NO. 20-4098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, a federally recognized Indian tribe,

Plaintiff/Appellant,

v.

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

Defendants/Appellees.

On Appeal from the United States District Court
for the District of Utah, Central Division
The Honorable Judge Howard C. Nielson, Jr.
No. 2:18-cv-00314-HCN

CORRECTED BRIEF OF APPELLEES GREGORY D. MCKEE, T & L LIVESTOCK, INC., MCKEE FARMS, INC., AND GM FERTILIZER, INC.

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Appellees T & L Livestock, Inc., McKee Farms, Inc., and GM Fertilizer, Inc., each state that there is no parent corporation or publicly held corporation that owns 10% or more of its stock.

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There are no related cases.

STATEMENT OF THE ISSUES

Appellees Gregory D. McKee ("**Mr. McKee**"), T & L Livestock, Inc., McKee Farms, Inc., and GM, Fertilizer, Inc. (collectively "**McKee**" or "**McKee Appellees**") rejects the Statement of the Issues on Appeal presented by Appellant Ute Indian Tribe of the Uintah and Ouray Reservation (the "**Tribe**"). It mischaracterizes the ruling of the district court and attempts to expand the scope of this appeal beyond the ambit of the district court's ruling on jurisdiction. Accordingly, pursuant to Fed. R. App. P. 28(b)(2), McKee provides the following statement of issues that accurately reflect the issues presented to and decided by the district court.

ISSUE 1. Whether the district court correctly determined that the Ute Tribal Court of the Uintah and Ouray Reservation, Fort Duchesne, Utah (the "**Tribal Court**") lacked jurisdiction to enter a judgment against non-Indian McKee (the "**Tribal Court Judgment**").

ISSUE 2. Whether the district court correctly determined that the Tribe's "inherent sovereign powers" do not confer plenary jurisdiction over the activities of non-Indians on non-Indian land.

ISSUE 3. Whether the district court correctly determined the Tribe failed to demonstrate the existence of the two exceptions to the general rule that Tribal

Courts lack jurisdiction over the activities of non-Indians on non-Indian land, recognized by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1246 (1981).

ISSUE 4. Whether the district court correctly determined that it could not enforce the Tribal Court Judgment where the Tribal Court lacked jurisdiction to adjudicate the dispute between the Tribe and McKee – a non-Indian.

ISSUE 5. Whether the district court properly exercised its discretion to deny the Tribe's motion to amend its complaint and to dismiss the Tribe's action with prejudice where the proposed amendment was futile to remedy the Tribal Court's lack of jurisdiction.

STATEMENT OF THE CASE

None of the McKee Appellees are Tribal members. Tribe's Addendum 1, p. 61, ¶ 2 (Tribal Court Findings of Fact and Conclusions of Law ("**Tribal Court Findings**")). McKee owns approximately 121 acres of land in Uintah County, Utah. ("**McKee Property**"), which is non-Indian fee land that was diminished from the Reservation in 1914 through Patent No. 159817 and was never restored to the Reservation. *Id.*, p. 63, ¶ 9 (Tribal Court Findings); *Hagen v. Utah*, 510 U.S. 399, 414 (1994). The McKee Property is neither owned by, nor held in trust for, the Tribe. Tribe's Addendum 3, p. 101 (Memorandum Decision and Order Denying Plaintiff's Motion for Summary Judgment dated August 28, 2020 ("**District Court Order**")).

McKee is entitled to receive water on the McKee Property upon two separate bases: (1) Utah State Water Right 43-3202 (which is titled in McKee's name, and which is not implicated by the Tribal Court Judgment), and (2) Agreements made in 1943 (the "**1943 Agreement**") and 1946 (the "**1946 Agreement**") between McKee's predecessor in interest, Dewey McConkie, and a department of the United States government now known as the Bureau of Indian Affairs ("**BIA**"). Tribe's Appendix Vol. III, APP 344 (1943 Agreement) and APP 349 (1946 Agreement). The Tribe is not a party to either Agreement. *Id.* Accordingly, McKee's right to receive water is not the product of any "consensual relationship" with the Tribe, but rather a contractual arrangement with the United States government.

The 1943 Agreement and 1946 Agreement provide that McKee is entitled to a small portion of the water under Water Right 43-3011,[1] which is also appropriated

[1] The Tribal Court found that Water Right **43-3004** did not include the McKee Property under its Certificate of Appropriation of Water. Tribe's Addendum 1, pp. 65 & 72 (Tribal Court Findings, pp. 9 & 16). However, the water right that supplies the water for the 1943 and 1946 Agreements is actually supplied by Water Right **43-3011**. Water Right 43-3011 includes both the prior lands listed in the 1943 and 1946 Agreements in its Certificate of Appropriation of Water. Compare Tribe's Appendix Vol. VI, at APP 1044 (Certificate of Appropriation), with Tribe's Appendix Vol. III, APP 344 (1943 Agreement) and APP 349 (1946 Agreement). Following the execution of the 1943 and 1946 Agreements, Defendants' predecessor-in-interest, Dewey McConkie, with permission of what is now the BIA, filed Change Applications a1639 and a2107 with the Utah State Engineer to change the place of use for the water under the Agreements. Tribe's Appendix Vol. VI, APP 941-945 (Change Applications). These Change Applications were approved. Thus, the McKee Property is within the approved place of use of Water Right 43-3011, which the BIA relies upon to deliver water to the McKee Property.

under the Laws of the State of Utah, and which is owned and titled in the name of USA Indian Irrigation Services ("**UIIS**"). Tribe's Appendix Vol. III, APP 344 (1943 Agreement) and APP 349 (1946 Agreement). McKee is entitled to receive water on what is now the McKee Property in exchange for payment of yearly assessments. *Id.*

Since the 1940s, McKee, his family, and his family's predecessors-in-interest have annually purchased water from the BIA pursuant to the 1943 and 1946 Agreements and paid the assessments for the same. Tribe's Appendix Vol. VI, at APP 1013, ¶¶ 7, 9, 10 (Declaration of Gregory McKee). The assessments are used to fund the construction, maintenance, and repair of the Uintah Indian Irrigation Project ("**UIIP**"), which Congress authorized in 1906, that includes the Deep Creek Canal and Lateral No. 9. Tribe's Appendix Vol. III, APP 345 (1943 Agreement) and APP 350 (1946 Agreement).[2]

The Deep Creek Canal and Lateral 9, both of which are conveyance channels for the UIIP by which McKee receives water from the UIIP, traverse the McKee

[2] In addition, and in contradiction to elementary doctrines of water right conveyance and contractual interpretation, the Tribe presented irrelevant evidence that McKee's chain of title did not include the water McKee was using pursuant to the Agreements. Tribe's Addendum 1, pp. 71–73 (Tribal Court Findings). However, the Agreements did not convey any water rights; rather, the Agreements provide McKee only a contractual right to the delivery of water in exchange for McKee's payment of assessments. Tribe's Appendix Vol. III, APP 345 (1943 Agreement) and APP 350 (1946 Agreement). In other words, there was no water right to be conveyed.

Property. Tribe's Addendum 1, pp. 64-65. ¶ 13 (Tribal Court Findings). The points of diversion utilized by McKee are located on the McKee Property, and on a parcel to the north of the McKee Property – neither of which is tribal land. Tribe's Addendum 3, pp. 3-4 (District Court Order).

The United States holds the easements over which water is delivered by the BIA to the McKee Property. Tribe's Addendum 1, p. 66, ¶ 15 (Tribal Court Findings). The Tribal Court made no finding that McKee ever enters tribal land to receive or use water under the decades-old Agreements with the BIA. *See* Tribe's Addendum 1, pp. 61-80 (Tribal Court Findings).

