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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' REPLY MEMORANDUM SUPPORTING CROSS-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' Reply in Support of Cross Motion for Summary Judgment ("**Reply**").

ARGUMENT

I. THE TRIBE'S SOVEREIGN AUTHORITY TO EXCLUDE NON-INDIANS FROM ENTERING ITS RESERVATION DOES NOT APPLY TO DEFENDANTS' CONDUCT ON NON-INDIAN LAND.

The Tribe argues, without supporting authority, that "[a]n Indian tribe's inherent sovereign power to exclude would be *meaningless* if it does not extend to the McKee Defendant's brazen misappropriation of court-decreed *Winters* water under the facts of this case." (Mem. in Opp., at 13.)[1] However, the Tribe's exclusion argument may be readily disregarded, as it would violate the spirit and letter of *Montana v. United States*, 450 U.S. 544 (1981), which divested tribes and tribal courts of jurisdiction over non-Indians and non-Indian land absent proof by the Tribe that one of only two narrow *Montana* exceptions – neither of which is present here – applies. The Tribe's argument should further be rejected, as it blithely ignores the ready availability and jurisdiction of federal and state courts to pursue claims against the Defendants, who are non-Indians and whose conduct occurred on non-Indian land pursuant to agreements with the BIA, not the Tribe.

A. The Power to Exclude Provides no Basis for Tribal Court Jurisdiction.

The Tribe's sovereign power to exclude is limited to a gatekeeping right to determine who can gain entry onto tribal land. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (Cherokee nation is distinct community occupying its own territory to which Georgia citizens have ***no right to enter*** without Cherokee assent) (emphasis added); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (tribe has power to exclude or condition nonmember's presence "***on the reservation***" (emphasis added); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d

[1] The "brazen theft" is McKee's receipt of water under a contract with the Bureau of Indian Affairs ("**BIA**"). McKee is only one of many non-Indians who receive this same water from the BIA.

802, 808 (9th Cir. 2011) (tribe's authority "over non-Indians ***on tribal land***" arises from tribe's "inherent sovereign powers, including the authority to exclude") (emphasis added). The Tribe's sovereign authority to exclude does not extend beyond the Reservation's boundaries because an Indian tribe has ***no sovereign authority*** to regulate non-Indian fee land or conduct on non-Indian land. *E.g. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 424 (1989); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 329 (2008).

B. *LaRance* Does Not Support Tribal Court Jurisdiction.

LaRance, a case upon which the Tribe heavily relies, exposes the Tribe's unsupported attempt to expand its sovereign power. In *LaRance*, Water Wheel, a non-Indian closely held corporation, had entered into a lease agreement with the Colorado River Indian Tribes for 26 acres of tribal-owned land within its reservation. 642 F.3d at 805. When the lease expired, Water Wheel failed to vacate the premises and the tribes filed an eviction suit in tribal court. *Id.* at 806.

In finding that the tribes had the sovereign authority to exclude Water Wheel from tribal land, the court explained that it was the "sovereign authority over ***tribal land***" that gave the tribes "the power to exclude Water Wheel and Johnson, who were ***trespassers on the tribe's land*** and had violated the conditions of their ***entry***." *Id.* at 811 (emphasis added). The court also determined that the tribes' regulatory jurisdiction over non-Indians ***on Indian land*** "necessarily includes the lesser authority to set conditions on their ***entry*** through regulations." *Id.* (emphasis added).

The missing – and crucial – element in this case is that none of the Defendants' conduct occurred on tribal land. *Id*. at 813. The *LaRance* court acknowledged that the United States Supreme Court has "interpreted Montana broadly as applying to both Indian and non-Indian land." *Id*. at 809. However, the court acknowledged that "[s]ince deciding Montana, the Supreme Court

has applied [the Montana] exceptions almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent." *Id*. at 809, 813. The *LaRance* court ultimately held that "where the non-Indian activity in question ***occurred on tribal land***, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction ***without considering Montana***." *Id.* at 814 (emphasis added).

The Tribe cannot dispute that McKee is not an Indian. Nor can it dispute that all of McKee's actions took place on non-Indian fee land, which was removed from the Reservation nearly a century ago.[2] At no point did McKee ever enter the Tribe's reservation to use water purchased pursuant to the decades-old 1943 and 1946 Agreements with what is now the BIA. McKee never needed permission from the Tribe to use the water he is contractually entitled to use because none of his actions took place on Reservation land. The Tribe's sovereign authority to exclude does not apply to McKee's activity ***on his fee land***. *LaRance*, 642 F.3d at 811. Simply put, *LaRance* does not advance the Tribe's argument.

