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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

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-HCN Judge Howard C. Nielson, Jr. **Oral Argument Requested**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Indian Tribe" or "Tribe"), respectfully submits its opposition memorandum to Defendants' cross-motion for summary judgment, ECF No. 61.

PRELIMINARY STATEMENT

Defendants' response to the Tribe's summary judgment motion and their cross-motion for summary judgment were combined into a single document in contravention of DUCivR 7-1(b)(1)(A), which states that, "No motion, including but not limited to cross-motions and motions pursuant to Fed. R. Civ. P. 56(d) may be included in a response or reply memorandum. Such motions must be made in a separate document."[1] Because Defendants' cross-motion requests summary judgment on an additional ground different from the grounds asserted under the Tribe's summary judgment motion, the Tribe is filing separate reply and response memoranda.

REFERENCES TO THE RECORD

The Tribe's Opposition Appendix to Defendants' Cross-Motion, and exhibits as allowed by DUCivR 56-1(d), is referenced as Tribe Supp. App., followed by the volume and page number, i.e., Tribe Supp. App. I at 10. References to the Tribe's Appendix for the Tribe's initial summary judgment motion, ECF No. 55, will be to the ECF number for the Appendix, ECF No. 55-1, 55-2, 55-3 or 55-4, and the appropriate Appendix page number, i.e., ECF No. 55-1 at 10.

[1] Defendants filed the identical pleading *twice*, first as ECF No. 60, and then as ECF No. 61. Both pleadings are captioned "Defendants' Cross-Motion for Summary Judgment and Supporting Memorandum; Memorandum Opposing Plaintiff's Motion for Summary Judgment."

I. RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

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

RESPONSE: Disputed.

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).

RESPONSE: No dispute.

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).

RESPONSE: Disputed, in part. The patent is dated February 12, 1919 (not 1914), and the controlling authority is not *Hagen*, but rather, *Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. Utah*, 114 F.3d 1513, 1529-31 (10th Cir. 1997), *cert. denied*, *Duchesne County v. Ute Tribe*, 522 U.S. 1107 (1998).

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).

RESPONSE: Disputed. The written Agreements speak for themselves. The Agreements do not provide for McKee (or his predecessors-in-interest) "*to receive water … in exchange for assessments*," as recited. Instead, the Agreements purport to transfer tribal waters that were decreed to the Ute Indians under the 1923 federal court decree in *United States and Franklin K. Lane, Secretary of the Interior, as Trustee of the Indians of the former Uintah and Ouray Indian Reservation v. Cedarview Irrigation Co., et al.*, U.S. District Court for the District of Utah, case number 4427, to lands *outside* of the Ute Indian

Irrigation Project (UIIP) as those UIIP lands were identified in the 1923 decree. *See* ECF No. 55-1 at 98.[2] This means that the Agreements violate the 1923 court decree, which has never been amended. The 1923 decree identifies the lands entitled to receive Indian water via the U.S. Deep Creek Canal and the Tabby White Canal as the Indian allotments that were listed, by their legal description, by the United States in its 1905 application to the Utah State Engineer for a water right for the Ute Indians, Certificate of Appropriation No. 1234. *See* ECF No. 55-1 at 94.

The McKee property is *not* included in the list of Indian allotments for which a water right was requested under Certificate of Appropriation No. 1234—a list that was later adopted by reference and incorporated into the 1923 decree in *U.S. v. Cedarview*. ECF No. 55-1 at 94. In addition, in the Tribal Court suit, Mr. McKee failed to deny the Tribe's Request for Admission that the McKee property is "not identified as land entitled to irrigation water from the U.S. Deep Creek Canal or the Tabby White Canal under the Utah State Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004)." [3] Consequently, the McKee Defendants are deemed to have admitted that the McKee property is not entitled to receive Indian water via the Deep Creek Canal under either the

[2] The 1923 Decree states, "The said 34,700.09 acres of land to be irrigated and the other uses under said ditches and canals are as more particularly described in the final certificates of appropriation for the several said named ditches and canals as the same may appear upon the records of the office of the State Engineer of the State of Utah, and which are numbered to wit: … 1234…." ECF No. 55-1 at 98.

[3] *See* the Tribe's Notice of Deemed Admissions, Tribe Supp. App. I at 125, Request No. 1; Tribe's Motion and Supporting Legal Memorandum for the Imposition of Discovery Sanctions, Tribe Supp. App. I at 134; and Tribal Court's Order on Motion to Stay, Compel Discovery and to Withdraw, dated June 12, 2015, Tribe Supp. App. I at 140.

Certificate of Appropriation of Water, No. 1234 or the 1923 decree, and the Tribal Court so found. *See* Tribal Court's Findings of Fact, Nos. 13-14 and 29-46. ECF No. 55-1 at 43-44, 49-55. Further, even if the Agreements could operate in violation of the 1923 court decree, the Agreements do not allow for Indian-owned water to be used to irrigate the entirety of Mr. McKee's 121.14 acre property. Instead, the Agreements purport to transfer tribal water rights for only 36.28 acres to the lower-third (40 acres) of the McKee property, that is, to the NW/4 of the SE/4 of Section Two, Township One South, Range One East, Uintah Special Meridian ("USM"), Uintah County, Utah. Contrary to this express limitation under the Agreements, Defendant McKee insisted throughout the Tribal Court suit that he had a legal right to divert Indian water from the Deep Creek Canal to irrigate *all* of his 121.14 acres—a claim the Tribal Court rejected. *See* McKee's Tribal Court Memorandum of Law, Tribe Supp. App. I at 65; *see also* Tribal Court's Findings of Fact, Nos. 14 and 29-46. ECF No. 55-1 at 43-44 and 49-55.

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).

