CASE NO. 18-4030 & CASE NO. 18-4072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYNN D. BECKER, Plaintiff, Counterclaim Defendant – Appellee, v. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally chartered corporation and a federally recognized Indian tribe, et al., Defendants, Counterclaimants, Third-Party Plaintiffs -Appellants, v. JUDGE BARRY G. LAWRENCE Third-Party Defendant - Appellee.	)

On Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Clark Waddoups
No. 2:16-cv-00958

APPELLANTS' REPLY BRIEF

Thomasina Real Bird
Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839

August 29, 2018

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

The Ute Indian Tribe respectfully submits its reply brief.

STANDARD OF REVIEW

Becker states that the Tenth Circuit reviews the issuance of a preliminary injunction for abuse of discretion but omits that in conducting the analysis, the Court reviews "the district court's factual findings for clear error and its conclusions of law de novo." *Norton v. Ute Indian Tribe*, 862 F.3d 1236, 1242 (10th Cir. 2017) (*quoting Fish v. Kobach*, 840 F.3d 712, 723 (10th Cir. 2016)). Becker then incorrectly states the standard of review for "tribal court matters" is for abuse of discretion. Becker Brief, 5. However, "'the proper scope of the tribal exhaustion rule' is a legal issue that [the Tenth Circuit reviews] de novo." *Norton v. Ute Indian Tribe,* 862 F.3d at 1242 (*quoting Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1501 (10th Cir. 1997)).

INTRODUCTION

The posture of this case is almost exactly the same as it was when the Court first considered the case in *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017) (*Becker I*). On remand, the district court (*i*) did not permit exhaustion of tribal remedies, (*ii*) did not conduct an evidentiary hearing, and instead, (*iii*) granted Becker a preliminary injunction of the tribal court suit by *sua sponte* reconsidering the court's earlier denial. Not only is the failure to order exhaustion a departure from binding Tenth Circuit precedent, but it also reveals a determination by the district

court and Becker to ignore the fundamental tenants of Federal Indian Law and their underpinnings.

The fact that the case has proceeded this far is a testament to that departure.

I. BECAUSE THE TRIBAL COURT PROPERLY DETERMINED IT HAS JURISDICTION OVER THE TRIBE'S SUIT AGAINST BECKER, EXHAUSTION OF TRIBAL COURT REMEDIES IS REQUIRED. AND BECAUSE TRIBAL COURT REMEDIES HAVE NOT BEEN EXHAUSTED, THIS COURT MUST VACATE THE PRELIMINARY INJUNCTION AND ORDER THE DISTRICT COURT TO STAY ITS HAND.

The district court did not determine whether the tribal court has jurisdiction as a matter of federal law. Instead, it ruled that the Becker Contract is valid and therefore tribal exhaustion "is both unnecessary and futile." Aplt. App. XIV, 2957. However, as set forth below, this is not a recognized exception to tribal exhaustion nor does the district court's ruling cite to any authority that says tribes can contractually waive tribal court exhaustion. Insofar as the tribal court properly determined it has jurisdiction based on Becker's consensual relationship with the Tribe, exhaustion is required.

A. There is Tribal Court Jurisdiction as a Matter of Federal Law.

Becker errs in assuming that the federally-imposed limits on tribal jurisdiction are a function of positive tribal law. Becker Brief, 46-49. The Eighth Circuit in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010) rejected that assumption:

> API's theory also suffers from a conceptual flaw. … API assumes that the limits on tribal jurisdiction are a function of positive tribal law. That assumption misapprehends the source of Indian tribes' civil authority, as well as the nature of an appropriate inquiry under *Montana*.
>
> The *Montana* exceptions recognize that the Indian tribes "retain inherent sovereign power," *Montana*, 450 U.S. at 565, 101 S.Ct. 1245, and our task in applying the exceptions is to outline the boundaries of that retained power. Those boundaries are established by federal law, a source of law external to the tribes. *See*, *e.g.*, *Nat'l Farmers Union*, 471 U.S. at 852, 105 S.Ct. 2447. Positive tribal law, in contrast, is internal to the tribes. It is a manifestation of tribal power, and as such it does not contribute to the external [federal] limitations which concern us here. Once it is determined that certain conduct is within the scope of a tribe's power as a matter of federal law, our inquiry is at an end.

Sac & Fox Tribe, 609 F.3d at 938. "If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through [claims presented to the tribal court]." *Id.* "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Indeed, jurisdiction over the Tribe's suit against Becker "presumptively lies" in the Ute Indian Tribal Court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987). This presumption applies to contract clause interpretation:

> The district court resolved the Authority's claim of supervening tribal court jurisdiction by turning directly to the contract's forum-selection clause and passing upon its enforceability, *see Ninigret*, 32 F. Supp. 2d at 504-05, thus holding, by implication, that the tribal exhaustion doctrine does not apply to the interpretation of such a provision. …