The Tribe seeks an unprecedented expansion of its sovereign power to exclude non-Indians from entering its Reservation in a clumsy effort to turn *Montana* on its head and assert jurisdiction over non-Indian conduct on non-Indian land. In doing so, however, the Tribe acknowledges that there is not a single precedent supporting its argument. (*See* Mem. in Opp., at 12–13.)

[2] The United States reserved an easement for the UIIP that traverses McKee's and Anderson's land. Tribe's Appendix. I, at 83. The Tribe does not dispute that the McKee and Anderson lands are non-Indian land diminished from the Reservation. An easement is not an ownership interest in land, but is merely a right to use another's land without changing title to the underlying property. *E.g., Judd v. Brown*, 2017 UT App 56, ¶¶ 38–42, 397 P.3d 686. Accordingly McKee's actions occurred on non-Indian fee land.

Acknowledging that there is no support for its argument, the Tribe asks this Court to fashion a new rule granting the Tribe regulatory authority over non-Indians on non-Indian land under its sovereign authority to exclude, which applies only to "place conditions on entry, on continued presence, or on reservation conduct." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45 (1982). To manufacture such a new rule, this Court would have to overrule decades of Supreme Court jurisprudence, including *Montana*. This Court should decline to do so.

C. **The Tribe's "Hacking" Analogy is Fallacious and Inapplicable.**

Second, the Tribe's untenable and expansive jurisdiction claim under its new theory of a "right to exclude non-Indians on non-Indian land" is invalidated by its own fallacious hypothetical. The Tribe envisions a parade of horribles where a tribe cannot regulate a hypothetical situation where "McKee, sitting at his home computer, ... hack[s] into the Tribe's on-reservation computer network, and surreptitiously drain[s] the Tribe's off-reservation bank accounts of all the money in those accounts." (Mem. in Opp., at 12.)

As a threshold matter, trying to equate McKee's lawful receipt of water from the BIA pursuant to valid agreements with a hypothetical international con artist is a strained apples-to-oranges comparison. The Tribe's hypothetical, and the facts at issue here, namely, non-Indian conduct occurring on non-Indian land, is precisely the type of conduct the United States Supreme Court has ***conclusively determined*** is not within a tribal court's jurisdiction under *Montana*. *E.g., Montana*, 450 U.S. at 566 (tribe had no jurisdiction over non-Indians hunting and fishing on non-Indian land); *Plains Commerce Bank*, 554 U.S. at 340–41 (tribe had no jurisdiction over a non-Indians sale of non-Indian land within a reservation); *Strate v. A-1 Contractors*, 520 U.S. 438, 456–59 (1997) (tribe had jurisdiction over car accident on a non-Indian, state road right-of-way,);

Ute Indian Tribe of Uintah v. Lawrence, 312 F. Supp. 3d 1219, 1243 (D. Utah 2018) (*Montana* establishes a presumption *against* tribal court civil jurisdiction over non-Indians).

More importantly, the Tribe's strained efforts to extend its right to exclude beyond tribal land highlights the fallacies of its position. McKee purchases water from the BIA pursuant to agreements with the BIA that came with ***ownership of the land***. Tribe's Appendix II, at 214–20. BIA delivers the water pursuant to the 1943 and 1946 Agreements and pursuant to federal regulations. *Id.*; 25 C.F.R. § 171.100 *et seq*. BIA owns the water rights that supply the water that is delivered to McKee's land. Act of June 21, 1906, ch. 3504, 34 Stat. 325. The Tribal Court made no finding that the Tribe has, at any time, regulated the Deep Creek Canal or the water rights that the BIA owns that flow through the Deep Creek Canal. *See* Tribe's Appendix I, at 35–62. When tribal members have complained to the BIA's Regional Solicitor about delivery of water to McKee, the BIA has refused to discontinue its delivery to McKee – even after the Tribal Court entered the judgment the Tribe seeks to enforce. McKee's Appendix I, at 77, ¶ 16. [3] The Tribe knows this.