RESPONSE: Disputed. If Defendants are continuing to receive water via the Deep Creek Canal and if they are using the Tribe's court-decreed *Winters* Reserved waters to irrigate the McKee property, then Defendants are doing so in violation of the injunctions under both the 1923 Decree in *United States v. Cedarview*, case no. 4427, and the Final Judgment in *Ute Indian Tribe v. McKee*, Ute Indian Tribal Court, Case No. 12-285.

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).

RESPONSE: Disputed. In the Tribal Court, Greg McKee testified that he receives water via pipeline from the LaPoint-Tridell municipal water system. Tribe's Appendix, III at 431, ECF No. 553 at 431. Further, although the Tribe agrees that the United States holds the easement on which the Deep Creek Canal and Lateral No. 9 traverse, the 1906 Act expressly provides that the United States holds the UIIP and its infrastructure, including its ditches and canals, "in trust for the Indians." ECF No. 55-1, at 375. *See Hackford v. Babbitt*, 14 F.3d 1457, 1468 (10th Cir. 1994).

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).

RESPONSE: Disputed. At the bench trial in the Tribal Court, the Tribe presented evidence that the McKee family had for many years operated an underground pipeline that bored into, and surreptitiously siphoned Indian water out of, the Deep Creek Canal and onto the McKee property.[4] Indeed, Mr. Brent Searle testified that Greg McKee had admitted to him that he siphoned water out of the Deep Creek Canal through an underground pipeline. ECF No. 55-4 at 663-666 (Transcript pages 62:17 to 75:16). In addition, the Tribe introduced into evidence multiple color photographs and detailed reports on McKee's illegal *surface* diversions of water from the Deep Creek Canal prepared by the Tribe's engineers, Natural Resources Consulting Engineers, Inc. ("NRCE"). ECF No. 55-1 at 124-201; ECF No. 55-2 at 226-72, 273-295. At trial, NRCE

[4] See, e.g., ECF No. 55-2 at 353-54, Investigative Report, interview of Jack Horner, and Mr. Horner's testimony at ECF No. 55-4 at 685-86 (Transcript pages 151:3 to 157:9).

Engineer Chad Hall and Mr. Brent Searle both testified that McKee made illegal *surface* diversions from Deep Creek Canal at a point just above the Bureau of Indian Affairs (BIA) installed weir for Lateral Ditch No. 9. The witnesses explained that a weir is a device that records the amount of water that is diverted out of Deep Creek Canal into Lateral Ditch No. 9. Because water was being diverted onto the McKee property *above* the weir, it was difficult for the illegal water diversions onto the McKee property to be detected and/or quantified. ECF No. 55-4 at 660-62 (Transcript pages 53:8 to 59:3) (Hall testimony) and ECF No. 55-4 at 664 (Transcript pages 67:21 – 69:6) (Searle testimony).

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).

RESPONSE: Not disputed. The Tribe is not aware of any such contract(s) at this time.

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)

RESPONSE: Disputed. The Tribal Court found that McKee had diverted water from Deep Creek Canal to irrigate the additional 81.14 acres in the upper two-thirds of his property. ECF No. 55-1 at 47-49, ¶¶ 24-28. However, the legality of the BIA's water deliveries to the McKee property following the Tribal Court's judgment in *Ute Indian Tribe v. McKee* is now the subject of litigation between the Ute Tribe and the United States. Parenthetically, the Tribal Court judgment in *McKee* does not enjoin the United States; rather, the judgment does permanently enjoin the McKee Defendants from "diverting water from the Deep Creek Canal and Lateral No. 9 for use on the McKee property." ECT No. 55-4 at 750, ¶ 3.

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).

RESPONSE: Disputed and objected to. Water is not diverted into the Deep Creek Canal by virtue of State Water Right 43-3011; rather the waters diverted into Deep Creek Canal are made pursuant to the 1923 Decree in *U.S. v. Cedarview*. ECF No. 55-1 at 98. Further, the Tribe objects to this asserted fact, and the purported record that the asserted fact is based upon (*see* McKee's Appendix, 111-113). The Tribe objects to this document under Federal Rules of Evidence 401 (relevancy), 403 (prejudice), 602 (lack of foundation), 802 (hearsay), and 901 (no authentication). On its face—and in red lettering—the document carries this unequivocal warning:

(WARNING: Water Rights makes NO claims as to the accuracy of this data)

Obviously, no reliance can be placed on a document that itself disclaims the accuracy of the information contained within the document. Further, the total amount of water diverted into Deep Creek Canal is irrelevant and immaterial to the actual damages that are suffered by the Tribe and its members as a result of McKee's misappropriation of tribal waters.

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).

RESPONSE: Disputed and objected to on the same grounds set forth above in response to Statement No. 10. The document in McKee's Appendix at 96-100 carries the same warning as above:

(WARNING: Water Rights makes NO claims as to the accuracy of this data)

Obviously, no reliance can be placed on a document that itself disclaims the accuracy of the information contained within the document.

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.

RESPONSE: The Tribe objects to this asserted fact as irrelevant, immaterial, and entirely speculative insofar as it relates to a Water Compact that is not currently ratified and therefore, has no legal efficacy.

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.

RESPONSE: Disputed. In light of Mr. McKee's failure to appear for trial, the Tribal Court had to obligation to even enter Findings of Fact and Conclusions of Law.[5] Yet, despite Mr. McKee's non-appearance, the Tribal Court proceeded to conduct a full 2-day evidentiary trial and the Court's Findings of Fact and Conclusions of Law run to 28 pages in total length. See ECF No. 55-1 at 35-62. Within those 28 pages, the Tribal Court adequately found a proper predicate for tribal court jurisdiction, particularly in Findings of Fact Nos. 16-23 and 49-53, and in Conclusions of Law Nos. 1 and 2. Thereafter, the McKee Defendants waived their right to question the adequacy of the Tribal Court's

[5] Rule 24 of the Ute Indian Rules of Civil Procedure requires the entry of findings of fact and conclusions of law "except in cases where a party defaults, fails to appear or otherwise waives" their right to findings and conclusions, as happened here.