Even after the Tribal Court entered judgment against McKee, the BIA has continued to recognize and perform under the 1943 and 1946 Agreements[3] by delivering water to McKee and charging McKee assessments, which McKee continues timely to pay. Tribe's Appendix VI, at APP 1013-14, ¶¶ 9-10, 16 (McKee

[3] An agreement that benefits a certain parcel of land, as the 1943 Nd 1946 Agreements do, is a covenant that runs with the land. *E.g., Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, 274 P.3d 935. The 1946 Agreement specifically states that it is "binding upon and shall inure to the benefit of the United States and its assigns and to the heirs, executors, administrators and assigns of the Contractors." Tribe's Appendix Vol. III, APP 344 (1943 Agreement) and APP 349 (1946 Agreement). Thus, by operation of law—and not through any deed conveyance—Defendants are entitled to the benefits of the Agreements. This is exactly why the BIA continues to deliver water to Defendants and also requires Defendants to pay assessments, which they have continued to pay, and which the BIA accepts. The invoices that Defendants receive and pay clearly indicate that they are for the same property that is described in the Agreements. Tribe's Appendix Vol. VI, APP 1015-1024 (Invoices).

Declaration), APP 1015-1024 (Invoices). As successor-in-interest, McKee continues to receive water pursuant to the 1943 and 1946 Agreements. Tribe's Appendix VI, at APP 1013-14, ¶¶ 7, 15 (McKee Declaration). McKee has not entered into any contracts with the Tribe or any tribal members with respect to McKee's receipt of water pursuant to the Agreements. Tribe's Appendix VI, at APP 1013-14, ¶ 8 (McKee Declaration).

Pursuant to the 1943 and 1946 Agreements, the BIA delivers approximately 108 acre-feet of water to the McKee Property each year. Tribe's Appendix Vol. III, APP 344 (1943 Agreement) and APP 349 (1946 Agreement). The Tribal Court made no findings that McKee's use of approximately 108 acre-feet of water pursuant to the 1943 and 1946 Agreements caused any catastrophic harm to the Tribe as a whole. Tribe's Addendum 1 (Tribal Court Findings).

In 2012, the Tribe sued McKee in the Tribal Court, alleging, among other things, that McKee is misappropriating water owned by the United States in trust for the Tribe from the Deep Creek Canal. Tribe's Appendix Vol. II, APP 139-145, 149, ¶¶ 12-33, 52 (Tribal Court Complaint). McKee moved to dismiss the Tribal Court Complaint, asserting lack of jurisdiction and failure to join the United States as a necessary party to the suit. (District Court Complaint Exhibit G). On June 2, 2014, the Tribal Court denied McKee's motion to dismiss and ruled that the United States was not a necessary and indispensable party, even though the Tribe was essentially

seeking to invalidate the 1943 and 1946 Agreements between McKee and the United States. Tribe's Addendum 1, p. 59 (Tribal Court Findings). Thereafter, McKee withdrew from participating in the Tribal Court proceedings.

On August 3, 2015, after a trial on the merits, in which McKee did not participate, the Tribal Court issued the Tribal Court Findings, in which it held that:

> The Court has subject matter jurisdiction pursuant to the Ute Tribe's inherent sovereign right to regulate activities of all non-Indians who willingly enter into a consensual relationship with the Tribe or whose conduct imperils the Tribe's political integrity, economic security, or health and welfare. See *Montana v. United States*, 450 U.S. 544 (1981). The Court also has subject matter jurisdiction pursuant to the Tribe's inherent sovereign right to (i) manage the use of its territory and natural resources by both members and nonmembers, see *New Mexico v. Mescalero Apache Tribe, 462 U.S.* 324, 335–36 (1983), and (ii) to exclude nonmembers from the Tribe's lands and waters, including the irrigation ditches and canals that transport tribal waters. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811–14 (9th Cir. 2011).

Tribe's Addendum 1, p. 92, ¶ 4 (Tribal Court Findings). The Tribal Court thereafter entered its *Decree of Judgment (Corrected) Entered Nunc Pro Tunc to August 3, 2015* (the "**Tribal Court Judgment**") against McKee. Tribe's Addendum 2.

On April 17, 2018, the Tribe filed its *Complaint for Recognition, Registration, and Enforcement of Tribal Court Judgment and Writ of Execution* (the "**District Court Complaint**") in the U.S. District Court for the District of Utah, Central Division. By its District Court Complaint, the Tribe sought enforcement of the

"tribal court money judgment under principles of comity." Tribe's App. I, p. 16, ¶ 1 (District Court Complaint).

On competing motions for summary judgment, the district court considered the narrow issue of whether the Tribal Court lacked jurisdiction to enter the Tribal Court Judgment against McKee. Tribe's Addendum 3, p. 18 (District Court Order). The district court determined that the Tribal Court lacked jurisdiction over the action and dismissed the District Court Complaint with prejudice, also ruling that the Tribe's motion to amend the District Court Complaint was futile in that it could not remedy the Tribal Court's lack of jurisdiction. *Id.* at pp. 17-18.

SUMMARY OF ARGUMENT

The District Court correctly determined that the Tribal Court lacked jurisdiction over the McKee Appellees. First, the District Court correctly determined that the Tribe's "inherent sovereign powers" do not confer upon the Tribal Court plenary jurisdiction over the activities of non-Indians on non-Indian land.

Second, the district court correctly concluded that neither of the *Montana* exceptions to the presumption that the Tribal Court lacked jurisdiction over the activities of non-Indians on non-Indian land was shown by the Tribe. The Tribe failed to establish any consensual relationship between the McKee Appellees and the Tribe regarding the Tribe's claim that the McKee Appellees "misappropriated" Tribal water. Moreover, the Tribe failed to establish that the McKee Appellees' use

of water pursuant to the decades-old 1943 and 1946 Agreements between the BIA and McKee, as successor in interest, imperils the Tribe's sovereignty or causes catastrophic harm to the Tribe.

Third, the district court correctly declined to enforce the Tribal Court Judgment where the Tribal Court lacked jurisdiction over McKee. The district court correctly limited its decision to a determination of the Tribal Court's jurisdiction and did not address the merits of the Tribe's claims against McKee.

Finally, the district court properly exercised its discretion to deny the Tribe's motion to amend its complaint and to dismiss the Tribe's action with prejudice where amendment was futile to remedy the Tribal Court's lack of jurisdiction.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRIBAL COURT LACKED JURISDICTION TO DECIDE THE DISPUTE BETWEEN THE TRIBE AND MCKEE.

A. STANDARD OF REVIEW

Because the question of subject matter jurisdiction is intertwined with the merits of the Tribe's claims, this Court's review proceeds under a summary judgment standard. *See Ortiz v. U.S. ex rel. Evans Army Community Hosp.*, 786 F.3d 817, 820 (10th Cir. 2015) (citing *Holt v. United States,* 46 F.3d 1000, 1003 (10th Cir.1995).

Thus, the Court's review is *de novo*, and the Tribe "must present evidence sufficient to establish the [Tribal] court's subject matter jurisdiction by a preponderance of the evidence." *See Ortiz*, 786 F.3d at 820; *Robinson v. Union Pac. R.R.*, 245 F.3d 1188, 1191 (10th Cir. 2001) (quoting *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 n. 5 (10th Cir.1999)). This Court may affirm if there is no genuinely disputed issue of material fact concerning jurisdiction. *See Ortiz*, 786 F.3d at 820 (citing *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000)).

As set forth below, the Tribe failed to establish the Tribal Court's jurisdiction by a preponderance of the evidence in the district court and has failed to show that there is a genuinely disputed issue of material fact concerning the Tribal Court's lack of jurisdiction in either the district court or in this Court. Accordingly, this Court should affirm the district court's dismissal of the District Court Complaint.

B. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRIBE'S "INHERENT SOVEREIGN POWERS" DO NOT CONFER PLENARY JURISDICTION OVER THE ACTIVITIES OF NON-INDIANS ON NON-INDIAN LAND.