> Although the question is close, we believe that, under *National Farmers*, the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions that may be contained within the four corners of an underlying contract. *See National Farmers*, 471 U.S. at 855-56, 105 S. Ct. 2447. At that stage, the pivotal question is not which court the parties agreed would have jurisdiction, but which court should, in the first instance, consider the scope of the tribal court's jurisdiction and interpret the pertinent contractual clauses (including any forum-selection proviso). *See Iowa Mut.*, 480 U.S. at 16, 107 S. Ct. 971; *National Farmers*, 471 U.S. at 855-57, 105 S. Ct. 2447. This logic indicates that where, as here, the tribal exhaustion doctrine applies generally to a controversy, an argument that a contractual forum-selection clause either dictates or precludes a tribal forum should not be singled out for special treatment, but should initially be directed to the tribal court. *See Basil Cook*, 117 F.3d at 63-64, 69; *Snowbird*, 666 F. Supp. at 1444.
>
> We also believe that this approach comports with the concern for tribal sovereignty that forms the epicenter of the tribal exhaustion doctrine. *See El Paso Natural Gas*, 526 U.S. at 483, 119 S. Ct. at 1437; *National Farmers*, 471 U.S. at 856, 105 S. Ct. 2447. For the district court to bypass the tribal court and interpret the forum-selection clause itself would place the two judicial systems in direct competition with each other, and thereby undermine the tribal court's authority over tribal affairs. Proper respect for tribal legal institutions counsels convincingly against putting courts on such a collision course. *See Iowa Mut.*, 480 U.S. at 16, 107 S. Ct. 971; *see also National Farmers*, 471 U.S. at 857, 105 S. Ct. 2447 (admonishing a lower federal court to "stay its hand until the Tribal Court has had a full opportunity to determine its own jurisdiction").

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority, 207 F.3d 21, 33 (1st Cir. 2000). *Accord* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §7.04[3], p. 634-35 (Nell Jessup Newton ed., 2012). (To hold that a forum-selection or other contractual clause eliminates the need for tribal court exhaustion "overlooks

the fact that the enforceability of a choice-of-forum [or other contract] clause may itself raise questions of tribal law.").

That same rationale applies here. The district court concluded, and Becker asserts, that the Ute Tribe waived tribal court exhaustion. However, questions as to the legality of a tribe's purported waiver must be decided in the first instance by the tribal court. The Utah Supreme Court recently reached the same result in *Harvey v. Ute Indian Tribe*, 2017 UT 75, p. 21 (Utah 2017) ("We agree that, as a matter of comity, the tribe should be given the first right to interpret the March 20th letter and determine the tribe's jurisdiction.").

> The exhaustion requirement applies beyond cases involving challenges to tribal court jurisdiction. … the Tenth Circuit has held that the policies behind *National Farmers* "almost always" dictate exhaustion in cases arising on reservations, and in other cases where the tribal court has jurisdiction and exhaustion would further the interests of self-government, orderly administration of justice, and utilizing tribal expertise. Examples of the kinds of cases in which courts have required exhaustion include … cases challenging the nature and extent of a tribe's sovereign immunity.

Cohen's at 631.

Without citation to any authority, Becker argues that "federal courts have not only the power, but the duty to review … and interpret tribal law." Becker Brief, 38. However, both the United States Supreme Court and the Tenth Circuit have rejected the suggestion that federal courts have federal question jurisdiction under 28 U.S.C. § 1331 to review (and reverse) a tribal court's interpretations 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 (10th Cir. 1959); *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).

B. The District Court Did Not Apply Any of the Recognized Exceptions to Tribal Exhaustion.

Exhaustion of tribal remedies is mandatory except where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the [tribal] court's jurisdiction." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856, n.21 (1985). Also, where it is clear that the tribal court lacks

jurisdiction and that judicial proceedings would serve "no purpose other than delay." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014) (*quoting Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). Finally, "[w]hen … it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in *Montana v. United States*]." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (*quoting Strate v. A-1 Contrs*., 520 U.S. 438, 459 n. 14 (1997)). None of the exceptions apply here, but more importantly, the district court did not rule that any of the recognized exceptions apply. The district court failed to rule on tribal court jurisdiction as a matter of federal law, but instead ruled that the Becker Contract is valid and therefore tribal exhaustion "is both unnecessary and futile." Aplt. App. XIV, 2957. This is not a recognized exception to the exhaustion requirement in this Circuit (or any other circuit).

The Tenth Circuit "has taken a strict view of the tribal exhaustion rule, the exceptions are applied narrowly." *Norton*, 862 F.3d at 1243 (*citing Kerr McGee*, 115 F.3d at 1507; *Thlopthlocco*, 762 F.3d at 1239) (internal citations omitted). "Exceptions typically will not apply so long as tribal courts can 'make a colorable claim that they have jurisdiction.'" *Id.* (*quoting Thlopthlocco*, 762 F.3d at 1240). Because Becker's breach of contract claim arises out of his on-reservation contract and work for the Ute Tribe, and because the Tribe contests the legality and

enforceability of the Becker Contract under tribal law, the case presents a colorable claim of tribal court jurisdiction. "In considering whether tribal jurisdiction is 'colorable', we emphasize that 'Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.'" *Id.* (*quoting Thlopthlocco*, 762 F.3d at 1240; *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

II. RESPONSE TO BECKER'S ARGUMENTS ON THE LEGALITY OF THE CONTRACT.

A. Clarification of the Tribe's Argument on Legality of the Contract

Becker criticizes the Tribe's contentions on the illegality of his contract as "rambling and difficult to pin down." Becker Brief, 12. The Tribe rejects Becker's characterization, but nonetheless will further elucidate its arguments.

a. The Becker Contract Granted Becker a 2% "Participation Interest" or "Net Revenue Interest" in the Tribe's Working Interest in Tribal Minerals.

