CASE 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, et al.,	)
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

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. Rule 26.1, the Appellants Ute Indian Tribe of the Uintah and Ouray Reservation ("Ute Tribe") submits the following corporate disclosure statement:

The Ute Indian Tribe is a sovereign Indian tribe and has no parent corporation or other parent entity, and no publicly held corporations owns 10% or more of its stock.

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The Plaintiff/Appellant, the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe" or "Ute Tribe"), respectfully submits its opening brief.

STATEMENT OF RELATED CASES

There are no related cases.

STATEMENT OF JURISDICTION

The Tribe's suit below seeks federal court recognition and enforcement of a tribal court judgment on grounds of comity. The Tenth Circuit has long recognized that "[t]he question of the regulatory and adjudicatory authority of [Indian] tribes—a question bound up in the decision to enforce a tribal court order—is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331." *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1066 (10th Cir. 2007) (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985)). Thus, the district court properly ruled that federal question jurisdiction exists under 28 U.S.C. § 1331 for the Tribe's suit below. App. X, 1797-98. The Tribe's appeal is taken from a final judgment entered on August 28, 2020, which disposed of cross-motions for summary judgment filed by the parties on the threshold question of the tribal court's jurisdiction over the underlying tribal court suit. App. X, 1811. The district court granted summary judgment in favor of the Defendants/Appellees ("the McKee Defendants"), and dismissed the Tribe's complaint on grounds the Ute Indian Tribal Court did not possess jurisdiction over the non-Indian, nonmember

McKee Defendants. App. X, 1792.[1] The Tribe's notice of appeal was timely filed on Monday, September 28, 2020, under the Federal Rules of Appellate Procedure, Rule 4(a)(1)(A) and Rule 26(a)(1)(C). App. X, 1812.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the district court erred in (*i*) its determinations of the status of the land owned by the McKee Defendants inside the exterior boundaries of the Uintah and Ouray Reservation; and (*ii*) its conclusions regarding ownership of the tribal water that the Ute Indian Tribal Court determined the McKee Defendants had illegally diverted, misappropriated, and converted to private use.

2. Whether an Indian tribe's inherent sovereign powers (*i*) to manage its tribal territory and resources, and (*ii*) to exclude nonmembers from its territory and resources, encompasses the power to exclude nonmembers from illegally diverting and misappropriating (stealing) the tribe's federally-reserved and federally-decreed tribal waters.

3. Whether the district court erred in determining that the tribal court lacked jurisdiction over the McKee Defendants under the two exceptions recognized

[1] The district court entered a single 19-page Memorandum Decision and Order, but issued it twice, once under ECF No. 88, and then under ECF 89. The Tribe has included both Decisions and Orders in its appendix, App. X at 1792 and 1847; however, to avoid confusion, and because the two documents contain the same identical text, the Tribe will limit its references in its brief to the Decision and Order contained in ECF No. 89, found at App. X, 1792.

by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544, 566 (1981)—the so-called "*Montana* exceptions."

4. Whether the McKee Defendants were barred by issue preclusion from relitigating the substantive merits of the case, and if so, whether the district court erred in permitting Defendants to repudiate the sworn testimony and admissions Defendants made in the underlying tribal court suit. Alternatively, whether the Defendants' diametrically opposing presentation of the facts in tribal court and in federal court present a genuine issue of material fact that precluded the district court from granting the McKee Defendants' summary judgment motion.

5. Whether the district court erred in denying comity to the judgment of the Ute Indian Tribal Court. Alternatively, whether the district court erred in (*i*) denying the Tribe's motion to amend its complaint, and (*ii*) dismissing the Tribe's complaint with prejudice.

INTRODUCTION

This case appears to present an issue of first impression. Does an Indian tribe's inherent sovereign powers (*i*) to manage its tribal territory and resources, and (*ii*) to exclude nonmembers from its territory and resources, include the power to exclude nonmembers from illegally diverting and misappropriating (stealing) the tribe's federally-reserved and federally-decreed tribal waters? The district court answered that question in the negative and dismissed the Tribe's suit to enforce a tribal court judgment that awards the Tribe damages and injunctive relief against the McKee Defendants' long-standing theft of the Tribe's federally-reserved and federally-decreed tribal waters. The district court ruling is contrary to controlling Tenth Circuit and United State Supreme Court precedents. *E.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (affirming tribal jurisdiction to regulate hunting fishing by both tribal members and nonmembers inside the Mescalero reservation) (citing, *inter alia*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (affirming tribes' inherent authority to tax nonmembers' severance of tribal oil/gas resources) (other citations omitted); *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1246 (10th Cir. 2017) cert. denied sub nom. *Norton v. Ute Indian Tribe of Uintah & Ouray Reservation*, __ U.S. __, 138 S. Ct. 1001 (2018) (recognizing inherent tribal power to exclude nonmembers); *Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River*

Reservation, 670 F.2d 900, 903 (10th Cir. 1982) (affirming Indian tribes' inherent power and authority to protect their homeland against degradation and exploitation).

STATEMENT OF THE CASE

The leading treatise on Federal Indian law, *Cohen's Handbook of Federal Indian Law*, emphasizes in its opening chapter that "[h]istorical perspective is of central importance in the field of Indian law." *Cohen's Handbook of Federal Indian Law*, §1.01, p. 5 (Nell Jessup Newton ed., 2012). That caveat is nowhere more true than in this case where it is essential for the Court to understand the historical facts and shifts in federal Indian policy that underlie the issues presented by this case. *See Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994) (addressing the Tribe's *Winters* reserved water rights and the shifts in federal Indian policy over the last century).

Accordingly, the Tribe's Statement of the Case includes background information on the Ute Tribe, the Tribe's federally-adjudicated and decreed *Winters* reserved water rights, and the underlying tribal court suit that the Tribe prosecuted against the McKee Defendants.

A. Facts Pertinent to the Ute Indian Tribe

The Ute Indians once "ranged from the Wasatch Front all the way to the Colorado Front Range—from present-day Salt Lake City to Denver,"[2] and into

[2] Charles Wilkinson, *Fire on the Plateau, Conflict and Endurance in the American Southwest*, 128 (1999).

northern New Mexico.[3] In return for the Utes' cessions of vast tracts of valuable lands to the federal government in the nineteenth century, the United States executed treaties with the Utes that guarantee them a tribal homeland.[4] Three bands of the greater Ute nation—the Uintah Band, the White River Band, and the Uncompahgre Band—today reside on the Uintah and Ouray Reservation in Utah.

In 1905-06, the United States unilaterally broke apart the Tribe's reservation, allotted tribal lands in severalty to individual tribal members,[5] and opened the remaining "surplus" reservation lands to non-Indian settlement. *Hackford v. Babbitt*, 14 F.3d at 1459-60. An excellent reference for the events of 1903-1906 is District Court Bruce S. Jenkins' ninety-three page decision in *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd in part, rev'd in part*, 773 F.2d 1087 (10th Cir. 1985) ("*Ute III*") (en banc). Judge Jenkins recounted how Indian Inspector James McLaughlin was directed to meet with the Utes in 1903, ostensibly to obtain their consent to the allotment of their tribal lands:

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[3] Floyd A. O'Neil and Kathryn L. MacKay, *A History of the Uintah-Ouray Ute Lands*, University of Utah, at 2 (U. Utah, American West Center 1977).

[4] Ute Treaty of 1863 (13 Stat., 673); Ute Treaty of 1868 (15 Stat., 619); and Act of April 29, 1874, Ch. 136 (18 Stat., 36).

[5] An Indian allotment is a parcel of land "allotted" in severalty to an individual Indian, a practice authorized by the General Allotment Act of 1887, 24 Stat. 388 (also known as the Dawes Act). *See Cohen's Handbook*, §1.04; Ch. 16, § 1603[2][b].

> McLaughlin was in the peculiar position of one who was delegated to negotiate Indian consent to a chain of events that would occur regardless of the outcome of the negotiations. Accordingly, he argued to the Utes that they had no choice but to agree [to the forced allotment of their tribal lands] (quotation omitted).

Ute I, 521 F. Supp. at 1117. Judge Jenkins added:

> Inspector McLaughlin's approach to the Utes was reminiscent of the Athenian's approach to the Melians recounted by Thucydides in his History of the Peloponnesian War (ca. 416 b.c.):
>
> > ATHENIANS: "Then we on our side will use no fine phrases saying, for example, that we have a right to our empire because we defeated the Persians, … a great mass of words that nobody would believe …. Instead we recommend that you should try to get what it is possible for you to get, taking into consideration what we both really do think: since you know as well as we do that when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept."
>
> Thucydides, *The Peloponnesian War*, 401-402 (Penguin ed. 1954).
>
> As the City of Melos was besieged and captured by the Athenians, so the Uintah Reservation was allotted and opened by the Government against its residents' wishes.

Id., n. 36. The General Allotment Act of 1887 was meant to herald the "beginning of the end" of the American Indians and their reservation homelands. That era in American history, lasting from 1871 to 1934, is known as the period of Indian "Allotment and Assimilation." Under these twin federal policies, tribal lands were to be allotted in severalty to individual Indians who were then to be assimilated into

the larger American society.[6] As described by Judge Jenkins:

> President Theodore Roosevelt colorfully described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass."

Ute I, 521 F. Supp. at 1151. The Indian Reorganization Act (IRA), enacted in 1934—and continuing in effect today—25 U.S.C. § 5101 *et seq.*, implements a federal policy that is 180-degrees the opposite of allotment and assimilation. "The IRA halted the allotment of tribal land and recognized the right of tribes to adopt constitutions and corporate charters for self-governance." *Hackford*, 14 F.3d at 1461. The IRA was "specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976). The IRA's goal is to reestablish tribal governments, reconstitute tribal land bases, and revitalize tribal economies and cultures. *Cohen's Handbook*, §4.04[3][a], p. 256.

Pursuant to the IRA, the Uintah, White River, and Uncompahgre bands adopted a constitution and by-laws in 1937, establishing themselves as the Ute Indian Tribe of the Uintah and Ouray Reservation. Under its Constitution, the Tribe's governing body is a six-member Tribal Business Committee. Today, the Tribe has nearly four thousand enrolled members and over half its members live on its reservation.

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[6] *See Cohen's Handbook*, Ch. 1, §1.04.

The tribal government of the Uintah and Ouray Indian Reservation provides services to its members and manages the Reservation through multiple tribal departments and agencies, including land and minerals management, fish and wildlife management, housing and education departments, a tribal medical clinic, law enforcement, a tribal newspaper, and a tribal court system. The Tribe's governmental programs and tribal enterprises employ approximately 450 people, seventy-five percent of whom are tribal members. Water is the lifeblood of the Tribe's continued existence and its economic stability and viability.

B. The Tribe's *Winters* Reserved and Adjudicated Water Rights

The Uintah and Ouray Reservation is located on an arid and sparsely settled plateau at the foot of the Uinta Mountains in the northeastern corner of the State of Utah.[7] The State of Utah is the third most arid state in the country.[8] At times during the nineteenth century, Ute Indians in Utah were recorded as being in a "state of nakedness and starvation, destitute and dying of want." *Ute I*, 521 F. Supp. at 1094-

[7] According to the U.S. Board on Geographic Names, "Uinta" is the proper spelling for natural features, whereas "Uintah" is the spelling applied to political entities; however, the two spellings are often used interchangeably.
See http://www.uintabasin.info/ (last visited 2/1/2021).

[8] *See* https://www.worldatlas.com/articles/the-10-driest-states-in-the-united-states-of-america.html (ast visited on 2/1/2021). The Tribe asks the Court to take judicial notice of this fact. *Zimomra v. Alamo Rent-a-Car, Inc.*, 111 F.3d 1459, 1504 (10th Cir. 1997) ("Where, as here, a party requests a court to take judicial notice of adjudicative facts and supplies the court with the necessary information, Rule 201(d) requires the court to comply with the request.").

96. In 1905, the year of forced allotment of the Ute tribal lands, the Commissioner of Indian Affairs, in his annual report to Congress, provided a stark description of conditions on the Tribe's reservation, stating in pertinent part:

> The future of these [Ute] Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate.

Rept. of the Comm. of Ind. Aff., 1906, quoted in *Ute I*, 521 F. Supp. at 1126, and *Hackford*, 14 F.3d at 1460.

The following year, 1906—two years before the United States Supreme Court's seminal decision in *Winters v. United States*, 207 U.S. 564 (1908), discussed *infra*—Congress authorized construction of a project to irrigate "the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah."[9] The Congressional authorization stated, in pertinent part:

> [t]hat such irrigation systems shall be constructed and completed and held and operated … and the title thereto until otherwise provided by law shall be in the Secretary of the Interior in trust for the Indians….[10]

See also Hackford, 14 F.3d at 1467. The Indian irrigation project authorized in 1906 is known today as the Uintah Indian Irrigation Project (hereafter "UIIP" or the "Project"). Funds for construction of the UIIP came out of the proceeds from the

[9] "Allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ("trust" allotment) or owned by an Indian subject to a restriction on alienation in the United States or its officials ("restricted" allotment). *Cohen's Handbook* §16.03[1], p. 1071.

[10] Pub. L. 59-258, Stat. 325, 375.

Federal Government's forced sale of the Tribe's "surplus lands," which the Government sold to non-Indians at the price of $1.25 per/acre. *Ute I*, 521 F. Supp. at 1099. The 1906 Act stated expressly that "the cost of said entire [irrigation project is] to be reimbursed from the proceeds of the sale of the [surplus] lands within the former Uintah Reservation."[11] As described by Judge Jenkins:

> The [Ute Indian Irrigation] Project covered 80,000 acres, most of the [Indian] allotted lands, and contained 22 canal systems which diverted water from most of the streams in the Uintah Basin. A program was initiated to level, clear, plow, and fence the Indian allotments to get them into cultivation. Tribal funds were used for this purpose. (emphasis added)

*Id. a*t 1126 n.165 (quoting *A History of the Uintah-Ouray Lands* at 34).

a. The Utah State Law Water Certificate No. 1234

When Congress authorized the UIIP in 1906, it was two years before the Supreme Court's seminal decision in *Winters v. United States*, *supra*, discussed *infra* at 13-14. At that time, in 1906,

> … officials on the [Ute] reservation believed that state water law would be applied to the Indian reservation and that, without irrigation and water rights protection, the Indians would be left out of the Utah state scheme based on priority of use.

Hackford v. Babbit, 14 F.3d at 1467. For this reason, the Federal government applied to the Utah State Engineer in 1905 to appropriate water for the Indians and was

[11] The use of the phrase "former Uintah Reservation," reflects the prevailing understanding in 1906 that the opening of the Uintah and Ouray Reservation had the legal effect of terminating the status of tribal lands as "reservation lands."

granted, among other certificates of appropriation, Certificate No. 1234, for the diversion of water from the Whiterocks River into the "U.S. Deep Creek Canal." App. II, 167-68. Certificate No. 1234 includes an extensive list of all the Indian lands that were to be irrigated through the "U.S. Deep Creek Canal"—one of the many canals of the UIIP, the Ute Indian Irrigation System. *Id*., *see also Ute I*, 521 F. Supp. at 1126 n.165. The list of lands entitled to receive water through the Deep Creek Canal is critical to this case because the fee land owned by the McKee Defendants is *not* on the list of lands entitled to receive water from the Deep Creek Canal under Certificate No. 1232. The reason the McKee land is not listed in Certificate No. 1232 is because the McKee land is neither an Indian allotment, nor a former Indian allotment—the only type of lands entitled to receive tribal water through the UIIP. Further, the list of lands under Certificate No. 1234 was later incorporated by reference into the Utah federal district court's 1923 decree adjudicating the Ute Tribe's *Winters* reserved water rights in the Whiterocks and Uinta rivers, as discussed in more detail *infra*. App. II, 169-75.

b. *Winters v. United States*

In 1908—two years after Congress authorized construction of the UIIP—the U.S. Supreme Court issued its seminal ruling in *Winters v. United States*, 207 U.S. at 575-76. The federal government had filed suit in *Winters* to enjoin up-stream non-Indians in Montana from interfering with the flow of the Milk River onto the Fort

Belknap Indian Reservation. The non-Indians in *Winters* had challenged the Indians' water rights, contending that their Montana state water rights took precedence over the Indians' water rights. *Id*. The Supreme Court disagreed, holding that the federal government's reservation of the Fort Belknap Reservation pursuant to a Treaty with the Gros Ventre and Assiniboine Tribes had included an implied reservation of water sufficient to meet the Indians' need for a permanent homeland. *Id*. at 576-78. Under that holding, known today as the *Winters* doctrine, the priority date of federally-reserved Indian water rights is the date on which a tribe's reservation was established. *Winters* reserved water rights become a vested tribal property right upon the date the reservation is established. *Arizona v. California*, 373 U.S. 546, 600 (1963) (finding that Indian reserved water rights are "present perfected" rights as the term is used in the 1922 Colorado River Compact). Since *Winters*, the Supreme Court has also "ruled that Indian reserved rights to water are determined by federal, not state law." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

c. The Adjudication of the Tribe's Waters on the Uinta and White Rock Rivers

As in *Winters*, in the early twentieth century conflicts arose between the Ute Indians and their non-Indian neighbors in the Uintah Basin over access to the surface streams flowing onto the Tribe's reservation. Thus

> In 1925, the United States filed two actions to enjoin various irrigation companies from interfering with the Indians prior use of waters of the

> Lake Fork, Whiterocks, and Uintah Rivers which flowed through the [UIIP] project area. *United States v. Dry Gulch Irrigation Co.*, No. 4418, slip op. (D. Utah 1923); *United States v. Cedarview Irrigation Co.*, No. 4427 slip op. (D.Utah 1923).

Hackford, 14 F.3d at 1461.

> [T]he United States argued that the water flowing through the [UIIP] Project irrigation systems was Indian reserved water under *Winters*, 207 U.S. 564, 28 S.Ct. 207, entitled to a October 3, 1861 priority date.

Id. at 1469. The final decrees in *Dry Gulch* and *Cedarview* contain injunctions against "interference with [UIIP] Project water." *Id.* Thus, in this case the McKee Defendants' illegal diversion, misappropriation, and conversion of tribal waters violates the *Cedarview* adjudication decree and injunction. App. II, 169-75. The Decree states in pertinent part that the Ute Indians of the Uintah and Ouray Reservation

> …have the first *and an exclusive right* under a priority that antedates the third day of October, 1881 [sic], at all times to divert from the Uintah River and its tributaries by certain ditches and canals water in certain quantities … for the irrigation of certain lands and for certain domestic, culinary and stock-raising uses all as described and fixed by the following schedule and other parts of this decree.[12] (emphasis added)

The Cedarview Decree identifies twenty-six (26) separate UIIP irrigation canals, including the Deep Creek Canal—the canal from which the McKee Defendants

[12] The date 1881 in the Cedarview Decree is a typographical error, the Tribe's Uintah Valley Reservation was established by Executive Order on October 3, 1861. App. X, 1815-16.

illegally diverted, misappropriated, and converted tribal waters to private use. App. II, 171. The Cedarview Decree then identified the lands "to be irrigated" with the tribally-decreed water rights by incorporating into its Decree the lands that are identified by their legal descriptions in the 1905 Utah State certificates of appropriation, including Certificate No. 1234.[13] App. II, 171. In turn, Certificate No. 1234 identifies, by legal description, each of the tracts of Indian allotment land that are entitled to receive tribal waters diverted from the Whiterocks River and conveyed through the "U.S. Deep Creek Canal." App. II, 167-68. As noted above, the McKee land is *not* on the list of lands identified in Certificate No. 1234 as an Indian allotment entitled to irrigation water from the Deep Creek Canal.

C. The Facts Giving Rise to the Tribal Court Suit Against the Defendants

In July of 2012—at the height of the summer irrigation season on the Uintah and Ouray Reservation—a non-Indian woman named Maggie McKee hand-delivered a letter to the Tribal Business Committee during one of the Committee's regularly-scheduled meetings. App. II, 153. Ms. McKee informed the Tribe that her non-Indian husband, Gregory (Greg) McKee, from whom she was estranged, was diverting water from the Deep Creek Canal "*from a 4" pipe buried into the Deep*

[13] The Cedarview Decree states, "The said 34,700.09 acres of land to be irrigated and the other uses under said [UIIP] ditches and canals are as more particularly described in the final certificates of appropriation for the several said named ditches and canals as the same may appear on the records of the office of the State Engineer of the State of Utah, and which are numbered to wit: ….1234…." App. II, 171.

Creek Canal illegally." Ms. McKee's letter also advised that Greg McKee was using water from the Deep Creek Canal to "*flood irrigate*" his 120-acre property. A copy of Ms. McKee's letter is included in the Appendix. App. II, 153.

As noted *supra*, the McKee property is private fee land that was sold to non-Indians when the United States opened the Tribe's reservation to non-Indian settlement in 1905. App. II, 156-57. As private fee land, the McKee property is neither an Indian allotment, nor a former Indian allotment—the only two categories of land that are entitled to receive tribal water through the UIIP. And as private fee land, Mr. McKee's property is not included in the list of Indian trust lands that are entitled to receive tribal waters through the Deep Creek Canal as those lands were identified, by their legal descriptions, in the United States Indian Irrigation Service's 1905 Certificate of Appropriation, App. II, 167-68—land descriptions that were later later incorporated by reference into the 1923 Cedarview Decree, adjudicating the Tribe's water rights on the Whiterocks and Uinta Rivers. App. II, 171.

Upon receiving Ms. McKee's letter, the Tribal Business Committee directed its Water Engineer, Dr. Woldezion Mesghinna, Ph.D., P.E., to visit the McKee property the next day to document the illegal water diversions and to provide the Tribal Business Committee with an investigative report. The investigation revealed that Mr. McKee's diversions of tribal waters from the Deep Creek Canal had been prolific. For example, a State of Utah inspection report for the cattle feedlot that Mr.