If the Tribe is correct, and the BIA should not and cannot deliver water to McKee, along with dozens of other non-Indians, the Tribe can—and should—sue the BIA. Rather than sue the BIA to nullify longstanding agreements that the BIA continues to honor, the Tribe chose to file the lawsuit in Tribal Court against McKee and McKee's companies only. McKee's water deliveries are the pawn in the Tribe's ultimate goal of expanding its jurisdiction over non-Indians

[3] *See also* Tribe's Appendix II, at 230 ("Mr. Perank [UIIP Manager for the BIA] indicated that he was unsure how to handle the temporary restraining order since Mr. McKee has paid O&M fees and his leases were up to date. Furthermore, Mr. Perank took the matter to the Regional Solicitor, Grant Vaughn, who determined that as payments for both the leased land and O&M were current, the water should be delivered."); *id.* at 232 ("Furthermore, Mr. Perank indicated that the BIA would not prevent Mr. McKee from irrigating Tract 3 during the 2014 irrigation season.")

in contravention of *Montana*. The Tribe's hypothetical is a case-in-point. The Tribe knows as well as anybody that there is no barrier from pursuing claims against the hypothetical international con artist in federal district court., as well as in Tribal Court if the Tribe can prove that one (or both) of the *Montana* exceptions applies. The Court should see the Tribe's blatant expansion of its "right to exclude non-Indians on non-Indian land" as a futile attempt to end run *Montana* and assert jurisdiction over the non-Indian Defendants' conduct on non-Indian land.

In sum, the simple answer to the Tribe's hypothetical is that "[t]he 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." *Plains Commerce Bank*, 554 U.S. at 330. If it cannot, no jurisdiction exists, regardless of how egregious the conduct is alleged to be.

II. TRIBAL LAW DOES NOT AND CANNOT CONFER SUBJECT MATTER JURISDICTION OVER DEFENDANTS IN CONTRAVENTION OF *MONTANA.*

The Tribe argues that, despite *Montana,* the "Tribal Court properly applied the 2013 amendments to the McKee case pending before the Tribal Court," and that "[f]ederal courts have no constitutional or federal statutory authority to review (and reverse) a tribal court's interpretation of internal tribal law." (Mem. in Opp., at 11.) This is simply a second effort to end-run *Montana*. Even if *Montana* did not control, which it does, the Tribe misunderstands that, unlike other sovereigns such as states and the federal government where all citizens are represented, non-Indians such as the Defendants have no representation in the Tribe's government, do not get to vote in elections for representatives, and have no input in tribal lawmaking.

Thus, while it is true that an amendment to a procedural rule in state or federal law, may, under certain circumstances, be applied retroactively, *e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), applying an entirely new tribal code provision that grants the Tribe subject

matter jurisdiction over a non-Indian, where the previous code did not, substantially impacts the relationship with a non-Indian who has no voice in the Tribe's government and who had no previous expectation of being haled into a tribal court. *See Lawrence*, 312 F. Supp. 3d at 1241–42; *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1132 (9th Cir. 2006) (quoting *Strate*, 520 U.S. at 442). This Court need not "review (and reverse) a tribal court's interpretation of internal tribal law" to hold that a retroactive application of a tribal jurisdictional statute that violates *Montana* fails to confer jurisdiction over Defendants as non-Indians on non-Indian land.

III. NEITHER OF THE *MONTANA* EXCEPTIONS APPLIES IN THIS CASE.

A. There Are No Consensual Relationships Between Defendants And The Tribe.

The Tribe first argues that a 1919 Patent between a long-dead Constant Darling and the United States somehow creates a consensual relationship between the Tribe and McKee. (Mem. in Opp., at 13.) Ignoring that (1) neither the Tribe nor McKee were parties to the 1919 Patent; (2) the Patent is not and never was a contract; and (3) the 1919 Patent is a conveyance of land governed by property law principles and not contract law principles, the Tribe argues that *State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999), "acknowledges that sometimes transfers of property rights can create continuing consensual relationships." (*Id.* at 13.) According to the Tribe's flawed syllogism, the 1919 Patent therefore qualifies as the requisite "consensual relationship" invoking the first *Montana* exception.

King held that "[t]he first *Montana* exception does not apply in this case" because "transfers of property interests between governmental entities create property rights; they generally ***do not*** create continuing consensual relationships." 191 F.3d at 113 (emphasis added). *King* does not elaborate on when or how a conveyance of property rights gives rise to consensual relationship.

See id. Nor does the Tribe cite any case that supports its conclusion that the 1919 Patent between Ms. Darling and the United States somehow imposes a consensual relationship between the Tribe and Defendants. Rather, the Tribe argues only that the 1919 Patent, to which the Tribe is not a party, constitutes a consensual relationship because the Tribe is a beneficiary of the reserved easement. (*See* Mem. in Opp., at 15.) The Tribe cites no authority for this legal conclusion.