Every first-year law student learns that property ownership can be imagined as a "bundle" of legal rights, akin to a bundle of sticks, with "each stick in the bundle representing a different right that is inherent in the ownership of the physical thing that we typically think of as property, such as a parcel of land."[1] The bundle-of-

[1] Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 OCT Fed. Law 30 (October, 2007).

legal-rights analogy is also appropriate for the micro-world of property interests in oil and gas and other minerals:

> A mineral interest includes various rights, interests, or attributes…. [and] … Each attribute is an independent property right which may be severed into a separate interest and may be separately conveyed or reserved by the owner.

58 C.J.S. *Mines and Minerals* § 202 (1955).

The Ute Tribe capitalized Ute Energy Holdings LLC and Ute Energy LLC with a single type of mineral interest: the Tribe's working interest in the oil and gas minerals that are subject to Exploration and Development Agreements (EDAs) between the Tribe and various oil/gas companies.[2] Under Tenth Circuit precedent, the Tribe's EDAs are the functional equivalent of an oil/gas lease. *E.g., State of Utah v. Babbitt*, 53 F.3d 1145 (10th Cir. 1995) (holding an oil/gas development and operating agreement to be the legal equivalent of an oil/gas "lease" under federal law). Under the EDAs, the Tribe had the right to participate in the development of its tribal minerals as a working interest or operational owner.

The Tribe did not assign the EDAs themselves to the Ute Energy LLCs, just the Tribe's working interest in the tribal minerals that are subject to the EDAs (and ancillary rights incidental to the working interest, such as oil/gas right-of-ways). In oil and gas terminology, a working interest is:

[2] Aplt. App. XV, 3181, 3193-95; Aplt. App. XVI, 3230, 3238-41.

> The operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land; the interest may exist in concurrent ownership with others.[3] (underscore added)

Accord Elm Ridge Expl. Co., L.L.C. v. Engle, 721 F.3d 1199, 1204 (10th Cir. 2013). The Participation Plan under Becker's contract granted Becker a "participating" or "net revenue interest" in the Tribe's working interests in the tribal minerals that were assigned to the two Ute Energy LLCs.[4] Although Williams & Meyers suggest the term "net revenue interest" is "rarely used currently," in fact, discussions of "net revenue interest" remain relevant and abound on the Internet, including the Schlumberger Oilfield Glossary, which defines "net revenue interest" as "[a] share of production after all burdens, such as royalty and overriding royalty, have been deducted from the working interest …."[5]

At the hearing on 2/28/2018 in case number 2:16-cv-579, Michael Wozniak, the Tribe's oil and gas expert, testified using a demonstrative exhibit to assist the

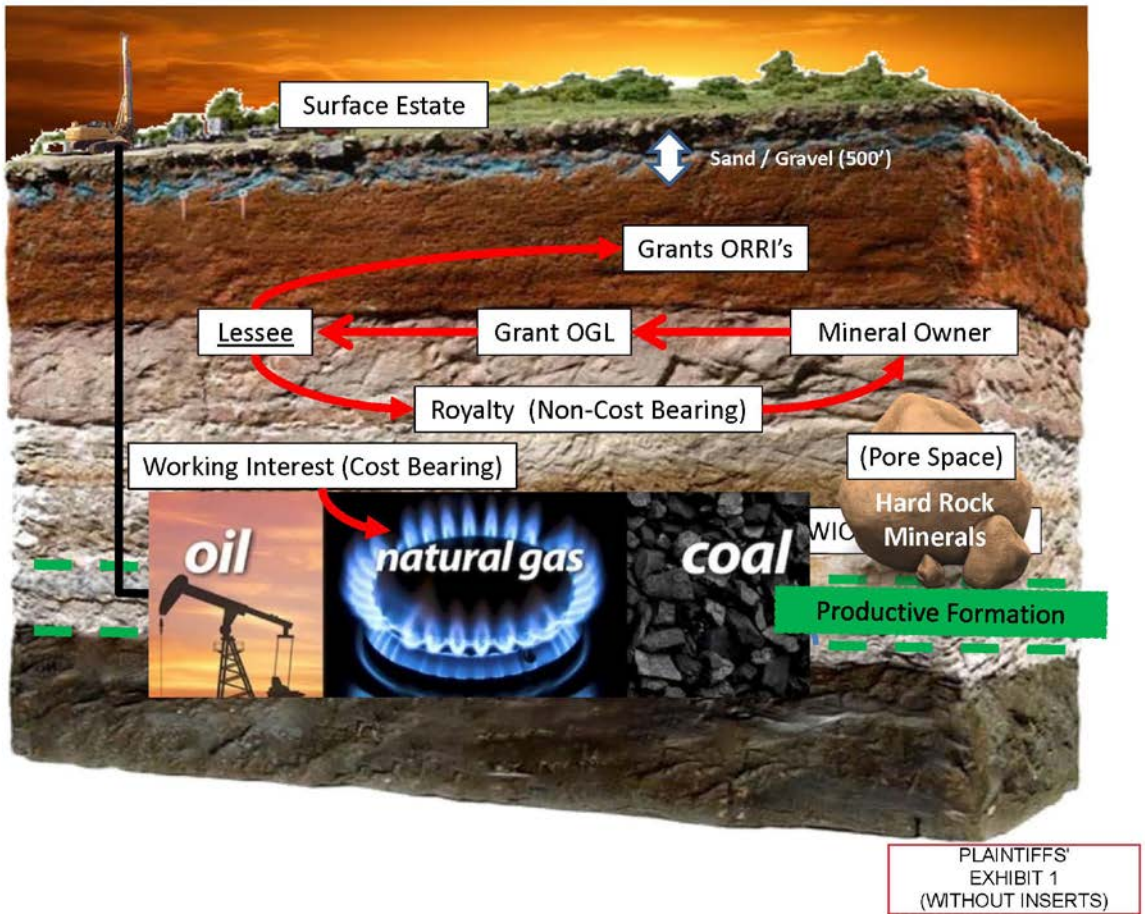
---

[3] Aplt. App. VII, Part 2, 1365, 8 Howard R. Williams and Charles J. Meyers, *Oil and Gas Law*, 1155 (2016).