McKee operates on his property contains a hand-written notation that the McKee property included an "*irrigation induced wetland*" on its premises. App. III, 330. Dr. Mesghinna's multiple photographs and written reports also document the extensive flood irrigation that was occurring on the McKee property in the late summer of 2012. App. II, 197-255; App. III, 306-91. Dr. Mesghinna later testified as an expert witness for the Tribe in its suit against the McKee Defendants in the Ute Indian Tribal Court. App. IV, 613-93.

D. The Tribal Court Litigation and that Court's Findings and Conclusions

The Ute Tribe filed suit against the McKee Defendants in its tribal court on September 6, 2012, seeking to recover damages and to enjoin the unauthorized diversion and misappropriation of tribal waters from the Deep Creek Canal. *Ute Indian Tribe v. McKee, et al.*, Ute Indian Tribal Court, case number CV-12-285. App. II, 136.

Mr. McKee, represented by Utah Attorney John Hancock, appeared before the tribal court and testified at a preliminary injunction hearing conducted on March 26, 2013. App. IV, 515-604. Thereafter, Mr. McKee failed to appear for either a subsequently scheduled deposition or for the two-day bench trial that was conducted in Mr. McKee's absence on July 13-14, 2015. App. V, 741-90.

Following the trial, the tribal court entered extensive Findings of Fact and Conclusions of Law, running to 27 pages, a copy of which is attached to the Tribe's

Opening Brief. App. II, 108-35. Among the tribal court's Findings of Fact are these:

> The McKee Property is traversed by the Deep Creek Canal and Lateral No. 9, both of which are conveyance channels for the Uintah Indian Irrigation Project ("UIIP"). The UIIP was established to provide irrigation water to Ute tribal trust and Indian allotment lands. The Ute Tribe is the beneficial owner of the Indian reserved waters conveyed through the Deep Creek Canal and Lateral No. 9 as described in a 1905 Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004), and subsequently recognized in a federal court decree dated March 16, 1923, copies of which were admitted into evidence as Plaintiff's Exhibits 5 and 6.
>
> The 1905 Certificate of Appropriation contains a lengthy legal description of Indian lands (some of which are now former allotment lands) that are entitled to tribal water from the Deep Creek Canal and the Canal's associated lateral ditches. The Tribe's Water Engineers, Dr. Woldezion Mesghinna, PhD., P.E., and Chad Hall, P.E., both testified that the McKee property is not identified as land entitled to receive water through the Deep Creek Canal under the 1905 Certificate of Appropriation of Water. Further, the Tribe's Request for Admission No. 1 asked Defendants to admit that "the McKee property is not identified as land entitled to irrigation water from the U. S. Deep Creek Canal or the Tabby White Canal under the State Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004), issued on June 15, 1905." By failing to respond to Plaintiff's Request No. 1, the Court finds that Defendants have admitted the McKee Property is not identified under the 1905 Certificate as land entitled to water from the Deep Creek Canal.
>
> The 1910 Patent conveyed title to the McKee Property subject to
>
> > . . . any vested and accrued water rights . . . and rights to ditches and reservoirs used in connection with such water rights . . . and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States . . . .

The Ute Tribe has established by clear and convincing evidence that Defendants have misappropriated tribal waters from Deep Creek Canal and Lateral No. 9 for application to the McKee Property since at least August 3, 1999. Defendants have used tribal waters to flood irrigate the McKee Property and to supply water to the cattle feedlot on the property.

The extent of the flood irrigation is documented in photographs taken by Chad Hall, P.E. on September 6, 2012. Those photographs, admitted as Plaintiff's Exhibit 10, show, *inter alia*, bulldozer tracks near an illegal diversion from the Deep Creek Canal; standing water in the McKee pastures; irrigation infrastructures including concrete culverts, earthen dams and illegal ditches for diverting water from Lateral No. 9; perforated PVC pipe, and housing for water pipeline valves.

Engineer Chad Hall and Brent Searle, McKee's former father-in-law, testified that McKee diverts water illegally from Deep Creek Canal above the weir that is located at Lateral No. 9. The purpose of the weir is to monitor the amount of water that is diverted into the lateral. By illegally diverting water from Deep Creek Canal above the weir for Lateral No. 9, Hall and Searle testified that McKee is able to conceal the actual amount of water that is diverted from Deep Creek Canal onto the McKee Property. Engineer Hall testified that vegetation around the illegal diversions structures is mature, and the concrete diversion culverts are old and rusted, suggesting to him that the illegal diversions have occurred for some time.

Mr. Searle testified that the McKee Property is located at the upper end of the Deep Creek Canal, meaning that when water from the Canal is diverted illegally onto the McKee Property, there is less water to flow down the Canal to other irrigators. The 1923 Decree in *U.S. v. Cedarville*, admitted as Plaintiff's Exhibit 3, locates the "head or intake" of the Deep Creek Canal in Section 5, Township 1 South, Range 1 East, USM, approximately 2.5 miles west of the McKee Property in Section 2 of that same Township and Range.

The Court heard testimony from Jack Horner, who worked for Greg McKee's father, Larry McKee for a period of three years, from approximately 1999 to 2001. Mr. Horner described an underground pipeline that Larry McKee installed to supply water to the cattle feedlot

> on the McKee Property. Brent Searle testified that the underground pipeline diverts water directly from the Deep Creek Canal, and that he was present on two occasions when maintenance work was performed on the pipeline.

App. II, 115-19, Tribal Court Findings of Fact Nos. 13-17, 19-21. The Tribe's monetary damages were quantified by Jason M. Bass, an economist and financial analyst, who testified as an expert witness for the Tribe at trial and whose written report was admitted into evidence. App. III, 406-13; App. V, 762-66.

The tribal court's Conclusions of Law included, *inter alia*:

> Indian water rights are vested property rights predicated on federal law. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Winters v. United States*, 207 U.S. 664, 577 (1908). Indian water rights are "reserved rights" because they are deemed an essential part of the tribe's reservation." *Arizona v. California*, 373 U.S. 546, 600, (1963).
>
> The importance of water to the survival of the Ute Indians is beyond dispute. Before the [Uintah and Ouray] Reservation was opened to non-Indian settlement, the Commissioner of Indian Affairs cautioned that "[t]he future of these Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate."
>
> * * * *
>
> 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).
>
> Under 25 U.S.C. § 194, the burden of proof was on the Defendants to establish their right to divert tribal waters from the Deep Creek Canal and Lateral No. 9. . . . Defendants have not met this burden.

App. II, 131-33, Tribal Court Conclusions of Law Nos. 1-3, 4-5. The tribal court entered its final judgment on September 29, 2015. App. V, 843-47.

The McKee Defendants did not appeal the tribal court's judgment to the Ute Indian Appellate Court and did not otherwise seek post-judgment relief through the Ute Indian Tribal Courts. App. I, 40 at ¶¶ 12-14; App. V, 851-56 (from the Ute Tribe's federal court summary judgment motion). To this day, the McKee Defendants have not satisfied any portion of the judgment entered by the tribal court.

E. The District Court Suit for Recognition and Enforcement

The Tribe instituted this federal court suit against the McKee Defendants on April 17, 2018, seeking recognition and enforcement of its tribal court judgment on grounds of comity. App. I, 15. The parties filed cross-motions for summary judgment on the threshold question of the tribal court's jurisdiction over the nonmember McKee Defendants. App. I at 29, App. II, III, IV and V (Tribe's summary judgment motion and exhibit appendix); App. VI (McKee Defendants' cross-motion for summary judgment and exhibit appendix).

The district court heard oral argument on November 21, 2019, App. X, 1699, and entered a memorandum decision and order and judgment on August 28, 2020. App. X 1792. The court dismissed the Tribe's complaint, ruling that the Ute Indian Tribal Court lacked tribal court jurisdiction over the McKee Defendants, and hence, the tribal court judgment would not be enforced. *Id*.

STANDARD OF REVIEW

An appellate court reviews a summary judgment *de novo*. *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959, 965 (10th Cir. 2019). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of demonstrating its entitlement to summary judgment beyond a reasonable doubt. *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987). When, as here, the parties have filed cross-motions for summary judgment, entry of summary judgment is nonetheless "inappropriate if disputes remain as to material facts." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

SUMMARY OF THE ARGUMENT

The district court erred in determining that the tribal court lacked jurisdiction over the McKee Defendants. The court further erred in not binding the McKee

Defendants to their sworn testimony and the admissions they made in the tribal court; alternatively, Defendants' differing testimony as to material facts created a genuine issue of material fact that precluded the entry of summary judgment in Defendants' favor. If the tribal court possessed jurisdiction over Defendants, then no grounds exist for denying comity to the tribal court judgment. Alternatively, if the Tenth Circuit determines that the tribal court lacked jurisdiction over the McKee Defendants, then the Tribe's motion to amend its complaint should have been granted, and the district court should not have dismissed the Tribe's complaint *with prejudice*.

ARGUMENT

I. THE DISTRICT COURT FAILED TO CORRECTLY IDENTIFY THE LEGAL STATUS OF THE LAND AND WATER INTERESTS INVOLVED IN THE TRIBAL COURT SUIT.

It is impossible to 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. And straight out the gate, the district court erred by erroneously labeling the McKee property as an Indian allotment. Next, the court erred in its construction of the 1923 Cedarview Decree, saying the words "'in trust for the Indians'" in the Decree is "not coextensive with 'in trust for the tribe.'" Finally, the district court erred in its assessment that the Ute Tribe does not beneficially own all the water that is conveyed through the Deep Creek Canal. Mem. Decision and Order,

p. 2 n. 1. App. X, 1793. ("[W]hile the court has no doubt that at least some of the disputed water is held in trust for the Tribe, it is far from clear that all of the water is so held."). These threshold errors require reversal. The Tribe will address each error in turn.

i. The McKee Property is Not a Former Indian Allotment

The district court decided this case by indulging in sheer speculation that the McKee property is a former Indian allotment, the court stating that:

> Many of the [Indian] allotted lands—including the McKee Property—were eventually transferred to non-Indians.

Mem. Decision, p. 2 n. 1. App. X, 1793. (citing *Hackford*, 14 F.3d at 1461 n.2). The district court 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. *United States v. Powers*, 305 U.S. 527, 532 (1939) ("[W]hen allotments were made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the [non-Indian] owners."). *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50-51 (9th Cir. 1981) (holding that a non-Indian purchaser of an Indian allotment was entitled to "participate ratably" with Indian allottees in the use of a Tribe's reserved water rights, quoting *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321,342 (9th Cir. 1957)).

However, there was *no* evidence before the court that the McKee property had ever been an Indian allotment. In fact, in the proceedings below, neither the Tribe nor the McKee Defendants asserted, or submitted evidence, to show that the McKee property was originally an Indian allotment. In its summary judgment motion the Tribe asserted, as an undisputed fact, that the land now owned by Mr. McKee was former reservation land that had been opened to non-Indian purchase in 1905, and further asserted that the United States had issued a patent to the land in 1910. App. I, 40-41, ¶ 18. A copy of the 1910 patent was included with the Tribe's exhibits, including the U.S. Bureau of Land Management's status report on the patent, which contains no reference to the McKee property having ever been a former Indian allotment. App. II, 158-60. The McKee Defendants' statement of material facts was to the same effect as the Tribe's. App. VI, 899, ¶ 2. Neither party asserted, nor submitted evidence, that the McKee property had ever been an Indian allotment. Parenthetically, if the McKee property had been an Indian allotment, the record title for the property would have included an Indian allotment patent in the chain of title, which it does not. *See Questar Explorat. and Product. Co. v. Lambeth*, No. 2:08-cv-455, 2010 WL 4782986 (D. Utah Nov. 16, 2010) (describing the Indian allotment patent in that case and further noting that the Indian Reorganization Act halted Indian allotments before the expiration of the 25 year trust period for allotment patents issued on the Uintah and Ouray Reservation).

Further, if the McKee property was a former Indian allotment, it would mean that the property remains a part of the Tribe's Indian country, as that term is defined in 18 U.S.C. 1151(a), under the Tenth Circuit holdings in the *Ute Tribe v. Utah* line of cases. Under the *Ute Tribe v. Utah* precedents, the Tribe's reservation boundary and its territorial jurisdiction extend to all "lands allotted to individual Indians that have passed into fee status after 1905." *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513, 1529-30 (10th Cir. 1997). Therefore, even if we assume, *arguendo*, that the McKee property is a former Indian allotment, it nonetheless would still mean that the district court erred in holding that the Ute tribal court lacked territorial jurisdiction over the McKee property.

ii. "In trust for the Indians" is "coextensive with "in trust for the tribe."

In a similar vein, the district court likely thought it had seized upon an easy disposition of this case when it came upon language in *Hackford* stating that "'in trust for the Indians' in the 1906 Act" (authorizing construction of the UIIP) "is not coextensive with 'in trust for the tribe'" as that phrase is used in the 1954 Ute Partition Act, 25 U.S.C. § 677. The district court then proceeded to take the *Hackford* language out of context, suggesting that legal title to the UIIP ditches and canals is held in trust by the United States for the benefit of *individual* Ute Indians, not for the Tribe itself. Mem. Decision, p. 2 n. 1. App. X, 1793 (quoting *Hackford*, 14 F.3d at 1461 n.2.). The district court then bolstered its observation by further

noting language in the Cedarview Decree which states that the water from the Whiterocks and Uinta Rivers were being adjudicated to the federal government "as Trustees of the *Indians* on the former Uintah and Ouray Indian Reservation." *Id*. (emphasis in original) The district court concluded its analysis by saying that the use of the word "Indians" instead of the word "tribe" confirmed the court's belief that "it does not follow that all of the UIIP waters are held in trust for the Tribe." *Id*.

Unfortunately, the district court's focus on individual words—the word "Indians" here, the word "tribe" there—achieves no useful purpose. Instead, we must recall the all-important caveat in the opening chapter of *Cohen's Handbook of Federal Indian Law*, that "[h]istorical perspective is of central importance in the field of Indian law." *Cohen's*, §1.01, p. 5. Of course the 1906 UIIP Act and the 1923 Cedarview Decree use the word "Indians" instead of "Indian tribe." But this is because the 1906 Act was enacted, and the 1923 Decree was issued, during the height of the allotment and assimilation era in federal Indian policy when Indian tribes and their reservations were being systematically dismantled. However, that era ended in 1934 with enactment of the Indian Reorganization Act ("IRA"), which continues in force and effect to this day. 25 U.S.C. § 5101 *et seq*. As noted *supra*, 8-9, the IRA implements a federal policy that is 180-degrees the opposite of allotment and assimilation. "The IRA halted the allotment of tribal land and recognized the right of tribes to adopt constitutions and corporate charters for self-

governance." *Hackford*, 14 F.3d at 1461. The IRA implements a federal policy of reestablishing tribal self-governance, *Fisher*, 424 U.S. at 387, reconstituting tribal land bases, and revitalizing tribal economies and cultures. *Cohen's Handbook*, §4.04[3][a], p. 256.

Accordingly, it is wrong to suggest, as the district court did here, that the UIIP was built to "provide irrigation for the allotted, not tribal lands." Mem. Decision, p. 2 n. 1. App. X, 1793. While that statement may accurately reflect the Congressional intent, or belief, in 1906, the IRA reversed the federal policies of allotment and assimilation, and in the 87 years since the IRA was enacted in 1934, the Ute Tribe has been reconstituting its tribal land base by buying back many of the former Indian allotments on its reservation, including fractional interests in some of the allotments.[14] And the Tribe itself is the record owner of the former allotments it has purchased; hence, it is no longer accurate to say that the UIIP conveys water exclusively to "allotted, not tribal lands."

The district court's misapprehension of these essential facts constitutes reversible error.

[14] In fact, Mr. McKee holds agricultural lease agreements with the Tribe and the Bureau of Indian Affairs on five former allotment lands which the Tribe has purchased, making these "tribal lands" that are today receiving tribal water for irrigation through UIIP canals and lateral ditches. *See* App. II, 249-52; V, 857-65.

iii. The Ute Tribe Owns All Water Conveyed Through Deep Creek Canal.

For all the reasons identified above, the district court also erred in speculating that the Ute Tribe is perhaps not really the beneficial owner of the water, or all the water, that is conveyed through the Deep Creek Canal. *See* Mem. Decision, p. 2 n. 1. App. X, 1793. As above, the district court grounded its speculation on the use of the word "Indians" in the 1906 Act and the 1923 Cedarview Decree, which, in the court's view, means that beneficial ownership of the *Winters* reserved waters resides in *individual* Ute Indians, not the Ute Tribe itself. Not only is that reasoning untenable, but it's also contrary to the Tenth Circuit's recognition in *Hackford* that the water right adjudicated in *Cedarview* is a property interest owned by the Tribe, not its individual tribal members. *Id.* at 1468 ("the water right itself is a tribal right.").

Under the *Winters* doctrine, the Tribe's reserved water rights were vested in the *Tribe*, not its individual members. The vesting occurred on the day President Abraham Lincoln signed the Executive Order establishing the Uintah Valley Reservation—October 3, 1861. App. X, 1815-16. That vesting, in 1861, occurred 44 years *before* the Tribe's lands were broken apart in 1905 and allotted to individual tribal members. So of course, given this chronology, the water right itself is a tribal right, as the Tenth Circuit correctly recognized in *Hackford*.

The district court also erred in taking judicial notice of the Tribe's currently pending breach of trust suit against the United States, *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 1:18-cv-00546 (D.D.C), as additional grounds for the court's speculation, observing in footnote 1, that "it appears that the portion of the water that belongs to the Tribe is currently a matter of dispute and litigation among the United States, the State of Utah and the Tribe." This statement is misleading. The Ute Tribe acknowledges that not all of its water rights have been adjudicated; to date there has been no adjudication of the Tribe's water rights in the Duchesne River, the White River or the Green River. However, the fact that the Tribe's water rights in other surface waters have not been adjudicated is quite beside the point because the Tribe's water rights in the source water for the Deep Creek Canal and Lateral No. 9—the Uinta and Whiterocks rivers——*have been adjudicated*. Hence, the district court erred by indulging in speculative musings to the complete disregard of the language of the Cedarview Decree—a decree issued by the very district court on which the district court judge sits. The Tribe points out that the unproven allegations contained in pleadings in a pending lawsuit are not "facts" that are properly subject to judicial notice under Rule 201 of the Federal Rules of Evidence. Furthermore, it is axiomatic that a court may not judicially notice materials for the truth of the matters asserted, as the district court did here. *See Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006).

As opposed to the district court's speculative musings, there simply is no evidence that the water conveyed through Deep Creek Canal is owned by anyone *but* the Ute Tribe. The Cedarview Decree could not be more explicit. It states that the United States, on behalf of the Ute Tribe, "has the first *and an exclusive right* … to divert from the Uintah River and its tributaries" through "certain ditches and canals," including, expressly, the "Deep Creek Canal." App. II, 171. The district court may also have been suggesting that the McKee Defendants were simply diverting unappropriated and excess water from Deep Creek Canal. Again, however, there was no evidence before the district court to support the court's speculation that Deep Creek Canal contains *any* unappropriated or excess water. Therefore it was reversible error for the district court to exalt speculation and conjecture over the undisputed material facts that the Tribe had submitted to the court in its summary judgment motion and supporting exhibits.

II. AN INDIAN TRIBE'S INHERENT SOVEREIGN POWERS TO MANAGE ITS TRIBAL TERRITORY AND RESOURCES AND TO EXCLUDE NONMEMBERS FROM ITS TRIBAL TERRITORY AND RESOURCES MUST NECESSARILY INCLUDE THE POWER TO EXCLUDE NONMEMBERS FROM ILLEGALLY DIVERTING AND MISAPPROPRIATING (STEALING) THE TRIBE'S FEDERALLY-RESERVED AND FEDERALLY-DECREED TRIBAL WATERS.

A long line of Supreme Court precedents recognize that Indian tribes "have the power to manage the use of [tribal] territory and resources by both members and nonmembers." *Mescalero*, 462 U.S. at 335 (affirming tribal jurisdiction to regulate

hunting fishing by both tribal members and nonmembers inside the Mescalero reservation) (citing, *inter alia*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 140 (1982) (affirming tribes' inherent authority to tax nonmembers' severance of tribal oil/gas resources) (other citations omitted). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

A Tribal power is an "essential attribute of Indian sovereignty" if it "is a necessary instrument of self-government and territorial management." *Norton*, 862 F.3d at 1246 (affirming inherent tribal power to exclude nonmembers) (citing *Merrion*, 455 U.S. at 137). *See also Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d at 902-04) (affirming Indian tribes' inherent power and regulatory authority to protect their homeland against degradation and exploitation).

The Tenth Circuit has recognized that a tribe's sovereign power to exclude nonmembers may be guaranteed under its treaty with the United States. *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 712-14 (10th Cir. 1982) (holding the federal OSHA statute did not abrogate by implication the Navajo Tribe's sovereign power of exclusion which is guaranteed to the Tribe under its treaty with the United States). Significantly, the Ute Tribe's 1868 Treaty with the United States contains the same guarantee, the Ute Treaty stating, in pertinent part:

> The United States agree … [that the Ute Tribe's reservation] … shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named … and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, excepts as herein otherwise provided.

Ute Treaty of 1868, subsequently affirmed in Act of June 1880, 21 Stat. 199. App. X, 1826, Art. 2; App. X, 1836.

Accordingly, 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 authority to exclude nonmembers from tribal *waters*. That is especially true, when, as here, the waters in question have been *adjudicated* and a federal court decree has determined the Indian tribe to be the beneficial owner of the water in question. These are the *operative facts* of this case. The 1923 Cedarview Decree states expressly that the Ute Indians have the first "and an *exclusive* right" to divert water from the Uintah River and its tributaries for conveyance through the UIIP ditches and canals, including expressly, the Deep Creek Canal. (emphasis added) App. II, 171.