For over two hundred years, the United States Supreme Court has recognized Indian tribes as "distinct, independent political communities, … qualified to exercise many of the powers and prerogatives of self-government." *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008) (citations

omitted). However, the "sovereignty that the Indian tribes retain is of a unique and limited character" that "centers on the land held by the tribe and on tribal members within the reservation." *Id*. (citation omitted).

"A tribe's power to exclude nonmembers entirely" from land that belongs to, or is held in trust for, the tribe is "well established." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). However, "once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce Bank*, 554 U.S. at 328.

Further, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. "This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians— what we have called 'non-Indian fee land.'" *Plains Commerce Bank*, 554 U.S. at 328.

Where McKee is not a member of the Tribe, or any other recognized tribe, the district court correctly concluded that the Tribal Court's jurisdiction in this matter turns on the Tribe's authority to regulate McKee's water use, which "turns on where that conduct occurs and is closely related to the Tribe's control over 'land held by the tribe.'" *Id.* at p. 8. As the Tribal Court recognized, the McKee Property is non-

Indian fee land, diminished from the Reservation. *See* Tribe's Addendum 1, p. 64, ¶ 10. (Tribal Court's Findings.)

It is clear from controlling Supreme Court precedent that, except for the two narrow *Montana* exceptions, a tribe lacks the inherent authority to regulate or adjudicate non-Indian conduct on fee land, as is the case here. *Montana*, 450 U.S. at 563–66.

1. The Tribe's Power to Exclude Provides no Basis for Tribal Court Jurisdiction in this Case.

Citing *Mescalero Apache Tribe*, 462 U.S. at 335-36, the Tribe contends that precedents of the United States Supreme Court recognize that "Indian tribes 'have the power to manage the use of [tribal] territory and resources by both members and nonmembers.'" Tribe's Brief, p. 32. According to the Tribe, "if Indian tribes indisputably have the sovereign authority to exclude nonmembers from tribal *lands*, there is no rational basis in law or logic for holding that Indian tribes lack the sane [*sic*] authority to exclude nonmembers from tribal *waters*. Tribe's Brief, p. 34 (italics in original).

What the Tribe fails to acknowledge is that the "long line of precedents" upon which it relies uniformly holds that Indian tribes' ability to regulate "resources" also requires that the "resources" be *on Indian land*. For example, in *Mescalero* , the Supreme Court was called upon to determine "whether a State may restrict an Indian Tribe's regulation of hunting and fishing ***on its reservation.***" 462 U.S. 324, 325

(1983) (emphasis added). In that case, the Mescalero Apache Tribe and the Federal Government jointly developed and managed the reservation's fish and wildlife resources, with the tribal council adopting hunting and fishing ordinances each year on the basis of recommendations submitted by a BIA range conservationist. *Id.* 328-29.

The Supreme Court noted that the Mescalero Apache Tribe "lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife." 462 U.S. at 337. The Court further explained that sovereign power of tribes to "regulate ***on-reservation hunting and fishing***" is confirmed by federal statutes, including 25 U.S.C.A. § 1321(b) and 18 U.S.C.A. § 1162(b). *Id.* (emphasis added). Citing *Montana v. United States*, 450 U.S. at 562 n. 11, the court acknowledged that "[t]his authority is afforded the protection of the federal criminal law by 18 U.S.C.A. § 1165, which makes it a violation of federal law to ***enter Indian land*** to hunt, trap or fish without the consent of the tribe." *Mescalero*, 462 U.S. at 337-38 (emphasis added.)

Montana concerned lands located within a reservation, but not owned by the Crow Tribe or its members. The Supreme Court held in that case that the Crow Tribe could not as a general matter regulate hunting and fishing ***on non-Indian lands***. 450 U.S., at 557–567. But as to "***lands belonging to the Tribe or held by the United States in trust for the Tribe***," [the Supreme Court] "readily agree[d]" that a Tribe

may "prohibit nonmembers from hunting or fishing ...[or] condition their entry by charging a fee or establish bag and creel limits." *Mescalero,* 462 U.S. at 330-31 (citing *Montana,* 450 U.S. at 557). *Montana* plainly limited the Tribe's ability to regulate hunting and fishing to that which occurs on tribal land.

Likewise, in *Merrion v. Jicarilla Apache Tribe*, the Supreme Court was asked to determine whether the Apache Tribe had authority to impose a severance tax on oil and gas production on ***tribal reservation land***. 455 U.S. 130, 130 (1982) (emphasis added). The Court ruled that "a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity ***on the reservation*** to which the tribe can attach a tax." *Id*. at 141-42 (emphasis added).

> This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember ***enters the tribal jurisdiction***. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember ***enters tribal lands or conducts business with the tribe***.

Id. at 142 (emphasis added).

Similarly, in *City of Albuquerque v. Browner*, a case decided by this Court, the City brought an action challenging the EPA's approval of water quality standards set by the Isleta Pueblo Tribe pursuant to Congress' authorization of the EPA to treat Indian tribes as states for purposes of the Clean Water Act. 97 F.3d 415, 418 (10th Cir. 1996). The Court reasoned that this authorization "preserves the right of tribes

to govern their water resources within the comprehensive statutory framework of the Clean Water Act" and allows the Tribe to impose standards more stringent that the federal government. *Id.* at 418, 423. However, while the Tribe was authorized to set water quality standards, it was the ***EPA***, an agency of the Federal Government – not the Isleta Pueblo Tribe – that was authorized to enforce the standards ***beyond the reservation boundary***. *Id.* at 424.

> Under the statutory and regulatory scheme, tribes are ***not*** applying or enforcing their water quality standards ***beyond reservation boundaries***. Instead, it is the ***EPA which is exercising its own authority*** in issuing NPDES permits in compliance with downstream state and tribal water quality standards.

Id. (emphasis added).

In fact, no case cited by the Tribe stands for the Tribe's proposition that it can exclude nonmembers from "resources" – including water – outside the reservation. Although 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*, 455 U.S. at 144–45. 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.

a) 1923 Cedarview Decree Grants the Federal Government – Not the Tribe – Authority to Divert Water from the Deep Creek Canal.

The Tribe contends that the 1923 Cedarview Decree states "expressly" that the "Ute Indians" have "the first and 'exclusive right' to divert water from the Uintah River and its tributaries…" Tribe's Brief, p. 34. However, the Tribe's argument overstates the actual right of the "Ute Tribe" to divert any water.

In fact, 1923 Cedarview Decree gives the "**United States, and the Secretary of the Interior as Trustees of the Indians** on the former Uintah and Ouray Indian Reservation"… "the first and exclusive right" to divert water from the Deep Creek Canal. Tribe's Appendix II, pp. 169-171 x (1923 Cedarview Decree.) (emphasis added.) Nowhere in the 1923 Cedarview Decree is the Tribe, as the beneficial owner of the water, given any authority to divert any water or control any third party's diversion of water from the Deep Creek Canal – especially not on non-Indian fee land, such as the McKee Property.

This authority is reserved to the United States, which has, and is, exercising this authority through the 1943 and 1946 Agreements. The real dispute over managing the water is between the Tribe and the United States. McKee and many other non-Indians like him simply purchase or lease water from the United States under decades-old agreements.

b) The United States Has Not Conferred Upon the Tribe Regulatory or Adjudicatory Jurisdiction Over the UIIS Water Rights or McKee's Water Right.

"[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors,* 520 U.S. 438, 445 (1997). "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (citing *United States v. Kagama*, 118 U.S. 375, 379–81 (1886)). "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).

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

The BIA, through the UIIS, has continued to operate under the jurisdiction of the Utah State Engineer with respect to the UIIS water rights, including Water Right 43-3011. In fact, the UIIS has approximately 50 water rights that it appropriated under the laws of the State of Utah, with priority dates that range from 1861 to 1933. Tribe's Appendix Vol. VI at APP 1028-1029 (UIIS Water Rights). Furthermore, as recently as 2008, the UIIS has filed change applications with the Utah State Engineer, seeking permission to change the point of diversion, place of use, or manner of use of one of its water rights. Tribe's Appendix Vol. VI, at APP 946-948 (UIIS 2008 Change Application).