Findings of Fact and Conclusions of Law by virtue of Defendants' failure to submit their own proposed findings and conclusions, and their failure to prosecute an appeal to the Ute Indian Court of Appeals from the trial court's 28-page Findings of Facts and Conclusions of Law and the Court's final judgment.

II. STATEMENT OF ADDITIONAL MATERIAL FACTS RELEVANT TO THE DEFENDANTS' CROSS-MOTION

1. The Tribe incorporates by reference all of the Ute Indian Tribal Court's underlying Findings of Fact. ECF No. 55-1 at 39 - 58, ¶¶ 1 – 53.

2. On one of the Tribal Court exhibits admitted into evidence, a Utah state inspector had noted on a AFO [Animal Feedlot Operation] report that the McKee property included "*an irrigation inducted wetland*." ECF No. 55-1 at 250.

3. "There is a very limited water supply on the Whiterocks River in the Deep Creek Canal, in particular, during the later growing season in about mid-July, August and September, the flows are quite low and most of the years there is a shortage of water supply to satisfy the water requirements for even the most senior, 1861 water right lands." Declaration of Woldezion Mesghinna, Ph.D., P.E., Tribe Supp. App. I at 152, 157 at ¶ 20.

4. "[S]hortages in the Colorado River system, including the federal reserved water rights of the Ute Indian Tribe in the Whiterocks River, have become a serious problem for irrigators, municipalities, and other water users and added to the value of water." *Id.,* Mesghinna Declaration, Tribe Supp. App. I at 157, ¶ 22.

5. In 2015, the Upper Colorado River Commission began a pilot program to

partially mitigate the decline of or to raise water levels in Lake Powell for drought contingency planning, the "Colorado River System Conservation Pilot Program (Program)." In 2015, the program provided an annual payment of between $200-330 per acre foot of water to irrigators for the fallowing of agricultural lands. *Id.,* Mesghinna Declaration, Tribe Supp. App. I at 157-58, ¶ 22.

6. "The Ute Indian Tribe's Indian Reserved Water Rights, the water rights involved in the McKee case, are all part of the Colorado River System, and no amount of the Ute Indian Tribe's Indian reserved water rights are unimportant or miniscule in the face of the serious drought and water shortages faced by citizens of the seven states in the Colorado River System, combined with the Ute Indian Tribe's need to promote the economic vitality and health of the Tribe and its members." *Id.,* Mesghinna Declaration, Tribe Supp. App. I at 158-59, ¶ 25.

III. LEGAL ARGUMENT

A. THE TRIBAL COURT HAD BOTH PERSONAL AND SUBJECT MATTER JURISDICTION

1. The Tribe's Tribal Law.

Defendants argue that the Ute Tribe's tribal law "cannot confer subject matter" jurisdiction" over the McKee Defendants "if the *Montana* exceptions cannot be shown." Defs' Mem., ECF No. 61 at 16. However, this argument fundamentally misperceives and distorts the Tribe's argument under its motion, ECF No. 55 at 13-17. Contrary to Defendants' suggestion, the Tribe is not using tribal law as a "bootstrap" into the *Montana* exceptions; rather, the Tribe's jurisdictional analysis of the Tribe's tribal law is simply a part of the comity analysis required in the Tenth Circuit. In seeking comity, Tenth Circuit

precedent requires an Indian tribe to show that its tribal court possessed personal and subject-matter jurisdiction over the McKee Defendants <u>both</u> (i) under the Tribe's own internal tribal law, and (*ii*) under the federally-imposed limitations on tribal court jurisdiction recognized in *Montana v. United States*, 450 U.S. 544 (1981).

> "'Inquiry into jurisdiction is a part of comity analysis.' *John v. Baker*, 30 P.3d 68, 72 n. 14 (Alaska 2001), and a court 'need not recognize a judgment of the court of a foreign state if … the court that rendered the judgment did not have jurisdiction of the subject matter of the action. *Restatement (Third) of Foreign Relations Law* § 482(2)(a) (1987) (including case citations to comity analysis of tribal-court judgments)."

Burrell v. Armijo, 456 F.3d 1159, 1176 (10th Cir. 2006). Whether, the Ute Tribe additionally had jurisdiction over the McKee suit in Tribal Court under the *Montana* exceptions is an entirely different inquiry, addressed *infra*.

The Tribe stands by its argument that the Tribe's 2013 amendment of its Law and Order, was a procedural, not a substantive, change in law that the Tribal Court properly applied the 2013 amendments to the McKee case pending before the Tribal Court. *See* ECF No. 55 at 15-17. Moreover, this question presented an issue of tribal law exclusively for the Tribal Court to decide. Federal courts have no constitutional or federal statutory authority to review (and reverse) a tribal court's interpretation of internal tribal law. *E.g., Talton v. Mayes*, 163 U.S. 376, 385 (1899); *Wheeler v. United States*, 811 F.2d 549, 550-53 (10th Cir. 1987); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 135 (10th Cir. 1959) ("neither under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations"); *Alexander v. Salazar*, 739 F. Supp. 2d 1333, 1338 (E.D. Okla. 2010). The same is true of other federal circuits. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004) ("[I]n this Circuit we "defer to the tribal

courts' interpretation" of tribal law.") (citation omitted); *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) ("[F]ederal courts may not readjudicate questions – whether of federal, state or tribal law - already resolved in tribal court[.]"); *Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 68 (2nd Cir. 1997) ("Plaintiffs invite us to [interpret tribal law and] enter into this interpretative thicket. We decline to do so. These constitutional questions are, for good reason, matters of tribal law reserved to the tribal judiciary to resolve.") (citations omitted).