The Tenth Circuit has recognized that tribal authority over tribal waters constitute one of the "four critical elements necessary for tribal sovereignty"—the other three essential elements being tribal jurisdiction over its land, its members, and

its mineral rights and other natural resources. *See City of Albuquerque v. Browner*, 97 F.3d 415, 418 and n.2 (10th Cir. 1996) (affirming an Indian tribe's authority to adopt water quality standards under the Clean Water Act).

Parenthetically, a district court's obligation to follow the precedent of higher federal court extends not merely to "the narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law." *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1279 (10th Cir. 2001) (citation omitted).

Here, however, the district court distinguished the foregoing precedents by saying, effectively, that water is not *land*, and that the foregoing precedents apply strictly to tribal lands, not tribal *water*. The district court then reasoned that McKee's illegal diversion of tribal water took place on private fee land, not tribal lands, and hence, the foregoing authorities are inapposite and the Ute Tribe has no regulatory or adjudicatory jurisdiction over McKee's illegal diversion of tribal water because the illegal diversion occurred on private fee land. *See* Mem. Decision, pp. 3, 8-13. App. X, 1793, 1799-1804.

In effect, the district court imposed a hyper-technical limitation on a tribe's "core sovereign rights to exclude and to self-govern," *Norton*, 862 F.3d at 1241, restricting the jurisdictional analysis to the locus of the nonmember's conduct (tribal land or fee land?) to the exclusion of any other consideration, including, importantly,

the locus of injury or harm that results from a nonmember's conduct. In this case, the tribal court found specifically that the "McKee property is located at the upper end of Deep Creek Canal, meaning that when water from the Canal is diverted illegally onto the McKee Property, there is less water to flow down the Canal to other irrigators [down stream]." App. II, 118 ¶ 20. Downstream tribal members testified to the injury they had suffered as a result of McKee's illegal diversions, including tribal member Tim Ignacio, who testified 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. App. II, 120 ¶ 23.

The district court's mechanistic limitation on a tribe's "core sovereign rights to exclude and to self-govern" is contrary to tribal sovereignty jurisprudence. As the Supreme Court explained in *Mescalero*:

> [B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." [citation omitted] In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members and nonmembers, [citations omitted], to undertake and regulate economic activity on the reservation.

Mescalero, 462 U.S. at 334-35. And as the Ninth Circuit has held:

> [L]imiting a tribe's regulatory power over nonmember conduct to that which directly interferes with a tribe's inherent powers to exclude and

> manage its own lands … would restrict tribal sovereignty absent explicit authorization from Congress—an approach we [have] specifically rejected….

Knighton v. Cedarville Rancheria of Northern Paiute Indians, 922 F.3d 892, 901 (9th Cir. 2019), *cert. denied*, __ U.S. __, 140 S. Ct. 513 (2019); *see also Smith v. Salish Kootenai College*, 434 F.3d 1127, 1135 (9th Cir. 2006) (holding that the inquiry into tribal court jurisdiction is not limited to precisely where the claim arose, but whether the claim bears some direct connection to tribal lands).

The district court also relied heavily on language in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008). However, *Plains* is distinguishable, both factually and legally, and thus, is not dispositive. Importantly, the tribal court litigation in *Plains* involved neither Indian trust property, nor an Indian tribe exercising its "core sovereign rights to exclude and to self-govern." *Norton*, 862 F.3d at 1241. Instead, *Plains* involved litigation between a non-Indian bank and a non-Indian individual over private fee property. As such, *Plains* did not implicate—and did not require the Supreme Court to even consider or address—an Indian tribe's "core sovereign rights to exclude and to self-govern."

The district court also reasoned that, "[t]o the extent the Tribe's argument rests on the existence of an easement [for the Deep Creek Canal and Lateral Ditch 9], the court rejects it, citing a recent Supreme Court decision for the proposition that "easements are not land." Mem. Decision, p. 11n. 1. App. X, 1802, citing *United*

States Forest Serv. v. Cowpasture River Pres. Ass'n, __ U.S. __, 140 S. Ct. 1837, 1845 (2020). While 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." J. Bruce & J. Ely, *Law of Easements and Licenses in Land*, § 1:1, p. 1–5 (2015). In any event, the Ute Tribe's reliance on its sovereign power to exclude relates more specifically to its tribal waters that are conveyed through the Deep Creek Canal and Lateral No. 9, instead of the easements for the UIIP conveyance channels per se.

III. THE DISTRICT COURT ERRED IN RULING THAT THE TRIBAL COURT LACKED JURISDICTION OVER THE MCKEE DEFENDANTS UNDER THE EXCEPTIONS RECOGNIZED IN *MONTANA v. UNITED STATES*.

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court recognized that Indian tribes possess the inherent sovereign power to regulate (1) activities of all non-Indians who willingly enter into a consensual relationship with the Tribe or its members, and (2) activities upon tribal lands that imperil the Tribe's political integrity, economic security, or health and welfare. The Ute Indian Tribal Court concluded that it possessed jurisdiction over the McKee Defendants under both of the *Montana* exceptions. In particular, the tribal court concluded that under the Tribe's Law and Order Code

> … the Tribe's territorial jurisdiction extends to "all waters, water storage facilities and irrigation works owned by or held in trust for the Ute Tribe and Ute Indian allottees." UTE LOC, §1-2-2(1)(g). The

> Uintah Indian Irrigation Project is held by the United States in trust for the Tribe. Accordingly, the Tribe's territorial jurisdiction extends to the Deep Creek Canal and Lateral Ditch No. 9 and to the tribal waters within the Canal and Ditch even when, as here, the Ditch and Canal cross fee property such as the McKee Property. Because the Tribe's territorial jurisdiction extends to the Deep Creek Canal and Lateral Ditch No. 9, and the tribal waters therein, the Tribal Court has adjudicatory jurisdiction to "determine the ownership thereof or rights therein." UTE LOC, §1-2-4. The Tribe's long-arm jurisdiction extends to any person who "causes a tortious injury to the Tribe, tribal members, or to any trust land, allotted land, fee land, or any other property within the Tribe's territorial jurisdiction," and any action "outside the Tribe's territorial jurisdiction which causes actual injury or damage inside the Tribe's territorial jurisdiction, where such injury or damage was reasonably foreseeable." UTE LOC, § 1-2-3(2)(E) and (G). In addition, the Tribe's Law and Order Code includes an implied consent provision under which any person "entering the territorial jurisdiction of the Ute Tribe as defined in Section 1-2-2 shall be automatically subject to the jurisdiction of the Courts of the Ute Indian Tribe." UTE LOC § 1-2-3(4).

App. II, 132-33, Tribal Court Conclusions of Law Nos. 3-4; *see* Tribal Law and Order Code at App. V, 868-72.

i. A Consensual Relationship Existed Between McKee and the Tribe and between McKee and a Tribal Member.

Mr. McKee has agricultural leases on at least five former Indian allotments that are now owned by the Ute Tribe. Under those agricultural leases, Mr. McKee is obligated to "comply with all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies." App. V, 861 ¶ 16. The evidence before the tribal court also included Mr. McKee's affidavit attesting to his long-standing farming partnership with tribal member Frank

Arrowchis. In his affidavit, Mr. McKee stated:

> During the meeting with the Ute Tribe, Respondent [Maggie McKee], and her father accused me and my long time business associate and tribal member Frank Arrowchis ("Mr. Arrowchis") of stealing tribal water, illegally leasing tribal land and burying diseased cattle on tribal land.
>
> Mr. Arrowchis has been a business associate of my family for decades.
>
> My business activities with Mr. Arrowchis include sharecropping, and bartering cattle, hay and farm services.
>
> Losing this business association with Mr. Arrowchis would be extremely damaging to my business/farming operations.

App. II, 256-57. At the tribal court's preliminary injunction hearing, Mr. McKee testified that he and tribal member Frank Arrowchis had been farming partners since at least 2006, and in advancement of their partnership, McKee testified that he routinely accessed tribal lands owned by the Ute Tribe to conduct farming operations on tribal lands that the Tribe had under an assignment agreement with Arrowchis. App. IV, 531:17 – 534:7. A copy of the McKee/Arrowchis Farming Agreement was entered into evidence in the tribal court. App. VIII, 1320.

Consequently, there was ample evidence before the tribal court to support the existence of a consensual agreement between both Mr. McKee and the Tribe, and between McKee and tribal member Frank Arrowchis. It is the Tribe's belief that tribal member Arrowchis knew of Mr. McKee's illegal diversion of tribal waters from the Deep Creek Canal, but that Arrowchis concealed that information from the Tribe

in order to advance his commercial relationship with Mr. McKee. The tribal court also found that McKee's farming activities on the tribal lands assigned to Arrowchis constituted a trespass:

> There is no dispute that Frank Arrowchis has received 160 acres of assignments of tribal lands from the Ute Indian Tribe. The Tribe in making assignments of its own trust lands can impose any conditions on the use of such lands at it deems appropriate. The Assignment Committee Ordinance No. 94-001 (January 24, 1994), at Article X, Section 5 specifically proscribes leasing of such assignments or their "use by any person other than the assignee's immediate family. [McKee] does not dispute that he farms all or part of the Arrowchis assignments but contends that where he simply bills Arrowchis a specified hourly rate for faming services, harvests the crops and stores them at [his] feedlot, and receives payment from Arrowchis in crops rather than [cash], such arrangement does not violate Ordinance 94-001. The language of the Ordinance is broad and the arrangement between Arrowchis and defendant constitutes use by any person other than the family of Arrowchis.

App. II, 128-29 ¶ 47.

ii. The Second *Montana* Factor is Also Satisfied.

Under the second *Montana* exception, 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." *Montana*, 450 U.S. at 566. The district court rejected application of the second *Montana* exception on the ground that the second exception "may be invoked only if the challenged conduct could 'fairly be called catastrophic for tribal self-government,'" citing *Norton*, 862 F.3d at

1246, and *Plains Commerce*, 554 U.S. at 341.

The district court then reasoned that "a diversion of a total of $142,718 worth of water over the course of sixteen years" cannot "fairly be called catastrophic for tribal self-government." Mem. Decision at 17, App. X, 1808.

The district court's reliance on the quoted language in *Norton* and *Plains* is untenable. To begin with, the quoted language is *dicta* in both *Norton* and *Plains*. An entire chapter in *The Law of Judicial Precedent* is devoted to the difference between *dicta* and precedent:

> The holding of an appellate court constitutes the precedent as a point necessarily decided. *Dicta* do not: they are merely remarks made in the course of a decision but not essential to the reasoning behind that decision.

Bryan A. Garner, et al., *The Law of Judicial Precedent*, 44 (2016). The quoted language from *Norton* and *Plains*—implying that *Montana's* second exception applies only if a nonmember's conduct poses a catastrophic threat to a tribe—was not actually litigated by the parties in either *Norton* or *Plains*. In *Norton*, the Tenth Circuit reversed a federal court injunction against a tribal court suit against nonmember police officers for trespass. The actual holding in *Norton* is quite narrow—that the federal district court had to stay its hand to allow for the exhaustion of tribal court remedies in that case. *Norton*, 862 F.3d at 1251-52. Hence, the *Norton* Court was not required to make, and did not make, any holding as to the applicability of *Montana's* second exception in that case.

Similarly, as noted above, the tribal court litigation in *Plains* involved neither Indian trust property, nor an Indian tribe exercising its "core sovereign rights to exclude and to self-govern." *Norton*, 862 F.3d at 1241. Instead, *Plains* involved litigation between a non-Indian bank and a non-Indian individual over private fee property. As such, it is factually and legally distinguishable from the case at bar. Further, as Chief Justice Roberts noted, "[n]either the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception." *Plains*, 554 U.S. at 340-41. Insofar as the lower federal courts had not relied on the second *Montana* exception, that issue was not squarely before the Court in *Plains* and thus was not "necessarily decided" in *Plains*. The Supreme Court itself has long recognized that dicta in its opinions is not binding on subsequent courts as authority or precedent:

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

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

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

Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013) (emphasizing that there was "one important fact" to distinguish *Kirtsaeng* from the *Quality King* case) (emphasis in original) (underscore added).[15]

The Ute Tribe asks the Tenth Circuit to uphold the tribal court's ruling that *Montana's* second exception applies under the facts of this case, and to do so under the reasoning that the Ninth Circuit articulated by in *Walton*:

> A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things. Cf. *Montana*, — U.S. at —, 101 S.Ct. at 1259 (complaint did not allege peril to subsistence or welfare of tribe from non-Indian hunting and fishing on fee lands).
>
> Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and

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

> semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

Walton, 647 F.2d at 52. As part of their cross-motion for summary judgment, the McKee Defendants argued that their diversions of water from Deep Creek Canal were "miniscule and *de minimis*." Def. Mem., App. VII, 1078. To counter that self-serving (and false) narrative, the Tribe submitted a Declaration from the Tribe's Water Engineer, Dr. Woldezion Mesghinna, Ph.D., P.E., which states, in pertinent part:

> [T]here is a very limited water supply on the Uinta River in the Deep Creek Canal, in particular, during the later growing season in about mid-July, August and September the flows are quite low and most of the years there is a shortage of water supply to satisfy the water requirements for even the most senior, 1861 water right lands. There is no storage for Tribal water rights to supplement its natural flow shortages in the River, and irrigators with Tribal water rights from the Deep Creek Canal fail to receive sufficient irrigation water even during average flow years during the latter part of the irrigation season and, as a result, the senior Indian water right holders suffer with low crop yields that translates into reduced income.
>
> If water users with invalid water rights share water with the irrigators using senior Indian water rights, the shortage of irrigation water is further exacerbated resulting in more diminished income for Tribal water users.
>
> * * * *
>
> The Ute Indian Tribe's Indian Reserved Water Rights, the water rights involved in the McKee case, are all part of the Colorado River System, and no amount of the Ute Indian Tribe's Indian reserved water rights are unimportant or miniscule in the face of the serious drought and water shortages faced by citizens of the seven states in the Colorado River System, combined with the Ute Indian Tribe's need to promote

the economic vitality and health of the Tribe and its members.

App. VIII, 1401-03 ¶¶ 20-21, 25. Based on the foregoing, the Ute Tribe urges the Tenth Circuit to find *Montana's* second exception satisfied here.

IV. THE DISTRICT COURT ERRED IN ALLOWING DEFENDANTS TO REPUDIATE THE SWORN TESTIMONY AND ADMISSIONS THEY MADE IN THE UNDERDLYING TRIBAL COURT SUIT. ALTERNATIVELY, DEFENDANTS' DIAMETRICALLY OPPOSING PRESENTATION OF CRITICAL FACTS IN TRIBAL COURT AND IN FEDERAL COURT PRESENT A GENUINE ISSUE OF MATERIAL FACT THAT PRECLUDES THE ENTRY OF SUMMARY JUDGMENT IN DEFENDANTS' FAVOR.

In the tribal court, Greg McKee testified unequivocally, *inter alia*, that he irrigated his entire 120-acre property with water diverted from the Deep Creek Canal. App. IV, 599:14 – 600:18. In federal court, however, McKee changed his story and asserted, *inter alia*, that he diverted water from Deep Creek Canal only to irrigate the bottom 40 acres of his property. This was only one of several discrepancies between McKee's testimony and legal arguments in the tribal court on the one hand, and in federal court on the other hand. *See* Tribe's Motion for Leave to Clarify, App. X, 1621. The doctrine of issue preclusion precluded Defendants from relitigating the issues that were decided in the Tribe's favor in the tribal court. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction … proper deference to the tribal court system precludes relitigation of issues … resolved in the Tribal Courts."); *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (same); *see also In re Corey*,

583 F.3d 1249, 1251 (10th Cir. 2009) ("The doctrine of issue preclusion prevents a party that has lost the battle over an issue in one lawsuit from relitigating the same issue in another lawsuit."); Restatement (Second) of Judgments, § 27 (1980). Accordingly, the district court erred in not binding Defendants to the issue decided against them in the tribal court. Alternatively, to the extent the district court failed to recognize the existence of genuine issues of material fact—including the question of McKee's credibility—and to the extent the district court otherwise relied on speculation and conjecture in awarding summary judgment to the Defendants, the Tenth Circuit should reverse the summary judgment entered in Defendants' favor. *E.g., Madison v. Deseret Livestock Co.*, 574 F.2d 1027, 1036-37 (10th Cir. 1978) (reversing summary judgment where credibility was at issue).

V. THE DISTRICT COURT ERRED IN DENYING COMITY TO THE TRIBAL COURT JUDGMENT. ALTERNATIVELY, THE DISTRICT COURT ERRED IN DISMISSING THE TRIBE'S COMPLAINT WITH PREJUDICE AND IN DENYING THE TRIBE'S MOTION TO AMEND ITS COMPLAINT.

The decision to enforce a tribal court judgment is a matter of discretion exercised under principles of comity. *See McArthur*, 497 F.3d at 1060; *see also Chesapeake Life Ins. Co. v. Parker*, No. 18-C-643, 2018 WL 4188469 at * 204 (E.D. Wis. Aug. 31, 2018) (enforcing a tribal court judgment). In furtherance of a court's discretion to enforce a tribal court judgment, the importance of tribal courts and the dignity that are to be afforded to their decisions weigh in favor of enforcing a tribal

court judgment. *Id*. at 1067.

"As a general policy, '[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *FMC Corp. v. Shoshone-Bannock Tribes*, No. 4:14-cv-489, 2017 U.S. Dist. LEXIS 161387 at 26 (D. Idaho 2017), quoting *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997). The interest of the United States includes "(1) furthering the congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed in the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary." *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997). Each of these interests would be advanced by the recognition and enforcement of the tribal court judgment in this case.

Alternatively, if this Court determines that the Ute Indian Tribal Court lacked jurisdiction over the McKee Defendants, then the Ute Tribe should be allowed to amend its complaint to allege claims against the McKee Defendants in federal court. *See, e.g.*, *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978) (holding that federal question jurisdiction existed for a Tribe's lawsuit to recover damages to tribal property caused by the Defendant's off-reservation conduct). In fact, the Tribe sought leave to amend its complaint to seek redress against the McKee Defendants on grounds, *inter alia*, that Defendants'

misappropriation of tribal waters violated the injunction that is contained in the 1923 Cedarview Decree. App. IX at 1461. *See Berman v. Denver Tramway Corp.*, 197 F.2d 946, 950 (10th Cir. 1952) (recognizing that federal judgments can be enforced through subsequent federal court suits).

The district court denied the Tribe's motion to amend its complaint on the ground that the proposed amendment would be futile. Mem. Decision at 18, App. X, 1809. However, an amendment to the Tribe's complaint would not be futile. The amendment would not be time-barred. *Cty. of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 244 (1985) (holding that there is no time bar on an Indian tribe's federal common-law right of action for violations of the tribe's possessory right in its property). And the amended complaint would also be within the court's federal question jurisdiction under 28 U.S.C. § 1331. *Pueblo of Isleta*, 570 F.2d at 301-03.

Finally, the district court erred in dismissing the Tribe's complaint *with prejudice*. When, as here, a complaint is dismissed on jurisdictional grounds—in this case, for lack of tribal court jurisdiction—then the dismissal should be *without* prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d1213, 1218 (10th Cir. 2006) ("[O]ur prior, long-standing line of cases require[s] that dismissal for lack of jurisdiction be without prejudice."). Accordingly, the Tribe asks the Tenth Circuit to reverse the district court's dismissal of its complaint with prejudice.

CONCLUSION

Based on the facts and authorities cited herein, the district court erred in denying comity to the tribal court judgment. Alternatively, the district court erred in denying the Tribe's motion to amend its complaint and in dismissing the Tribe's complaint with prejudice. The Tribe prays for a ruling that reverses the district court's orders granting summary judgment to the McKee Defendants and denying the Tribe's motion for summary judgment. Alternatively, the Tribe prays for a reversal of the district court's orders denying the Tribe's motion to amend its complaint and dismissing the Tribe's complaint with prejudice.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because of the obvious significance of this case to the Ute Indian Tribe. In addition, in light of the case's complex procedural history, and the complexity of the legal issues before the Court, the Tribe believes that the parties and the Court will both benefit from oral argument.

Respectfully submitted this 2nd day of February, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 12,957 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 365 MSO.

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 365 MSO 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/ Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING 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 02/02/21, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: *s/ Frances C. Bassett*
Frances C. Bassett

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2021, a copy of this **APPELLANT'S OPENING BRIEF**, was served via the ECF/NDA system which will send notification of such filing to all parties of record as follows:

Clark R. Neilsen
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Defendants/Appellees

I hereby certify that within five (5) days after notification of acceptance from the Court, seven (7) copies of the foregoing **APPELLANT'S OPENING BRIEF**, will be delivered by courier to the Clerk of the Court, U.S. Tenth Circuit Court of Appeals.