Indeed, the BIA's actions of operating the UIIP pursuant to the laws of the State of Utah is in accordance with the current regulations for the UIIP: "We administer our irrigation facilities by enforcing the ***applicable statutes***, regulations, Executive Orders, directives, Indian Affairs Manual, the Irrigation Handbook, and other written policies, procedures, directives, and practices to ensure the safe, reliable, and efficient administration, operation, and maintenance, and rehabilitation of our facilities." 25 C.F.R. § 171.110 (emphasis added). One of the "applicable statutes" is 1906 Act, 34 Stat. 325, which Congress has never repealed.

Utah's water code, Title 73 of the Utah Code, provides a comprehensive process for appropriating and administering water rights in the state. Among other things, Utah defines what constitutes beneficial use of water, Utah Code Ann. § 73-

1-3; provides a process to appropriate water, *id.* at § 73-3-1; provides a process for changing points of diversion, places of use, and types of beneficial use, *id.* at § 73-3-3; provides for judicial review of the State Engineer's decisions on applications, *id.* at § 73-3-14; provides enforcement authority to the State Engineer to combat illegal water use, *id.* at § 73-2-25; and provides general adjudication authority to the state that includes adjudicating Tribal water rights and reserved water rights. *Id.* at § 73-4-1 *et seq.* In sum, if there were an issue with the BIA's water right – a state appropriated water right – the State of Utah, and not the Tribe nor the Tribal Court, has regulatory and adjudicative authority.

Congress has exercised its plenary authority in expressly designating that the UIIP be held and operated under the laws of the State of Utah and that the water in the UIIP be appropriated and administered under the laws of the State of Utah. 1906 Act, 34 Stat. 325. Accordingly, the State of Utah, rather than the Tribe has the authority to regulate the operations of the UIIP and its appropriation, distribution, and use of the water.

While "regulation of water on a reservation may be critical to the lifestyle of its residents" and "water is the lifeblood of the community," as argued by the Tribe (Tribe's Brief, p. 44), the power to regulate the water administered by the United States in the Deep Creek Canal is vested in the State of Utah – not the Tribe.

Under governing Supreme Court precedent, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Tribe's Addendum 3, p. 7 (District Court Order) (citing *Plains Commerce Bank*, 554 U.S. at 330.) Accordingly, a tribal court's jurisdiction (its adjudicative jurisdiction) "turns upon whether the actions at issue in the litigation are regulable by the tribe" (its regulatory jurisdiction). *Id*. at pp. 7-8 (citing *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1245 (10th Cir. 2017)).

Simply put, the Tribe does not have the regulatory authority over the UIIP or the water in the UIIP. The United States administers the UIIP water under the regulatory authority of the State of Utah. Thus, the Tribal Court does not have subject matter jurisdiction to adjudicate issues regarding the same. *See Plains Commerce Bank*, 554 U.S. at 330. Likewise, neither the Tribe nor Tribal Court has regulatory authority over McKee's Water Right 43-3202, although it purported to adjudicate Water Right 43-3202.

c) *Plains Commerce Bank* is Applicable to the District Court's Analysis Because It Directly Addresses Tribal Court Jurisdiction Over Claims of Indians Regarding Conduct of Non-Indians on Non-Indian Fee Land.

The Tribe complains about the district court's reliance on language in *Plains Commerce Bank* and disingenuously argues that *Plains Commerce Bank* is not dispositive because "involved litigation between a non-Indian bank and a non-Indian individual over private property." Tribe's Brief, p. 37. The Tribe's argument is

unavailing, because, in fact, the issue in *Plains Commerce Bank* was whether the tribal court lacked jurisdiction to adjudicate the discrimination claims of ***Indian lessees*** against the ***non-Indian bank*** with respect to the sale of ***non-Indian fee land.*** 554 U.S. at 320.

The issue in this case is substantively identical: whether the Tribal Court lacked jurisdiction to adjudicate the claims of the Tribe against the non-Indian McKee with respect to use of water on non-Indian fee land pursuant to a contract with the United States. The district court appropriately considered the analysis of *Plains Commerce* and quoted its dispositive language to reach the same conclusion as the *Plains Commerce Bank* court that the Tribal Court lacked jurisdiction over a non-Indian on non-Indian land utilizing state-appropriated water rights, a portion of which is under a contract with the United States.

2. The District Court Correctly Analyzed Supreme Court Precedent Regarding Jurisdiction Over the Activities of a Non-Indian on Non-Indian Fee Land.

The Tribe asserts that the district court's analysis improperly focused on the "locus of the nonmember's conduct," complaining that the district court "imposed a hyper-technical limitation on a tribe's 'core sovereign rights to exclude and to self-govern.'" Tribe's Brief, p. 35. However, governing Supreme Court precedent regarding Tribal Court jurisdiction over non-Indians actually centers on whether the conduct in question ***occurred on tribal land***. *See Montana*, 450 U.S. at 557; *Plains*

Commerce Bank 554 U.S. at 327-30; *Strate*, 520 U.S. at 454; *Mescalero*, 462 U.S. at 325; *Merrion*, 455 U.S. at 141-42.

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,* 554 U.S. at 329. Accordingly, courts must presume that a tribe does not have jurisdiction over a non-Indian, regardless of whether the non-Indian conduct occurred on or off reservation land. *Plains Commerce Bank*, 554 U.S. at 330.

Indeed, "[g]iven *Montana's* general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains Commerce Bank*, 554 U.S. at 330 (citations and internal punctuation omitted). "The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." *Id*. at 331. The Tribe failed to meet that burden in the district court and has failed to carry it in this Court.

Contrary to the Tribe's assertion that subject matter jurisdiction is appropriate through its power to exclude, the Tribal Court made no findings regarding whether

McKee, in receiving water pursuant to the Agreements with the BIA, ever entered the Tribe's right-of-way—*i.e.*, whether McKee's conduct of receiving water from the BIA on the McKee Property occurred on tribal land. *See* Tribe's Addendum 1, pp. 57-80 (Tribal Court Findings). The reason there were no such findings, is McKee did not, and does not, enter tribal land to receive water pursuant to the 1943 and 1946 Agreements with the BIA. Tribe's Appendix Vol. VI, at APP 1013, ¶ 14 (McKee Declaration).

Tellingly, the Tribe did not allege that McKee's receipt of water from the BIA pursuant to the 1943 and 1946 Agreements was a trespass on tribal land, and the Tribal Court did not so find. *See* Tribe's Addendum 1, at 61–80 (Tribal Court Findings). Rather, the Tribal Court Judgment purports to regulate non-Indian conduct on non-Indian fee land.

3. The District Court Correctly Rejected the Tribe's Argument That the Deep Creek Canal Easement Constituted Tribal Property.

The Tribe argued below that "[t]he Deep Creek Canal and Lateral 9 are trust property of the Tribe running on the Tribe's easement (a real property interest), placing Defendants' entry and water theft from the Canal and Lateral 9 within the purview of the Tribe's inherent sovereign power to exclude." Tribe's Appendix Vol. I, APP 58 (Tribe's Motion for Summary Judgment).

Relying on *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, -- U.S. --, 140 S. Ct. 1837, 1845 (2020), the district court rejected the Tribe's argument. Tribe's Addendum 3, p. 11 (District Court Order). The Tribe urges on appeal that, "[w]hile an easement may not be 'land,' nonetheless, easements are generally defined as an 'interest' in land, or more specifically, 'a nonpossessory interest in the land of another.'" Tribe's Brief, p. 38.

However, such an interest is not enough. Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude." *Strate*, 520 at 456; *Montana*, 450 at 557, 564.