[4] Aplt. App. VI, Part 1, 1050, ¶ 1.

[5] Aplt. App. VII, Part 2, 1366. *See* https://www.glossary.oilfield.slb.com/Terms/n/net_revenue_interest.aspx (last visited on 8/29/2018). The Tribe asks the Tenth Circuit to take judicial notice of the Schlumberger definition, a copy of which was included in the district court record. See *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir. 1997) (when a party asks a court to take judicial notice of adjudicative facts and supplies the necessary information, Federal Rule of Evidence 201 requires the court to comply with the request.").

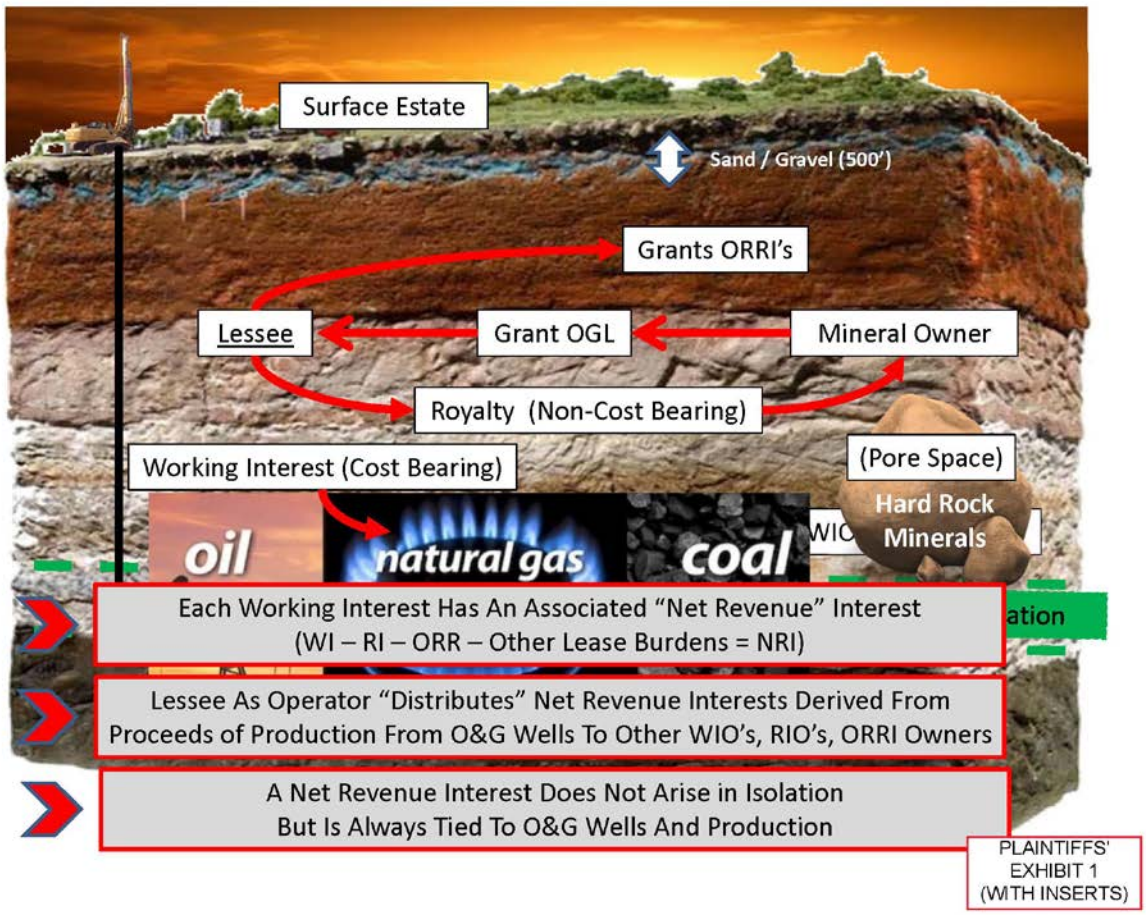
court in visualizing a net revenue interest ("NRI") associated with mineral development. In this Reply Brief, the Tribe reproduces Plaintiffs' Exhibit 1,[6] first without the explanatory inserts, and then with them:



Mr. Wozniak explained that each working interest in a mineral estate has an associated net revenue interest. He also testified that a "net revenue interest" does not arise in isolation, but is always tied to production from oil/gas wells:[7]

[6] Aplt. App. XV, 3177-78.

[7] Aplt. App. XV, 3128:2 – 3132:19.