More importantly, the Tribe's argument conflicts with the principles underlying *Montana's* first exception, which requires that the Tribe and the non-Indian enter into a consensual arrangement ***with each other***: "The first exception to the *Montana* rule covers activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Strate*, 520 U.S. at 456–57 (internal quotation marks omitted) (emphasis added). *See also Zempel v. Liberty*, 143 P.3d 123, 132 (Mont. 2006) (relationship not consensual where it "did not involve 'the tribe or its members.'").

Contrary to the Tribe's argument, not all "arrangements" constitute the type of consensual relationship that *Montana* requires. *E.g., Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001) ("a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection."). Rather, *Montana* refers only to "private individuals ***who voluntarily submitted themselves to tribal regulatory jurisdiction by arrangements they (or their employers) entered into***." *Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (emphasis added).

Thus, even assuming that the 1919 Patent could somehow be considered a "consensual relationship," it was the late Ms. Darling and the United States—and not the Tribe and Defendants—who were parties to the 1919 Patent and therefore entered into the consensual relationship. Tribe's Appendix I, at 83. McKee never entered into any consensual relationship; he

is merely a successor owner of land that is burdened by an easement held by the United States. Property law—and not contract law—governs the relationship between McKee and the United States. *E.g., State of Mont. Dept. of Transp. v. King*, 191 F.3d 1108, 1113 (9th Cir. 1999). McKee did not "voluntarily submit[] himself to tribal regulatory jurisdiction." *Hicks*, 533 U.S. at 372.

Ironically, the Tribe reverts to property law principles to support its conclusion that the 1919 Patent "certainly qualified as a consensual relationship." (Mem. in Opp., at 15.) Indeed, the Tribe concludes its argument by declaring that "McKee violated his duties as a servient estate owner when he misappropriated federally-reserved waters running through the UIIP canal." (*Id.*) However, the BIA, and not the Tribe, owns the UIIP canal and the easement for the UIIP canal. The BIA, and not the Tribe, is thus the dominant estate holder. Where the Tribe does not regulate the UIIP and is not the dominant estate holder, it has no consensual relationship with Defendants.

The Tribe next argues that Defendants entered into a consensual relationship with the Tribe through the unrelated Lease No. 8FP0007852, which, it argues, had a nexus to McKee's use of water pursuant to the 1943 and 1946 Agreements. (Mem. in Opp., at 16.) However, Lease No. 8F90007852 is for land nearly ***three miles away*** from McKee's land and use of water. McKee's Appendix I, at 89. The Tribe does not dispute this. According to the Tribe, even though Lease No. 8FP0007852 does not mention McKee's land or water use, does not identify any of McKee's businesses (the other defendants), and does not mention the 1943 and 1946 Agreements McKee has with the BIA to receive water on his land miles away, McKee must have submitted himself to the Tribe's regulatory jurisdiction because "[t]he lease ... plainly establishes a broad consensual relationship between the Ute Tribe and the Defendants." (*Id.*) After all, according to the Tribe,

"McKee agreed and covenanted to comply with 'all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies." (*Id.*)

In relying on its this claim of a "broad consensual relationship," the Tribe cites no authority that supports its contrived effort to broaden *Montana's* first exception. (*See id.*) Neither does the Tribe seek to address, distinguish, or even mention *Atkinson*. (*See id.*). This is because *Atkinson* is fatal to the Tribe's attempt to broaden *Montana's* first exception. The Tribe's "broad consensual relationship" argument seeks to do exactly what *Atkinson* prohibits: "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." *Atkinson Trading Co. Inc.*, 532 U.S. at 656.

Stated differently, just because McKee may have had a consensual relationship with the Tribe through Lease No. 8FP0007852 does not mean McKee had a consensual relationship with the Tribe for every action or decision he makes, including receiving water from the BIA pursuant to the decades-old 1943 and 1946 Agreements on his separate fee land. "The mere fact that a nonmember has some consensual commercial contracts with a tribe does not mean that 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 contacts." *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941 (9th Cir. 2009).

Put simply, neither the 1919 Patent between Ms. Darling and the United States nor Lease No. 8FP0007852, which involves property nearly three miles away from McKee's property, is a qualifying consensual relation under *Montana's* first exception. The Court should reject the Tribe's broad reading of *Montana's* first exception, "which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power." *Atkinson Trading Co.*, 532 U.S. at 655.

