the authority to regulate the operations of the UIIP and its appropriation, distribution, and use of the water. Because the Tribe does not have the regulatory authority over the UIIP or the water in the UIIP, the Tribal Court does not have subject matter jurisdiction to adjudicate issues regarding the same. *See Plains Commerce Bank*, 554 U.S. at 330. Likewise, neither the Tribe nor Tribal Court has regulatory authority over Defendants' Water Right 43-3202, although it improperly purported to adjudicate Water Right 43-3202.

C. The Tribe's Right to Exclude is Inapplicable to the Tribe's Claims.

The Tribe's contention that its power to exclude is applicable to non-Indian conduct on non-Indian land is directly at odds with the United States Supreme Court's Indian jurisdiction jurisprudence, which state, in part, that "the inherent sovereign powers of an Indian tribe—those powers a tribe enjoys apart from express provision by treaty or statute—do not extend to the activities of nonmembers of the tribe." *Strate v. A-1 Contractors*, 520 U.S. 438, 445–46 (1997) (internal quotation marks omitted). In line with this general pronouncement, the Supreme Court has explained what types of conduct tribes have the power to regulate, including that a tribe has the inherent authority "to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." 450 U.S. at 564. Except for the two narrow *Montana* exceptions, which the United States Supreme Court has only found applicable once, *see Plains Commerce Bank*, 554 U.S. at 333, a tribe lacks the inherent authority to regulate or adjudicate non-Indian conduct on fee land, as is the case here. *Montana*, 450 U.S. at 563–66.

Even with these exceptions, the Court has cautioned that, due to the "implicit divestiture of sovereignty [that] has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*,"…"the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564 (internal quotation marks omitted). Accordingly, courts must ***presume*** that a tribe does not have jurisdiction over a non-Indian, regardless of whether the non-Indian conduct occurred on or off reservation land. *Plains Commerce Bank*, 554 U.S. at 330. "[E]fforts by a tribe to regulate

nonmembers, especially on non-Indian fee land, are presumptively invalid." *Id.* at 300 (internal quotation marks omitted). "The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." *Id.* at 331. The Tribe has failed to meet that burden.

The Tribe argues that its "power to exclude . . . acts as an independent basis on which the Tribal Court exercised jurisdiction over Defendants regardless of the applicability of the *Montana* exceptions. (Mot. for Summary Judgment, at 29.). The Tribe cites several cases, all of which include tribal regulation of conduct ***on tribal land***, a critical distinction fatal to the Tribe's reliance. *See New Mexico v. Mescalaro Apache Tribe*, 462 U.S. 324, 325 (1983) (determining jurisdiction of tribe to regulate hunting and fishing on a reservation)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982) (deciding applicability of severance tax on companies operating on a reservation); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137 – 38 (1980) (deciding jurisdictional issues over non-Indians engaging in commerce on a reservation); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 844, 849–50 (9thy Cir. 2009) (determining whether tribal court jurisdiction was plausible where a non-Indian got lost on a tribe's reservation, lit a signal fire, and burned over 400,000 acres of tribal land); *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 902 (9th Cir. 2019) (determining jurisdiction issues over non-Indian working on tribal land); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 804–05, 811 (9th Cir. 2011) (determining jurisdictional issues over a company who occupied tribal land pursuant to a lease); *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 932–33, 940 (8th Cir. 2010) (determining jurisdictional issues regarding a security company who engaged in a raid on tribal land); *Window*

Rock Unified School District v. Reeves, 861 F.3d 894, 896 (9th Cir. 2017) (determining whether jurisdiction was plausible in tribal court over an employment dispute with two school districts who operated schools on land leased from a tribe).

Unlike this case, all of these cases involved activities on tribal lands. Accordingly, all of the cases cited and relied upon by the Tribe are readily distinguishable from this case where none of the complained activities occurred on tribal land. It is axiomatic that the tribal right to exclude does not, and cannot, extend to activities by non-Indians on non-tribal land.

Contrary to the Tribe's assertion that subject matter jurisdiction is appropriate through its power to exclude, the Tribal Court made no findings regarding whether Defendants, in receiving water pursuant to the Agreements with the BIA, ever entered the Tribe's right-of-way—i.e., whether Defendants' conduct of receiving water from the BIA on their property occurred on tribal land. *See* Tribe's Appendix I, at 35–62 (Findings of Fact and Conclusions of Law). The reason there were no such findings, is the Defendants did not, and do not, enter tribal land to receive water pursuant to their Agreements with the BIA. McKee's Appendix I, at 77 ¶ 14 (Decl. of Gregory McKee).