To further illustrate the calculation of net revenue interest, the Tribe included in its summary judgment appendix a calculation of the Tribe's net revenue interest under the Tribe's Lake Canyon EDA. The contract summary shows that the Tribe had a 25% working interest under the Lake Canyon EDA, and that after deducting the 18.75% royalty, the Tribe's net revenue interest under its working interest in the EDA was 20.31%.[8] A net revenue interest such as Becker's can be cost or non-cost

[8] Aplt. App. VII, Part 1, 1205.

bearing.[9] The Participation Plan under Becker's contract purports to grant Becker both (*i*) a non-cost bearing interest in the Tribe's working interests assigned to Ute Energy LLC, and (*ii*) a cost-bearing interest in "any projects involving the development, exploration and/or exploitation of minerals in which the Tribe" participated but did not assign to Ute Energy LLC. [10] Kevin Gambrell, one of the Tribe's non-attorney expert witnesses, opined that the Participation Plan under Becker's contract made Becker a "participating party" on the Tribe's working interest in the EDAs that were assigned to the Ute Energy LLCs.[11]

Mr. Gambrell is *not* an attorney; therefore, his expert opinions cannot be summarily rejected out of hand as "legal argument," as the district court did here."[12] Gambrell holds a Master's of Science in Mineral Economics from the Colorado School of Mines, and he has extensive experience with oil and gas development on Indian and federal lands.[13] For eight years, Mr. Gambrell served as Regional

[9] Expert Report of Michael J. Wozniak, Aplt. App. VII, Part 2, 1355-57, ¶¶ 6-15.

[10] *Id*., ¶¶ 14, 15.

[11] Aplt. App. VIII, 1467:2-12; 1468:6-15; 1471:2-6; 1473:6-16; 1474:3-19. Or to quote John Jurrius, the Tribe's former financial consultant, "[I]f the Tribe had a 33% working interest … Mr. Becker could participate for 2% of that interest (2%x33%)." Aplt. App.VI, Part 1, 1028-29.

[12] Aplt. App. XVI, 3242, Mem. Decision and Order in 2:16-cv-579, p. 44.

[13] Mr. Gambrell was deposed in the Becker state court suit in compliance with Rule 26(a)(4)(B) of the Utah Rules of Civil Procedure which provides that litigants may conduct discovery on experts but only through "either" a deposition or a written report, not both. Becker elected to depose Gambrell.

Director of the Federal Indian Minerals Office of the U.S. Department of Interior in the oil/gas rich Four Corners area, Farmington, New Mexico.[14] Mr. Gambrell described the two-percent "net revenue interest" under Becker's contract as "providing Becker with a 2 percent working interest in the tribal interest" in the EDAs that the Tribe assigned to Ute Energy Holdings LLC and to Ute Energy LLC.[15] Mr. Gambrell repeatedly referred to Becker's "beneficial net-revenue interest" as an interest that was "*hidden*" from federal regulators:

> Gambrell: In this particular case the [Department of Interior] Solicitor or the [BIA] Superintendent was not able to look at the participating interest that Becker had because it was hidden. It never came out in any document that the Solicitor reviewed or the Superintendents reviewed. It never showed up on any audit report. It never showed up on any 10-K. And it did not show up in the EDA operational agreements.
>
> Mr. Isom: How do you know that?
>
> Gambrell: Because I read those documents.

Aplt. App. VIII, 1479:1-9.

> Gambrell: The Secretary of Interior should have reviewed those documents and …. should have done a background check on Becker. Becker held the position of [the Tribe's] division of mineral resource[s] manager. He had control over drilling permits, reviewing accounting standards within those drilling blocks, what type of drilling would occur and other things.

[14] Aplt. App. VIII, 1453-58.

[15] Aplt. App. VIII, 1476:8 – 1477:1.

> Having a participating interest in those agreements and also being a regulatory person who oversees those lease agreements, could be considered a conflict of interest. And if I were in a regional director's position I would question that.
>
> Had they done that, they could have made the determination if there was a conflict of interest in his role as division manager of an [Indian] mineral program. Is he bonded? Does he have the background that they want to deal with when he's working on Indian leases? Does he have any prior outstanding issues in Indian country that may not allow him to be on Indian leases?

Aplt. App. VIII, 1483:4 – 1484:3.

> Mr. Isom: Do you see the Becker [IC] Agreement as creating any interest in trust – Indian trust assets?
>
> Gambrell: It's the working interest portion of the Agreement. It's having an active role in developing the oil and gas leases on Indian country in the working interest side.
>
> * * * *
>
> In the situation here [with Becker], if I was reviewing this as a federal manager and I saw that Becker had somewhat of a regulatory responsibility as a manager of a division within the Tribe, I would question him being a participating interest in the working interest side. I would think he had a conflict of interest. And he may do things that benefit his economic interest that may not benefit the tribe's economic interest.

Aplt. App. VIII, 1486:1-24. Indeed, the Indian Mineral Development Act (IMDA) seeks to avoid conflicts of interest such as Becker's by requiring the Secretary of Interior to review and approve contracts such as Becker's. 25 U.S.C. § 2103. Senate Report 97-472 explains that by requiring the Secretary to evaluate "non-lease agreements" for the "best interests" of a tribe, Congress intended for the Secretary

to "assure that no one individual or faction of a tribe should gain an unfair advantage or be unjustly enriched at the expense" of the Tribe as a whole.[16] And that is precisely what Becker's contract does—it allows Becker individually to be unjustly enriched at the expense of the Ute Tribe as a whole.

b. Alternatively, Becker's contract was a "service" or "management" contract within the scope of IMDA.