C. THE TRIAL COURT CORRECTLY DETERMINED THAT NEITHER OF THE *MONTANA* EXCEPTIONS TO THE PRESUMPTION AGAINST CIVIL JURISDICTION OVER NON-INDIANS IS PRESENT IN THIS CASE.

In *Montana*, the United States Supreme Court laid down a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The presumption against tribal court jurisdiction is especially applicable where, as here, a tribe seeks to regulate non-Indian conduct on non-Indian fee land. *See Plains Commerce Bank,* 552 U.S. at 330. "Tellingly, with only one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*." *Id*. at 333 (internal quotation marks omitted) (emphasis in original).

The presumption against tribal court civil jurisdiction may only be overcome if a tribe meets its burden to show that one of two exceptions, known as the "*Montana* exceptions," apply. "First, [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Plains Commerce Bank*, 554 U.S. at 329. (internal quotation marks omitted).

"Second, a tribe may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 329–30 (internal quotation marks omitted). The *Montana* exceptions are "limited" ones, and cannot be construed in a manner that would "swallow the rule," or "severely shrink" it. *Plains Commerce Bank*, 554 U.S. at 330 (citations omitted).

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

Tribe's claims is determined *separately* from the Tribe's claims that McKee was "stealing" water or was "trespassing" on tribal land.

"The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land." *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1305-06 (9th Cir. 2013) (quoting *Plains Commerce Bank*, 554 U.S. at 330, (citing *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 654 (2001).

As set forth below, the Tribe has failed to satisfy its burden of demonstrating that either of the *Montana* exceptions conferred jurisdiction upon the Tribal Court to enter the Tribal Court Judgment.

1. The Tribe Failed to Establish Any Consensual Relationship Between the McKee Appellees and the Tribe with Respect to the Tribe's "Water Theft" Claims.

Under the first *Montana* exception, the Tribe must prove that McKee had a consensual relationship with the Tribe and that the "regulation imposed by the Indian tribe [has] a nexus to the ***consensual relationship itself***." *Atkinson* , 532 U.S. at 656. (emphasis added). "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not in for a penny, in for a Pound [*sic*]." *Id.*

Put simply, "[t]he mere fact that a nonmember has some consensual commercial contracts with a tribe does not mean the tribe has jurisdiction over ***all suits*** involving that nonmember, or even over all such suits that arise within the reservation; ***the suit must also arise out of those consensual contracts***." *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941 (9th Cir. 2009) (emphasis added).

The Tribe argues McKee's agricultural lease ("**Lease No. 8FP007852**") of five former Indian allotments (the "**Leased Property**") now owned by the Ute Tribe and Mr. McKee's farming partnership with tribal member Frank Arrowchis establish consensual relationships sufficient to confer Tribal Court jurisdiction over McKee. Appellant's Brief, pp. 39-40. The Tribe is again wrong.

a) Lease No 8FP007852

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 the McKee Property, McKee must have submitted himself to the Tribal Court's jurisdiction because, under Lease 8FP0007852, "Mr. McKee is obligated to 'comply with all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies."

Appellant's Brief, pp. 39-40. However, the Tribe's argument is flawed in several material respects.

First, Lease No. 8FP0007852 is between McKee and the United States Department of the Interior, *not the Tribe*. Tribe's Appendix Vol. V, APP 859 (Lease No. 8FP0007852). Second, the Leased Property identified by the Tribe is located nearly ***three miles away*** from the McKee Property, a fact never disputed by the Tribe. Tribe's Appendix Vol. VI, APP 1025 (Map of Leased Lands). Third, the Tribe has never argued that the water at issue was used on the Leased Property and the Tribal Court did not find that McKee used the water at issue on the Leased Property. Tribe's Addendum I, pp. 75-76, ¶ 44. (Tribal Court Findings). There is simply no nexus between the Leased Property, McKee's use of water under the 1943 and 1946 Agreements, and the Tribe's claims that McKee is "stealing" water.

The law is clear that "[n]on-Indians ... do not consent to tribal-court jurisdiction over unrelated transactions by entering into separate consensual relationships, such as leases, with a tribe. ... [T]he suit must also *arise out of* those consensual contacts." *Window Rock Unified School District v. Reeves*, 861 F.3d 894, 920 (9th Cir. 2017) (internal quotation marks omitted). Where the Tribe's claim of "water theft" does not arise out of the unrelated Lease No. 8FP0007852 transaction, McKee did not "consent" to jurisdiction of the Tribal Court over his water use pursuant to the 1943 and 1946 Agreements.

b) Arrowchis "Farming Partnership"

The Tribe failed to provide the district court – and similarly fails to cite to this Court – any evidence that McKee's "farming partnership" with Mr. Arrowchis has any nexus with McKee's use of water pursuant to the 1943 and 1946 Agreements with the BIA – because ***there is no nexus***. The Tribe cites no legal authority that supports its contrived effort to broaden *Montana's* first exception. Tribe's Brief, pp. 39-41. Neither does the Tribe seek to address, distinguish, or even mention *Atkinson*, even though the district court relied on *Atkinson* in its analysis of the first *Montana* exception. Tribe's Addendum 3, pp. 15-16 (District Court Order). The reason is simple – *Atkinson* is fatal to the Tribe's attempt to broaden *Montana's* first exception. The Tribe's argument seeks to do exactly what *Atkinson* prohibits: trigger tribal civil authority in one area based on a consensual agreement in an unrelated area. 532 U.S. at 656.

The Tribe's expansive overreach of tribal jurisdiction based on such general and unrelated business dealings is precisely what the United States Supreme Court has specifically declined to grant to tribes. *E.g., Plains Commerce Bank*, 554 U.S. at 338–40 (rejecting an argument that a company's general business dealings with a tribe grant the tribe general subject matter jurisdiction over all of the company's activities); *Atkinson,* 532 U.S. at 656 (tribe lacked authority to impose tax on

nonmember guests of hotel); *Strate*, 520 U.S. at 457 (car accident did not arise out of defendant's contracts with the tribes).

The Tribe asserts for the first time on appeal, with no reference to any evidence in the record, that the Tribe believes that "tribal member Arrowchis knew of Mr. McKee's illegal diversion of tribal waters" and that "Arrowchis concealed that information from the Tribe." Tribe's Brief at 40-41. Apparently, the Tribe believes, without any legal or factual support, that this newly-alleged suspected subterfuge somehow confers jurisdiction on the Tribal Court. It does not.

Even if such a clandestine concealment could confer jurisdiction on the Tribal Court, which it does not, this Court has long held that it will not address arguments brought for the first time on appeal "unless the party demonstrates an impediment which prevented raising the argument below." *See United States v. Hernandez*, 847 F.3d 1257, 1269 (10th Cir. 2017). "In order to preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to 'give it everything they've got' at the trial level." *Id.* The Tribe's failure to address the asserted conspiracy between McKee and Arrowchis in the district court is fatal to its use now.

In summary, the Tribe has failed to establish that Tribal Court had subject matter jurisdiction under the first *Montana* exception.

2. The Tribe Failed to Establish That McKee's Use of Water Pursuant to Agreements with the BIA Imperils the Tribe's Sovereignty or Has Caused the Tribe Catastrophic Harm.

It has long been settled that the "second [*Montana*] exception authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). However, "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community. *Id.* "One commentator has noted that 'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert *catastrophic consequences*.' [F. Cohen, Handbook of Federal Indian Law] § 4.02[3][c], at 232, n. 220." *Id.* (emphasis added).

Thus, "'*Montana's* second exception 'does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe.'" *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d at 1306 (quoting *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064–65 (9th Cir. 1999)). "Rather, the challenged conduct must be so severe as to 'fairly be called *catastrophic* for tribal self-government.'" *Evans*, 736 F.3d at 1306 (quoting *Plains Commerce Bank*, 554 U.S. at 341).