B. Defendants conduct has not cause "catastrophic harm."

The Tribe argues that its "ability … to regulate its water and federally reserved water rights, and to protect those rights from theft, is vital to tribal self-governance and sovereignty." (Mem. in Opp., at 16–17.) However, the Tribe cannot show, nor could it, that Defendants' use of water pursuant to the agreements with BIA "could fairly be called catastrophic for tribal self-government." *Norton*, 862 F.3d at 1246 (internal quotation marks omitted).

The Tribe spends a considerable amount of effort to miscast as dicta *Plains Commerce Bank's* requirement that the harm required under *Montana's* second exception must be "catastrophic." (Mem. in Opp., at 17–19.) According to the Tribe, because "Chief Justice Roberts noted in *Plains*, [that] "Neither the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception," any reference in *Plains Commerce Bank* to the second *Montana* exception is "pure dicta." (*Id.* at 17.)

To the contrary, the court in *Plains Commerce Bank* was tasked with determining "whether the Tribal Court had jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of fee land it owned." *Plains Commerce Bank*, 554 U.S. at 320. After the Tribal Court determined that it had jurisdiction, the bank filed a complaint in federal district court seeking a declaration that the tribal court judgment was null and void because, as here, the tribal court lacked jurisdiction over the plaintiffs' claim. *Id.* at 323. The *Plains Commerce Bank* Court carefully examined both *Montana* exceptions, and ***specifically held*** that the second *Montana* exception was inapplicable in that case. *See id.* at 341.

Moreover, numerous courts, including the Tenth Circuit Court, have relied on this holding in *Plains Commerce* to determine whether the second *Montana* exception applied in those cases.

E.g., Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation, 862 F.3d 1236, 1246 (10th Cir. 2017); *Ute Indian Tribe of Uintah v. Lawrence*, 312 F. Supp. 3d 1219, 1244 n.31 (D. Utah 2018); *Window Rock Unified School District v. Reeves*, 861 F.3d 894, 920 (9th Cir. 2017); *Belcourt Public School Dist. v. Davis*, 786 F.3d 653, 660 (8th Cir. 2015).

Both the United States Supreme Court, in *Plains Commerce Bank*, and the Tenth Circuit Court of Appeals, in *Norton*, required a showing of "***catastrophic harm***" under the second *Montana* exception. This Court is bound by that precedent. Thus, under the second *Montana* exception, the Tribe must show that the "challenged conduct could fairly be called catastrophic for tribal self-government." *Norton*, 862 F.3d at 1246 (internal quotation marks omitted). McKee's purchase of relatively minimal water pursuant to the 1943 and 1946 Agreements with the BIA is not, has not, and cannot cause catastrophic harm to the Tribe's self-government.

As a threshold matter, the Tribe has a fundamental misunderstanding of the agreements between McKee and the BIA that obligates the BIA to deliver water to McKee in exchange for McKee paying annual assessments. The Tribe argues that the "Agreements do not provide for McKee (or his predecessors-in-interest) 'to receive water ... in exchange for assessments' as recited. Instead according to the Tribe, the Agreements purport to transfer tribal waters that were decreed to the Ute Indians under the 1923 federal court decree," which the Tribe argues violates the 1923 court decree – a brand new argument the Tribe has raised for the first time in its Memorandum in Opposition, notwithstanding that this argument has been available to the Tribe for over half a century. (Mem. in Opp., at 2–3.)

However, the 1943 and 1946 Agreements do not support the Tribe's argument. The 1943 Agreement refers to Dewey McConkie, McKee's predecessor-in-interest, as "Contractor," and

recites that McConkie owned land that "is entitled to a proportionate part of the White Rocks River water available for the irrigation of the project lands under the United States Whiterock Canal." Tribe's Appendix. II, at 214–20. Like any other agreement for the use of water, this language evidences only a right to use water—it says nothing about whether McConkie owned the water. (*See id.*) Nor does it convey the water right in question to McConkie, as it is undisputed that this water right is owned by the Indian Irrigation Service, which has never conveyed it.

Because the original land designated for water delivery was unsuitable for irrigation, McConkie desired to transfer his right to the use of project water to what is now McKee's land. (*Id.*) The 1943 Agreement states that the new land, McKee's land, "is under United States Deepcreek Canal." (*Id.*) The Government agreed to "cease delivery of water" to the prior land "and will deliver ***to the extent available*** said water by means of project works." (*Id.* (emphasis added).) In addition, Mr. McConkie agreed that the Government "reserves the right to refuse delivery of water to the above described premises at any time when the owner or owners therefor fail to promptly pay any irrigation charges assessed against the land." (*Id.*)

The 1946 Agreement is similarly refers to McConkie as "Contractor," and states that "Contractors desire, by authority of the Secretary of the Interior ... to transfer this ***project water right***." (*Id.*) The 1946 Agreement even references the 1923 court decree, stating that "the amount of project water which may be available from year to year for use by the Contractors shall be governed and limited by the provisions of the Federal court decree entered May 16, 1923 in the case of United States, et al v. Dry Gulch Irrigation Company, et al." (*Id.*) The 1946 Agreement also permits the Government to refuse to deliver water if assessments are not paid. (*Id.*) The Indian Irrigation Service has never conveyed the ownership of the water right.