By its terms, IMDA is not limited to agreements that grant a property interest in Indian minerals; IMDA also extends to "service" and "managerial" agreements related to the "development" of Indian minerals. 25 U.S.C. § 2102(a). By his own admission, Becker's contract was a "service" contract. Becker Brief, 10 (describing his contract as "an independent contract for services"). Becker's job was to *manage* the development of the Tribe's energy and minerals, and by his own admission, Becker played a central role in developing the Tribe's oil and gas resources.[17] Therefore, Becker's service contract clearly falls within the ambit of 25 U.S.C. § 2102(a) as a "service" or "managerial" agreement.

c. The United States Supreme Court recognizes common law restraints on the alienation of Indian property *in addition to* statutory restraints.

Becker argues that "[n]ot a single authority, including the Tribe's vaunted 100-year-old *Noble*, recognizes any common law voiding any Indian-related

[16] Aplt. App. VII, Part 2, 1372, Senate Report 97-472.

[17] Aplt. App. VIII, 1666-70, Becker Declaration of 12/20/2016.

agreement for lack of Secretarial approval." Becker Brief, 6. That statement is not true, of course. In *Oneida I* and *Oneida II*, in 1974 and 1985, the Supreme Court ruled that the Oneida Indian Nation's 1795 conveyance of 100,000 acres to the State of New York was a legal nullity because the conveyance was never approved by the federal government.[18] In *Oneida II*, the Court explained in relevant part:

> By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial.
>
> * * * *
>
> Numerous decisions of this Court prior to *Oneida I* recognized at least implicitly that Indians have a federal common-law right to sue to enforce their aboriginal land rights. In *Johnson v. McIntosh*, *supra*, the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent.
>
> * * * *
>
> Finally the Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. Citing *United States v. Santa Fe Pacific R. Co.* [citation omitted] we noted that Indians' right of occupancy need not be based on treaty, statute, or other formal Government action. [citation omitted]
>
> * * * *

[18] *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 667-75 (1974) (*Oneida I*), and *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*).

> In keeping with these well-established principles, we hold that the Oneidas can maintain their action for violation of their possessory rights based on federal common law.

Oneida II, 470 U.S. at 233-36. The Tribe cited the *Oneida* cases in its summary judgment motion in the district court[19] and in its Reply Brief in the companion appeal, 18-4013.

d. Both the Indian canon of construction and *Chevron* deference support the Tribe's position, not Becker's.

If the Tenth Circuit deems the NIA, 25 U.S.C. § 177, or IMDA to be ambiguous in relation to the facts of this case, then the Indian canon of construction "controls over more general rules of deference to an agency's interpretation of an ambiguous statute." *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011); *see also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (Indian canon trumps *Chevron* deference); *Navajo Health Found. v. Burwell*, 220 F. Supp. 3d 1190, 1223-27 (D.N.M. 2016) (same).

Yet, *Chevron* deference also weighs in the Tribe's favor, not Becker's. In *Long Royalty Company, Appellant*, MMS-87-0244-IND (FE), 1989 WL 1712513 (September 22, 1989), the United States Department of Interior ("Interior") ruled that the federal government's trust responsibility to Indians extends to the collection of revenues from Indian oil/gas minerals, even when a tribe's oil/gas assets are

[19] Aplt. App. V, 871.

placed into a joint venture with non-Indians. In *Long*, Interior denied Long's appeal from a departmental decision requiring Long to pay additional proceeds to the Cheyenne and Arapaho Tribes on an Indian oil/gas lease in Oklahoma following an audit conducted by the department's Minerals Management Service ("MMS"). Interior soundly rejected Long's argument that the federal government's trust responsibility to Indians does not extend to and encompass "revenue collection" from oil/gas wells on Indian lands, stating in pertinent part:

> This contention is wholly without merit.
>
> The Federal courts have long recognized the existence of a trust relationship between the Federal Government and Indians. [citations omitted]
>
> Most recently, the Congress has provided a clear and specific statutory basis for the trust responsibility of the Secretary of the Interior (Secretary) with respect to the collection of all oil and gas revenues earned from covered lands. … [T]he Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), … Congress states therein that the purposes of FOGRMA … are in relevant part … (to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources; * * *.
>
> It is evident by its terms that **FOGRMA's requirements apply to working interest revenues as well as to royalties payable under this Indian lease**.
>
> It is evident from this authority that it is well within the Secretary's trust responsibilities to oversee the collection of revenues earned from a lessor's working interest in Indian oil and gas leases. The Appellant has provided no basis whatsoever for its contention that the working

> interest or "joint venture" arrangement authorized by this lease falls outside these responsibilities. (emphasis added)

The Tribe cited *Long* in its summary judgment motion in the district court,[20] and included a copy of *Long* in its summary judgment appendix.[21] The district court and Becker have both ignored *Long*. Yet, the analogy between *Long* and the case at bar is unmistakable. In both cases, an Indian tribe had a working interest in tribal minerals and the minerals were being produced by a non-Indian operator—Long Royalty Co. in *Long*, and Ute Energy LLC here. Both Long Royalty and Becker maintain that the federal government's trust responsibility ends as soon as an Indian tribe places its minerals in the hands of a non-Indian operator for production. The Department of Interior rejected Long Royalty's argument in *Long*; the Tenth Circuit should similarly reject Becker's argument here.

e. 25 U.S.C. § 81 has no application.