Instead of marshaling evidence to show that McKee's purchase and use of water menaces the political integrity, the economic security, or the health or welfare

of the Tribe, the Tribe seizes upon the district court's reliance on the language in *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation* that "[t]he second *Montana* exception may be invoked only if the challenged conduct could 'fairly be called catastrophic to tribal self-government.'" 862 F.3d at 1246. The Tribe contends that this language is "dicta," condescendingly explaining to this Court that it should ignore the clear language of *Norton* and *Plains Commerce Bank*. The Tribe's effort to distinguish *Norton* and *Plains Commerce Bank* must fail.

In *Plains Commerce Bank*, the United States Supreme Court clearly imposed a requirement of "catastrophic" harm when it held that the second *Montana* exception was inapplicable where "[t]he sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the Tribe, but cannot fairly be called 'catastrophic' for tribal self-government." 554 U.S. at 341. *Norton* cited *Plains Commerce Bank* to hold that the trespass claim at issue might be "sufficiently catastrophic" to support the Tribal Court's "colorable claim" of jurisdiction. 862 F.3d at 1246. In both instances, the requirement of "catastrophic harm" was integral to the respective courts' rulings. It is not dicta.

In fact, other courts have cited the requirement of "catastrophic harm" for the application of the second *Montana* exception. For example, in *Ute Indian Tribe of Uintah v. Lawrence,* the district court found that, although the Tribal Court held that it had jurisdiction under the second *Montana* exception, the Tribe failed to argue any

"catastrophic consequences" requiring assertion of Tribal Court jurisdiction and the Tribal Court identified no facts supporting the conclusion. 312 F.Supp.3d 1219, 1244, n.31 (D. Utah 2018).

Similarly, in *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, the Shoshone-Bannock Tribes sought to impose regulations on the construction of single-family house by Evans, a non-Indian, on non-Indian fee land in the reservation. 736 F.3d at 1300-01. In seeking to exercise jurisdiction over Evans' land use, the Shoshone-Bannock Tribes "identif[ied] a variety of alleged problems flowing from Evans' construction project, including: (1) groundwater contamination; (2) improper disposal of construction debris; and (3) increased risk of fire." *Id*. at 1305.

Quoting extensively from *Plains Commerce Bank*, the Ninth Circuit held that, to invoke the second *Montana* exception, "the challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government.' *Plains Commerce*, 552 U.S. at 341, 128 S.Ct. 2709 (internal quotation and citation omitted)." *Evans*, 736 F.3d at 1306. The court determined that that "[t]he Tribes fail to show that Evans' construction of a single-family house poses *catastrophic risks*. The Fort Hall Reservation has long experienced groundwater contamination, and the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem." *Id*. (emphasis added). In addition, the court determined that "the Tribes'

generalized concerns about waste disposal and fire hazards are speculative, as they do not focus on Evans' specific project." *Id*. "Accordingly, the tribal court plainly lacks jurisdiction …." *Id*.

While the Tribe expounds at length the significance of water on the reservation (Tribe's Brief, pp. 44-45), the only specific instance of harm proffered by the Tribe is Tim Ignacio's testimony that "his alfalfa cuttings were significantly reduced and he was 'lucky to recover production costs' as the result of insufficient water flow in the Deep Creek Canal." Tribe's Brief, p. 36. However, injury to one individual tribal member that does not threaten the Tribe as a whole does confer jurisdiction over a non-Indian under the second Montana exception. *Cf. Norton*, 862 F.3d at 1247 (Tribal Court claims concerned actions that threatened an individual tribal member but did not threaten the Tribe as a whole); *Strate*, 520 U.S. at 456–59 (tort claims relating to traffic accident affected only one family).

In fact, the Tribe has never sought to quantify or explain the alleged harm to the Tribe as a whole – not before the Tribal Court, before the district court, or on this appeal. Neither does the Tribe explain to this Court how much water it is entitled to use in comparison to McKee's inconsequential use of water. Rather, the Tribe relies solely on the broad, conclusory statement of the Tribe's Water Engineer, Woldezion Mesghinna, Ph.D., P.E., that "no amount of the Ute Indian Tribe's Indian reserved water rights are [*sic*] 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." Tribe's Brief, pp. 45-46.

As set forth above, under the 1943 and 1946 Agreements, McKee receives approximately 108 acre-feet of water annually. Tribe's Appendix Vol. III, APP 344 (1943 Agreement) and APP 349 (1946 Agreement). McKee's use of approximately 108 acre-feet of water each year pales in comparison to the approximately 14,461.05 acre-feet of water UIIS is permitted to divert pursuant to Water Right 43-3011, the water right that supplies McKee's water pursuant to the Agreements.[4]

Under the duty established by the Utah State Engineer and Division of Water Rights, the water McKee is entitled to receive is only enough water to irrigate 36.28 acres of land. In the scope of both the volume of water that is subject to the 1943 and 1946 Agreements, a total of 108 acre-feet, and the total reserved water rights of the tribe, a minimum of 470,594 acre-feet, 108 acre-feet is miniscule and *de minimis*.

Further, under the Ute Indian Water Compact, which the Utah Legislature has approved but the Tribe has not, the Tribe is entitled to divert 470,594 acre-feet of water per year. Utah Code Ann. § 73-21-103. McKee's water use is thus less than one thousandth of one percent of the Tribe's water. Moreover, the Tribe may receive

[4] The McKee portion of this water right is 0.007483%.

an even larger amount of water, depending on whether its recent lawsuit against the United States in the District of Columbia prove successful. Tribe's Appendix Vol. VI, APP 951-1011 (D.D.C. Complaint).

The Tribe fails to explain how McKee's use of water pursuant to the 1943 and 1946 Agreements which McKee (and his predecessors-in-interest) have always paid assessments, is the type of "catastrophic" harm that permits the Tribal Court to exercise subject matter jurisdiction over McKee pursuant to the second *Montana* exception. If anything, McKee's use of water pursuant to the Agreements with the BIA is benefitting the Tribe because McKee has paid thousands of dollars in assessments to the BIA pursuant to the agreement, which helps fund the construction, operation, and maintenance of the UIIP that conveys water to the Tribe and its members, as well as non-Indians. Tribe's Appendix Vol. III, APP 345 (1943 Agreement), APP 350 (1946 Agreement), Vol. VI, APP 1015-1024 (Invoices).

Significantly, the Tribal Court made no findings regarding how much water flows through the Deep Creek Canal and Lateral No. 9, how many other water users use the Deep Creek Canal, how Defendants' water use pursuant to the Agreement compares to the amount of water flowing through Deep Creek Canal, and how the BIA manages this or other water deliveries from the Deep Creek Canal. *See* Tribe's Addendum 1, pp. 61-80 (Tribal Court Findings). In fact, no testimony was presented from any BIA officials regarding the Agreements or the deliveries of water to

Defendants pursuant to the Agreements. *See id*. In other words, the Tribal Court did not find that Defendants' use of water pursuant to the Agreements causes "catastrophic consequences" to the Tribe (*see Plains Commerce Bank*, 554 U.S at 341) or "imperil[s] the subsistence of the tribal community." *See Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 905 (9th Cir. 2019). Nor could it.

Put simply, McKee's use of water pursuant to the Agreements with the BIA, which the BIA continues to honor, is a very small drop in the Tribe's overall bucket of water. It cannot be considered catastrophic – or even significant – as required by *Montana*. Where the second *Montana* exception is inapplicable, the district court correctly dismissed the District Court Complaint because the Tribal Court lacked subject matter jurisdiction.

D. THE DISTRICT COURT CORRECTLY CHARACTERIZED THE MCKEE PROPERTY AND MCKEE'S USE OF WATER PURSUANT TO THE 1943 AND 1946 AGREEMENTS FOR PURPOSES OF DETERMINING WHETHER THE TRIBAL COURT LACKED JURISDICTION.