Tellingly, the Tribe did not allege that Defendants' receipt of water from the BIA was a trespass on tribal land, and the Tribal Court did not so find. *See* Tribe's Appendix I, at 35–62 (Findings of Fact and Conclusions of Law). Rather, the Tribe's claim and judgment purports to regulate non-Indian conduct on non-Indian fee land. The Tribe has failed to carry its burden to prove that it had jurisdiction pursuant to *Montana*. *Lawrence*, 312 F. Supp. 3d at 1243.

D. The Tribe does not have Jurisdiction over Defendants Pursuant to Either *Montana* Exception.

In determining whether the Tribal Court had subject matter jurisdiction, "[e]ach claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it." *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1245 (10th Cir. 2017). Thus, whether the Tribal Court had subject matter jurisdiction over the Tribe's claim that Defendants were "stealing" water is determined separately from whether Defendants were trespassing on tribal land.

1. Defendants do not have a consensual relationship with the Tribe with respect to the Tribe's water theft claims.

Under the first *Montana* exception, the Tribe must prove that Defendants had a consensual relationship with the Tribe and that the "regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not in for a penny, in for a Pound [*sic*]." *Id.* Put simply, "[t]he mere fact that a nonmember has some consensual commercial contracts with a tribe does not mean the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; ***the suit must also arise out of those consensual contracts***." *Phillip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941 (9th Cir. 2009) (emphasis added).

In arguing a consensual relationship exists, the Tribe relies on the 1914 patent from the United States government, which diminished the McKee Property from the Reservation and precluded the land from later being restored to the Reservation. (Mot. for Summary Judgment, at

19.)[3] As explained below, a patent does not constitute a consensual relationship and the Lease No. 8FP0007852 and the Leased Land and other commercial dealings between Defendants and the Tribe have no nexus to the issues here.

The Tribe cites no authority for the proposition that the patent granted by the United States government to a non-Indian qualifies as the type of "consensual relationship" the United States Supreme Court had in mind in establishing the *Montana* exceptions. In fact, a land patent, including the reserved rights-of-way in a lease, is not a commercial dealing, contract, or lease—it is a conveyance of property rooted in property law and not contract law. *Lower Brule Sioux Tribe v. State of S.D.*, 104 F.3d 1017, 1023 (8th Cir. 1999) ("Neither the original title deeds for the lands nor the purchase of hunting and fishing licenses give rise to the requisite consensual relationship between the Tribe and nonmembers who hunt and fish on the fee lands."); *State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108, 1113 (9th Cir. 1999) ("[T]ransfers of property interests between government entities create property rights; they generally do not create continuing consensual relationships."); *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999) ("A right-of-way created by congressional grant is a transfer of property interest that does not create a continuing consensual relationship between a tribe and the grantee."); *Chiwewe v. Burlington Northern and Santa Fe Railroad Co.*, 239 F. Supp. 2d 1213, 1217 (D.N.M. 2002). The 1914 patent did not establish a consensual relationship between Defendants and the Tribe.

[3] The Tribe further contends it has a contractual relationship with Defendants based upon Lease No. 8FP0007852 and the Leased Land, which is for a separate parcel of land located nearly 3 miles away from the McKee Property and has no relationship with the Tribe's allegations that Defendants are stealing water. McKee's Appendix I, at 89 (Leased Land Map).

The Tribe further argues that "Defendant McKee and Defendant McKee Farms, Inc. also established a consensual relationship with the Tribe by leasing tribal land," and that Defendants' general business dealings on the Reservation pursuant to the lease agreement are sufficient to confer subject matter jurisdiction over Defendants in Tribal Court. (*See* Mot. for Summary Judgment, at 21–22. The Leased Property is located nearly three miles away from the McKee Property and is wholly unrelated to the Tribe's claims that Defendants are stealing water. McKee's Appendix I, at 89 (Leased Land Map). There is simply no nexus between Lease No. 8FP0007852, which is between Defendants and the United States Department of the Interior, and the issues present here. *E.g., Window Rock Unified School District v. Reeves*, 861 F.3d 894, 920 (9th Cir. 2017) ("Non-Indians . . . do not consent to tribal-court jurisdiction over unrelated transactions by entering into separate consensual relationships, such as leases, with a tribe. . . . [T]he suit must also *arise out of* those consensual contacts.") (internal quotation marks omitted).