By: *s/ Debra A. Foulk*
Assistant to Frances C. Bassett

ADDENDUM

- Ute Indian Tribal Court's Findings of Fact and Conclusions of Law, *Ute Indian Tribe v. McKee*, case number CV 12-285, entered on August 3, 2015

- The Ute Indian Tribal Court's Decree of Judgment (corrected) in *Ute Indian Tribe v. McKee*, case number CV 12-285, entered on September 29, 2015

- Memorandum Decision and Order Denying Plaintiff's Motion for Summary Judgment, *Ute Indian Tribe v. McKee*, case number 2:18-cv-000314

- Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment, *Ute Indian Tribe v. McKee*, case number 2:18-cv-000314

- Judgment Dismissing Complaint in *Ute Indian Tribe v. McKee*, case number 2:18-cv-000314

ADDENDUM 1

Ute Indian Tribal Court's Findings of Fact and Conclusions of Law,
Ute Indian Tribe v. McKee, *et al.*, case number CV 12-285,
entered on August 3, 2015

THE UTE INDIAN TRIBAL COURT OF THE UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

UTE INDIAN TRIBE, Plaintiff, v. GREGORY D. MCKEE, T & L LIVESTOCK, INC., MCKEE FARMS, INC., and GM FERTILIZER, INC. Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** CASE NO. CV12-285

This matter came before the Court on July 13, 2015, for trial on the merits of the claims under the Plaintiff Tribe's First Amended Complaint for Declaratory Judgment, Theft/Conversion/Misappropriation, Trespass, Conspiracy and Injunctive Relief. As discussed more fully below, the Court has personal jurisdiction over Defendants under the Tribe's Law and Order Code, Section 1-2-3, captioned "Personal Jurisdiction and Long Arm Civil Jurisdiction." The Court has subject matter jurisdiction under the Tribe's Law and Order Code, Section 1-2-2, subsections (1)(g) and (2),[1] as well as the Tribe's inherent jurisdiction as a sovereign, which is discussed in more detail below. At trial the Tribe was represented by Attorneys Frances Bassett

[1] As amended by Ordinance 13-010, on March 27, 2013.

and Jeffrey Rasmussen. Defendants did not appear for trial. The Tribe presented documentary and testimonial evidence, and at the conclusion of trial the Court took the matter under advisement.

PROCEDURAL HISTORY

The Tribe's original complaint was filed on September 6, 2012, together with a verified motion for issuance of a temporary restraining order and request for expedited hearing. Process was served on Mr. Gregory (Greg) McKee the following day, and counsel for both parties attended a telephonic hearing on September 20, 2012, after which the Court issued a temporary restraining order. Because of the unavailability of a court reporter, the September 20th hearing was continued to September 25, 2015, and in the interim both parties submitted briefs with attached affidavits and evidentiary materials. Following the hearing on September 25th, the Court issued a second temporary restraining order dated October 1, 2012. A preliminary injunction hearing was scheduled for November 15, 2012.

On October 25, 2012, Defendant McKee, through counsel, filed an Answer to the Complaint, and the next day Mr. McKee's attorney filed a Notice of Withdrawal of Counsel.

On November 14, 2012, the day before the scheduled preliminary injunction hearing, Mr. McKee's newly-retained counsel, the John D. Hancock Law Group, requested a continuance of the preliminary injunction hearing. The Court granted the continuance on the condition that the restraining order entered on October 1, 2012 "shall continue in force pending the rescheduled hearing."

A rescheduled hearing was held on March 26, 2013, beginning at 1 p.m. At the hearing both parties submitted documentary evidence and Mr. McKee was examined by counsel for both

parties. In addition, the Tribe presented the testimony of its expert, Dr. Woldezion Mesghinna, P.E., of Natural Resources Consulting Engineers, Inc. ("NRCE"), the company that functions as the Tribe's Water Engineer.[2] During a break in the hearing, Mr. McKee's attorney advised the Court that he was unavailable to continue the hearing the next day. Attorney Hancock also requested leave of the Court in order to secure an expert witness on Mr. McKee's behalf.[3]

On April 15, 2013, the Defendant filed a motion to dismiss the Tribal Court suit, challenging the subject matter jurisdiction of the Tribal Court, and alternatively alleging that the United States was a necessary and indispensable party to the suit. The Tribe opposed the motion through a memorandum filed on May 16, 2013. The Tribe concurrently filed a motion to amend its complaint to allege, *inter alia*, claims against Defendant McKee's business entities as additional defendants, T & L Livestock, Inc., McKee Farms, Inc., and GM Fertilizer, Inc.

The Tribe's motion to amend its complaint was granted on August 8, 2013, and the amended complaint was filed on September 4, 2013. The McKee business entities were served with process on October 22, 2013, and the Defendants filed an answer to the First Amended Complaint on November 5, 2013.

On June 2, 2014, the Court denied the Defendants' motion to dismiss for lack of jurisdiction. In addition, the Court ruled that the United States was not a necessary and indispensable party to the suit.

[2] Transcript of Preliminary Injunction March 26, 2013.
[3] *Id.*, pp. 104:6 – 109:25; 186:23 – 192.

Pursuant to a scheduling order issued on January 15, 2015, trial was scheduled to begin on July 13, 2015. Deadlines for completing discovery were set and subsequently modified under an Amended Scheduling Order entered on April 15, 2015.

On June 5, 2015, the Tribe filed an expedited motion requesting a court order to compel Defendants to respond to the Tribe's written discovery and to compel Defendant Greg McKee to appear for a deposition.

On June 6, 2015, the Court ordered Defendants to respond to the Tribe's written discovery by Wednesday, June 10, 2015.

Defendants did not respond to the Tribe's written discovery as ordered, and instead, on June 10, 2015, the due date for Defendants' discovery responses, Defendants' counsel, John D. Hancock Law Group, PLLC, filed a motion to withdraw as Defendants' counsel.

The Tribe did not object to the motion to withdraw, but did press the Tribe's pending motion to compel, observing that simply because "Defendants are apparently asking their attorney to withdraw does not provide a basis for delaying the entry of the motion to compel."

The Court agreed. By order issued on June 12, 2015, the Court granted defense counsel's motion to withdraw, and at the same time directed Defendants to respond to Plaintiff's written discovery by June 25, 2015, and for Defendant Greg McKee to appear for a deposition "on or before July 1, 2015."

Defendants never responded to the Tribe's written discovery and Mr. McKee never appeared for a deposition as ordered by the Court.

On July 31, 2015, the Tribe filed a motion for discovery sanctions in the form of attorney fees and costs, negative inferences, and deemed admissions based on the Defendants' failure to respond to the Tribe's Request for Admissions.

On July 31, 2015, the Tribe submitted its proposed Findings of Fact and Conclusions of Law. The Tribe concurrently filed a motion seeking to dismiss without prejudice Counts Three and Four of the First Amended Complaint, which alleged claims for nuisance and civil conspiracy. The Court has granted the motion to dismiss Counts Three and Four without prejudice.

FINDINGS OF FACT

JURISDICTIONAL FACTS

1. Plaintiff Ute Tribe is a federally recognized Indian Tribe, organized with a Constitution approved by the Secretary of Interior under the Indian Reorganization Act of 1934, 26 U.S.C. § 476. At all times relevant, the Tribe has occupied the Uintah and Ouray ("U&O") Reservation in northeastern Utah. The Tribe commenced this action on its own behalf and as *parens patriae* on behalf of its tribal members.[4]

2. Defendant Greg McKee is a non-Indian with business offices in Lapoint, Uintah County, Utah. Defendants T&L Livestock, Inc., McKee Farms, Inc., and GM Fertilizer, Inc., are Utah corporations, and Defendant McKee is the registered agent for each corporation.

3. The U&O Reservation is a union of two reservations, the Uintah Valley Reservation, established by Executive Order and Congressional action,[5] and the Uncompahgre

[4] First Amended Complaint, ¶3.
[5] Reprinted in I C. Kappler, Indian Affairs: Laws and Treaties 900 (2d ed. 1904), 13 Stat. 63.

Reservation, established through Executive Order on January 5, 1882.[6]

4. In litigation to determine the reservation boundaries, the Tenth Circuit ruled that neither the Uintah Valley Reservation nor the Uncompahgre Reservation was diminished as a result of allotment acts that opened the reservations to non-Indian settlement in 1905. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1093 (10th Cir. 1985) (*en banc*) (hereinafter "*Ute III*").

5. Nine years later, however, in a state court criminal prosecution initiated by the State of Utah, the U.S. Supreme Court ruled—contrary to the *Ute III* holding—that the Uintah Valley Reservation was diminished (though not disestablished) under the 1905 allotment legislation. *Hagen v. Utah*, 510 U.S. 399 (1994).

6. *Hagen*, however, did not delineate the scope of the diminishment. That question was left for the Tenth Circuit to resolve when the State of Utah and Ute Tribe subsequently filed competing motions to uphold, or conversely, to recall the *Ute III* mandate. The Tenth Circuit refused to withdraw its prior mandate; the Court said it would modify the mandate but only to the extent necessary to conform to the narrow decision in Hagen. *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513, 1519 (10th Cir. 1997) ("*Ute V*"). The Court concluded that the Reservation was diminished but only to the extent of "lands that passed from trust to fee status pursuant to non-Indian settlement under the 1902-1905 allotment legislation." *Id.* at 1529-31.

7. The Tenth Circuit emphasized that "*Hagen* did not erase the [exterior] boundaries of the Uintah Valley Reservation," relying on the *Hagen* Court's own language that the Uintah Valley Reservation was "'diminished'—not 'disestablished,' 'eliminated,' or 'terminated.'" *Id.* (quoting *Hagen v. Utah*, 510 U.S. at 414). The Court acknowledged that the *Hagen* ruling

[6] Reprinted in I C. Kappler, Indian Affairs: Laws and Treaties 901 (2d ed. 1904).

resulted in a checker-boarded boundary. *Id.* at 1530.

8. On remand to the district court, two separate maps were produced, the first map showing land ownership inside the original exterior boundary of the Uintah Valley Reservation, and the second map showing jurisdictional boundaries within the same area (hereinafter "*Jurisdiction Map*" or "*Ownership Map*"). On the *Jurisdiction Map*, Indian Country within the original exterior reservation boundary of the Uintah Valley Reservation is depicted in yellow and non-Indian lands are depicted in blue.[7] The State of Utah, Duchesne County, Uintah County, and the Ute Indian Tribe filed a stipulation with the Court related to the maps, and based on the parties' stipulation, the federal district court entered an order on November 20, 1998, which states in pertinent part that, "[t]here will hereafter exist a rebuttable presumption that the maps accurately depict the [ownership and jurisdictional] status of the land." *Ute Indian Tribe v. State of Utah*, case no. 75-CV-408, *Dkt.* 100 (D.Utah Nov. 20, 1998).[8]

9. The property owned by Gregory D. McKee (hereinafter referred to as the "McKee Property") was conveyed to Mr. McKee's predecessor in interest, Constant L. Darling, on November 3, 1910, under Patent No. 159817.[9] The McKee Property is described as 121.14 acres, consisting of Lot 2, SW/4 NE/4, and NW/4 SE/4 of Township 1 South, Range 1 East, Uinta Special Meridian (USM), Utah. For reference purposes on demonstrative exhibits at the preliminary injunction hearing and at trial, Lot 2 was referred to as "Tract 1," the SW/4 NE/4 was referred to as "Tract 2," and the NW/4 SE/4 was referred to as "Tract 3."[10]

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[7] Plaintiff's Exhibit 49.
[8] Plaintiff's Exhibit 50.
[9] Plaintiff's Exhibit 3-1.
[10] Preliminary Hearing Transcript, 3-26-2013, p. 45:14-25.

10. The McKee Property is land that was diminished from the Uintah Valley Reservation, i.e., "lands that passed from trust to fee status." However, the McKee Property is situated in a checker-board area of the Reservation and is immediately adjacent to tribal trust lands to the east and south. The McKee Property is depicted as essentially surrounded by Indian Country on the *Jurisdictional Map* approved by the U.S. District Court in *Ute Tribe v. Utah*, case no. 75-CV-408.[11]

11. Greg McKee's parents, Larry Dean McKee and Deborah McKee, acquired full ownership in the McKee Property when Larry McKee's brother Rex McKee quit claimed his interest to Larry and Deborah McKee under a Quit Claim Deed dated August 3, 1999.[12]

12. The evidence establishes that Larry Dean McKee and Deborah McKee and their son Greg McKee have used the property for a cattle feedlot and associated pasture land. Although Defendants failed to produce evidence in response to the Tribe's Interrogatories, Requests for Production, and Requests for Admission relating to the McKee family business entities, public records maintained by the Utah Secretary of State, Division of Corporations, were admitted into evidence as Plaintiff's Exhibits 40, 41, and 42. The Court finds that T&L Livestock, Inc. was registered as a Utah corporation on February 3, 1993; that McKee Farms, Inc. and G M Fertilizer, Inc. were registered as Utah corporations on March 25, 2002, and that Defendant Greg McKee is listed as the registered agent for all three corporations.

13. The McKee Property is traversed by the Deep Creek Canal and Lateral No. 9, both of which are conveyance channels for the Uintah Indian Irrigation Project ("UIIP"). The

[11] Plaintiff's Exhibit 51.
[12] Plaintiff's Exhibits 26 and 27.

UIIP was established to provide irrigation water to Ute tribal trust and Indian allotment lands.[13] The Ute Tribe is the beneficial owner of the Indian reserved waters conveyed through the Deep Creek Canal and Lateral No. 9 as described in a 1905 Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004), and subsequently recognized in a federal court decree dated March 16, 1923, copies of which were admitted into evidence as Plaintiff's Exhibits 5 and 6.[14]

14. The 1905 Certificate of Appropriation contains a lengthy legal description of Indian lands (some of which are now former allotment lands) that are entitled to tribal water from the Deep Creek Canal and the Canal's associated lateral ditches. The Tribe's Water Engineers, Dr. Woldezion Mesghinna, PhD., P.E., and Chad Hall, P.E., both testified that the McKee property is not identified as land entitled to receive water through the Deep Creek Canal under the 1905 Certificate of Appropriation of Water.[15] Further, the Tribe's Request for Admission No. 1 asked Defendants to admit that "the McKee property is not identified as land entitled to irrigation water from the U. S. Deep Creek Canal or the Tabby White Canal under the State Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004), issued on June 15, 1905." By failing to respond to Plaintiff's Request No. 1, the Court finds that Defendants

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[13] See Act of June 21, 1906, ch. 3504, 34 Stat 325, 375-376, LD 127.

[14] In 1916 the United States, as trustee for the Ute Indians, filed two actions to enjoin various irrigation companies from interfering with the Indians' prior use of waters of the Lake Fork, Whiterocks, and Uintah Rivers which flowed through the Project area. *U. S. v. Dry Gulch Irrigation Co.*, No. 4418, slip op. (D. Utah 1923), and *U.S. v. Cedarview Irrigation Co.*, No. 4427, slip op. (D. Utah 1923). The *Cedarview* Decree was admitted as Plaintiff's Exhibit 6. *See generally Hackford v. Babbitt*, 14 F.3d 1457 n.2 (10th Cir. 1994) ("Today, more than one-third of the land served by the [UIIP] Project is held in fee by non-Indian successors to Indian allottees.") (citing *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1126 n.165 (D. Utah 1981), *aff'd in part, rev'd in part, Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985).

[15] Trial Transcript, 7-13-2015, p. 51:11-24; Preliminary Injunction Hearing, 3-26-2015, pp. 130:16 - 131:7.

have admitted the McKee Property is not identified under the 1905 Certificate as land entitled to water from the Deep Creek Canal.

15. The 1910 Patent conveyed title to the McKee Property subject to

> . . . any vested and accrued water rights . . . and rights to ditches and reservoirs used in connection with such water rights . . . and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States . . . .

Section 203(f)(2) of the Central Utah Project Completion Act (CUPCA) provides:

> Title to Uintah Indian Irrigation Project rights-of-ways and facilities shall remain in the United States. The Secretary shall retain any trust responsibilities to the Uintah Indian Irrigation project.

(Titles II through VI of P. L. 102-575, 106 Stat. 4605, Oct. 30, 1992).

16. The Ute Tribe has established by clear and convincing evidence that Defendants have misappropriated tribal waters from Deep Creek Canal and Lateral No. 9 for application to the McKee Property since at least August 3, 1999. Defendants have used tribal waters to flood irrigate the McKee Property and to supply water to the cattle feedlot on the property.

17. The extent of the flood irrigation is documented in photographs taken by Chad Hall, P.E. on September 6, 2012. Those photographs, admitted as Plaintiff's Exhibit 10, show, *inter alia*, bulldozer tracks near an illegal diversion from the Deep Creek Canal; standing water in the McKee pastures; irrigation infrastructures including concrete culverts, earthen dams and illegal ditches for diverting water from Lateral No. 9; perforated PVC pipe, and housing for water pipeline valves.

18. A "Utah AFO [Animal Feeding Operation] Assessment Form" completed for the cattle feedlot on the McKee Property on June 23, 2010, contains a hand-written observation that there is an "irrigation induced wetland' near the feedlot.[16]

19. Engineer Chad Hall and Brent Searle, McKee's former father-in-law, testified that McKee diverts water illegally from Deep Creek Canal above the weir that is located at Lateral No. 9. The purpose of the weir is to monitor the amount of water that is diverted into the lateral. By illegally diverting water from Deep Creek Canal above the weir for Lateral No. 9, Hall and Searle testified that McKee is able to conceal the actual amount of water that is diverted from Deep Creek Canal onto the McKee Property.[17] Engineer Hall testified that vegetation around the illegal diversions structures is mature, and the concrete diversion culverts are old and rusted, suggesting to him that the illegal diversions have occurred for some time.[18]

20. Mr. Searle testified that the McKee Property is located at the upper end of the Deep Creek Canal, meaning that when water from the Canal is diverted illegally onto the McKee Property, there is less water to flow down the Canal to other irrigators.[19] The 1923 Decree in *U.S. v. Cedarville*, admitted as Plaintiff's Exhibit 3, locates the "head or intake" of the Deep Creek Canal in Section 5, Township 1 South, Range 1 East, USM, approximately 2.5 miles west of the McKee Property in Section 2 of that same Township and Range.[20]

21. The Court heard testimony from Jack Horner, who worked for Greg McKee's father, Larry McKee for a period of three years, from approximately 1999 to 2001. Mr. Horner

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[16] Plaintiff's Exhibit 35, Attachment 3.
[17] Trial Transcript, 7-13-2015, pp. 53:10-56:15; 68:16 – 69:7.
[18] *Id.*, pp. 54:23 – 55:25.
[19] *Id.*, p. 72:1-23.
[20] See Plaintiff's Exhibit 3, p. 5, ¶1 and Plaintiff's Exhibit 2 (BLM Master Title Plat for T1S, R1E, USM).

described an underground pipeline that Larry McKee installed to supply water to the cattle feedlot on the McKee Property.[21] Brent Searle testified that the underground pipeline diverts water directly from the Deep Creek Canal, and that he was present on two occasions when maintenance work was performed on the pipeline.[22]

22. Janet Cuch and her children live on tribal land that adjoins the McKee Property to the east. Her children are enrolled members of the Ute Tribe and the tribal land where they live is also irrigated with water from the Deep Creek Canal. Ms. Cuch has lived there for thirty-five years, and during the entirety of that time, she says the McKee property has been "very, very green," while the tribal lands on which she lives and other tribal lands have been "very dry."[23] Ms. Cuch described McKee's use of tribal water as "uncontrolled and unregulated."[24] She testified that the ditch rider on the Deep Creek Canal is Rex McKee—Greg McKee's uncle—and she said that while Rex McKee holds her family to "an exacting small amount of water," Greg McKee "never has any trouble getting water delivered to his property."[25] She testified that she has seen Deep Creek water on the 121.14 acre McKee Property "continually" during the 35 years she has lived adjacent to the McKee Property, and she said "You can climb up on the bluffs," in the area "and look down on the countryside and you know what land he is moving water to."[26]

23. Also testifying was Tim Ignacio, a tribal member who farms 180 acres of tribal land and irrigates with water from Deep Creek Canal at a location approximately 5 to 6 miles

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[21] *Id.*, pp. 151:10 – 156:25; Plaintiff's Exhibit 46.
[22] *Id.*, pp. 64:25 – 65:20.
[23] *Id.*, pp. 99-102.
[24] *Id.*, p. 105:10-12.
[25] *Id.*, pp. 103-104.
[26] *Id.*, pp. 108:1-3; 117:9-12.

south (down-stream or down-Canal) from the McKee Property. Ignacio said he is the last irrigator on the Deep Creek Canal. He would prefer to flood irrigate his property, but he was required to install a sprinkler system 10 to 12 years ago.[27] Before then, when he still flood irrigated, before his 8-hour ditch run began he would have to "go up and shut all the head gates all the way up to Lapoint," in order to insure that water would be flowing in the Canal when his diversion run began. He testified that Greg McKee's father, Larry McKee, would just "go back over and kick the gate(s) open again." When Ignacio complained to his ditch rider, the ditch rider had Ignacio accompany him to the McKee Property where the ditch rider implored Mr. McKee to allow Ignacio to have his water.[28] Ignacio agreed with Janet Cuch's testimony that the "McKee Property is always green when everything around it is brown" particularly in dry years.[29] Ignacio testified that even with the installation of a pipeline and sprinkler systems, irrigators in the lower section of the Deep Creek Canal "are still hurting" because of insufficient water reaching the lower reaches of the Canal."[30] Ignacio testified that when water is short, his alfalfa cuttings are significantly reduced, and he is lucky to recover production costs, including the cost of fertilizer.[31]

DEFENDANTS' MISAPPROPRIATION OF WATER FROM DEEP CREEK CANAL AND LATERAL NO. 9 FOR APPLICATION TO THE LOT 2 AND SW/4 NE/4 OF SECTION 2, TOWNSHIP 1 SOUTH, RANGE 1 EAST, USM

24. In this lawsuit Greg McKee has defended the Defendants' right to divert water from Deep Creek Canal for application to the upper 81.14 acres of the McKee Property based on

[27] *Id.*, pp. 175:17 – 15.
[28] *Id.*, pp. 176:17 – 178-12.
[29] *Id.*, pp. 179:16 – 180:1.
[30] *Id.*, pp. 182-11-18.
[31] *Id.*, pp. 182:8 – 184:21.

a State of Utah Certificate of Appropriation of Water No. 1962, Utah State Water Right 43-3202, which was introduced in evidence as Plaintiff's Exhibit 23.[32]

25. At the Preliminary Injunction hearing on March 26, 2013, Greg McKee testified that the State water right is identified as a "44 acre water right in Goodrich Gulch," in the Personal Representative's Deed dated September 22, 2005, that conveyed his father Larry McKee's interest to him.[33] The Deed was introduced as Plaintiff's Exhibit 22.