Mr. Becker devotes five pages of his brief to arguing that Secretarial approval of his Agreement was not required under 25 U.S.C. § 81, and that the 2000 amendments to § 81 should somehow be incorporated into IMDA, 25 U.S.C. § 2102(a). Becker Brief, 23-27. Becker's contention should be rejected on multiple grounds. To begin with, the applicability of § 81 was never "presented to,

[20] Aplt. App. V, 881-82.

[21] Aplt. App. VII, Part 2, 1390-92.

considered [and] decided by the trial court," and therefore, the applicability of 25 U.S.C. § 81 is not properly before the Tenth Circuit. *Tele-Communications, Inc. v. C.I.R.*, 104 F.3d 1229, 1232-33 (10th Cir. 1997) (appellate courts generally do not consider issues raised for the first time on appeal). None of the Tribe's motions in the district court asserted that 28 U.S.C. § 81 applies to Becker's contract. Further, none of the Tribe's six expert witnesses opined that § 81 applies to Becker's contract. Becker's statements to the contrary to this Court are simply incorrect. In footnote 48, Becker states:

> As recently as the February 28 hearing in the Companion Case [16-cv-579] the Tribe argued <u>through its tendered "experts"</u> that Section 81 was itself a statute that caused the [Becker] Agreement to be void for lack of Secretarial approval …. On this appeal, however, the Tribe has understandably abandoned that claim for reasons discussed in this subsection. (underscore added)

The full transcript of the 2/28/2018 hearing is included in the Appeal Appendix. Aplt. App. XV, 3014. At no time did the Tribe's experts ever discuss 25 U.S.C. § 81 at the 2/28/2018 hearing. Nor is there any mention of § 81 in *any* of the experts' written reports. There are only two mentions of § 81 in the entire 2/28/2018 hearing, the first in response to a question posed by the district court. When asked by the court whether any statutes other than 25 U.S.C. §§ 177 and 2102(a) apply to this case, the Tribe's counsel said that the Tribe had initially believed § 81 might apply, but had concluded that § 2102(a) was the more specific and more applicable statute.

Aplt. App. XV, 3076:14-16. Later, in argument, the Tribe cited the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, as the source of Congress' power to enact Indian non-alienation statutes such as "*the Indian Minerals Development Act, 25 U.S.C. § 81, and a handful of others*." Aplt. App. XV, 3093:19 – 3094:8. (emphasis added)

More to the point, Becker himself never raised 25 U.S.C. § 81 or made the arguments relative to § 81 that he is making now to this Court. Becker's failure to raise § 81 in the district court means he cannot raise it now, for the first time on appeal in an answer brief:

> In order to preserve the integrity of the appellate structure, [an appellate court] should not be considered a "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time…. Thus, an issue must be presented to, considered [and] decided by the trial court before it can be raised on appeal.

Cummings v. Norton, 393 F.3d 1186, 1190 (10th Cir. 2005). In addition, when, as here, an appellee seeks either to enlarge his own rights or to lessen the rights of his adversary, a cross-appeal is required. Fed. R. App. P. 4(a)(3). Therefore, it would be improper for this Court to decide an issue that was not properly raised by cross-appeal. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-81 (1999).

Finally, it is well-established that a specific statute controls over a general statute "without regard to priority of enactment." *Kay Elec. Coop. v. City of*

Newkirk, 647 F.3d 1039, 1044 (10th Cir. 2011) (quoting *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)).

In this case, IMDA, 25 U.S.C. §§ 2101 et seq., is the more specific statute. Section 81 is a statute that deals with contracts that "encumber[] Indian lands for a period of 7 or more years." 25 U.S.C. § 25(b). IMDA, in contrast, deals specifically with agreements with Indian tribes that involve the "*exploration*," "*development*," or "*the sale or other disposition*" of the "*production or products of such [Indian] mineral resources*." 25 U.S.C. 2102(a). Insofar as the "Participation Plan" under Becker's contract was inextricably linked to the exploration, development and sale or other disposition of the Tribe's oil and gas minerals, IMDA is obviously the more specific statute. Further, by its terms, § 2102(a) expressly applies to "service" and "managerial" contracts such as Mr. Becker's contract here.

II. THE TENTH CIRCUIT HAS PENDENT APPELLATE JURISDICTION TO REVIEW PROTECTIVE ORDER ISSUES, INJUNCTIVE RELIEF ISSUES, AND THE SANCTIONS ISSUE.

Federal appellate courts have pendent jurisdiction "to decide 'closely related' issues of law, i.e., claims that are 'inextricably intertwined with' or 'necessary to ensure meaningful review of' [the appealable issue]." *Prescott*, 387 F.3d at 755-756 (appellate court had pendent appellate jurisdiction to decide closely related question involving tribal court jurisdiction). The Tenth Circuit recognizes pendent appellate jurisdiction when it exercises "jurisdiction over an otherwise nonfinal and

nonappealable lower court decision that overlaps with an appealable decision." *Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995) (*citing Snell v. Tunnell*, 920 F.2d 673, 676 (10th Cir. 1990), *cert. denied* 499 U.S. 976 (1991)). The Tenth Circuit has exercised pendent appellate jurisdiction "where the otherwise nonappealable decision is 'inextricably intertwined' with the appealable decision, or where review of the nonappealable decision is 'necessary to ensure meaningful review' of the appealable one." *Id.*, (*citing Swint v. Chambers County Comm'n.*, 514 U.S. 35, 50-51 (1995)).