Furthermore, the Tribe provides no evidence that Defendants' general business dealings have any nexus with Defendants' use of water pursuant to their decades-old Agreements with the BIA because ***there is no nexus***. This general and broad overreach of tribal jurisdiction based on "general business dealings" is precisely what the United States Supreme Court has specifically declined to grant to tribes. *E.g., Plains Commerce Bank*, 554 U.S. at 338–40 (rejecting an argument that a company's general business dealings with a tribe grant the tribe general subject matter jurisdiction over all of the company's activities); *Atkinson Trading Co., Inc.*, 532 U.S. at 656; *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (the car accident at issue did not arise out of the defendant's contracts with the tribes). After all, "tribal courts have a unique, limited jurisdiction that does not extend generally to the regulation of nontribal members whose actions

do not implicate the sovereignty of the tribe or the regulation of tribal lands." *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 768 (7th Cir. 2014).

Put simply, the Tribe fails to establish that the first *Montana* exception applies and gave the Tribal Court the required subject matter jurisdiction.

2. The Tribe cannot meet its burden to establish the second Montana *Exception because Defendants' use of water pursuant to decades-old Agreements with the BIA does not imperil the Tribe's sovereignty and does not, and has not, caused the Tribe catastrophic harm.*

It has long been settled that the "second [*Montana*] exception authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 341. However, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community. *Id.* (quoting *Montana*, 450 U.S. at 566). "Thus, '*Montana's* second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.'" *Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064–65 (9th Cir. 1999)). "Rather, the challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Id.* (quoting *Plains Commerce Bank*, 554 U.S. at 341).

Thus, "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." *Strate*, 520 U.S. at 459. "Key to its proper application . . . is the Court's preface: Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* (internal quotation marks omitted).

In seeking to apply the second *Montana* exception, the Tribe argues that the Tribal Court had subject matter jurisdiction because Defendants' use of water pursuant to the decades-old Agreements with the BIA, is "the most egregious and damaging harm to the Tribe." (Mot. for Summary Judgment, at 24.) Yet, notwithstanding the Tribe bears the burden "to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land," *Plains Commerce Bank*, 554 U.S. at 330, the Tribe has never sought to quantify or explain the alleged "egregious" harm—not before the Tribal Court and not here. Neither does the Tribe explain to this Court how much water it is entitled to use in comparison to Defendants' inconsequential use of water, which is merely a drop in the Tribe's proverbial bucket of water. Rather, the Tribe relies solely on broad, conclusory statements that "[m]aintaining the integrity of the Tribe's tribal waters is essential to the Tribe's economic well-being and security, and to the Tribe's 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." (*Id.* at 24.) Such broad platitudes are not disputed, but are hardly applicable to Defendants use of 108 acre-feet of water under the Agreements.

As explained above, under the Agreements, the Defendants receive approximately 108 acre-feet of water annually. Tribe's Appendix II, at 215–20 (Agreements). Under the duty established by the Utah State Engineer and Division of Water Rights, this is only enough water to irrigate 36.28 acres of land.[4] In the scope of both the volume of water that is subject to the

[4] The "duty" is the quantity of water that may be put to beneficial use without waste. For irrigation purposes, the State of Utah has determined duties ranging from three acre-feet of water per acre of ground to six acre-feet per acre of ground, based on the growing season and climate of the area. *See* Utah Division of Water Rights Glossary of Water Words, https://www.waterrights.utah.gov/wrinfo/glossary.asp#D.

Agreements, a total of 108 acre-feet, and the total reserved water rights of the tribe, a minimum of 470,594 acre-feet, 108 acre-feet is miniscule and *de minimis*.