26. However, the source of water and point of diversion for the Utah State Water Right 43-3202 is not the Deep Creek Canal but, rather, the Goodrich Gulch, and the Engineer's Certificate attached to the Certificate includes engineer drawings which show that water from Goodrich Gulch is to be conveyed via a wooden flume "over and across the U.S. Deep Creek Canal." The Engineer's Certificate was introduced in evidence as Plaintiff's Exhibit 23-1.

27. The Tribe's Water Engineer, Dr. Woldezion Mesghinna, P.E., of NRCE, testified on March 26, 2013, that there is no infrastructure, i.e., wooden flume, for transporting Goodrich Gulch Water over the Deep Creek Canal, and that the original diversion point for Utah State Water Right 43-3202 has never been transferred from the Goodrich Gulch to the Deep Creek Canal.[34] Dr. Mesghinna also testified that Defendants theoretically could transport the Goodrich Gulch water through the Deep Creek Canal if Defendants had a Carriage Agreement with the UIIP, but he testified there is no Carriage Agreement.[35]

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[32] See Defendant's Memorandum of Law in Opposition to Motion for Emergency Temporary Restraining Order, submitted September 21, 2012; Transcript of 3-26-2013 Hearing, p. 99:14-22.

[33] Transcript of 3-26-2013 Hearing, pp. 19:11 – 22:19.

[34] Transcript of 3-26-2013 Hearing, pp. 123:23 – 126:25; see also Plaintiff's Exhibit 11, pp. 3, 10, 13.

[35] Transcript of 3-26-2013 Hearing, p. 121:1-18; see also Plaintiff's Exhibit 11, pp. 3, 10, 13.

28. Dr. Mesghinna testified that surface water flows through Goodrich Gulch only intermittently,[36] and at trial Brent Searle, who has lived in the area for almost 60 years, said the Goodrich Gulch has not flowed sufficient water for surface diversion in "years."[37]

DEFENDANTS' MISAPPROPRIATION OF WATER FROM DEEP CREEK CANAL FOR APPLICATION TO THE NW/4 SE/4 OF SECTION 2 TOWNSHIP 1 SOUTH, RANGE 1 EAST, USM

29. In 1941 Congress authorized the Secretary of the Interior to "transfer water rights" within the Uintah Indian Irrigation Project, subject to two specified conditions: first, any such transfers had to be with "the consent of the interested parties" and secondly, such transfers could only be made "to other lands under said project."[38]

30. Defendants claim the right to divert water from Deep Creek Canal to the bottom 40 acres of the McKee Property—i.e., the NW/4 SE/4 of Section 2, referred to in this case as Tract 3—based upon water rights purportedly transferred onto Tract 3 pursuant to the Secretary's delegated authority under the 1941 Act.

31. Plaintiff's Exhibit 29 is an Agreement dated March 4, 1943 between the United States and Dewey McConkie, one of Greg McKee's predecessor's in interest to the McKee Property (1943 Agreement). The 1943 Agreement purports to transfer "21 acres of water right appurtenant" to land in Section 34, Township 1 North, Range 1 East, USM, "which land is situated within the Uintah Irrigation Project" to the NW/4 SE/4 of Section 2, Township 1 South, Range 1 East, USM, that is, to Tract 3 of the McKee Property. The 1943 Agreement contains no

[36] Transcript of 3-26-2013 Hearing, pp. 150:14 – 151:3.

[37] Trial Transcript, p. 64:17-24.

[38] See Act of May 28, 1941, ch. 142, 55 Stat. 209, Section 2, Reprinted in VI C. Kappler, Indian Affairs: Laws and Treaties 112 (2d ed. 1904).

recitation that the McKee Property—the land to which the water right is being transferred—is within the UIIP, and as testified by both Dr. Dr. Mesghinna and Engineer Hall, and as admitted by Defendants—the McKee Property is located outside the lands designated as UIIP project lands under the State Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004).[39]

32. As the beneficial owner of the water in the UIIP, the Ute Tribe would have been an "interested party" to the transfer of water purportedly made under the 1943 Agreement; however the Agreement contains no recitation that the Tribe was informed of, and consented to, the transfer, and the Tribe is not a signatory to the Agreement.

33. Plaintiff's Exhibit 30 is an Agreement dated December 23, 1946, again between the United States and Dewey McConkie (1946 Agreement). The 1946 Agreement purports to transfer water from 15.28 acres of land described as Lot 2 (SW/4 NW/4) of Section 18, Township 1 South, Range 2 East, "within the Uintah Irrigation Project," to Tract 3 of the McKee Property, i.e., the NW/4 SE/4 of Section 2, Township 1 South, Range 1 East, USM. As with the 1943 Agreement, the 1946 Agreement contains no recitation that the McKee Property—the land to which the water right was being transferred—is within the UIIP, and as testified by both Dr. Mesghinna and Engineer Hall, and as admitted by Defendants—the McKee Property is located outside the lands designated as UIIP project lands under the State Certificate of Appropriation of Water, No. 1234 (Water Right No. 43-3004).[40]

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[39] See Finding No. 14 above.
[40] *Id.*

34. As the beneficial owner of the water in the UIIP, the Ute Tribe would have been an "interested party" in the transfer of water purportedly made under the 1946 Agreement; however the Agreement contains no recitation that the Tribe was informed of, and consented to, the transfer, and the Tribe is not a signatory to the Agreement.

35. By a warranty deed dated May 15, 1961, Dewey McConkie and his wife Thora conveyed the 121.14 acre McKee Property to Reed H. McKee and Thelma McKee, husband and wife, as joint tenants. Included in the deed by specific reference were:

> . . . all water and water rights held and used in connection therewith, and in particular 36.28 shares of water in U.S. Deep Creek canal, and 44 acre water right in Goodrich Gulch. . . . (emphasis added)[41]

36. The specific reference to "36.18 shares of water in U.S. Deep Creek canal" is never repeated in any subsequent conveyance of the McKee property.[42]

37. By warranty deed dated March 23, 1978, Reed H. McKee and Thelma W. McKee conveyed undivided half interests in the 121.14 acre McKee Property to Rex McKee, a single man, and Larry Dean McKee and Deborah McKee, husband and wife, "including a 44 acre water right in Goodrich Gulch." There is no mention of conveyance of "36.18 shares of water in U.S. Deep Creek canal."[43]

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[41] *See* Plaintiff's Exhibit 31.

[42] *See* Plaintiff's Exhibit 27, a summary of the chain of title for realty and water rights for the McKee Property.

[43] *See* Plaintiff's Exhibits 27 and 32.

38. Two subsequent quit claim deeds to the 121.14 acre McKee Property, dated August 12, 1980 and August 3, 1999, make no mention of conveyance of "36.18 shares of water in U.S. Deep Creek canal."[44]

39. On July 10, 2001, Deborah J. McKee quit claimed her interest in the 121.14 acre McKee Property to Larry Dean McKee making no mention of conveyance of "36.18 shares of water in U.S. Deep Creek canal." At the same time, however, in that same Quit Claim Deed, Deborah J. McKee also quit claimed her interest in a second tract of land in a different township and range—the W/2 SW/4 of Section 19, Township 1 South, Range 2 East, USM—and as to that second property, Deborah J. McKee did specifically quit claim her interest in "39 shares of Indian Irrigation Rights."[45]

40. The very next day, July 11, 2001, Larry Dean McKee quit claimed an undivided one-half interest in the 121.14 acre McKee Property to Defendant Greg McKee, again making no mention of conveyance of "36.18 shares of water in U.S. Deep Creek canal." At the same time, however, in that same Quit Claim Deed, Larry Dean McKee also quit claimed to Greg McKee an undivided one-half interest in that second tract of land in a different township and range—the W/2 SW/4 of Section 19, Township 1 South, Range 2 East, USM—and as to that second property, Larry Dean McKee did specifically quit claim an undivided one-half interest in "39 shares of Indian Irrigation Rights."[46]

41. Finally, on September 22, 2005, Deborah Jean McKee, as Personal Representative of the Estate of Larry Dean McKee, conveyed by Personal Representative's Deed all of Larry

[44] *See* Plaintiff's Exhibits 27, 33 and 26.
[45] *See* Plaintiff's Exhibits 27 and 25.
[46] *See* Plaintiff's Exhibits 27 and 24.

Dean McKee's interest in the 121.14 acre McKee Property. The conveyance contains no mention of conveyance of "36.18 shares of water in U.S. Deep Creek canal." At the same time, however, in the same Personal Representative's Deed, Deborah Jean McKee conveyed to Greg McKee all of Larry Dean McKee's interest in that second tract of land in a different township and range—the W/2 SW/4 of Section 19, Township 1 South, Range 2 East, USM—and as to that second property, the conveyance expressly includes all of Larry Dean McKee's interest in the "39 shares of Indian Irrigation Rights" in that second property.

42. In summary, the most recent instruments of conveyance in the chain of title for the McKee Property—six separate instruments of conveyance from March 23, 1978 to September 22, 2005——contain no reference to "36.18 shares of water in U.S. Deep Creek canal." Of these instruments of conveyance, the last five instruments are noteworthy for what they do include—they expressly convey by specific reference "39 shares of Indian Irrigation Rights"—however this conveyance is made in relation to an entirely different property in an entirely different Township and Range—Section 19, Township 1 South, Range 2 East, USM.

43. At the preliminary injunction hearing, Defendant Greg McKee admitted that he has no instrument of conveyance or other legal document that entitles Defendants to use tribal waters on the NW/4 SE/4 of Section 2 (Tract 3 of the McKee property).[47]

44. The only evidence Defendants presented in support of their asserted right to use tribal water on Tract 3 were annual operation and maintenance billing invoices from the Department of Interior, Bureau of Indian Affairs ("BIA"). While the Court admitted Defendants' Exhibits I, J, L, M and N into evidence, Defendants did not call any witness from

[47] Preliminary Injunction Hearing Transcript, 3-26-2013, pp. 87:25 – 88:9.

the BIA to explain the basis for O&M assessments on a tract by tract basis. There is no dispute that in addition to the 121.14 acre McKee Property, Greg McKee also leases tribal land through the BIA, and McKee is assessed O&M charges for water delivered to those tribal leased lands. For this reason the Court finds that the billing invoices are not particularly probative; by themselves, invoices for O&M charges do not establish the Defendants' legal right to divert water from Deep Creek Canal for irrigation of the NW/4 SE/4 of Section 2 (Tract 3 of the McKee property). Moreover, it is entirely possible that the 1941 statute that was cited as authority for the 1943 and 1946 transfer of tribal waters onto the McKee Property was later employed to transfer those same water rights *off* the McKee Property, particularly, if it was discovered that the McKee Property is not within the designated lands of the UIIP.

45. The Tribe propounded written discovery to Defendants related to Defendants' legal right, if any, to divert water from Deep Creek Canal for application to Tract 3. Plaintiff's Interrogatory No. 1 asked Defendants whether the 36.28 acre feet of tribal water purportedly transferred to Tract 3 of the McKee Property under the 1943 and 1946 Agreements were "listed as assets of the Estate of Larry Dean McKee in the federal Estate Tax Return that was filed by the Estate of Larry Dean McKee, and if so, [to] identify the value that was assigned to those assets in the federal Estate Tax Return."[48] Request for Production No. 5 asked Defendants to produce "that portion of the federal Estate Tax Return filed by the Estate of Larry Dean McKee which shows that the [UIIP] Project waters which Gregory McKee claims to own … were listed as an asset of the Estate on the Estate Tax Return, including the value attributable to the asset."[49]

[48] *See* Plaintiff's Exhibit 47.
[49] *Id.*

Requests for Admission Nos. 18 and 19 asked Defendants to admit that the tribal waters purportedly transferred to the McKee Property under the 1943 and 1946 Agreements "were not listed as assets of the Estate of Larry Dean McKee in the federal Estate Tax Return that was filed by the Estate of Larry Dean McKee," and that those same assets "were not listed under any federal Gift Tax Return filed by Deborah Jean McKee."[50]

46. The Court has granted the Tribe's motion to sanction Defendants for their failure to respond to the Tribe's discovery requests by drawing negative inference against the Defendants and in deeming the Defendants to have admitted the substance of the Tribe's Requests for Admission. Accordingly, the Court finds that Defendants have failed to establish their asserted right to the use of tribal water for the NW/4 SE/4 of Section 2 (Tract 3 of the McKee property). In addition, Defendants are deemed to have admitted that purported water rights were not listed in any Estate Tax Return filed by the Estate of Larry Dean McKee, or in any Gift Tax Return filed by Deborah Jean McKee.

TRESPASS ON TRIBAL LANDS ASSIGNED TO FRANK ARROWCHIS

47. The Court adopts by incorporation the language contained in the Court's Temporary Restraining Order of October 1, 2012:

> There is no dispute that Frank Arrowchis has received 160 acres of assignments of tribal lands from the Ute Indian Tribe. The Tribe in making assignments of its own trust lands can impose any conditions on the use of such lands as it deems appropriate. The Assignment Committee Ordinance No. 94-001 (January 24, 1994), at Article X, Section 5 specifically proscribes leasing of such assignments or their "use by any person other than the assignee's immediate family." Defendant does not dispute that he farms all or part of the Arrowchis assignments but contends that where he simply bills Arrowchis a specified hourly rate for farming services, harvests the crops and stores them at defendant's feedlot, and receives payment from Arrowchis in crops rather than case, such

[50] *See* Plaintiff's Exhibit 48.

arrangement does not violate Ordinance 94-001. The language of the Ordinance is broad and the arrangement between Arrowchis and defendant constitutes use by any person other than the family of Arrowchis.

48. Janet Cuch and her daughter Janel Cuch testified at trial that Defendants had continued through the date of trial to continue farming the Arrowchis assignments.[51]

DAMAGES AND INJUNCTIVE RELIEF

49. NRCE has quantified the amount of water the Tribe contends the Defendants have illegally misappropriated from Deep Creek Canal for watering livestock in the feedlot and for flood irrigating the McKee Property. The quantification is from August 3, 1999, when Mr. McKee's father obtained full ownership of the McKee Property, through the end of calendar year 2014.[52] Engineer Chad Hall testified that NRCE used the documented amount of water diverted annually through the Deep Creek Canal and the total amount of acreage irrigated from the Deep Creek Canal to arrive at a unit diversion rate equating to acre foot/per acre. NRCE then applied that unit rate to the acreage irrigated by Mr. McKee to arrive at a total volumetric use.[53] NRCE quantified the water used for livestock based upon the Utah AFO Assessment Form, which indicates a maximum animal capacity for the feedlot of 4,000 animals, and an assumed confinement period of 120 days.[54] The Court notes, parenthetically, that Brent Searle testified based on personal knowledge that Defendants have confined as many as 7,500 to 10,000 animals per year at the feedlot.[55]

[51] Trial Transcript, pp. 113:3-115:25; 119:20-120:7.

[52] *See* Plaintiff's Exhibit 35, NRCE Supplemental Report dated March 23, 2015, Section 3, Quantification of Water Diversions, pp. 8-11.

[53] Trial Transcript, p. 50:11-15.

[54] *See* Plaintiff's Exhibit 35, p. 11.

[55] Trial Transcript, p. 64:5-9.

50. NRCE segregated the water diversion quantifications by (*i*) year, (*ii*) Tracts 1 and 2, (*iii*) Tract 3, and (*iv*) Livestock Water Use. NRCE estimates a total misappropriation of water for Tracts 1, 2 and 3 of 3,368 acre feet of water from August 3, 1999 through the end of calendar year 2014. According to the *Cedarview* Decree, irrigation waters may be diverted from March 1st through October 31st, and "[w]ater may be diverted for domestic, culinary and stock-watering purposes during the entire year."[56]

51. Janet Cuch testified that Defendants were continuing to divert Deep Creek Canal water onto the McKee property even as of the time of trial.[57]

52. Jason Matthew Bass is a certified public accountant who holds credentials as a financial analyst.[58] The Tribe qualified Mr. Bass as an expert on the economic losses to the Tribe and its members resulting from Defendants' conversion of tribal waters from Deep Creek Canal. Relying on the NRCE diversion quantifications, Mr. Bass arrived at a monetary amount equivalent to lost productivity to the Ute Tribe and tribal members resulting from the misappropriation of waters not being available to the Tribe and tribal members to grow alfalfa. That amount is $136,218.00. Like NRCE, Mr. Bass determined damages from August 3, 1999, when Mr. McKee's father obtained full ownership of the McKee Property, through the end of calendar year 2014.[59]

53. The Court finds that the Tribe has prevailed on the merits on its claims under Counts 1 (declaratory and injunctive relief) and 2 (damages) of the First Amended Complaint.

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[56] Plaintiff's Exhibit 6, p. 7 ¶ 1.

[57] Trial Transcript, p. 112:9-24.

[58] Plaintiff's Exhibit 38.

[59] *See* Plaintiff's Exhibit 35, NRCE Supplemental Report dated March 23, 2015, Section 3, Quantification of Water Diversions, pp. 8-11.

Notwithstanding the Court's interim injunction order, the evidence establishes that Defendants have continued to convert tribal water from Deep Creek Canal for use on the McKee Property and have continued to sublease and farm the Arrowchis assignments. Because the Tribe should not be required to institute repeated lawsuits in order to remedy these ongoing wrongs, the Court finds that permanent injunctive relief is appropriate as well as the recovery of damages for past wrongs. The Court finds that without permanent injunctive relief, the Tribe will suffer irreparable harm and finds that the harm to the Tribe outweighs the harm that permanent injunctive relief may cause the Defendants. Finally, the Court finds that issuance of the injunction will not adversely affect the public interest.

CONCLUSIONS OF LAW

1. Indian water rights are vested property rights predicated on federal law. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Winters v. United States*, 207 U.S. 664, 577 (1908). Indian water rights are "reserved rights" because they are deemed an essential part of the tribe's reservation." *Arizona v. California*, 373 U.S. 546, 600, (1963).

2. The importance of water to the survival of the Ute Indians is beyond dispute.[60] Before the U&O Reservation was opened to non-Indian settlement, the Commissioner of Indian

[60] Before the Uintah Valley Reservation was established by Executive Order in 1861, Brigham Young, Territorial Governor of the Territory of Utah and President of the Mormon Church, dispatched a survey term to determine whether the proposed reservation lands would instead be suitable for Mormon settlement.[60] The team's "unanimous and firm" verdict was that the proposed reservation lands were "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians and to hold the world together." Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004).

Affairs cautioned that "[t]he future of these Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate."[61]

3. On March 27, 2013, the Tribe adopted Ordinance 13-010, which amended Chapter 2 of the Tribe's Law and Order Code (UTE LOC) governing jurisdiction.[62] As pertinent here, the Tribe's territorial jurisdiction extends to "all waters, water storage facilities and irrigation works owned by or held in trust for the Ute Tribe and Ute Indian allottees." UTE LOC, §1-2-2(1)(g). The Uintah Indian Irrigation Project is held by the United States in trust for the Tribe. Accordingly, the Tribe's territorial jurisdiction extends to the Deep Creek Canal and Lateral Ditch No. 9 and to the tribal waters within the Canal and Ditch even when, as here, the Ditch and Canal cross fee property such as the McKee Property. Because the Tribe's territorial jurisdiction extends to the Deep Creek Canal and Lateral Ditch No. 9, and the tribal waters therein, the Tribal Court has adjudicatory jurisdiction to "determine the ownership thereof or rights therein." UTE LOC, §1-2-4. The Tribe's long-arm jurisdiction extends to any person who "causes a tortious injury to the Tribe, tribal members, or to any trust land, allotted land, fee land, or any other property within the Tribe's territorial jurisdiction," and any action "outside the

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[61] *Ute Indian Tribe v. Utah*, 521 F. Supp. at 1126 (quoting Rept. of the Comm. of Ind. Aff., 1905, JX 328 at 1893).

[62] The Court finds no barriers to retroactive application of the amendments under the facts of this case: the amendments were adopted after the filing of the Tribe's original complaint on September 6, 2012, but before the Tribe's First Amended Complaint was filed on September 4, 2013. The amendments were adopted, *inter alia*, to take into account (*i*) the delineation of the U&O Reservation boundaries under the decision in *Ute Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), (*ii*) the return of certain federally-held lands to tribal ownership, and (*iii*) to specifically address the Tribe's "jurisdictional authority over the Tribe's water, air, environment and other natural resources." Because the amendments are justified by rational legislative purposes, the amendments may be applied retroactively without violating due process. *See, e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1983) (retroactive application of legislation does not violate due process if retroactive application is justified by a rational legislative purpose).

Tribe's territorial jurisdiction which causes actual injury or damage inside the Tribe's territorial jurisdiction, where such injury or damage was reasonably foreseeable." UTE LOC, § 1-2-3(2)(E) and (G). In addition, the Tribe's Law and Order Code includes an implied consent provision under which any person "entering the territorial jurisdiction of the Ute Tribe as defined in Section 1-2-2 shall be automatically subject to the jurisdiction of the Courts of the Ute Indian Tribe." UTE LOC § 1-2-3(4).

4. 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).

5. Under 25 U.S.C. § 194, the burden of proof was on the Defendants to establish their right to divert tribal waters from the Deep Creek Canal and Lateral No. 9, and their right to continued entry upon the tribal lands under assignment to Frank Arrowchis. Defendants have not met this burden.