Contemporaneously with the 1943 and 1946 Agreements, McConkie filed two change applications with the Utah State Engineer to move the water as contemplated by the Agreements. McKee's Appendix I, at 5–9. In each change application, McConkie described the "applicant" as "Dewey McConkie, Contract holder, U.S. Indian Irr. Service," and the change application for the 1943 Agreement was "approved by the United States Indian Irrigation Service [which owned the water right] for the purpose herein set out."[4] (*Id.*) If McConkie owned the underlying water, no approval of the United States Indian Irrigation Service to file the change applications would have been necessary. In addition, ownership of a small portion the water right—Water Right 43-3011—would have been conveyed to Mr. McConkie, which did not happen.[5]

Furthermore, and as mentioned, BIA—and not the Tribe—owns and manages the UIIP, including the irrigation systems, easements, and water rights. Act of June 21, 1906, ch. 3504, 34 Stat. 325. The governing regulations, including 25 C.F.R. § 171.205 and 25 C.F.R. § 171.600, specifically contemplate providing irrigation water in line with the 1943 and 1946 Agreements.

Instead of recognizing the 1943 and 1946 Agreements for what they are – valid, decades-old agreements that obligate BIA to deliver approximately a mere 108 acre-feet of water each year to McKee's land – the Tribe distorts and mischaracterizes McKee's use of water pursuant to the 1943 and 1946 Agreements as "theft." McKee cannot be stealing water for which he and his

[4] Undoubtedly, the United States Indian Irrigation Service would have also approved the change application for the 1947 Agreement since its name was on the change application, although the final page of the change application is missing in the Utah Division of Water Rights' database.

[5] Water Right No. 43-3011 is for irrigation of 4,820.35 acres of which McKee is only entitled to irrigate 21 acres, which is less than ½ of 1 percent of Water Right 43-3011's permitted acreage.

predecessors-in-interest have always paid assessments to the owner.[6] And as explained in McKee's affidavit, he only opens the headgates to allow water onto his property pursuant to BIA's watering schedule. McKee's Appendix I, at 77 ¶¶ 12, 14. The Tribe does not dispute that the assessments have always been paid or that the Tribe directly benefits from the paid assessments.

Understanding the proper context, the Tribe's allegation that the "conduct at issue is long-term theft of tribal property by diverting tribal water to which Defendants have no right," is a flagrant and intentional misrepresentation. While McKee's lands may have been green, this fact alone does not demonstrate that McKee is "stealing" water. And of course there will be standing water in McKee's fields following a flood irrigation cycle. After all, the contractual irrigation method is and has always been flood irrigation, which, by definition, creates standing water in the fields. But, just like the many other non-Indian irrigators with similar contracts with the BIA, the BIA only delivers water to McKee when there is available water. In times of shortage, McKee, like any other irrigator, does not receive water from BIA.

The Tribe apparently seeks a per se rule that the Tribe automatically satisfies the second *Montana* exception due to McKee's use of water because water is "important to the Tribe," just like water is important to everyone else. But the Tribe's broad conclusion misconstrues the second *Montana* exception. This Court ***must presume*** that the Tribe does not have jurisdiction over Defendants. *E.g., Plains Commerce Bank*, 554 U.S. at 330. And, unless the Tribe can show that

[6] The Tribe flagrantly contradicts itself by declaring that "[t]he Tribal Court decision did not invalidate the Agreements." (Mem. in Opp., at 28.) However, the Tribe's predicate for calling McKee a "thief" is that he has no right to use water pursuant to the 1943 and 1946 Agreements, although the BIA considers the right valid and enforceable. Tribe's Appendix II, at 230, 232.

Defendants' conduct is causing "catastrophic harm" to the Tribe's self-government, the Tribe cannot exercise jurisdiction over Defendants. *E.g., Norton*, 862 F.3d at 1246.