A similar argument was made to, and rejected by, the Ninth Circuit Court of Appeals in *Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736 F.3d 1298, 1305–06 (9th Cir. 2013). In *Evans*, the Shoshone-Bannock Tribes sought to impose regulations on the construction of Evans' home, which was located on fee land, by requiring Evan to pay a permit fee to the tribe and by requiring Evans' subcontractors to obtain business licenses from the tribe. *Id.* at 1301. When Evans refused to comply, the Shoshone-Bannock Tribes demanded that all work cease and posted a Stop Work Notice on Evans' property and also sent Evans a cease and desist letter. *Id.* Thereafter, the Shoshone-Bannock Tribes filed a complaint against Evans in tribal court; Evans responded and filed a complaint in federal district court. *Id.*

Arguing that it was "plausible" that the tribal court had jurisdiction, and thus the district court should have required Evans to exhaust tribal court remedies, the Shoshone-Bannock Tribes "identif[ied] a variety of alleged problems flowing from Evans' construction project, including: (1) groundwater contamination; (2) improper disposal of construction debris; and (3) increased risk of fire." *Id.* at 1305.

The Ninth Circuit, however, determined that "[t]he Tribes fail to show that Evans' construction of a single-family house poses catastrophic risks. The Fort Hall Reservation has long experienced groundwater contamination, and the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem." *Id.* In addition, the court determined that "the Tribes' generalized concerns about waste disposal and fire hazards are speculative, as

they do not focus on Evans' specific project." *Id.* "Accordingly, the tribal court plainly lacks jurisdiction, and Evans need not exhaust tribal remedies." *Id.* The instant matter is similar.

The Tribe cites three cases in support of its argument that the Tribal Court has subject matter jurisdiction through the second *Montana* exception. The Tribe, however, fails to explain the cases actually demonstrate that Defendants' use of water—use pursuant to the Agreements with the BIA for which Defendants (and their predecessors-in-interest) have always paid assessments—is not the type of "catastrophic" harm that permits the Tribal Court to exercise subject matter jurisdiction over Defendants pursuant to the second *Montana* exception.

For example, in *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), a non-Indian became lost on the White Mountain Apache Tribe's reservation and lit a small signal fire that "grew into a substantial forest fire" that "burned more than 400,000 acres of land and caused millions of dollars in damage." *Id.* at 844, 848. While the court determined that the tribal court did not "plainly" lack jurisdiction as an exception to the prudential tribal court exhaustion rule, it did ***not*** determine that burning over 400,000 acres of land was "catastrophic," within the meaning of the second *Montana* exception. *Id.* at 850. Even if the Ninth Circuit had determined the 400,000 acres burned satisfied the second *Montana* exception, the mere comparison of 400,000 acres burned to 108 acre-feet of water used demonstrates the gross dissimilarities.

In *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 905 (9th Cir. 2019), a tribal employee caused over $1.5 million in losses to the tribe by investing the tribe's money without authority, concealing documents and finances from the tribe, attempting to enter into financial agreements without authorization, making unreasonably risky investments, and

engaging in deceptive practices. The court found that this conduct, which occurred on tribal land, "threated the Tribe's very subsistence," invoking the second *Montana* exception for exercising jurisdiction. 922 F.3d at 905.

Finally, in *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1241–42 (10th Cir. 2017), a Ute Tribal member lost his life following a car chase with Utah law enforcement officers more than 25 miles into the reservation. The parents of the decedent and the Ute Indian Tribe filed tort claims against the officers in tribal court, including trespass, false imprisonment, false arrest, assault and battery, wrongful death, spoliation of evidence, and conspiracy. *Id.* at 1242, 1246.

Like the court in *Knighton*, the court in *Norton* "stress[ed] that we are not deciding today whether the Tribal Court possesses jurisdiction, but merely whether it can make a colorable claim that [it has] jurisdiction." *Id.* at 1246 (internal quotation marks omitted). Based on a tribe's right to exclude, the court determined that "[t]he particular allegations of this trespass claim may qualify as a critical undermining of the Tribe's ability to engage in self-government and territorial management," but cautioned that "[w]hether such allegations are sufficiently catastrophic would benefit from full consideration in the Tribal Court." *Id*. As to the other claims, which also arose on tribal land, the court determined that "they do not implicate the Tribe's core sovereign interest in excluding non-Indians from tribal lands, or any of the other tribal interests at stake in Montana's second exception." *Id.*

Unlike the non-Indian defendants in *Elliot*, *Knighton*, and *Norton*, Defendants' use of 108 acre-feet of water has not caused any identifiable harm to the Tribe, let alone catastrophic harm. For instance, they have not burned more than 400,000 acres of tribal land, have not caused millions

of dollars of damage to the Tribe while working on tribal land, and have not caused the death of a tribal member. While the Tribe asserts it has an interest in protecting its water resources, it has not identified any actual contamination or harm to the Tribe's water source or any effect on the Tribe's very subsistence.