6. The Tribe established damages of $136,218.00 for the Defendants' misappropriation and conversion of tribal waters from August 3, 1999, when Greg McKee's

father Larry Dean McKee gained full ownership of the McKee Property, through the end of calendar year 2014. In light of testimony that Defendants have continued to divert water from the Deep Creek Canal through the date of trial, the Court awards additional damages of $6,500.00 as the value of tribal water misappropriated from January 1, 2015 through the date of trial, noting that this amount represents less than half the damage amounts assigned by Jason Bass for the two most recent calendar years, 2013 and 2014. Total damages awarded are $142,718.00.

7. Although the Estate of Larry Dean McKee is not a named defendant, Defendant T&L Livestock, Inc. has been in existence since February 3, 1993, and Defendants McKee Farms, Inc. and G M Fertilizer, Inc. have been in existence since March 25, 2002. Defendant Greg McKee obtained an undivided one-half interest in the property on July 11, 2001, and gained full ownership of the property on September 22, 2005. Accordingly, the Court apportions the damages as follows: $8,854.50 against T&L Livestock, Inc. for 1999 through July 11, 2001; $7,636.00 against T&L Livestock and McKee Farms, Inc., jointly and severally, for July 11, 2001 through September 22, 2005, and $126,227.50 against Gregory McKee from July 11, 2001 through the date of trial on July 13, 2015.

8. As discussed under Finding No. 53 above, the Tribe is entitled to a permanent injunction to prevent Defendants from continuing to divert and convert tribal water from Deep Creek Canal for use on the McKee Property and from continuing to trespass upon the tribal lands under assignment to Frank Arrowchis.

9. The Court grants the Tribe's motion for the recovery of costs and attorney fees as a discovery sanction in the amount of $7,027.73.

10. The Tribe is entitled to post-judgment interest at the rate one and one-half percent (1.5%) per annum.

11. The Court grants the Tribe's motion to dismiss Counts 3 and 4 of the First Amended Complaint without prejudice.

ORDERED AND SIGNED this 30 day of August, 2015

By The Court:

Terry L. Pechota, Presiding Judge

ATTEST:

Clerk of Court [SEAL]

ADDENDUM 2

Ute Indian Tribal Court's Decree of Judgment (corrected) in *Ute Indian Tribe v. McKee*, *et al.*, case number CV 12-285, entered on September 29, 2015

THE UTE INDIAN TRIBAL COURT OF THE UINTAH AND OURAY RESERVATION

FORT DUCHESNE, UTAH

UTE INDIAN TRIBE, Plaintiff, v. GREGORY D. MCKEE, T & L LIVESTOCK, INC., MCKEE FARMS, INC., and GM FERTILIZER, INC., Defendants.	**DECREE OF JUDGMENT (Corrected) ENTERED NUNC PRO TUNC TO AUGUST 3, 2015** **Case No. CV12-285**

FINAL JUDGMENT FOR DAMAGES AND PERMANENT INJUNCTION

This matter came before the Court on July 13-14, 2015 for trial on the Plaintiff's First Amended Complaint for Declaratory Judgment, Theft/Conversion/Misappropriation, Trespass, Conspiracy and Injunctive Relief. The Court's findings of fact and conclusions of law are filed together with the Final Judgment. The Court has granted Plaintiff's motion for discovery sanctions, including attorney fees and costs in the amount of $7,027.73. In addition, the Court has granted Plaintiff's motion to dismiss Counts Three and Four of the First Amended Complaint without prejudice.

NOW, THEREFORE, it is accordingly ORDERED, ADJUDGED AND DECREED that:

1. The Court has personal jurisdiction over Defendants under the Tribe's Law and Order Code, Section 1-2-3. The Court has subject matter jurisdiction under the Tribe's Law and Order Code, Section 1-2-2, subsections (1)(g) and (2), as well as the Tribe's inherent jurisdiction as a sovereign.

2. Under 25 U.S.C. § 194, the burden of proof was on the Defendants to establish their right to divert tribal waters from the Deep Creek Canal, and their right to entry upon tribal lands that are under assignment to Frank Arrowchis. Defendants have not met this burden. Accordingly, the Court declares that Defendants have no right to divert water from the Deep Creek Canal of the Uintah Indian Irrigation Project for use on the McKee Property which is described as 121.14 acres, consisting of Lot 2, SW/4 NE/4, and NW/4 SE/4 of Section 2, Township 1 South, Range 1 East, Uinta Special Meridian (USM), Uintah County, Utah. The Court further declares that Defendants have no right to enter upon the tribal lands under assignment to Frank Arrowchis and that any sublease or other agreement between Defendants and Mr. Arrowchis that purports to allow Defendants access to tribal lands is declared null and void.

3. It is further ORDERED, ADJUDGED AND DECREED that Gregory D. McKee, individually and doing business as or through any other entity, T&L Livestock, Inc., McKee Farms, Inc., and GM Fertilizer, Inc., and anyone acting in concert with Defendants, is permanently enjoined and restrained from, directly or indirectly, by the use of any means or instrumentalities, from diverting water from the Deep Creek Canal and Lateral No. 9 for use on the McKee Property, described above.

4. It is further ORDERED, ADJUDGED AND DECREED that Gregory D. McKee, individually and doing business as or through any other entity, T&L Livestock, Inc., McKee Farms, Inc., and GM Fertilizer, Inc., and anyone acting in concert with them, is permanently enjoined and restrained from, directly or indirectly, by the use of any means or instrumentalities, and from entering upon the tribal lands under assignment to Frank Arrowchis for any purpose.

5. It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff Tribe is entitled to damages of $142,718.00 for the Defendants' conversion of tribal waters, which damages are assigned as follows: $8,854.50 against T&L Livestock, Inc.; $7,636.00 against T&L Livestock and McKee Farms, Inc., jointly and severally; and $126,227.50 against Gregory D. McKee. In addition, the Tribe is awarded attorney fees and costs in the amount of $7,027.73, as a sanction for the Defendants' violations of the Court ordered discovery. The Tribe is awarded post-judgment interest at the rate of 1.5 percent per annum.

6. It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff is permitted to engage in post-judgment discovery to ensure compliance with the permanent injunction.

7. It is further ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction of this action for the purpose of implementing and enforcing the Final Judgment.

8. It is further ORDERED, ADJUDGED AND DECREED that Counts 3 and 4 of the First Amended Complaint are dismissed without prejudice.

9. It is further ORDERED, ADJUDGED AND DECREED that the DECREE OF JUDGMENT (Corrected) is entered nunc pro tunc to August 3, 2015.

There being no just reason for delay, the Clerk is directed to enter this Final Judgment forthwith.

SO ORDERED this 29th day of September 2015.

BY THE COURT:

Judge Terry L. Pechota
Ute Indian Tribal Court

CERTIFICATE OF SERVICE

Copies of the foregoing **DECREE OF JUDGMENT (Corrected) ENTERED NUNC PRO TUNC TO AUGUST 3, 2015** were sent to:

Frances C. Bassett
Jeremy J. Patterson
Todd K. Gravelle
Alvina L. Earnhart
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, CO 80027
Facsimile: (303) 673-9839
Attorney for Plaintiff

Gregory D. McKee
T & L Livestock, Inc.
McKee Farms, Inc.
GM Fertilizer, Inc.
P.O. Box 1485
Roosevelt, UT 84066
Pro Se Defendants

Frances C. Bassett
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Attorneys for Plaintiff

THE UTE INDIAN TRIBAL COURT OF THE UINTAH AND OURAY RESERVATION
FORT DUCHESNE, UTAH

UTE INDIAN TRIBE, Plaintiff, v. GREGORY D. MCKEE, T & L LIVESTOCK, INC., MCKEE FARMS, INC., AND GM FERTILIZER, INC., Defendants.	**UTE INDIAN TRIBE'S MOTION TO CORRECT CLERICAL ERROR IN THE FINAL DECREE AND FOR ENTRY OF A CORRECTED DECREE NUNC PRO TUNC TO THE DATE OF THE ORIGINAL DECREE** **Case No. CV 12-285**

COMES NOW the Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe"), pursuant to Rule 4(b) and Rule 30(a) of the Ute Indian Rules of Civil Procedure, and

moves the Court for correction of a clerical error in the Decree of Judgment that was entered in this case on August 3, 2015, and for entry of a corrected decree *nunc pro tunc* to August 3, 2015.

Rule 30 (a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice as the court may direct; mistakes may be corrected before an appeal is docketed in the Appellate Court, and thereafter while the appeal is pending may be corrected with leave of the Appellate Court.

The Decree of Judgment was entered on August 3, 2015, and no appeal was taken. Since entry of the Judgment, the Tribe's undersigned counsel has noticed a clerical mistake in the legal description of the McKee Property in paragraph 2 of the Decree of Judgment. The clerical mistake consists of the omission of the words "Section 2" immediately before the word "Township" on line 6 of Paragraph 2.

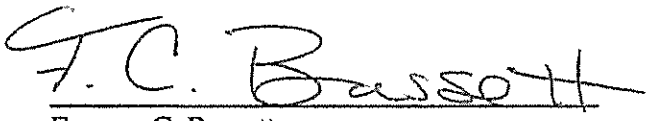
Accordingly, the Plaintiff Tribe is submitting a "Decree of Judgment (Corrected)" in which the words "Section 2" are included in the legal description of the McKee Property.

The Corrected Decree also recites that the Decree is entered *nunc pro tunc* to August 3, 2015.

A copy of this motion is being served upon the Defendants.

WHEREFORE, the Plaintiff Tribe moves the Court for entry of the Decree of Judgment (Corrected) that is included with this motion for correction.

Respectfully submitted this 28th day of September, 2015.



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Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I certify that on this 28th day of September, 2015, the original of this **UTE INDIAN TRIBE'S MOTION TO CORRECT CLERICAL ERROR IN THE FINAL DECREE AND FOR ENTRY OF A CORRECTED DECREE NUNC PRO TUNC TO THE DATE OF THE *ORIGINAL DECREE*** was sent both via certified U.S. Mail, return receipt requested, and facsimile to the Ute Indian Tribal Court and a true and accurate copy was sent via U.S. Mail, first class postage prepaid to the following individuals as indicated below:

Gregory D. McKee
T & L Livestock, Inc.
McKee Farms, Inc.
GM Fertilizer, Inc.
P.O. Box 1485
Roosevelt, UT 84066
Pro Se Defendants

Debbie A. Foulk
Assistant to Frances C. Bassett

THE LAW AND ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION UTAH

FORT DUCHESNE, UTAH 84026

Rule 3. **TIME.**

a) **Computation.** In computing any period of time set forth herein, the day that the period is to commence from shall not be counted and the last day of the period shall be counted; provided, however, that any time period under 7 days will not include intermediate Saturdays, Sundays, or legal holidays in the period and any period which would otherwise end on a Saturday, Sunday, or legal holiday will be deemed to end on the next day which is not a Saturday, Sunday or legal holiday.

b) **Enlargement.** The court for good cause shown may enlarge the prescribed period of time within which any required act may be done.

c) **Notice of Motions.** Written motions and notice of hearing thereon, other than ones which may be heard ex parte, shall be served not later than 5 days prior to the time specified for hearing.

d) **Service by Mail.** Whenever service is accomplished by mail, three days shall be added to the prescribed period of time, but such addition shall not cause Saturdays, Sundays, or legal holidays to be counted in the time period if they would not otherwise have been counted.

Rule 4 **PLEADINGS, MOTIONS AND ORDERS.**

a) **Pleadings.** There shall be a complaint and an answer; plus a responsive pleading shall be allowed whenever, by cross claim, counterclaim or otherwise, a party is first claimed against unless the court shall otherwise order. The court may grant additional leave to plead in the interest of narrowing and defining issues or as justice may require.

b) **Motions and Orders.**

1) **Motions.** An application to the court for an order shall be by motion and shall be in writing, unless made orally during a hearing or trial, and shall set forth the relief or order sought and the grounds therefor stated with particularity. A motion and notice of motion may be set forth together.

2) **Orders.** An order includes every direction of the court whether included in a judgment or not, and may be made with or without notice to adverse parties and may be vacated or modified with or without notice.

3) **Hearings on Motions and Orders.** A motion or hearing on an order shall be automatically continued if the judge before whom it was to be heard is unable to hear it on the day specified and no other judge is available hear it.

Rule 5. **GENERAL RULES OF PLEADING.**

a) **Claims for Relief.** A pleading which sets forth a claim for affirmative relief shall contain:

1) a short, plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction over the matter;

2) a short, plain statement of the claim showing that the pleader is entitled to relief; and

3) a demand for judgment for the relief to which the pleader considers himself entitled. Such claim for relief can be in the alternative or for several types of relief.

b) **Defenses and Denials.** A party shall state in plain, concise terms the grounds upon which he bases his defense to claims pleaded against him, and shall admit or deny the claims and statements upon which the adverse party relies. If he is without information or knowledge regarding a statement or claim, he shall so state and such shall be deemed to be a denial. Denials shall fairly meet the substance of the claims or statements denied and may be made as to specified parts but not all of a claim, statement, or averment. A general denial shall not be made unless the party could in good faith deny each and every claim covered thereby. A claim to which a responsive pleading is required, except for amount of damages, shall be deemed admitted unless denied; if no responsive pleading is allowed the claims of the adverse party shall be deemed denied.

c) **General Content of Claims and Defenses.** Claims and defenses shall be simply, concisely, and directly stated, but may be in alternative or hypothetical form, on one or several counts or defenses, need not be consistent with one another, and may be based on legal or equitable grounds or both.

4) damages so excessive or inadequate that they appear to have been given under influence of passion or prejudice; or

5) insufficiency of the evidence to justify the verdict or other decision, or that it is contrary to the law; or

6) error in law.

b) **Harmless Error.** A new trial shall not be granted on the basis of error or irregularity which was harmless in that it did not affect substantial justice.

c) **Support for Motion.** Parties may include memoranda or affidavits in support of their motions to which reply memoranda and affidavits shall be allowed if desired.

d) **Court Initiative.** The court may, on its own initiative, not later than 10 days after entry of judgment, order a new trial on any grounds assertable by a party to the action, and shall specify the reasons for so ordering.

e) **Motion To Alter Or Amend Judgment.** A motion to alter or amend a judgment shall be served not later than 10 days after entry of the judgment.

Rule 30. **RELIEF FROM JUDGMENT OR ORDER.**

a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice as the court may direct; mistakes may be corrected before an appeal is docketed in the Appellate Court, and thereafter while the appeal is pending may be corrected with leave of the Appellate Court.

b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may, in the furtherance of justice, relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 29(a); (3) fraud, misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 31. **HARMLESS ERROR.**

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding shall disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 32. **STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.**

a) **Stay upon Entry of Judgment.** Proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

ADDENDUM 3

Memorandum Decision and Order Denying Plaintiff's Motion for Summary Judgment, *Ute Indian Tribe v. McKee*, *et al.*, case number 2:18-cv-000314

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION Plaintiff, v. GREGORY D. MCKEE, T&L LIVESTOCK INC, MCKEE FARMS, INC., and GM FERTILIZER, INC. Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND RESOLVING OTHER PENDING MOTIONS** Civil No. 2:18-cv-000314-HCN-DBP Howard C. Nielson, Jr. United States District Judge

Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, seeks to enforce a judgment of its Tribal Court against Defendants: Gregory D. McKee and three companies with which he is associated, T&L Livestock, McKee Farms, and GM Fertilizer. Both the Tribe and Defendants have moved for summary judgment. The court grants Defendants' motion and denies the Tribe's motion.

I.

The Tribe sued Defendants in Tribal Court, alleging that they are misappropriating water that the United States owns in trust for the Tribe. *See* Dkt. No. 2-2 at 3–17. The Tribe alleged

that some water is taken pursuant to an alleged agreement with the United States, and that other water is taken without any authorization. *See, e.g.*, Oral Argument at 12:20-15:00.[1]

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[1] The disputed water is carried by canals as part of the Uintah Indian Irrigation Project (UIIP), which was established by the Act of June 21, 1906, ch. 3504, 34 Stat. 375. *See* Dkt. No. 55 at 7. The Tribe's position appears to be that all of the disputed water and the waterways that carry it are held in trust by the United States for the Tribe. *See, e.g.*, *id.* at 32–33.

The court has some doubt that the waterways are held in trust *solely* for the Tribe, however. By its terms, the 1906 Act appropriated money "[f]or constructing irrigation systems to irrigate *the allotted lands* of the Uncompahgre, Uintah, and White River Utes in Utah." 34 Stat. 375 (emphasis added). And as the 10th Circuit has explained, under the 1906 Act, the UIIP is held "in trust for the Indians." *Hackford v. Babbitt,* 14 F.3d 1457, 1468 (10th Cir. 1994). But "the phrase[] 'in trust for the Indians' in the 1906 Act is not coextensive with 'in trust for the tribe'. . . . The 1906 Act's purpose was to provide irrigation for the allotted, not tribal lands." *Id*. Many of the allotted lands—including the McKee Property—were eventually transferred to non-Indians. Indeed, "[t]oday, more than one-third of the land served by the [UIIP] is held in fee by non-Indian successors to Indian allottees." *Id*. at 1461 n.2.

And while the court has no doubt that at least *some* of disputed water is held in trust for the Tribe, it is far from clear that *all* of the water is so held. Much like the 1906 Act, the 1923 Decree and Permanent Injunction in *United States v. Cedarview Irrigation Co.,* No. 4427 (D. Utah 1923), on which the Tribe relies, determined that that the United States held the water in question "as Trustees of the *Indians* on the former Uintah and Ouray Indian Reservation." Dkt. No. 55-1 at 96–97. And although *Winters v. United States* held that when the United States establishes an Indian Reservation, it impliedly reserves enough water to fulfill the purpose of the reservation, *see* 207 U.S. 564, 576–77 (1908), it does not follow that *all* of the UIIP waters are held in trust for the Tribe.

Indeed, as Defendants explain, it appears that the portion of the water that belongs to the Tribe is currently a matter of dispute and litigation among the United States, the State of Utah, and the Tribe:

> although the Tribe is entitled to a yet to be determined amount of water to fulfill the original purposes of its reservation, *Winters v. United States*, 207 U.S. 564 (1908), that amount of water has, despite the efforts of Congress and the State of Utah, never been quantified. For instance, the Tribe contends that, under the Ute Indian Water Compact, the water at issue here is part of the Tribe's reserved water. However, the Tribe has failed and refused to ratify the Ute Indian Water Compact precluding quantification. In fact, the Tribe recently filed a lawsuit in the United States District Court for the District of Columbia alleging that the Tribe is entitled to more water than what is allocated in the Ute Indian Water Compact.

Mr. McKee is not a member of the Tribe. *See*, *e.g.*, Dkt. No. 55-1 at 46. Although the land on which the Defendants use the disputed water is located within the exterior boundaries of the Tribe's Reservation, it is no longer tribal land—that is, it is neither owned by, nor held in trust for, the Tribe. *See* Dkt. No. 55-1 at 49. As the Tribal Court found, "[t]he McKee Property is land that was diminished from the Uintah Valley Reservation, *i.e.*, 'lands that passed from trust to fee status.'" *Id.*; *see also id*. (finding that "[t]he McKee Property is situated in a checker-board area of the Reservation"); *Hagen v. Utah*, 510 U.S. 399, 414 (1994); *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1529–31 (10th Cir. 1997). Until 2018, Mr. McKee also leased "40.000 acres, more or less" of tribal land through the Bureau of Indian Affairs. Dkt. No. 55-4 at 138. It appears that the leased land was located approximately three miles from the McKee Property. *See* Dkt. No. 60 at 25; Dkt. No. 60-1 at 93. The Tribe does not argue, and the Tribal Court did not find, that Defendants used the water at issue here on this leased land. *See* Dkt. No. 64 at 18.

The Tribe maintains that the Deep Creek Canal and Lateral 9, the waterways from which Defendants divert the disputed water, "carr[y] the Ute Indian Tribe's waters through a parcel of [] McKee's property." Dkt. No. 55 at 23. The Tribe neither argues nor presents evidence that the points from which Defendants divert water are located on tribal land or that the Defendants otherwise enter tribal land to divert the water. A report attached to the Tribe's motion for summary judgment states that the points of diversion are located on the McKee Property (which

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Dkt. No. 60 at 17 n.2 (cleaned up); *see also id*. at 9; *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 1:18-cv-00546-CJN (D.D.C.). For purposes of resolving the motions here, the court finds it unnecessary to attempt to unravel or fully understand the thorny issues relating to the precise nature and scope of the Tribe's interest in the disputed water and waterways.

Mr. McKee owns in fee) as well as on a parcel located immediately north of the McKee Property. *See* Dkt. No. 55-1 at 194. But the Tribe does not argue, and the Tribal Court did not find, that the parcel immediately north of McKee's property is tribal land. *Cf*. Dkt. No. 55-1 at 49 (finding that McKee's property "is immediately adjacent to tribal trust lands *to the east and south*.") (emphasis added).

In concluding that it had jurisdiction over the Tribe's suit against the McKee Defendants, the Tribal Court reasoned as follows:

> 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).

Dkt. No. 55-1 at 67. On the merits, the Tribal Court found that Defendants had not proved their right to use the disputed water. *See id*. The Tribal Court awarded the Tribe $142,718 in damages for the water misappropriated between 1999 and 2015. *See id.* at 67–68.

The Tribe then sued in this court to enforce the Tribal Court's judgment. The Tribe seeks

> [a] finding that the Ute Tribal Court judgment is entitled to recognition, registration, and enforcement in accordance with federal law; [a]n order recognizing, registering, and making enforceable the [tribal] court judgment in this Court as a judgment of this Court; [a] writ of execution commanding the United States Marshal to seize the nonexempt portion of the property of Defendants sufficient to satisfy the judgment; [a]n order permitting post-judgment discovery for the purpose of identifying property from which the judgment can be satisfied; [a]n order forbidding any person from transferring, disposing, or interfering with property of the Defendants from which the judgment can be satisfied; [c]osts and disbursements of this proceeding, including without

> limitation, attorneys' fees, expenses, expert costs and all other costs; and [s]uch other and further relief as the Court shall deem just and proper.