The Tribe argues that the district court could not "correctly analyze the issues in this case without correctly identifying the legal status of both the land and the water interests that are involved in the dispute." Tribe's Brief, p. 24. While any perceived defects in the district court's analysis of the "legal status" of the land and water interests may be germane to the merits of the Tribe's claim that McKee "stole"

water from the Tribe, they are irrelevant to a determination of whether the Tribal Court had jurisdiction.

For purposes of determining whether the Tribal Court had jurisdiction, the district court and this Court need only determine whether any of non-Indian McKee's alleged wrongful conduct occurred on Indian land (*Plains Commerce Bank*, 554 U.S. at 327) and/or whether McKee's use of water pursuant to the 1943 and 1946 Agreements "menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Montana*, 450 U.S. at 566. As set forth above, the district court correctly found that, for purposes of its jurisdictional analysis, neither of these circumstances existed.

Further, as set forth below, the Tribe has failed to demonstrate that any of the district court's purported "errors" with respect to tangential facts invalidate its determination that where the Tribe lacks regulatory authority over McKee's diversion of the disputed water, the Tribal Court lacked jurisdiction over the dispute. Tribe's Addendum 3, p. 17 (District Court Order.) Where none of these alleged "errors" affects the substantial rights of the parties, they should be disregarded by this Court on appellate review. *See* 28 U.S.C.A. § 2111.

1. Whether the McKee Property is a Former Indian Allotment Was Not the Basis for the District Court's Determination of That the Tribal Court Lacked Jurisdiction.

The Tribe argues that the district court decided this matter on the premise that the McKee Property is a former Indian allotment because it "apparently believed that if the McKee land was a former Indian allotment, then the McKee Defendants would be legally entitled to divert water from the Deep Creek Canal." Tribe's Brief, p. 25. The Tribe is wrong again.

First, the language cited by the Tribe appears in a footnote of the District Court Order discussing the Tribe's underlying claims of misappropriation. Tribe's Addendum 3, pp. 2-3, n.1 (District Court Order.) At no point in the footnote does the district court opine that McKee is entitled to divert water. Indeed, the district court explicitly stated that it did "not hold, and should not be understood to suggest, that Defendants' use of the water is lawful or justified. The court simply does not reach that issue." Tribe's Addendum 3, p. 18 (District Court Order).

Second, while the district court seemed skeptical of the Tribe's claim that the disputed water and waterways were held in trust solely for the Tribe, this was clearly not the basis of the district court's actual holding that the Tribal Court lacked jurisdiction over the dispute because the Tribe lacked regulatory authority over the Deep Creek Canal. Tribe's Addendum 3, p. 17 (District Court Order.) In sum,

whether the McKee Property is a former Indian allotment was not ultimately relevant to the district court's ruling.

2. Whether "In Trust for the Indians" is "Coextensive With 'in Trust for the Tribe'" Was Not the Basis for the District Court's Determination That the Tribal Court Lacked Jurisdiction.

The Tribe asserts that the district court took the language of *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994) out of context to suggest that "legal title to the UIIP ditches and canals is held in trust for the benefit of *individual* Ute Indians, not for the Tribe itself." Tribe's Brief, p. 27. The Tribe's reading of the District Court Order is not only wrong, but it also ignores the basis for the district court's ruling that the Tribal Court lacked jurisdiction.

In providing a historical context for the UIIP in footnote 1 of the District Court Order, the district court quoted the actual language of *Hackford*, which states:

> The 1906 Act provided for construction of a system held in trust ***"to irrigate the allotted lands of the ... Utes,"*** 1906 Act, 34 Stat. at 375. (emphasis added). ***Allotted lands refers to lands held in severalty by individual Indians***. See [*Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n. 1, (1976)]; *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972)]; *see also* Ute Constitution art. VIII, §§ 1, 2 … (defining tribal and allotted lands.) Tribal lands, on the other hand, consisted of the unallotted lands of the reservation.
>
> Absent express language in the Partition Act concerning the Project itself, the phrases ***"in trust for the Indians" in the 1906 Act is not coextensive with "in trust for the tribe" in the Partition Act in light of the purposes behind each Act. The 1906 Act's purpose was to provide irrigation for the allotted, not tribal, lands***. The Ute

> Partition Act's purpose was to divide the tribal assets, including the tribal lands, between the full and mixed-bloods, without effect on the allotted lands.

14 F.3d at 1468 (emphasis added). It is difficult to see how the district court's verbatim quotation of the historical background of the 1906 Act is "out of context."

The district court also cited the 1923 Decree and Permanent Injunction in *United States v. Cedarview Irrigation Co.*, No. 4427 (D. Utah 1923) (the "**1923 Cedarview Decree**") (Tribe's Appendix II, at 169), on which the Tribe relies, which determined that the United States held the water in question "as Trustees of the *Indians* on the former Uintah and Ouray Indian Reservation." Tribe's Addendum 3, p. 2, n.1 (District Court Order). However, the district court never actually determined that legal title to the UIIP ditches and canals is held in trust for the benefit of individual Ute Indians, to the exclusion of the Tribe. The district court simply quoted the language of *Hackford* and *Cedarview* and noted that it had some question as to whether all of the water is held in trust for the Tribe. Addendum 3, p. 2, n.1 (District Court Order).

Again, the Tribe failed to show how the district court's historical exposition in footnote 1 formed the basis for the district court's ruling that the Tribal Court lacked jurisdiction over the dispute. Tribe's Addendum 3, p. 17 (District Court Order.)

3. Whether the Tribe has Beneficial Ownership of All Water Conveyed Through Deep Creek Canal Was Not the Basis for the District Court's Determination That the Tribal Court Lacked Jurisdiction.

As set forth above, the district court made no determination regarding ownership of the Deep Creek Canal, the water in the Deep Creek Canal, or McKee's right to divert any water. It is not disputed that the 1923 Cedarview Decree gives the "United States, and the Secretary of the Interior as Trustees of the Indians on the former Uintah and Ouray Indian Reservation"… "the first and exclusive right under a priority that antedates the third day of October, [1861], at all times to divert [water] from the Uintah River and its tributaries by certain ditches and canals," including the Deep Creek Canal. Tribe's Appendix II, pp. 169-171 (1923 Cedarview Decree.)

However, as the district court ultimately concluded, the Tribe's beneficial ownership interests in the Deep Creek Canal and the water therein did not give the Tribe any regulatory authority over the canal, the water, or non-Indians diverting water from the canal onto non-Indian fee land. Where the Tribe had no regulatory authority, the Tribal Court lacked jurisdiction. Tribe's Addendum 3, p. 17 (District Court Order.)

4. The District Court Did Not Take Improper "Judicial Notice" of the Tribe's Currently Pending Breach of Trust Lawsuit.

The Tribe contends that the district court "erred in taking judicial notice of the Tribe's currently pending breach of trust suit against the United States…." Tribe's

Brief, p. 31. Again, the Tribe's characterization of the district court's historical exposition in footnote 1 overstates the importance of the district court's observation.

The Tribe argued to the district court, as well as in this Court, that the water at issue is reserved water under the *Winters* Doctrine. McKee argued below that that amount of water has never been quantified because the Tribe refuses to ratify the Ute Indian Water Compact, as approved by Congress and the State of Utah. The district court simply noted "it appears that the portion of the water that belongs to the Tribe [under the *Winters* Doctrine] is currently a matter of dispute and litigation among the United States, the State of Utah, and the Tribe" and quoted McKee's argument. Tribe's Addendum 3, p. 2, n.1 (District Court Order.) The district court's observation is certainly correct, but was not necessary to its decision.

The district court made no determination regarding the water in dispute and did not consider the pendency of the action in its jurisdictional analysis. It is difficult to see how the district court's brief reference to McKee's argument resulted in reversible error, especially where the Tribe fails to provide any analysis demonstrating prejudice from the district court's "speculative musings." *See* Tribe's Brief, p. 32.