In determining whether a claim is inextricably intertwined with a properly reviewable claim, a court examines whether the "pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal – that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well." *Id.* at 930.

Here, the district court denied the Tribe's request for a protective order to shield a former elected member of the Ute Tribal Business Committee from a deposition sought to preserve testimony. Aplt. App. XIV, 2958. The Tribe objected to the deposition on grounds, *inter alia*, that the single issue in case is a legal question and there is no legal support for taking a deposition of a non-party under this circumstance. The Court granted Becker's motion to depose the former tribal official. Aplt. App. XII, 2473-2474. The Tribe then sought a protective order based

on (*i*) tribal sovereign immunity; (*ii*) the tribal court's ruling that there had been no valid waiver of tribal sovereign immunity; and (*iii*) that the former tribal official has no authority to waive tribal immunity. Aplt. App. XII, 2494-2500. The district court denied the protective order on the ground that "it is substantially likely that the tribal parties have waived sovereign immunity." Aplt. App. XIV, 2958. Having concluded the Tribe waived sovereign immunity under the Becker Contract, the district court denied the motion for protective order. *Id.* Under these circumstances, the issue of the denial of the protective order is inextricably intertwined with a central issue in this appeal – whether or not the Becker Contract is legally enforceable.

Similarly, the denials of the Tribe's motions for permanent injunctive relief on grounds of federal preemption, infringement on tribal sovereignty, and lack of state court subject-matter are inextricably intertwined with the issues presented in this interlocutory appeal.[22] Appellate review in an interlocutory injunction appeal "properly extends to all matters inextricably bound up with the injunction decision … [and] may extend further to allow disposition of all matters appropriately raised by the record, perhaps leading to final disposition of the case." 16 Fed. Prac. & Proc. Juris. § 3921.1 (3d ed). The issues presented in this appeal and in the companion

[22] Dkt. No. 52 in case number 2:16-cv-579; Aplt. App. IV, 0820, and Dkt. No. 73 in case number 2:16-cv-958.

appeal, number 18-4030 are subsumed in the Court's review of the issues raised by the Tribe's motions for permanent injunctive relief. Therefore, the Tenth Circuit should decide the Tribe's pending motions for permanent injunctive relief in both federal court cases.

Finally, the Tribe seeks review of the denial of its motion for sanctions. The Tribe sought sanctions against Becker and Attorney Isom for their offending statements about the Ute Indian Tribal Court, apparently made to advance Becker's position against tribal exhaustion and tribal court jurisdiction. In fact, the offending statements were made in the court filings wherein Becker asked the district court to reject the tribal court's ruling and reject the tribal court's determination of its own jurisdiction. The sanctions issue is therefore subsumed in the memorandum decision that is the subject of this appeal. In determining the appropriateness of the district court's denial of tribal exhaustion, the Tenth Circuit may conclude that the district court adopted, or was influenced by, Becker and Attorney Isom's unsupported and disparaging statements about the tribal court. Hence, the denial of the motion for sanctions and the resolution of the issues presented in this appeal are inextricably intertwined.

CONCLUSION

Because Becker still has not shown a probability of success on the merits, the district court erred in granting a preliminary injunction. *Becker I*, 868 F.3d at 1205.

The Tribe respectfully requests the Tenth Circuit reverse the district court's 4/30/2018 Memorandum Decision and Order in its entirety based on the facts and authorities cited herein. The Tribe expressly asks the Tenth Circuit to reverse the district court's denial of the Tribe's motions for a permanent injunction against the continued prosecution of the Becker suit in state court. The Tribe further asks the Tenth Circuit to direct the district court to allow for the exhaustion of tribal court remedies and if the district court reviews the jurisdiction of the tribal court following that exhaustion, to limit its review to a determination of whether the tribal court exceeded the bounds of any federally imposed limitation on its jurisdiction.

Respectfully submitted this 29th day of August, 2018.

FREDERICKS PEEBLES & MORGAN LLP

By: /s/ *Thomasina Real Bird*

Thomasina Real Bird
Frances C. Bassett
Thomas W. Fredericks
Jeremy J. Patterson
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-673-9600
Facsimile: 303-673-9155/9839
Email Address: trealbird@ndnlaw.com
fbassett@ndnlaw.com
tfredericks@ndnlaw.com
jpatterson@ndnlaw.com

Attorneys for Defendants, Counterclaimants, Third-Party Plaintiffs -Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 6,479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. Local Rule 32(b). I relied on my word processor to obtain the count and it is Microsoft Office Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman, 14 point font.

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/ *Thomasina Real Bird*
Thomasina Real Bird

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' REPLY BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 08/29/18, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ *Thomasina Real Bird*
Thomasina Real Bird

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2018, a copy of this **APPELLANTS' REPLY BRIEF**, was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

Brent M. Johnson
Nancy J. Sylvester
Keisa Williams
ADMINISTRATIVE OFFICE OF THE COURTS
State of Utah
P.O. Box 140241
Salt Lake City, Utah 84114-0241
Defendant Honorable Barry G. Lawrence

David K. Isom
ISOM LAW FIRM PLLC
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Defendant Lynn D. Becker

I hereby certify that on the 31st day of August, 2018, the original of the foregoing **APPELLANTS' REPLY BRIEF**, was delivered by courier to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

By: /s/ *Elizabeth Miller*
Assistant to Thomasina Real Bird