Both the nature and scale of Defendants' water use belie the Tribe's claim that Defendants' use is "catastrophic theft" of tribal water. Defendants purchase and use a small amount of water and have always paid assessments to the BIA for the use of water. The Tribe has not disputed that these payments benefit the Tribe and cannot show that Defendants' minimal use of purchased water is causing "catastrophic harm" to the Tribe's self-government.

In seeking to show that Defendants' water use "imperil[ed] the subsistence of the tribal community," and caused "catastrophic" harm to the Tribe, the Tribe relies on *FMC Corporation v. Shoshone-Bannock Tribes*, No. 4:14-CV-489, 2017 WL 4322393, at *11 (D. Idaho 2017). This case does not help the Tribe, but instead proves ***Defendants'*** point. In *FMC Corporation*, FMC, a non-Indian corporation "operated a phosphorous production plan on 1,450 acres of property FMC owned in fee in Pocatello Idaho, lying mostly within the Shoshone-Bannock Fort Hall Reservation." *Id.* at *1. "FMC's operations produced 22 million tons of waste products stored on the Reservation in 23 ponds. This waste is radioactive, carcinogenic, and poisonous. It will persist for decades, generations even, and is so toxic that there is no safe method to move it off-site." *Id.*

Unsurprising, the *FMC Corporation* court found that the Tribes had jurisdiction over FM**C** where the source of jurisdiction was "based on FMC's consent" and the 22 million tons of radioactive, carcinogenic and poisonous waste dumped on the Reservation ***literally*** posed a "***catastrophic threat*** … to Tribal governance, cultural traditions, and health and welfare." *Id.* (emphasis added). However, there can be no good faith comparison between the waste at issue in *FMC Corporation* and the approximately 108 acre-feet of water, out of a 19,280 acre foot water

right, delivered by the BIA to Defendants under valid, decades-old agreements with the BIA for which Defendants have always paid their assessments.[7]

Put simply, the Tribe has not, and cannot, meet its burden of showing that either of the *Montana* exceptions applies. The Tribal Court therefore lacked subject matter jurisdiction over the Defendants, nullifying the Tribal Court Judgment.

IV. THIS COURT LACKS SUBJECT MATTER JURISDICTION DUE TO THE TRIBE'S FAILURE OF THE TRIBE TO PLEAD A FEDERAL QUESTION.

For this Court to reach the point of examining jurisdiction under *Montana*, there must be a federal question. The Tribe argues that it pled a federal question in its Complaint "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." (Mem. in Opp., at 22.) However, The Tribe seems to forget the very purpose of its Complaint, which is captioned "Complaint for Recognition, Registration, and Enforcement of Tribal Court Judgment and Writ of Execution." The Complaint does not ask this Court determine the facts or law, as was purportedly done by the Tribal Court. Rather, the Complaint seeks only that this Court to enforce the Tribal Court's judgment, enter a writ of execution ordering a United States Marshall to seize McKee's property to satisfy the Tribal Court's Judgment, enter an order permitting post judgment discovery, and enter an order prohibiting Defendants from transferring assets. (Compl, at 1, 8.) It does not seek to determine any federal question.

[7] The Tribe conveniently ignores the fact that McKee's water use pales in comparison to the 470,594 acre-feet of water the Tribe would be entitled to if it ratified the Ute Indian Water Compact. Utah Code Ann. § 73-21-103.

The Tribe also argues that "Federal Courts have federal question jurisdiction to protect and enforce the terms of an earlier federal court judgment or decree." (Mem. in Opp., at 22.) Once again, the Tribe's Complaint does not ask this Court to protect and enforce the terms of an earlier federal court judgment or decree—the Complaint asks this Court to enforce the Tribal Court's judgment. The cases the Tribe relies on are inapposite, as they all include scenarios where a tribe's requested relief was rooted squarely within federal law. *Oneida Indian Nation of New York v. County of Oneida, New York*, 414 U.S. 661 (1974) ("The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough to be based on federal law."); *Franchise Tax Bd. Of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23 n.25 (1983) ("[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."). As set forth in Defendants' Cross Motion, the Tribe failed to allege federal question jurisdiction or to seek declaratory relief regarding the Tribal Court's jurisdiction. Defendants' Cross Motion, pp. 32-35.