Dkt. No. 2 at 7–8.

The Tribe also seeks leave to amend its complaint to make clear that the Tribal Court's decision is at least partially rooted in a 1923 decree and permanent injunction entered by this court in *United States v. Cedarview Irrigation Co.*, No. 4427 (D. Utah 1923). *See* Dkt. No. 78 at 2. That ruling established the United States' ownership of the water rights at issue in that litigation, which apparently encompass the water at issue here. *See* Dkt 55 at 8–9. The Tribe was not a party to that litigation, though it contends that the ruling established that the United States owns the water in trust for the Tribe. *Cf. supra* n.1.

Based on its review of the Motion and the proposed Amended Complaint, the court finds that its discussion of the 1923 decree is intended only to buttress the Tribe's jurisdictional allegations. While the proposed complaint does add to the prayer for relief a request for "[a]n order enjoining the Defendants from diverting water from the Deep Creek Canal in violation of the federal court decree and permanent injunction entered in *United States v. Cedarview Irrigation Co.*, No. 4427 (D. Utah 1923)," Dkt. No. 71-1 at 10, it does not assert any claims arising out of the 1923 decree. Rather, it remains "an action to recognize, register, and enforce a tribal court money judgment under principles of comity." Dkt. No. 71-1 at 3. As the Tribe explains in its briefing, the proposed amended complaint seeks to "enforce the *Cedarview* Decree *via* this Court's enforcement of the Tribal Court's enforcement of the *Cedarview* Decree through the Tribal Court suit," Dkt. No. 78 at 3 (emphasis in original), not to assert a free-standing claim that is independent of the Tribal Court's judgment. *See also* Oral Argument at 1:30-2:00; 11:30-12:00; 22:00–26:00.

Defendants and the Tribe have both moved for summary judgment. *See* Dkt. Nos. 55, 60.

II.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "[C]ourts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up).

III.

Defendants contend that this court lacks subject matter jurisdiction over this action because the Tribe's claims do not "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The court disagrees.

To be sure, jurisdiction under Section 1331 turns on the well-pleaded complaint rule, which generally "requires that the federal question appear on the face of the plaintiff's properly pleaded complaint." *Garley v. Sandia Corp.*, 236 F.3d 1200, 1207 (10th Cir. 2001); *see also*, *e.g.*, *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–54 (1908). And as Defendants note, the complaint here seeks only recognition and enforcement of the Tribal Court's judgment. *See* Dkt. No. 2 at 7-8. But that is enough to confer federal-question jurisdiction under Tenth Circuit precedent. As that court explained in *MacArthur v. San Juan County*, "bound up in the decision to enforce a tribal court order" is "[t]he question of the regulatory and adjudicatory authority of the tribes," which "is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331." 497 F.3d 1057, 1066 (10th Cir. 2007).

Defendants attempt to distinguish the Tenth Circuit's holding in *MacArthur* based on language in footnote four of that opinion:

> In this case, Plaintiffs argue that federal law has not divested the Navajo Nation of its civil jurisdiction over Defendants' activities—*in fact, they allege federal law has granted it such jurisdiction and seek a declaratory judgment saying as much*. As a result, we agree with the district court's observation that "the action . . . is one arising under federal law because it turns on substantial questions of federal law."

497 F.3d at 1066 n.4 (emphasis added) (alteration in original). While the import of this footnote is debatable, the court does not read it to limit the Tenth Circuit's clear analysis and explicit conclusion, in the text of its opinion, that a suit to enforce a Tribal Court judgment necessarily raises questions of federal law "giving rise to subject matter jurisdiction under 28 U.S.C. § 1331." *Id*. at 1066. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (noting that "whether a tribal court has adjudicative authority over nonmembers is a federal question"); *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1059 & n. 7 (9th Cir. 2019). The court accordingly concludes that it has subject matter jurisdiction.

IV.

This court will recognize and enforce the Tribal Court's judgment only if that court had jurisdiction to decide the dispute before it. As the Tenth Circuit has explained, "recognition of a tribal court judgment must be refused where . . . the tribal court lacked either personal or subject matter jurisdiction." *McArthur*, 497 F.3d at 1067.

Under governing Supreme Court precedent, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Plains Commerce Bank,* 554 U.S. at 330 (internal quotation marks omitted). "[T]ribal court jurisdiction"—the Tribe's "adjudicative" power—thus "'turns upon whether the actions at issue in the litigation are regulable by the tribe'" — the Tribe's "regulatory" power. *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d

1236, 1245 (10th Cir. 2017) (*quoting Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001)). The Tribal Court's jurisdiction in this case thus turns on whether the Tribe had authority to regulate Defendants' use of the water at issue here.[2] For the reasons that follow, the court concludes that the Tribe lacked such authority.

A.

Tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation. *Plains Commerce Bank*, 554 U.S. at 327. While "[a] tribe's power to prescribe the conduct of tribal members has never been doubted," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), Mr. McKee is not a member of the Tribe. The Tribe's power to regulate Defendants' use of the water at issue here thus turns on its authority to regulate nonmembers. As explained below, that authority turns on where that conduct occurs and is closely related to the Tribe's control over "land held by the tribe."

As this case illustrates, Indian reservations may contain two types of land. The first is land that "belong[s] to the Tribe or [is] held by the United States in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557 (1981). Courts frequently refer to such land as "tribal land." *E.g.*, *Plains Commerce Bank*, 554 U.S. at 328. The second is land within the reservations that is owned in fee simple by non-Indians. As the Supreme Court has explained, "[i]n the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of

[2] The parties also dispute whether the Tribal Court had authority under its own rules to issue the judgment in this case. Although its initial brief appeared to suggest otherwise, *see* Dkt. No. 55 at 21, the Tribe clarified in subsequent briefing and conceded at oral argument that the Tribal Court's rules cannot confer jurisdiction over Defendants if the Tribe lacks authority to regulate their use of the disputed water, *see* Dkt. No. 64 at 10–11; Oral Argument at 28:00 – 30:00. The Tribal Court did not hold otherwise. *See* Dkt. No. 55-1 at 66–67. While any such contention or holding would raise questions of federal law warranting review by this court, the court will not otherwise second-guess the Tribal Court's interpretation of its own rules.

the Indian tribes gave way to a policy of allotting those lands to tribe members individually." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253–54 (1992). "Some of these allotted lands were subsequently acquired by persons not members of [the tribes]." *South Dakota v. Bourland*, 508 U.S. 679, 682 (1993). "Non–Indians also acquired fee title to some of the unallotted and 'surplus' lands on the reservation" in other ways as well, including "pursuant to the Indian General Allotment Act of 1887." *Id.* As a result, there are now "millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes." *Plains Commerce Bank*, 554 U.S. at 328.

"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). And because "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them[,] this power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).

But the Supreme Court's "cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce Bank*, 554 U.S. at 328. As the Court has explained, "when the tribe or tribal members convey a parcel of fee land '*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands'" *Id.* (quoting *South Dakota*, 508 U.S. at 689) (emphasis in original). "This necessarily entails 'the loss of regulatory jurisdiction over the use of the land by others.'" *Id.* (quoting *South Dakota*, 508 U.S. at 689). "As a general rule, then, the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Id.* (internal quotation marks omitted). And because a Tribe's power to regulate nonmembers'

conduct arises from its right to exclude, it likewise follows that there is a "general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997).

The Supreme Court has, however, "recognized two exceptions to this principle"—that is, two "circumstances in which tribes *may* exercise 'civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.'" *Plains Commerce Bank*, 554 U.S. at 329 (emphasis added) (quoting *Montana*, 450 U.S. at 565). "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.'" *Id.* (*quoting Montana*, 450 U.S. at 565) (alteration in original). "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 (*quoting Montana*, 450 U.S. at 566). "These rules have become known as the *Montana* exceptions, after the case that elaborated them." *Id.*

B.

As the Tribal Court recognized, the McKee Property is owned by Defendants in fee simple. *See* Dkt. No. 55-1 at 42. And although the Tribal Court found that the land immediately "to the east and south" of McKee's Property is held in trust for the Tribe, Dkt. No. 55-1 at 49, it made no such finding regarding the land immediately to the north of the McKee property, where the Tribe's evidence indicates some of the water diversion occurs, *see id*. at 194. Nor has the Tribe argued or submitted evidence that the land immediate to the north of the McKee property is tribal land.

Although there is thus no evidence that Defendants' diversion or use of the disputed water took place on land owned by, or held in trust for, the Tribe, the Tribe argues 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." Dkt. No. 55 at 30 (emphasis removed); *see also id*. at 32–33 (arguing that diversion "occurred from tribal property on an easement held in trust for the Tribe by the United States, thereby implicating the Tribe's inherent sovereign power to exclude").

To the extent the Tribe's argument rests on the existence of an easement, the court rejects it. As the Supreme Court held just this year, "easements are not land, they merely burden land that continues to be owned by another." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1845 (2020). The fact that land owned in fee by nonmembers is burdened by an easement does not change the ownership of that land or convert it into tribal property.[3]

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[3] Although the Tribe cites the Supreme Court's decision in *Strate v. A-1 Contractors* elsewhere in its briefing, it does not cite this decision in support of this argument. *Strate* does, however, provide at least superficial support for the Tribe's argument: in that case the Court addressed tribal jurisdiction over an accident that occurred on a state highway built on a right-of-way within a reservation. *See* 520 U.S. at 454–56. Although the land burdened by the right-of-way was held in trust for the tribes, the Court nevertheless "align[ed] the right-of-way, for the purpose at hand, with land alienated to non-Indians" and thus held that the tribes could exercise jurisdiction only pursuant to the *Montana* exceptions. *Id*. at 456. As the Court explained,

> [f]orming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude.

Id. at 455–56.

The irrigation ditches that cross the McKee property are a far cry from a highway that is open to and traveled by the public and thus requires regular maintenance and policing. In

The Tribe also contends that just as it has the absolute right to exclude nonmembers from tribal lands, it also has the right to exclude them from tribal resources. Although the Tribe's briefing is not entirely clear on this point, it appears that the tribal resources to which it refers are the canals from which the water is taken and possibly the diverted water as well. *See* Dkt. No. 55 at 30–33; Dkt. No. 64 at 14–15.

Like the Tribal Court, *see* Dkt. No.55-1 at 67, the Tribe invokes the Supreme Court's decision in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), in support of its position. To be sure, the Court in that case stated "that tribes have the power to manage the use of its territory *and resources* by both members and nonmembers." *Id*. at 335 (emphasis added). But the Court in *New Mexico* was addressing only the Tribe's broad power to prohibit or regulate hunting and fishing by nonmembers on "lands belonging to the Tribe or held by the United States in trust for [a] Tribe." *Id*. at 331 (internal quotation marks omitted). Indeed, it expressly distinguished—and recognized the continued vitality—of the Court's holdings in other cases, including *Montana*, that tribes lack such power to prohibit or regulate hunting and fishing by

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addition, unlike the State, which maintained, policed, and exercised sole regulatory control of the highway in *Strate*, it appears that neither the United States as trustee nor the Tribe exercises exclusive regulatory control over the irrigation ditches and the water they carry. The 1906 statute that authorized their creation stated "[t]hat such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah," 34 Stat. 375, and it appears that the State may retain at least some role in the allocation of the water today, *see* Dkt. No. 60 at 9–10. In addition, while the State in *Strate* was undoubtedly the sole owner of the right of way, the irrigations ditches here were constructed "to irrigate *the allotted lands* of the Uncompahgre, Uintah, and White River Utes in Utah," 34 Stat. 375 (emphasis added), and it is at least disputed whether they are held in trust exclusively for the Tribe today. *See supra* n.1.

For all of these reasons, the court finds *Strate*'s analysis inapplicable to the easement here.

nonmembers on "lands located within the reservation but *not* owned by the Tribe or its members." *Id.* at 330–32 (emphasis in original).

Nor do the decisions invoked by the Tribal Court and cited by the Tribe support a plenary right to exclude nonmembers from, or regulate their use of, tribal resources located on land owned in fee by nonmembers. To the contrary, these cases address regulation of nonmembers *on tribal land*. *See, e.g.*, *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 896 (9th Cir. 2017), as amended (Aug. 3, 2017) (concerning "claims against two public school districts operating schools on leased tribal land."); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811-14 (9th Cir. 2011) ("[T]he non-Indian activity in question occurred on tribal land."); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) (addressing tribe's authority to "regulate [a non-Indian entity's] entry and conduct upon tribal land"). Indeed, the court has found no authority for the proposition that a tribe may assert regulatory authority over nonmembers' use of tribal resources on land held in fee by nonmembers except pursuant to the *Montana* exceptions.

The Tribe also raises policy arguments in support of its asserted authority to exclude nonmembers from tribal resources as well as from tribal land. *See* Dkt. No. 64 at 14–15. These arguments are not unreasonable, but the court concludes that they are unsupported by legal authority and cannot be reconciled with Supreme Court precedent.

For all of these reasons, the court rejects the Tribe's argument that it possesses plenary regulatory power over Defendants' diversion of the disputed water based on its power to exclude.

C.

It follows that the Tribe has authority to regulate Defendants' conduct only to the extent permitted under the two *Montana* exceptions. The Tribe maintains that both exceptions apply here.

Under the first *Montana* exception, "[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." *Montana*, 450 U.S. at 565. The Tribe argues that this exception applies because "McKee's land was conveyed to his predecessors in interest under an original U.S. Patent" which provided that the property rights conveyed were "subject to any vested and accrued water rights . . . and the rights to ditches and reservoirs used in connection with such water rights" and reserved "a right of way thereon for ditches or canals constructed by the authority of the United States." Dkt. No. 55 at 23 (emphasis removed). According to the Tribe, because this patent subjects the McKee Property to "the vested and accrued water rights of the Tribe and the rights-of-way for ditches and canals" it creates a "consensual relationship" between Defendants and the Tribe. *Id*. at 24.

The court rejects this argument. As the Tribe explains, the patent was granted by the United States to Defendants' predecessors in interest. Neither Defendants nor the Tribe were parties to the conveyance. To be sure, the patent appears to subject the McKee Property to an easement that no doubt binds Defendants today. But Defendants are not bound because they have entered into an agreement with the Tribe. Indeed there is no evidence that they have ever entered into any agreement with the Tribe relating to the easement. Rather, Defendants are bound because the easement reserved by the patent is a property right that runs with and burdens the land they now own. The Tribe cites no authority applying the first *Montana* exception based on

analogous circumstances and the court is aware of none. For all of these reasons, the court finds that the rights reserved by the patent do not establish a "consensual relationship" between Defendants and the Tribe. *Cf. Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999) ("A right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee."); *State of Mont. Dept. of Transp. V. King*, 191 F.3d 1108, 1113 (9th Cir. 1999) ("[T]ransfers of property interest between governmental entities create property rights; they generally do not create continuing consensual relationships.").

The Tribe also argues that Defendants' lease of a different parcel of land from the Tribe supports its authority to regulate Defendants' conduct under the first *Montana* exception. But the Tribe neither argues nor presents any evidence that Defendants used the disputed water on the leased land. And the Supreme Court has held that "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). It follows that "[t]he mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts." *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941–42 (9th Cir. 2009); *see also MacArthur v. San Juan Cty.*, 309 F.3d 1216, 1223–24 (10th Cir. 2002) (holding that an attorney was not subject to suit in the Navajo Nation court merely because he was admitted to practice there). To be sure, the lease was "subject to the lessee (Defendant McKee) complying with 'all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies.'" Dkt. No. 55 at 25 (emphasis removed). By signing

this agreement, Mr. McKee no doubt consented to broad Tribal jurisdiction over his use of the leased property. But under binding Supreme Court precedent, this court cannot construe the lease to confer tribal jurisdiction over conduct wholly unrelated to the lease. The court thus concludes that first *Montana* exception does not support jurisdiction here.

Under the second *Montana* exception, 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." *Montana*, 450 U.S. at 566. "The second *Montana* exception may be invoked only if the challenged conduct could 'fairly be called catastrophic for tribal self-government.'" *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1246 (10th Cir. 2017) (quoting *Plains Commerce Bank*, 554 U.S. at 341).[4] In *Plains Commerce Bank*, the Supreme Court gave one example of what is not considered catastrophic: "[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.

The court does not doubt the vital importance of water in the arid lands on which the Reservation is located. *See, e.g.*, *Winters v. United States,* 207 U.S. 564, 576 (1908). But

[4] Noting the Supreme Court's observation in *Plains Commerce Bank* that "[n]either the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception," the Tribe seeks to dismiss the Court's narrow formulation of the scope of the second exception in that case as dicta. Dkt. No. 64 at 19 (quoting *Plains Commerce Bank*, 554 U.S. at 340–41). But regardless of what the lower courts may have done, the Supreme Court squarely held this exception did not apply. *See Plains Commerce Bank,* 554 U.S. at 341 ("Accordingly, we hold the second *Montana* exception inapplicable in this case."). In addition, the Tenth Circuit followed this formulation in *Norton* in accepting one claim and rejecting another. Even if the Court's formulation were "dicta all the way down," moreover, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020), lower courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements," *Utah Republican Party v. Cox*, 892 F.3d 1066, 1079 (10th Cir. 2018) (cleaned up).

applying the standard from *Plains Commerce Bank* and *Norton,* the court cannot say that the diversion of a total of $142,718 worth of water over the course of sixteen years can "fairly be called catastrophic for tribal self-government."[5]

* * *

Because the Tribe lacks authority to regulate Defendants' diversion of the disputed water, the Tribal court lacked jurisdiction over this dispute. Defendants' motion for summary judgment is accordingly granted, and Plaintiff's motion is denied.

V.

In addition to moving for summary judgment, the Tribe has filed two other motions. As mentioned earlier, the Tribe seeks leave to amend its complaint to clarify that, by enforcing the Tribal Court's decision, it will also be enforcing a decree and permanent injunction entered by this court in 1923. *See supra* at 4–5. These allegations regarding the 1923 Decree are unnecessary to establish this court's subject matter jurisdiction, however—as this court has already held, it has federal question jurisdiction here because the Tribe seeks to enforce a Tribal Court judgment. Conversely, these allegations 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. And as discussed above, the proposed amended complaint does not allege any freestanding claims arising out of the 1923 Decree—rather, it remains an "an action to recognize, register, and enforce a tribal court money judgment under principles of comity." Dkt. No. 71-1 at 3. Even if the Tribe were permitted to amend its

[5] It is not clear that the Tribe seriously contends otherwise. In all of the Tribe's filings in this case, the court has found the word "catastrophic" only once—in a paragraph arguing that the Supreme Court's use of this word should be disregarded as dicta. *See* Dkt. No. 64 at 19.

complaint, then, summary judgment for Defendants would still be appropriate. The court accordingly denies the motion for leave to amend as futile. *See Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009).

The Tribe also filed a motion to clarify Defendants' diversion and use of the disputed water. *See* Dkt. No. 83. The court grants this motion and has relied on the Tribe's clarification in this opinion. Although the Tribe's clarifications were helpful, they ultimately did not change the court's analysis of the Tribal Court's authority.

VI.

The court emphasizes the limited scope of this decision. The court holds only that the Tribal Court lacked jurisdiction to adjudicate the dispute between the Tribe and Defendants. It does 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. The court's decision also does not bar the Tribe from bringing suit against Defendants in state or federal court. Nor is it the province of this court to evaluate the wisdom or justice of the United States' past and present stewardship of the water on which the Tribe depends for its existence and livelihood or of the limitations the Supreme Court and Tenth Circuit have imposed on tribal jurisdiction. Rather, this court's role is to apply the controlling decisions of those superior tribunals as faithfully as it is able to the facts presented here.

* * *

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED. Plaintiff's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Leave to Clarify is GRANTED, but its Motion for Leave to Amend is DENIED. This action will be DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 28th day of August, 2020.

BY THE COURT:

Howard C. Nielson, Jr.
United States District Judge

ADDENDUM 4

Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment, *Ute Indian Tribe v. McKee*, *et al.*, case number 2:18-cv-000314

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, Plaintiff, v. GREGORY D. MCKEE; T&L LIVESTOCK INC.; MCKEE FARMS, INC.; and GM FERTILIZER, INC., Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND RESOLVING OTHER PENDING MOTIONS** Case No. 2:18-cv-000314-HCN-DBP Howard C. Nielson, Jr. United States District Judge

Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Indian Reservation, seeks to enforce a judgment of its Tribal Court against Defendants: Gregory D. McKee and three companies with which he is associated, T&L Livestock, McKee Farms, and GM Fertilizer. Both the Tribe and Defendants have moved for summary judgment. The court grants Defendants' motion and denies the Tribe's motion.

I.

The Tribe sued Defendants in Tribal Court, alleging that they are misappropriating water that the United States owns in trust for the Tribe. *See* Dkt. No. 2-2 at 3–17. The Tribe alleged

that some water is taken pursuant to an alleged agreement with the United States, and that other water is taken without any authorization. *See, e.g.*, Oral Argument at 12:20-15:00.[1]

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[1] The disputed water is carried by canals as part of the Uintah Indian Irrigation Project (UIIP), which was established by the Act of June 21, 1906, ch. 3504, 34 Stat. 375. *See* Dkt. No. 55 at 7. The Tribe's position appears to be that all of the disputed water and the waterways that carry it are held in trust by the United States for the Tribe. *See, e.g.*, *id.* at 32–33.