If anything, Defendants use of water pursuant to the Agreements with the BIA is benefitting the Tribe because Defendants have paid thousands of dollars in assessments to the BIA pursuant to the agreement, which helps fund the construction, operation, and maintenance of the UIIP that conveys water to the Tribe and its members, as well as non-Indians.

Defendants are entitled to use approximately 108 acre-feet of water each year pursuant to the Agreements with the BIA. Tribe's Appendix I, at 215–220 (Agreements). On the other hand, under the Ute Indian Water Compact, which the Utah Legislature has approved but the Tribe has not, the Tribe is entitled to divert 470,594 acre-feet of water per year. Utah Code Ann. § 73-21-103. Defendants' water use is thus less than one thousandth of one percent of the Tribe's water. Similarly, Defendants' use of approximately 108 acre-feet of water each year also pales in comparison to the approximately 14,461.05 acre-feet of water UIIS is permitted to divert pursuant to Water Right 43-3011, the water right that supplies Defendants' water pursuant to the Agreements. Further, the Tribe may receive an even larger amount of water, depending on whether its recent lawsuit against the United States in the District of Columbia prove successful. McKee's Appendix I, at 13–75 (Complaints). Put simply, Defendants' use of water pursuant to the Agreements with the BIA, which the BIA continues to honor, is a very small drop of water in the Tribe's overall bucket of water. It cannot be considered catastrophic. *See Evans*, 736 F.3d at 1305–06.

Significantly, the Tribal Court made no findings regarding how much water flows through the Deep Creek Canal and Lateral No. 9, how many other water users use the Deep Creek Canal, how Defendants' water use pursuant to the Agreement compares to the amount of water flowing through Deep Creek Canal, and how the BIA manages this or other water deliveries from the Deep Creek Canal. *See* Tribe's Appendix I, at 35–62 (Findings of Fact and Conclusions of Law). In fact, no testimony was presented from any BIA officials regarding the Agreements or the deliveries of water to Defendants pursuant to the Agreements. *See id.* In other words, the Tribal Court did not find that Defendants' use of water pursuant to the Agreements causes "catastrophic consequences" to the Tribe *(see Plains Commerce Bank*, 554 U.S at 341) or "imperil[s] the subsistence of the tribal community." *See Knighton*, 922 F.3d at 905. Nor could it.

This Court should dismiss the Complaint because the Tribal Court lacked subject matter jurisdiction as the second *Montana* exception is also inapplicable.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE TRIBE'S COMPLAINT BECAUSE THE TRIBE HAS NOT PLED A FEDERAL QUESTION.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "It is to be ***presumed*** that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (emphasis added.)

"The presence or absence of federal-question jurisdiction is presented ***on the face of the plaintiff's properly pleaded complaint***" and does not arise through a defendant's affirmative defenses. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (emphasis added.) *See also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003); *Miccosukee Tribe,* 607 F.3d at 1273 n.8.

Furthermore, a claim that a court lacks subject matter jurisdiction may be made at any time, ***including after an entry of a judgment***. *E.g.,* Fed. R. Civ. P. 12(h); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 500 (2006) (emphasis added).

In this matter, the Tribe's Complaint seeks only to enforce the Tribal Court's Judgment through the doctrine of comity, alleging, without further analysis, only that this Court has subject matter jurisdiction "pursuant to 28 U.S.C.A. § 1331." (ECF No. 2, at 3, ¶ 7.) However, "the assertion or existence of comity concerns, alone, do not create federal question jurisdiction." *Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007); *Miccosukee Tribe*, 607 F.3d at 1276 ("an appeal to comity does not, standing alone, create federal question jurisdiction under 28 U.S.C. § 1331").

"[W]hen an action ***already rests on federal question jurisdiction***, the theory of comity ***can serve*** as a discretionary basis for a court to determine whether a foreign country court's judgment should be given preclusive effect." *Taveraz,* 477 F.3d at 1276. (emphasis added). Thus, "[a]s courts of limited jurisdiction, federal courts are obligated to consider whether a judgment of a foreign court should be afforded comity ***only when the federal court already has jurisdiction***." *Id.* (emphasis added). *See Wilson v. Marchington*, 127 F.3d 805, 813, 815 (9th Cir. 1997) (principles of comity require that a tribal court have competent subject matter jurisdiction before its judgment will be recognized by United States courts).