2. The Tribe's Inherent Sovereign Power to Exclude.

Defendants' argument on the sovereign power to exclude would limit that inherent sovereign power to tangible real property. However, there are other forms of tribal property, particularly in today's twenty-first century economy. Taken to its logical conclusion, the arguments advanced by the McKee Defendants would enable Mr. McKee, sitting at his home computer, to hack into the Tribe's on-reservation computer network, and surreptitiously drain the Tribe's off-reservation bank accounts of all the money in those accounts. The Tribe's inherent sovereign power to exclude must extend to other forms of tribal property. The form of Tribal property at issue here is the Tribe's judicially-decreed Indian reserved water rights. Under McKee's own judicial admissions, and the undisputed evidence at trial, the McKee Defendants were siphoning the Tribe's court-decreed waters out of the Deep Creek Canal, an Indian Irrigation Project the legal title to which is held *in trust* for the Tribe by the United States. Tribe's Appendix, ECF No. 55-1 at 25 ("That [said UIIP] shall be constructed and completed and held and operated, and water therefor appropriated … and the title thereto *shall be in the Secretary of the Interior*

in trust for the Indians.") An Indian tribe's inherent sovereign power to exclude would be *meaningless* if it does not extend to the McKee Defendants' brazen misappropriation of court-decreed *Winters* water under the facts of this case

3. The *Montana* Exceptions.

a. First Montana *Exception*

The Tribal Court had subject matter jurisdiction over this case under the first *Montana* exception based on the Defendants' consensual relationship with the Tribe arising from Defendant McKee's fee patent to the land on which he misappropriated Tribal water ("Patent"), and his lease of Tribal land that required him to comply with all Tribal laws.

Defendants first assert that the Patent did not establish a consensual relationship between the Defendants and the Tribe because a patent is not a commercial dealing, contract, or lease. Notably, however, no court has ever limited the term "consensual relationship" to only constitute a commercial dealing, contract, or lease. In fact, in *Montana v. United States*, the U.S. Supreme Court specifically explained that consensual relationships could be entered through "commercial dealing, contracts, leases, or *other arrangements*." 450 U.S. at 565-566. Moreover, even a case on which Defendants rely acknowledges that sometimes transfers of property rights can create continuing consensual relationships. *See State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108, 1113 (9th Cir. 1999) (explaining that transfers of property interests "*generally* do not create continuing consensual relationships.").

Moreover, the four cases on which Defendants rely do not address the unique provisions included in the Patent at issue here. Two of the cases on which Defendants rely addressed Indian tribes' jurisdictional authority over cases in which a tribal member was killed by a train within a railroad company's right of way through a tribal reservation. *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999); *Chiwewe v. Burlington Northern and Santa Fe R. Co*., 239 F. Supp. 2d 1213 (D.N.M. 2002). However, as the court explained in *Red Wolf*, the "Tribe had no reserved power to exclude the Railroad from the reservation, nor to exercise dominion or control over the right-of-way." *Red Wolf*, 196 F.3d at 1063. Moreover, nothing in the right-of-way transfer documents were alleged to retain any pertinent Tribal rights to the right-of-way. *King* similarly addressed whether a consensual relationship existed regarding a right-of-way granted from tribal land to the opposing party that did not explicitly reserve any pertinent Tribal rights. 191 F.3d at 1110-1113. That case involved the Fort Belknap Indian Community's ("Community") authority over a right-of-way through the Fort Belknap Reservation acquired by the State of Montana to construct a highway. The Indian Community argued that it had the authority to enforce its employment ordinance against the state of Montana for work done on the right-of-way; however, the court found that the original transfer to Montana specifically gave Montana the authority to "construct and maintain the highway upon the right of way in a good and workmanlike manner," and held that the right of way did not establish a consensual relationship. *Id*. at 1113.

Finally, *Lower Brule Sioux Tribe v. South Dakota* addressed whether the Lower Brule Sioux Tribe could regulate nonmembers' hunting and fishing on fee lands within the

reservation. 104 F.3d 1017, 1022 (8th Cir. 1997). The court held that the original title deeds transferring the fee lands from the tribe did not give rise to an applicable consensual relationship authorizing the Tribe to regulate nonmember hunting and fishing on fee lands. *Id*.

Here, in contrast, the Patent transferred land from the Tribe in fee specifically reserved a right-of-way for ditches or canals constructed by the authority of the United States. Tribe's Appendix, ECF No. 55-1 at 83. The canal constructed through this easement, the Deep Creek Canal, was constructed for the benefit of the Tribe as part of the UIIP to carry federally-reserved Tribal water. The Tribe is the beneficial owner of the UIIP and the federally-reserved water running through the Deep Creek Canal. Defendant McKee's estate is a servient estate burdened by an easement. While the servient estate owner retains the land, he may not take actions that unreasonably interfere with the easement. Am. Jur. 2d, Easements and Licenses in Real Property § 75. Defendant McKee, as owner of land burdened by an easement for a canal that the Tribe is the beneficial owner of and which carries Tribal water, thus had an arrangement with the Tribe, one of servient estate owner and beneficial owner of the dominant estate. This arrangement between the owners certainly qualified as a consensual relationship. Thus, unlike the transfers in the four cases cited by Defendants, here, the land transfer specifically reserved certain Tribal rights through the easement reservation. Defendant McKee violated his duties as a servient estate owner when he misappropriated federally-reserved waters running through the UIIP canal.