II. THE DISTRICT COURT CORRECTLY REFUSED TO ENFORCE THE TRIBAL COURT JUDGMENT WHERE THE TRIBAL COURT LACKED SUBJECT MATTER JURISDICTION.

A. STANDARD OF REVIEW

Recognition and enforcement of tribal court judgments as a matter of comity lies within the discretion of the court. *See MacArthur v. San Juan County* 497 F.3d 1057, 1067 (2007). Accordingly, this Court reviews the district court's decision not to enforce the Tribal Court Judgment for abuse of discretion.

B. THE DISTRICT COURT COULD NOT ENFORCE THE TRIBAL COURT JUDGMENT "ON PRINCIPLES OF COMITY" WHERE THE TRIBAL COURT LACKED SUBJECT MATTER JURISDICTION

The Tribe makes various policy arguments, urging that the Tribal Court Judgments should be enforced by the district court on principles of comity. Tribe's Brief, pp. 47-48. However, a federal court may recognize and enforce a tribal court's judgment only if the tribal court had jurisdiction to decide the dispute before it. "[R]ecognition of a tribal court judgment must be refused" and "***comity must not be granted*** where the tribal court lacked either personal or subject matter jurisdiction." *MacArthur*, 497 F.3d at 1067 (emphasis added).

As set forth above, the Tribal Court lacked subject matter jurisdiction, making its judgment void and unenforceable. This alone precluded the domestication and enforcement of the Tribal Court's void judgment by the district court. "If the tribal

court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains Commerce Bank* at 324.

Thus, the district court's first – and dispositive – inquiry was whether the Tribal Court had subject matter jurisdiction to enter the Tribal Court Judgment. Where the Tribal Court lacked jurisdiction, the Tribe's action to enforce the Tribal Court Judgment could only be dismissed.

C. THE UTE LAW AND ORDER CODE CANNOT CONFER SUBJECT MATTER JURISDICTION OVER NON-INDIAN ACTIVITY OCCURRING ON FEE LAND IF THE MONTANA EXCEPTIONS CANNOT BE SHOWN.

The Tribe seems to suggest that its Law and Order Code ("**UTE LOC**") extends the Tribal Court jurisdiction over McKee's contract with the BIA. *See* Tribe's Brief, pp. 38-39. For obvious reasons, this argument is untenable. It has long been held, that absent two narrow exceptions, that Indian tribes have been divested of any jurisdiction over non-Indians. *E.g., Montana*, 450 U.S. at 564–65.

Due to the strong presumption that the Tribe cannot exercise jurisdiction over non-Indians, on or off the reservation, the Tribe cannot extend jurisdiction denied it under *Montana* over non-Indians through the UTE LOC. *E.g., Plains Commerce Bank*, 554 U.S. at 329. Otherwise, any tribe would be able to easily accomplish an end run around the requirements of the *Montana* exceptions and render *Montana* meaningless. Despite any provision of the UTE LOC, the Tribe must prove that the

Tribal Court has subject matter jurisdiction to enforce the code or ordinance under one of the *Montana* exceptions.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE TRIBE'S MOTION TO AMEND ITS COMPLAINT WHERE ITS PROPOSED AMENDMENT IS FUTILE TO CONFER JURISDICTION ON THE TRIBAL COURT.

A. STANDARD OF REVIEW.

This Court reviews a district court's decision whether to grant leave to amend for abuse of discretion. *See Bylin v Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (citing *Harrison v. Wahatoyas, L.L.C.,* 253 F.3d 552, 559 (10th Cir. 2001). "A district court abuses its discretion if its decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (citing *Orr v. City of Albuquerque*, 417 F.3d 1144, 1153 (10th Cir.2005). "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or ***futility of amendment***." *Frank v. U.S. West, Inc.,* 3 F.3d 1357, 1365 (10th Cir. 1993) (emphasis added).

B. THE PROPOSED AMENDMENT TO THE DISTRICT COURT COMPLAINT COULD NOT CURE THE TRIBAL COURT'S LACK OF JURISDICTION.

The Tribe asserts that it should have been permitted to amend its District Court Complaint to assert a new claim to enforce the 1923 Cedarview Decree. However, the district court found that the Tribe's allegations regarding the 1923 Decree "do

not cure the Tribal Court's lack of jurisdiction over the conduct at issue here—nothing in the *Montana* exceptions (or any other source of law of which the court is aware) authorizes a Tribal Court to enforce a federal court judgment in a case in which it otherwise lacks jurisdiction." Tribe's Addendum 3, p. 17 (District Court Order).[5]

The district court found that the proposed amended complaint did not allege any freestanding claims arising out of the 1923 Decree—rather, the case remains an "an action to recognize, register, and enforce a tribal court money judgment under principles of comity." Tribe's Addendum 3, p. 17 (District Court Order). In other words, amendment of the District Court Complaint could not change the nature of the action in the district court or remedy the defects in the underlying Tribal Court action.

Accordingly, the district court properly held that the proposed amendment to the District Court Complaint was futile to remedy the Tribal Court's fatal lack of jurisdiction and properly dismissed the District Court Complaint with prejudice. Tribe's Addendum 3, p. 17 (District Court Order).

[5] The 1923 Cedarview Decree was not even mentioned in the Tribal Court and provides no new grounds for Tribal Court jurisdiction.

C. DISMISSAL OF THE DISTRICT COURT COMPLAINT WITH PREJUDICE DOES NOT BAR THE TRIBE FROM BRINGING ITS CLAIMS IN STATE OR FEDERAL COURT.

While the district court dismissed the District Court Complaint with prejudice, the district court did not rule that the Tribe had no remedy for any alleged "theft" of water or that the Tribe had no avenue for enforcement of the 1923 Cedarview Decree. Indeed, it specifically stated that its decision did not "bar the Tribe from bringing suit against Defendants in state or federal court." Tribe's Addendum 3, p. 18 (District Court Order). The Tribe remains free to do so.

CONCLUSION

The District Court correctly determined that the Tribal Court lacked jurisdiction over the McKee Appellees – non-Indians farming their non-Indian land. The Tribe's sovereign powers do not give it jurisdiction over non-Indians on non-Indian land. The Tribe did not demonstrate to the district court or to this Court the existence of either of the two *Montana* exceptions to the presumption that the Tribal Court lacks jurisdiction over the activities of non-Indians on non-tribal lands. There is no consensual relationship between McKee and the Tribe. McKee properly receives and uses water under decades-old Agreements with the BIA and has no consensual or contractual dealings with the Tribe regarding the McKee Property or the water McKee receives pursuant to the 1943 and 1946

Agreements. McKee's use of the contracted water neither imperils the Tribe nor causes catastrophic harm to the Tribe.

Accordingly, the District Court properly granted McKee's Motion for Summary Judgment, declining to enforce the Tribal Court Judgment against McKee based upon the lack of jurisdiction in the Tribal Court. The District Court also acted within its discretion to deny the Tribe's Motion to Amend when the amendment was futile to resolve the Tribal Court's lack of jurisdictions. The District Court Order should be affirmed in all respects.

STATEMENT REGARDING ORAL ARGUMENT

Mr. McKee requests oral argument because of obvious significance to his life and livelihood. McKee believes that the parties and the Court will all benefit from oral argument.

DATED this 8th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because this brief 11,617 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Local Rule 32(A). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office Word Times New Roman, 14-point font.

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Dated: March 8, 2021.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, MANAGED ANTI-VIRUS, Version 6.6.23.329, last update 3/8/2021, and according to the program is free of viruses.

/s/ Jennie B. Garner
Jennie B. Garner

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2021, a true and correct copy of the **CORRECTED BRIEF OF APPELLEES GREGORY D. MCKEE, T & SL LIVESTOCK, INC., MCKEE FARMS, INC., AND GM FERTILIZER, INC,** was served via the ECF/NDA system, which will send notification of such filing to all parties of record as follows:

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