Accordingly, the Tribe's Complaint, that merely seeks to domesticate and enforce the Tribal Court's judgment through the doctrine of comity, does not raise a federal question pursuant to 28 U.S.C. § 1331. *E.g., Miccosukee Tribe*, 607 F.3d at 1275 ("A suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law."); *Tribe v.*

Hawks, No. 2:16-CV-366, 2017 WL 3699347, *2 (D. Idaho 2017) (dismissing a tribe's complaint for lack of federal question jurisdiction where the tribe's complaint merely sought to have the federal district court recognize and enforce a tribal court judgment).

Unlike the complaints at issue in *Miccosukee Tribe* and *Hawks*, the Tribe's Complaint does not seek a ruling on whether the Tribal Court had jurisdiction to hear and decide the case against Defendants; rather, the Tribe merely seeks to domesticate and enforce the Tribal Court's judgment against Defendants in this Court through the principle of comity. (*See* ECF No. 2, at 2, ¶ 1 (asserting that the Complaint "is an action to recognize, register, and enforce a tribal court money judgment under principles of comity.").) The Tribe's reliance on *Marchington*, where a member of the Blackfeet Indian Tribe sought a ruling declaring that the tribal court had subject matter jurisdiction to enter a judgment, is distinguishable because the Tribe's Complaint does not request a ruling that the Tribal Court had subject matter jurisdiction. (*See* ECF No. 2.) Where the claim does not appear on the face of the Complaint, the Court does not have federal question jurisdiction over the Tribe's comity-based Complaint and it must therefore be dismissed. *See e.g., Caterpillar Inc.*, 482 U.S. at 392.

The Tribe's Complaint asserts that, because the underlying issues decided in the Tribal Court are based on the federal government's asserted trust responsibility for holding, protecting, preserving, and managing the waters at issue for the Tribe, the Tribe's request to recognize, domesticate, and enforce the Tribal Court's judgment raises a federal question. (*See id.* at 3–5, ¶¶ 7–11.) Stated differently, the Tribe believes this Court has federal question jurisdiction simply because the Tribe is a federally-recognized Indian tribe that is governed by federal laws and federal protections. However, this too fails to raise a federal question.

"[F]ederal question jurisdiction," however, "does not exist merely because an Indian tribe is a party." *Miccosukee Tribe*, 607 F.3d at 1273 (internal quotation marks omitted). Where the Tribe's Complaint merely seeks to have this Court recognize, domesticate and enforce the Tribal Court's judgment through the doctrine of comity, the Tribe's Complaint does not provide this Court with federal question jurisdiction. *Taveras*, 477 F.3d at 783; *Miccosukee Tribe*, 607 F.3d at 1276.

Although this Court lacks subject matter jurisdiction to hear this case, the Tribe is not without a remedy. "The Tribe can also seek enforcement of the [Tribal Court's] judgment in state court and will prevail if the state court elects to grant comity to the Tribal Court's judgment." *Miccosukee Tribe*, 607 F.3d at 1277, n.16. The district courts of the State of Utah are courts of general jurisdiction and are the proper forum for resolution of the Tribe's claims. Utah Code Ann. § 78A-5-101.

III. EVEN IF THIS COURT HAD JURISDICTION, IT SHOULD REFUSE TO ENFORCE THE TRIBAL COURT'S INEQUITABLE JUDGMENT.

Even if it were assumed that jurisdiction existed, this Court should exercise its discretion to refuse to enforce a tribal court judgment on equitable grounds. *Wilson*, 127 F.3d at 810.

Defendants and their predecessors-in-interest have paid assessments to the BIA, which ultimately benefits the Tribe through the funding of the UIIP, including the funding of operation, maintenance, and repair. In sum, Defendants and their predecessors-in-interest have paid more tens of thousands of dollars in assessments. Thus, not only does the Tribal Court's judgment deprive Defendants of the benefits of their bargain with the BIA in using water pursuant to the Agreements, but it also deprives Defendants of the benefits of the assessments it has paid for decades. Stated differently, Defendants' only offense, according to the Tribe and Tribal Court, is

that the BIA delivered water to McKee's property pursuant to the Agreements. Unilaterally declaring the Agreements to be void is inequitable and unfair. Particularly when the federal government, which was not a party, continues to deliver water to Defendants under the Agreements and has refused the requests by the Tribe that it cease to do so. McKee's Appendix I, at 78, ¶ 16 (Decl. of Gregory McKee).