The Tribe argues that "the Tribe sued Defendants for damages based on illegal trespass upon, and misappropriation of, its property." (Mem. in Opp., at 24.) Moving the goal posts, the Tribe intentionally confuses what it alleged in Tribal Court and what it is now alleging. Here, the Complaint does not allege a right to possession, an ejectment of Defendants from tribal land, or Defendants' misappropriation of tribal water—it merely requests enforcement of the Tribal Court's prior judgment. "A suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law." *Miccosukee Tribe of Indians of Florida v. Kraus-*

Anderson Construction Co., 607 F.3d 1268, 1275 (11th Cir. 2010).[8] For those same reasons, 28 U.S.C. § 1362 does not confer tribal court jurisdiction over Defendants.

V. THIS COURT SHOULD REFUSE TO RECOGNIZE AND ENFORCE THE TRIBAL COURT JUDGMENT ON EQUITABLE GROUNDS.

The Tribe disingenuously argues that Defendants did not dispute that the Tribal Court provided Defendants with due process. (Mem. in Opp., at 29.) The Tribe is wrong. Defendants specifically argued that the Tribal Court denied Defendants due process by committing several plain errors, including (1) refusing to join the United States or the BIA as necessary parties; (2) invalidating the 1943 and 1946 Agreements between BIA and McKee relying on clearly erroneous chain-of-title evidence; (3)refusing to recognize that the assessments clearly describe the land where McKee receives water from the BIA; and (4) relying on inaccurate evidence from the Tribe regarding the water rights at issue. (Defendants' Cross-Motion, at 36–38.) The Tribal Court's refusal to join the United States or the BIA is particularly egregious because the Tribal Court (1) never determined what constitutes UIIP project land, relying only on a state-issued Certificate of Appropriation, which marks only where the State of Utah has approved water use and says nothing about what constitutes UIIP project land; (2) never determined whether the Tribe did, in fact, provide its consent to the 1943 and 1946 Agreements, something the BIA likely has knowledge about; and (3) invalidated the 1943 and 1946 Agreements without joining the BIA.

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[8] After Defendants filed their Cross Motion, the Ninth Circuit reversed *Tribe v. Hawks*, No. 2:16-CV-366, 2017 WL 3699347 (D. Idaho 2017). *See Coeur d'Alene Tribe v. Hawks*, No. 17-35755, 2019 WL 3756886, *4 (9th Cir. 2019). While purporting to cite *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007) for the proposition that a tribe's action to enforce a tribal court judgment constitutes a federal question (*Hawks*, No. 17-35755, 2019 WL 3756886, at 6 n.7.), the Ninth Circuit failed to acknowledge that the *MacArthur* plaintiff specifically alleged in its complaint that federal law granted it jurisdiction and specifically sought "a declaratory judgment saying as much." *See MacArthur*, 497 F.3d at 1066 n.4.

In addition, the Tribe mischaracterizes Defendants' equitable argument by asserting that "Defendants failed to raise this equity argument as an affirmative defense in their Answer." (Mem. in Opp., at 30). Defendants' Answer specifically raises affirmative defenses that "Defendants were not afforded due process in the Ute Tribal Court," and that "[r]ecognition of the Ute Tribal Court Judgment, including the cause of action upon which it is based, is against the public policy of the United States and the State of Utah." (Answer, at 4.) In determining whether to enforce the Tribal Court judgment, the Court should "decline to recognize and enforce a tribal judgment ***on equitable grounds***, including... [if] recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought." *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (emphasis added).

The Tribal Court's interpretation of the 1943 and 1946 Agreements and the assessments that are paid to the BIA is foundationally inaccurate and at odds with both the agreements and the federal regulations. The agreements specifically require McKee to pay assessments to BIA, which he has always done, and obligate the BIA to deliver water to McKee according to the BIA's own watering schedule. Tribe's Appendix II, at 214–20. In addition, the 1943 and 1946 Agreements specifically grant the BIA the right ***not to deliver water*** if the assessments are not paid. *Id*. McKee has held up his side of the bargain. It would be inequitable, and thus against public policy, to allow the Tribe to nullify the decades-old agreements so that McKee does not get the benefit of his bargain, namely, his contracted right to have BIA deliver water to his property.

Defendants clearly raised these equity arguments as affirmative defenses. Equity does not favor a tribal court that committed numerous plain errors to achieve its desired outcome—the expansion of the Tribe's jurisdiction over non-Indians on non-Indian land.

CONCLUSION

For the foregoing reasons stated herein and stated in Defendants' Cross-Motion for Summary Judgment, Defendants respectfully request that the Court grant Defendants' Cross-Motion for Summary Judgment and dismiss the Tribe's Complaint for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 26th day of August, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2019, I electronically filed the foregoing **DEFENDANTS' REPLY MEMORANDUM SUPPORTING CROSS-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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