Next, Defendants assert that there is no nexus between Defendant McKee's lease of Tribal land, Lease No. 8FP0007852, Tribe's Appendix, ECF No. 55-4 at 763-71, and Defendants' misappropriation of Indian water to establish a consensual relationship within the meaning of *Montana*. Defs' Mem., ECF No. 61 at 18-22. The lease, however, plainly establishes a broad consensual relationship between the Ute Tribe and the Defendants. As one of the conditions for receiving the lease of Tribal land, McKee agreed and covenanted to comply with "all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies." *Id*. Through this lease, Defendant McKee thus entered into a broad consensual relationship with the Tribe in which he agreed to abide by the Tribe's laws and was on notice that he was subject to Tribal Court jurisdiction.[6]

In sum, the Tribe and the Defendants entered into a consensual relationship through the Patent and Lease No. 8FP0007852. Defendants therefore availed themselves of the Tribe's jurisdiction pursuant to the first *Montana* exception.

b. Second Montana *Exception*

The Tribe has also met its burden under the second (and alternative) *Montana* exception. It meets the second *Montana* exception because the theft of tribal water obviously threatens the Tribe's political integrity, economic security, and the health and welfare of the Tribe and its members. The ability of a Tribe to regulate its water and

[6] Notably in their Opposing Memorandum, Defendants did not deny that Defendant McKee himself had previously described his relationship with the Tribe as "good." Docket No. 55-2 at 497 (Prelim. Inj. Hr'g Tr. March 26, 2013, p. 67, ln 16-19).

federally reserved water rights, and to protect those rights from theft, is vital to tribal self-governance and sovereignty. In fact, reserved water rights are so paramount to the survival of Indian tribes that the Supreme Court found them implicitly reserved at the creation of a tribe's reservation, because without the reserved rights, "civilized communities could not be established thereon." *Winters v. United States*, 207 U.S. 564, 576 (1908). The Uintah & Ouray Reservation lands were themselves reported by a survey team delegated by Brigham Young to be unfavorable and not suited for cultivation. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1094 (D. Utah 1981), aff'd in part, rev'd in part, 716 F.2d 1298 (10th Cir. 1983), on reh'g, 773 F.2d 1087 (10th Cir. 1985). Yet, that "vast contiguity of waste" that is now the Uintah and Ouray Reservation was deemed suitable for the Ute Indians. Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004). Thus, without question, water is absolutely essential for the survival of American Indians in the arid West.

Relying on language from *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), Defendants argue that the non-Indian conduct must be "so severe as to 'fairly be called catastrophic for tribal government.'" *Id*. at 341. Defs' Mem., ECF No. 61 at 26. However, this language is pure dicta. As Chief Justice Roberts noted in *Plains*, "Neither the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception." *Id.* at 340-41. Moreover, in contrast to *McKee*—a case involving the misappropriation of tribal trust property—*Plains* involved neither an Indian tribe, nor Indian trust property; rather *Plains* involved a dispute between a non-Indian bank and non-Indian individual over non-Indian property that was not held in trust for the

benefit of the Indians. As dictum, the above-quoted language in *Plains* cannot be considered authoritative, or even carefully considered:

> Dicta are parts of an opinion that are not binding on a subsequent court, whether as a matter of stare decisis or as a matter of the law of the case. (citations omitted) They are nonbinding for two reasons. First, not being integral elements of the analysis underlying the decision—*not being grounded in a concrete legal dispute and anchored by the particular facts of that dispute*—they may not express the judges' most careful, focused thinking. Second, to give the inessential parts of an opinion the force of law would give judges too much power, and of an essentially legislative character. . . .

Wilder v. Apfel, 153 F.3d 799, 803 (7th Cir. 1998) (emphasis added). *Accord Thompson v. The Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009) (citing *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995)).

The United States Supreme Court itself has long recognized that dicta in its opinions is not binding on subsequent courts as authority or precedent:

> The discussion of § 5 in *East Carroll* was dictum unnecessary to the decision in that case. It is, therefore, not controlling in this case, in which the impact of § 5 is directly placed in issue.

McDaniel v. Sanchez, 452 U.S. 130, 141-42, 146 (1981) (observing that earlier precedents did not decide "the precise question that is now presented" for decision).

> We cannot . . . give the *Quality King* statement the legal weight for which Wiley argues. The language "lawfully made under this title" was not at issue in *Quality King*; the point before us now was not then fully argued; we did not canvas the considerations we have here set forth. . . . Most importantly, the statement is pure dictum. . . . And it is *unnecessary* dictum even in that respect. Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?

Kirtsaeng v. John Wiley & Sons, Inc., ___ U.S. ___, 133 S. Ct. 1351, 1355, 1368 (2013) (emphasizing that there was "one important fact" to distinguish *Kirtsaeng* from the *Quality*

King case) (emphasis in original) (underscore added).[7]

Defendants suppose that the conduct at issue here is their "use of water pursuant to the decades-old agreements with the BIA," when in fact the conduct at issue is long-term theft of tribal property by diverting tribal water to which Defendants have no right. Moreover, Defendants cannot avoid the Tribe's jurisdiction, via *Montana's* second exception, by characterizing the amount of water stolen as being below some arbitrary threshold. Additionally, the total amount of stolen water is likely indeterminable. Defendants have been diverting water since at least August 1999, in amounts large enough to maintain "very very green" lands surrounded by "very dry" properties. ECF No. 55-4 at 673.