In addition, the Tribal Court committed several plain errors in ruling that the Agreements were invalid. For example, even though the United States, through the BIA, entered into the Agreements with Defendants' predecessor-in-interest, the Tribal Court refused to require the Tribe to join the United States as a necessary party pursuant to Rule 19 of the Federal Rules of Civil Procedure. *E.g., Acton Co., Inc. of Massachusetts*, 668 F.2d at 81–82 (explaining and citing cases in support that an "action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined."); *Delta Financial Corp.*, 973 F.2d at 305 ("The cases are virtually unanimous in holding that in suits between parties to a contract seeking rescission of that contract, all parties to the contract, and others having a substantial interest in it, are necessary parties.").

Likewise, the Tribe presented inaccurate evidence regarding the underlying water right that supplies the water at issue under the Agreements. Specifically, the Tribe declared and the Tribal Court found that Water Right 43-3004 did not include Defendants' property under its Certificate of Appropriation of Water. Tribe's Appendix I, at 43 (Findings of Fact and Conclusions of Law). This is because the water right that supplies the water for the Agreements is supplied by ***Water Right 43-3011***. Water Right 43-3011 includes both the prior lands listed in the Agreements in its Certificate of Appropriation of Water. *Compare* McKee's Appendix I, at 108–110 (Certificate of

Appropriation), *with* Tribe's Appendix II, at 215–220 (Agreements). Following the execution of the Agreements in 1943 and 1947, Defendants' predecessor-in-interest, Dewey McConkie, with permission of what is now the BIA, filed Change Applications a1639 and a2107 with the Utah State Engineer to change the place of use for the water under the Agreements. McKee's Appendix I, at 5–9 (Change Applications). These Change Applications were approved. Thus, the McKee Property is within the approved place of use of Water Right 43-3011, which the BIA relies upon to deliver water to the McKee Property.

In addition, and in contradiction to elementary doctrines of water right conveyance and contractual interpretation, the Tribe presented irrelevant evidence that Defendants' chain of title did not include the water Defendants were using pursuant to the Agreements. Appendix I, at 51–53 (Findings of Fact and Conclusions of Law). However, the Agreements did not convey any water rights; rather, the Agreements provide Defendants only a contractual right to the delivery of water in exchange for the payment of assessments. Tribe's Appendix II, at 215–220 (Agreements). In other words, there was no water right to be conveyed.

An agreement that benefits a certain parcel of land, as the Agreements do, is a covenant that runs with the land. *E.g., Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, 274 P.3d 935. The 1946 Agreement specifically states that it is "binding upon and shall inure to the benefit of the United States and its assigns and to the heirs, executors, administrators and assigns of the Contractors." Tribe's Appendix I, at 220 (1946 Agreement). Thus, by operation of law—and not through any deed conveyance—Defendants are entitled to the benefits of the Agreements. This is exactly why the BIA continues to deliver water to Defendants and also requires Defendants to pay assessments, which they have continued to pay, and which the BIA

accepts. The invoices that Defendants receive and pay clearly indicate that they are for the same property that is described in the Agreements. McKee's Appendix I, at 79–88 (Invoices). Thus, the Tribal Court's determination that "the billing invoices are not particularly probative" is clearly erroneous and does not comport with the evidence that was presented.[5]

Accordingly, this Court should deny the Tribe's Motion because enforcing the Tribal Court's judgment is not equitable.

CONCLUSION

For the foregoing reasons, Defendants request that the Court deny the Tribe's Motion for Summary Judgment, grant Defendants' Cross Motion for Partial Summary Judgment, and dismiss the Tribe's Complaint.

RESPECTFULLY SUBMITTED this 24th day of June, 2019

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[5] If the Defendants were indeed not the successors in interest to the Agreements, it would seem to be a simple matter for the Tribe to bring this to the attention of the BIA, which would then terminate its deliveries to the Defendants as all the water BIA delivers is pursuant to the Agreements.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2019, I electronically filed the foregoing **DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM; MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** 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, including the following:

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