Defendants also rely upon the Ninth Circuit's decision in *Evans v. Shoshone-Bannock Land Use Policy Commission* to support their "drop in the bucket" argument. However, in *Evans*, the harm at issue was preexisting or speculative. Here, the harm

[7] *See also Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (Scalia, J., concurring) ("a formula repeated in dictum but never the basis for judgment is not owed stare decisis weight.") (emphasis added) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545-46 (2005)); *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The Court in *Edelman* considered the constitutionality only of the relief before it. . . . It was not presented with the question of the propriety of notice relief."); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169 (1939) ("We therefore hold that the issue in the instant case is sufficiently different from that presented by the [earlier case] that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits."); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 284 (1919) ("But the point [made in an earlier case] was unnecessary to determination of the cause . . . it must be regarded as *obiter dictum*, and we cannot now approve or follow it.") (emphasis in original).

from the Defendants' water theft is long-standing and actualized harm. 736 F.3d 1298, 1305–06 (9th Cir. 2013). Defendants are located at the upper end of the canal, and illegal diversions from the canal affect all rightful users below them. ECF No. 55-4 at 665. Defendants' illegal diversions lead to insufficient water for tribal uses including cultivation of crops, watering livestock, and tribal domestic and commercial uses. ECF No. 55-4 at 666. Decades-long theft of tribal water amounts to a threat to the Tribe's political integrity, economic security, and the health and welfare of the Tribe and its members. It is understood that water systems are unitary resources, where the actions of one user has an immediate and direct effect on other users. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) ("Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.").

The Idaho District Court recently held that toxic waste released by non-Indian FPM Corporation on fee lands within the Shoshone-Bannock Fort Hall reservation amounted to the type of threat that falls within *Montana's* second exception, even though there was no evidence anyone was harmed. *FMC Corp. v. Tribes*, 2017 WL 4322393, at *11 (D. Idaho Sept. 28, 2017). The Idaho District Court distinguished *Evans* because the threat from the toxic waste was many levels of magnitude greater than the threat of contamination in *Evans*. *Id.* Here too, the harm is distinguishable from the hypothetical harm in *Evans*. Defendants have been continually and intentionally harming the Tribe

through theft of its property, and will likely continue to do so without interference, imperiling the subsistence of the tribal community. See *Id.* at *10.

Defendants attempt to minimize the importance of water rights to the Tribe, and to limit their conduct at issue: the use of 108 acre-feet of water. In fact, theft of a large amount of illegally diverted water is the conduct at issue, and protection of water rights is necessary to protect tribal self-government and control internal tribal relations. A Tribal power is an "essential attribute of Indian sovereignty" if it "is a necessary instrument of self-government and territorial management." *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1246 (10th Cir. 2017), cert. denied sub nom. *Norton v. Ute Indian Tribe of Uintah & Ouray Reservation*, 138 S. Ct. 1001, 200 L. Ed. 2d 301 (2018) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982)). There is no state interest in the theft of Indian water, therefore there is no interest to be balanced against the Tribe's interest in protecting its tribal property. *See Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 850 (9th Cir. 2009). Theft of tribal property and resources threatens a cornerstone of tribal sovereignty, and the importance of the water to the Tribe is beyond dispute. *City of Albuquerque v. Browner*, 97 F.3d 415, 418 and n.2 (10th Cir. 1996); *see also* the Tribal Court's Findings of Fact and Conclusions of Law, ECF No. 55-1 at 35-62. For these reasons, the McKee case clearly fits within *Montana's* second exception. *Montana*, 450 U.S. at 566.

B. THIS FEDERAL COURT HAS FEDERAL QUESTION JURISDICTION

Pursuant to 28 U.S.C. § 1331, federal district courts are vested with jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."

As asserted in the Tribe's Complaint, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because this case integrally involves the Tribe's federally-decreed Indian waters and the theft of tribal waters from a federally managed Indian irrigation project that is held in trust by the United States for the benefit of the Tribe. ECF No. 2 at 3-4; Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 203(f)(2); ECF No. 55-1 at 42 ¶ 13. *See Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978) (holding that federal question jurisdiction existed for a Tribe's lawsuit to recover damages to tribal property caused by the Defendant's off-reservation conduct).

Federal Courts also have federal question jurisdiction to protect and enforce the terms of an earlier federal court judgment or decree entered in a party's favor, as pertinent here, the 1923 *Cedarview* Decree that adjudicated the Tribe's *Winters* reserved water rights and enjoined the Tribe's non-Indian neighbors from interfering with the Tribe's waters. Tribe's Appendix, ECF No. 55-1 at 101. *See Berman v. Denver Tramway Corp.*, 197 F.2d 946, 950 (10th Cir. 1952) (recognizing that federal judgments can be enforced through subsequent federal court suits).

The cornerstone of the underlying Tribal Court case and this Court's subject matter jurisdiction is the Tribe's federal water right which is governed by, and exists as a matter of, federal law. *See, e.g.,* ECF No. 55-1 at 18; Executive Order on October 31, 1861, confirmed by Congress in the Act of May 5, 1864, § 2, 13 Stat. 63; *Winters v. United States*, 207 U.S. 564 (1908); ECF No. 55-1 at 96-103. "Reserved or 'Winters' water rights are *federally created* and spring from the act of reserving lands for a particular purposes,

[sic] such as transforming nomadic Indians into productive agrarians or *promoting Indian self-sufficiency*." *Hackford v. Babbitt*, 14 F.3d 1457, 1461 (10th Cir. 1994) (emphasis added). Defendants' trespass occurred within the exterior boundaries of the Uintah and Ouray Reservation and adjacent to, and "essentially surrounded by," the Tribe's trust property. ECF No. 55-1 at 42 ¶ 10. The Deep Creek Canal, part of the UIIP, including the portion of the Canal that runs through Defendants' property, is a federal trust asset held by the United States for the benefit of the Tribe. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 203(f)(2); ECF No. 55-1 at 49 ¶ 3. The preservation of another federal trust asset is at issue – the water Defendants misappropriated was Indian water held in trust by the United States for the benefit of the Tribe. ECF No. 55-1 at 43 ¶ 13 ("The Ute Tribe is the beneficial owner of the Indian reserved waters conveyed through the Deep Creek Canal . . . ."); ECF No. 55-1 at 43 ¶ 14 (stating lands entitled to receive water from the Deep Creek Canal do not include the McKee Property). Such water belongs to the Tribe by virtue of the establishment of its Uintah Valley Reservation by Executive Order in 1861, i.e., by virtue of federal law. Exec. Order of Oct. 3, 1861, *reprinted in* I Kappler, Indian Affairs: Laws and Treaties 900 (2d ed. 1904); *see Arizona v. California*, 373 U.S. 546 (1963).

The Tribe's possessory interest in the federal trust property right at issue in the instant case vests this Court with jurisdiction. In *Oneida Indian Nation of New York v. County of Oneida, New York*, 414 U.S. 661 (1974), the Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin had sued two New York counties for violating their possessory rights to certain lands. The district court found that the cause

of action was created under state law, thus federal jurisdiction was lacking, and the appellate court affirmed. *Id*. at 665. The Supreme Court, however, found that the complaint did invoke federal jurisdiction under 28 U.S.C. § 1331 on the grounds that the right to possession asserted by the tribes was "conferred by federal law, wholly independent of state law." *Id*. at 666 (emphasis added). The Supreme Court again applied this principle in *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, stating that "an ejectment suit based on Indian title is within the original "federal question" jurisdiction of the district courts, because **Indian title creates a federal possessory right to tribal lands, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession**.'" 463 U.S. 1, 23 n.25 (1983), citing *Taylor v. Anderson*, 234 U.S. 74 (1914).

The Oneida tribes sued the counties for damages based on illegal trespass upon, and misappropriation of, their property. Likewise, here the Tribe sued Defendants for damages based on illegal trespass upon, and misappropriation of, its property. Like the Oneida tribes, the Tribe is suing to protect a property right (the right to its tribal water) that is "conferred by federal law, wholly independent of state law." *Oneida*, 414 U.S. at 666. Therefore, like the Oneida tribes' complaint, the Tribe's Complaint here is "plainly enough alleged to be based on federal law" – meaning the Tribe's Complaint falls within the conferral of federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362.[8] Just as the

[8] The Tribe will be seeking leave to file a motion to amend its complaint to include 28 U.S.C. § 1362 as a separate basis for federal question jurisdiction.

Oneida tribes' assertion of a possessory right to property as a matter of federal law conferred jurisdiction on the district court in *Oneida*, the Tribe's assertion of a possessory right to property as a matter of federal law here confers jurisdiction on this Court.

The Supreme Court reiterated this legal reasoning in *Franchise Tax Bd.*, 463 U.S. at 23. "[A]n ejectment suit based on Indian title is within the original 'federal question' jurisdiction of the district courts, because Indian title creates a federal possessory right to tribal lands, 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession.'" *Id*. at 23 n.25, citing *Oneida*, 414 U.S. at 677. In the instant case, the Tribal Court judgment is based on Indian title to property – the Tribe's federally reserved water right. Like Indian title to land, title to the Tribe's water is an Indian right to property, a natural resource that runs with the Tribe's land, that the Tribe possesses and has possessed since time immemorial. *See State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 767 (Mont. 1985) ("aboriginal-Indian reserved water rights exist from time immemorial and are merely recognized by the document that reserves the Indian land."). Like land, water rights are "critical elements necessary for tribal sovereignty."[9] *City of Albuquerque v. Browner,* 97 F.3d 415, 418 (10th Cir. 1996). The Supreme Court's rationale set forth in *Oneida* and reiterated in *Franchise Tax Board* is applicable here, confirming federal question jurisdiction because Indian water rights create a federal possessory right to tribal

[9] The Tenth Circuit in *Browner* identified "four critical elements necessary for tribal sovereignty – water rights and government jurisdiction" and "land and mineral rights." *Browner,* 97 F.3d at 418, 418 n.2.

water, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida*, 414 U.S. at 677.

In contesting this Court's jurisdiction, Defendants mischaracterize and misstate the assertions in the Tribe's Complaint in an effort to validate their flawed argument. The basis for this Court's federal question jurisdiction is expressly stated in paragraphs 7-11 of the Complaint, which discuss the Tribe's federal property right to the water at issue in the underlying action, the fact that said right was guaranteed by the United States through an Executive Order establishing the Reservation, and a litany of federal laws that establish the federal government's trust responsibility and its "*pervasive, comprehensive, and exclusive control of these waters*." ECF No. 2 at 3-5 (emphasis in original). This case is therefore readily distinguishable from *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Constr. Co.*, 607 F.3d 1268 (2010). The Court in *Miccosukee* held that the fact that a suit seeks to domesticate a tribal court judgment does not, in and of itself, present a federal question. However, here the Tribe has identified ample federal law implicated in and integral to this action, as well as the fact that property held in trust by the United States is at issue. Furthermore, the Miccosukee Tribe's complaint was "devoid of a single citation to a Constitutional provision, a federal statute, or a recognized theory of common law as the basis for the allegation that the Tribe's cause of action arises under federal law." *Id*. at 1276. As described above, the same cannot be said of the Tribe's Complaint. Moreover, *Miccosukee* is not binding on this Court and it ignores the directly applicable Supreme Court holding in *Oneida* to which this Court is bound. Because this matter directly involves the application of federal law to a tribal property interest

established through federal Executive Order and held in trust by the United States for the benefit of the Tribe, jurisdiction lies with this Court pursuant to 28 U.S.C. §§ 1331 and 1362.

In addition to the jurisdiction vested in this Court as described above pursuant to the holding in *Oneida*, jurisdiction lies with this Court because whether a tribal court has exceeded its federal implied limitations on jurisdiction is a federal question. "The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). Here, the parties dispute the Tribe's sovereign authority over its water, which is a "critical element[] necessary for Tribal sovereignty." *City of Albuquerque,* 97 F.3d at 418. Further, Defendants resist the Tribe's Motion on the grounds that the Tribal Court exceeded the lawful limits of its jurisdiction. Federal court jurisdiction over this matter is therefore proper.

C. EQUITY REQUIRES RECOGNITION OF THE TRIBAL COURT JUDGMENT

Defendants claim that the Tribal Court's judgment "deprive[d] 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." ECF No. 60 at 35. Defendants apparently, and erroneously, believe they can purchase federal Indian reserved water right water from the BIA. *Id*. The Tribe's water right is not for sale, and this is simply not how operation and maintenance ("O&M") fees and the UIIP work. Pursuant to the Central Utah Project Completion Act, O&M fees (or assessments)

must be used "exclusively for Uintah Indian Irrigation Project administration, operation, maintenance, rehabilitation, and construction where appropriate." Pub. L. No. 102-575 § 203(f)(3). The fees are paid and used for the operation and maintenance of the UIIP, not for the purchase of water. Payment of O&M fees in no way entitles a party to the water itself, only to the delivery of water to which the party has a right. At best, Defendants paid for the carriage of tribal water they misappropriated to the diversion point at which Defendants wrongfully took possession of the Tribe's water. Defendants have unclean hands and cannot complain that they are losing the benefit of UIIP facilities – specifically, the Deep Creek Canal from which they diverted the Tribe's water – because they will no longer be permitted to misappropriate the Tribe's water. Defendants' unclean hands clearly place the balance of equities in the Tribe's favor.

Defendants also claim that enforcement of the Tribal Court judgment would be inequitable due to an alleged error of the Tribal Court in "ruling that the Agreements were invalid" and due to allegedly "inaccurate" and "irrelevant" evidence presented by the Tribe. ECF No. 60 at 36-37. The Tribal Court decision did not invalidate the Agreements.[10] Moreover, the proper means for Defendants to challenge any decision of the Tribal Court was through the tribal court's appellate process, which Defendants elected to ignore. Likewise, the time to challenge evidence proffered by the Tribe was when that evidence was presented to the Tribal Court. Defendants waived their right to challenge the Tribe's

[10] The Tribal Court found that neither the 1943 nor 1946 Agreements states that the McKee property is within the UIIP and that, in fact, the McKee Property is located *outside* the UIIP project lands.

evidence by their failure to timely do so during the Tribal Court proceeding. Once again, this Court cannot re-litigate the Tribal Court case. *Iowa Mutual Ins. Co.*, 480 U.S. at 19.

As demonstrated above, jurisdiction over this matter lies with this Court and, as already shown in the Tribe's Motion, equitable grounds support recognition and enforcement of the Tribal Court judgment. No recognized basis for denial of recognition and enforcement exists here. *See Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (setting forth two mandatory and four discretionary reasons for which a tribal court judgment may be denied comity); ECF No. 55 at 31-32. The Tribal Court judgment was obtained through litigation that provided all substantive and procedural rights of due process. The judgment does not conflict with another final judgment entitled to recognition. And the judgment is not inconsistent with any contractual choice of forum. None of these facts are disputed in Defendants' Cross-Motion. In fact, Defendants failed to address this argument and have therefore conceded this point. *See Ali v. D.C. Court Servs.*, 538 F. Supp. 2d 157, 161 (D.D.C. 2008). In addition, recognition of the judgment actually furthers the public policies of both the United States and the State of Utah. *See Iowa Mutual*, 480 U.S. at 14 (recognizing "the Federal Government's longstanding policy of encouraging tribal self-government" in which "[t]ribal courts play a vital role . . . ."); *Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 416 P.3d 401, 420 (Utah 2017). There are, therefore, no discretionary reasons for which this Court may deny the Tribe's request.

Principles of equity clearly support recognition and enforcement of the Tribal Court judgment. Though they received notice and were otherwise afforded due process during

the Tribal Court proceeding, Defendants failed to even appear to defend themselves at the trial (ECF No. 51-1 at 36), while the Tribe offered expert testimony (ECF No. 51-1 at 37) and other testimonial evidence (ECF No. 51-1 at 36), submitted documentary evidence (ECF No. 51-1 at 36), and presented a full case supporting the request for relief. To reward Defendants' willful flaunting of the Tribal Court proceeding would be inequitable and run contrary to well-recognized public policy. Moreover, what would truly be inequitable would be for the Tribe to have no recourse when its federal trust property that is vital to the purposes of the Reservation is misappropriated and its federal Indian water right has been infringed upon.

The relief sought by the Tribe's Complaint does not allow re-litigation of the case presented to the Tribal Court. It is not within the purview of this Court to adjudicate again the issues before the Tribal Court, and "proper deference to the tribal court system precludes relitigation of issues [previously] resolved in the Tribal Courts." *Iowa Mutual*, 480 U.S. at 19.

Finally, Defendants failed to raise this equity argument as an affirmative defense in their Answer. This argument has therefore been waived. Federal Rules of Civil Procedure Rule 8(c) "requires a party pleading to a preceding pleading to set forth affirmatively all matters which the pleading party intends to use as an avoidance or affirmative defense." *Radio Corp. of America v. Radio Station KYFM, Inc.*, 424 F.2d 14, 17 (10th Cir. 1970). Because Defendants failed to affirmatively plead equity as a defense in their Answer, the argument is "deemed to have been waived and may not

thereafter be considered as triable issues in the case." *Id*. This Court must therefore disregard Defendants' equity argument.

CONCLUSION

Based on the facts and authorities cited above, and in the Tribe's briefing in support of its summary judgment motion, ECF No. 55, the Ute Indian Tribe respectfully requests that the Court enter summary judgment in favor of the Tribe and that the Court deny the Defendants' cross-motion for summary judgment, ECF No. 61.

Respectfully submitted this 29th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of DUCivR56-1(g)(1), because this response brief contains 9,105 words, excluding the parts of the brief exempted by DUCivR56-1(g)(1). I relied on my word processor to obtain the count and it is Microsoft Office Word 2016.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: */s/ Frances C. Bassett*
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