The court has some doubt that the waterways are held in trust *solely* for the Tribe, however. By its terms, the 1906 Act appropriated money "[f]or constructing irrigation systems to irrigate *the allotted lands* of the Uncompahgre, Uintah, and White River Utes in Utah." 34 Stat. 375 (emphasis added). And as the 10th Circuit has explained, under the 1906 Act, the UIIP is held "in trust for the Indians." *Hackford v. Babbitt,* 14 F.3d 1457, 1468 (10th Cir. 1994). But "the phrase[] 'in trust for the Indians' in the 1906 Act is not coextensive with 'in trust for the tribe'. . . . The 1906 Act's purpose was to provide irrigation for the allotted, not tribal lands." *Id*. Many of the allotted lands—including the McKee Property—were eventually transferred to non-Indians. Indeed, "[t]oday, more than one-third of the land served by the [UIIP] is held in fee by non-Indian successors to Indian allottees." *Id*. at 1461 n.2.

And while the court has no doubt that at least *some* of disputed water is held in trust for the Tribe, it is far from clear that *all* of the water is so held. Much like the 1906 Act, the 1923 Decree and Permanent Injunction in *United States v. Cedarview Irrigation Co.,* No. 4427 (D. Utah 1923), on which the Tribe relies, determined that that the United States held the water in question "as Trustees of the *Indians* on the former Uintah and Ouray Indian Reservation." Dkt. No. 55-1 at 96–97. And although *Winters v. United States* held that when the United States establishes an Indian Reservation, it impliedly reserves enough water to fulfill the purpose of the reservation, *see* 207 U.S. 564, 576–77 (1908), it does not follow that *all* of the UIIP waters are held in trust for the Tribe.

Indeed, as Defendants explain, it appears that the portion of the water that belongs to the Tribe is currently a matter of dispute and litigation among the United States, the State of Utah, and the Tribe:

> although the Tribe is entitled to a yet to be determined amount of water to fulfill the original purposes of its reservation, *Winters v. United States*, 207 U.S. 564 (1908), that amount of water has, despite the efforts of Congress and the State of Utah, never been quantified. For instance, the Tribe contends that, under the Ute Indian Water Compact, the water at issue here is part of the Tribe's reserved water. However, the Tribe has failed and refused to ratify the Ute Indian Water Compact precluding quantification. In fact, the Tribe recently filed a lawsuit in the United States District Court for the District of Columbia alleging that the Tribe is entitled to more water than what is allocated in the Ute Indian Water Compact.

Mr. McKee is not a member of the Tribe. *See*, *e.g.*, Dkt. No. 55-1 at 46. Although the land on which the Defendants use the disputed water is located within the exterior boundaries of the Tribe's Reservation, it is no longer tribal land—that is, it is neither owned by, nor held in trust for, the Tribe. *See* Dkt. No. 55-1 at 49. As the Tribal Court found, "[t]he McKee Property is land that was diminished from the Uintah Valley Reservation, *i.e.*, 'lands that passed from trust to fee status.'" *Id.*; *see also id*. (finding that "[t]he McKee Property is situated in a checker-board area of the Reservation"); *Hagen v. Utah*, 510 U.S. 399, 414 (1994); *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah*, 114 F.3d 1513, 1529–31 (10th Cir. 1997). Until 2018, Mr. McKee also leased "40.000 acres, more or less" of tribal land through the Bureau of Indian Affairs. Dkt. No. 55-4 at 138. It appears that the leased land was located approximately three miles from the McKee Property. *See* Dkt. No. 60 at 25; Dkt. No. 60-1 at 93. The Tribe does not argue, and the Tribal Court did not find, that Defendants used the water at issue here on this leased land. *See* Dkt. No. 64 at 18.

The Tribe maintains that the Deep Creek Canal and Lateral 9, the waterways from which Defendants divert the disputed water, "carr[y] the Ute Indian Tribe's waters through a parcel of [] McKee's property." Dkt. No. 55 at 23. The Tribe neither argues nor presents evidence that the points from which Defendants divert water are located on tribal land or that the Defendants otherwise enter tribal land to divert the water. A report attached to the Tribe's motion for summary judgment states that the points of diversion are located on the McKee Property (which

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Dkt. No. 60 at 17 n.2 (cleaned up); *see also id*. at 9; *Ute Indian Tribe of the Uintah and Ouray Reservation v. United States*, No. 1:18-cv-00546-CJN (D.D.C.). For purposes of resolving the motions here, the court finds it unnecessary to attempt to unravel or fully understand the thorny issues relating to the precise nature and scope of the Tribe's interest in the disputed water and waterways.

Mr. McKee owns in fee) as well as on a parcel located immediately north of the McKee Property. *See* Dkt. No. 55-1 at 194. But the Tribe does not argue, and the Tribal Court did not find, that the parcel immediately north of McKee's property is tribal land. *Cf*. Dkt. No. 55-1 at 49 (finding that McKee's property "is immediately adjacent to tribal trust lands *to the east and south*.") (emphasis added).

In concluding that it had jurisdiction over the Tribe's suit against the McKee Defendants, the Tribal Court reasoned as follows:

> 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).

Dkt. No. 55-1 at 67. On the merits, the Tribal Court found that Defendants had not proved their right to use the disputed water. *See id*. The Tribal Court awarded the Tribe $142,718 in damages for the water misappropriated between 1999 and 2015. *See id.* at 67–68.

The Tribe then sued in this court to enforce the Tribal Court's judgment. The Tribe seeks

> [a] finding that the Ute Tribal Court judgment is entitled to recognition, registration, and enforcement in accordance with federal law; [a]n order recognizing, registering, and making enforceable the [tribal] court judgment in this Court as a judgment of this Court; [a] writ of execution commanding the United States Marshal to seize the nonexempt portion of the property of Defendants sufficient to satisfy the judgment; [a]n order permitting post-judgment discovery for the purpose of identifying property from which the judgment can be satisfied; [a]n order forbidding any person from transferring, disposing, or interfering with property of the Defendants from which the judgment can be satisfied; [c]osts and disbursements of this proceeding, including without

> limitation, attorneys' fees, expenses, expert costs and all other costs; and [s]uch other and further relief as the Court shall deem just and proper.

Dkt. No. 2 at 7–8.

The Tribe also seeks leave to amend its complaint to make clear that the Tribal Court's decision is at least partially rooted in a 1923 decree and permanent injunction entered by this court in *United States v. Cedarview Irrigation Co.*, No. 4427 (D. Utah 1923). *See* Dkt. No. 78 at 2. That ruling established the United States' ownership of the water rights at issue in that litigation, which apparently encompass the water at issue here. *See* Dkt 55 at 8–9. The Tribe was not a party to that litigation, though it contends that the ruling established that the United States owns the water in trust for the Tribe. *Cf. supra* n.1.

Based on its review of the Motion and the proposed Amended Complaint, the court finds that its discussion of the 1923 decree is intended only to buttress the Tribe's jurisdictional allegations. While the proposed complaint does add to the prayer for relief a request for "[a]n order enjoining the Defendants from diverting water from the Deep Creek Canal in violation of the federal court decree and permanent injunction entered in *United States v. Cedarview Irrigation Co.*, No. 4427 (D. Utah 1923)," Dkt. No. 71-1 at 10, it does not assert any claims arising out of the 1923 decree. Rather, it remains "an action to recognize, register, and enforce a tribal court money judgment under principles of comity." Dkt. No. 71-1 at 3. As the Tribe explains in its briefing, the proposed amended complaint seeks to "enforce the *Cedarview* Decree *via* this Court's enforcement of the Tribal Court's enforcement of the *Cedarview* Decree through the Tribal Court suit," Dkt. No. 78 at 3 (emphasis in original), not to assert a free-standing claim that is independent of the Tribal Court's judgment. *See also* Oral Argument at 1:30-2:00; 11:30-12:00; 22:00–26:00.

Defendants and the Tribe have both moved for summary judgment. *See* Dkt. Nos. 55, 60.

II.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "[C]ourts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up).

III.

Defendants contend that this court lacks subject matter jurisdiction over this action because the Tribe's claims do not "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The court disagrees.

To be sure, jurisdiction under Section 1331 turns on the well-pleaded complaint rule, which generally "requires that the federal question appear on the face of the plaintiff's properly pleaded complaint." *Garley v. Sandia Corp.*, 236 F.3d 1200, 1207 (10th Cir. 2001); *see also*, *e.g.*, *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–54 (1908). And as Defendants note, the complaint here seeks only recognition and enforcement of the Tribal Court's judgment. *See* Dkt. No. 2 at 7-8. But that is enough to confer federal-question jurisdiction under Tenth Circuit precedent. As that court explained in *MacArthur v. San Juan County*, "bound up in the decision to enforce a tribal court order" is "[t]he question of the regulatory and adjudicatory authority of the tribes," which "is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331." 497 F.3d 1057, 1066 (10th Cir. 2007).

Defendants attempt to distinguish the Tenth Circuit's holding in *MacArthur* based on language in footnote four of that opinion:

> In this case, Plaintiffs argue that federal law has not divested the Navajo Nation of its civil jurisdiction over Defendants' activities—*in fact, they allege federal law has granted it such jurisdiction and seek a declaratory judgment saying as much*. As a result, we agree with the district court's observation that "the action . . . is one arising under federal law because it turns on substantial questions of federal law."

497 F.3d at 1066 n.4 (emphasis added) (alteration in original). While the import of this footnote is debatable, the court does not read it to limit the Tenth Circuit's clear analysis and explicit conclusion, in the text of its opinion, that a suit to enforce a Tribal Court judgment necessarily raises questions of federal law "giving rise to subject matter jurisdiction under 28 U.S.C. § 1331." *Id*. at 1066. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (noting that "whether a tribal court has adjudicative authority over nonmembers is a federal question"); *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1059 & n. 7 (9th Cir. 2019). The court accordingly concludes that it has subject matter jurisdiction.

IV.

This court will recognize and enforce the Tribal Court's judgment only if that court had jurisdiction to decide the dispute before it. As the Tenth Circuit has explained, "recognition of a tribal court judgment must be refused where . . . the tribal court lacked either personal or subject matter jurisdiction." *McArthur*, 497 F.3d at 1067.

Under governing Supreme Court precedent, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Plains Commerce Bank,* 554 U.S. at 330 (internal quotation marks omitted). "[T]ribal court jurisdiction"—the Tribe's "adjudicative" power—thus "'turns upon whether the actions at issue in the litigation are regulable by the tribe'" — the Tribe's "regulatory" power. *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d

1236, 1245 (10th Cir. 2017) (*quoting Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001)). The Tribal Court's jurisdiction in this case thus turns on whether the Tribe had authority to regulate Defendants' use of the water at issue here.[2] For the reasons that follow, the court concludes that the Tribe lacked such authority.

A.

Tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation. *Plains Commerce Bank*, 554 U.S. at 327. While "[a] tribe's power to prescribe the conduct of tribal members has never been doubted," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), Mr. McKee is not a member of the Tribe. The Tribe's power to regulate Defendants' use of the water at issue here thus turns on its authority to regulate nonmembers. As explained below, that authority turns on where that conduct occurs and is closely related to the Tribe's control over "land held by the tribe."

As this case illustrates, Indian reservations may contain two types of land. The first is land that "belong[s] to the Tribe or [is] held by the United States in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557 (1981). Courts frequently refer to such land as "tribal land." *E.g.*, *Plains Commerce Bank*, 554 U.S. at 328. The second is land within the reservations that is owned in fee simple by non-Indians. As the Supreme Court has explained, "[i]n the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of

[2] The parties also dispute whether the Tribal Court had authority under its own rules to issue the judgment in this case. Although its initial brief appeared to suggest otherwise, *see* Dkt. No. 55 at 21, the Tribe clarified in subsequent briefing and conceded at oral argument that the Tribal Court's rules cannot confer jurisdiction over Defendants if the Tribe lacks authority to regulate their use of the disputed water, *see* Dkt. No. 64 at 10–11; Oral Argument at 28:00 – 30:00. The Tribal Court did not hold otherwise. *See* Dkt. No. 55-1 at 66–67. While any such contention or holding would raise questions of federal law warranting review by this court, the court will not otherwise second-guess the Tribal Court's interpretation of its own rules.

the Indian tribes gave way to a policy of allotting those lands to tribe members individually." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253–54 (1992). "Some of these allotted lands were subsequently acquired by persons not members of [the tribes]." *South Dakota v. Bourland*, 508 U.S. 679, 682 (1993). "Non–Indians also acquired fee title to some of the unallotted and 'surplus' lands on the reservation" in other ways as well, including "pursuant to the Indian General Allotment Act of 1887." *Id.* As a result, there are now "millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes." *Plains Commerce Bank*, 554 U.S. at 328.

"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). And because "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them[,] this power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982).

But the Supreme Court's "cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce Bank*, 554 U.S. at 328. As the Court has explained, "when the tribe or tribal members convey a parcel of fee land '*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands'" *Id.* (quoting *South Dakota*, 508 U.S. at 689) (emphasis in original). "This necessarily entails 'the loss of regulatory jurisdiction over the use of the land by others.'" *Id.* (quoting *South Dakota*, 508 U.S. at 689). "As a general rule, then, the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Id.* (internal quotation marks omitted). And because a Tribe's power to regulate nonmembers'

conduct arises from its right to exclude, it likewise follows that there is a "general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997).

The Supreme Court has, however, "recognized two exceptions to this principle"—that is, two "circumstances in which tribes *may* exercise 'civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.'" *Plains Commerce Bank*, 554 U.S. at 329 (emphasis added) (quoting *Montana*, 450 U.S. at 565). "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.'" *Id.* (*quoting Montana*, 450 U.S. at 565) (alteration in original). "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 (*quoting Montana*, 450 U.S. at 566). "These rules have become known as the *Montana* exceptions, after the case that elaborated them." *Id.*

B.

As the Tribal Court recognized, the McKee Property is owned by Defendants in fee simple. *See* Dkt. No. 55-1 at 42. And although the Tribal Court found that the land immediately "to the east and south" of McKee's Property is held in trust for the Tribe, Dkt. No. 55-1 at 49, it made no such finding regarding the land immediately to the north of the McKee property, where the Tribe's evidence indicates some of the water diversion occurs, *see id*. at 194. Nor has the Tribe argued or submitted evidence that the land immediate to the north of the McKee property is tribal land.

Although there is thus no evidence that Defendants' diversion or use of the disputed water took place on land owned by, or held in trust for, the Tribe, the Tribe argues 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." Dkt. No. 55 at 30 (emphasis removed); *see also id*. at 32–33 (arguing that diversion "occurred from tribal property on an easement held in trust for the Tribe by the United States, thereby implicating the Tribe's inherent sovereign power to exclude").

To the extent the Tribe's argument rests on the existence of an easement, the court rejects it. As the Supreme Court held just this year, "easements are not land, they merely burden land that continues to be owned by another." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1845 (2020). The fact that land owned in fee by nonmembers is burdened by an easement does not change the ownership of that land or convert it into tribal property.[3]

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[3] Although the Tribe cites the Supreme Court's decision in *Strate v. A-1 Contractors* elsewhere in its briefing, it does not cite this decision in support of this argument. *Strate* does, however, provide at least superficial support for the Tribe's argument: in that case the Court addressed tribal jurisdiction over an accident that occurred on a state highway built on a right-of-way within a reservation. *See* 520 U.S. at 454–56. Although the land burdened by the right-of-way was held in trust for the tribes, the Court nevertheless "align[ed] the right-of-way, for the purpose at hand, with land alienated to non-Indians" and thus held that the tribes could exercise jurisdiction only pursuant to the *Montana* exceptions. *Id*. at 456. As the Court explained,

> [f]orming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude.

Id. at 455–56.

The irrigation ditches that cross the McKee property are a far cry from a highway that is open to and traveled by the public and thus requires regular maintenance and policing. In

The Tribe also contends that just as it has the absolute right to exclude nonmembers from tribal lands, it also has the right to exclude them from tribal resources. Although the Tribe's briefing is not entirely clear on this point, it appears that the tribal resources to which it refers are the canals from which the water is taken and possibly the diverted water as well. *See* Dkt. No. 55 at 30–33; Dkt. No. 64 at 14–15.

Like the Tribal Court, *see* Dkt. No.55-1 at 67, the Tribe invokes the Supreme Court's decision in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), in support of its position. To be sure, the Court in that case stated "that tribes have the power to manage the use of its territory *and resources* by both members and nonmembers." *Id*. at 335 (emphasis added). But the Court in *New Mexico* was addressing only the Tribe's broad power to prohibit or regulate hunting and fishing by nonmembers on "lands belonging to the Tribe or held by the United States in trust for [a] Tribe." *Id*. at 331 (internal quotation marks omitted). Indeed, it expressly distinguished—and recognized the continued vitality—of the Court's holdings in other cases, including *Montana*, that tribes lack such power to prohibit or regulate hunting and fishing by

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addition, unlike the State, which maintained, policed, and exercised sole regulatory control of the highway in *Strate*, it appears that neither the United States as trustee nor the Tribe exercises exclusive regulatory control over the irrigation ditches and the water they carry. The 1906 statute that authorized their creation stated "[t]hat such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah," 34 Stat. 375, and it appears that the State may retain at least some role in the allocation of the water today, *see* Dkt. No. 60 at 9–10. In addition, while the State in *Strate* was undoubtedly the sole owner of the right of way, the irrigations ditches here were constructed "to irrigate *the allotted lands* of the Uncompahgre, Uintah, and White River Utes in Utah," 34 Stat. 375 (emphasis added), and it is at least disputed whether they are held in trust exclusively for the Tribe today. *See supra* n.1.

For all of these reasons, the court finds *Strate*'s analysis inapplicable to the easement here.

nonmembers on "lands located within the reservation but *not* owned by the Tribe or its members." *Id.* at 330–32 (emphasis in original).

Nor do the decisions invoked by the Tribal Court and cited by the Tribe support a plenary right to exclude nonmembers from, or regulate their use of, tribal resources located on land owned in fee by nonmembers. To the contrary, these cases address regulation of nonmembers *on tribal land*. *See, e.g.*, *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 896 (9th Cir. 2017), as amended (Aug. 3, 2017) (concerning "claims against two public school districts operating schools on leased tribal land."); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811-14 (9th Cir. 2011) ("[T]he non-Indian activity in question occurred on tribal land."); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) (addressing tribe's authority to "regulate [a non-Indian entity's] entry and conduct upon tribal land"). Indeed, the court has found no authority for the proposition that a tribe may assert regulatory authority over nonmembers' use of tribal resources on land held in fee by nonmembers except pursuant to the *Montana* exceptions.

The Tribe also raises policy arguments in support of its asserted authority to exclude nonmembers from tribal resources as well as from tribal land. *See* Dkt. No. 64 at 14–15. These arguments are not unreasonable, but the court concludes that they are unsupported by legal authority and cannot be reconciled with Supreme Court precedent.

For all of these reasons, the court rejects the Tribe's argument that it possesses plenary regulatory power over Defendants' diversion of the disputed water based on its power to exclude.

C.

It follows that the Tribe has authority to regulate Defendants' conduct only to the extent permitted under the two *Montana* exceptions. The Tribe maintains that both exceptions apply here.

Under the first *Montana* exception, "[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." *Montana*, 450 U.S. at 565. The Tribe argues that this exception applies because "McKee's land was conveyed to his predecessors in interest under an original U.S. Patent" which provided that the property rights conveyed were "subject to any vested and accrued water rights . . . and the rights to ditches and reservoirs used in connection with such water rights" and reserved "a right of way thereon for ditches or canals constructed by the authority of the United States." Dkt. No. 55 at 23 (emphasis removed). According to the Tribe, because this patent subjects the McKee Property to "the vested and accrued water rights of the Tribe and the rights-of-way for ditches and canals" it creates a "consensual relationship" between Defendants and the Tribe. *Id*. at 24.

The court rejects this argument. As the Tribe explains, the patent was granted by the United States to Defendants' predecessors in interest. Neither Defendants nor the Tribe were parties to the conveyance. To be sure, the patent appears to subject the McKee Property to an easement that no doubt binds Defendants today. But Defendants are not bound because they have entered into an agreement with the Tribe. Indeed there is no evidence that they have ever entered into any agreement with the Tribe relating to the easement. Rather, Defendants are bound because the easement reserved by the patent is a property right that runs with and burdens the land they now own. The Tribe cites no authority applying the first *Montana* exception based on

analogous circumstances and the court is aware of none. For all of these reasons, the court finds that the rights reserved by the patent do not establish a "consensual relationship" between Defendants and the Tribe. *Cf. Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999) ("A right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee."); *State of Mont. Dept. of Transp. V. King*, 191 F.3d 1108, 1113 (9th Cir. 1999) ("[T]ransfers of property interest between governmental entities create property rights; they generally do not create continuing consensual relationships.").

The Tribe also argues that Defendants' lease of a different parcel of land from the Tribe supports its authority to regulate Defendants' conduct under the first *Montana* exception. But the Tribe neither argues nor presents any evidence that Defendants used the disputed water on the leased land. And the Supreme Court has held that "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). It follows that "[t]he mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts." *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941–42 (9th Cir. 2009); *see also MacArthur v. San Juan Cty.*, 309 F.3d 1216, 1223–24 (10th Cir. 2002) (holding that an attorney was not subject to suit in the Navajo Nation court merely because he was admitted to practice there). To be sure, the lease was "subject to the lessee (Defendant McKee) complying with 'all applicable laws, ordinances, rules, regulations, and other legal requirements, including tribal laws and leasing policies.'" Dkt. No. 55 at 25 (emphasis removed). By signing

this agreement, Mr. McKee no doubt consented to broad Tribal jurisdiction over his use of the leased property. But under binding Supreme Court precedent, this court cannot construe the lease to confer tribal jurisdiction over conduct wholly unrelated to the lease. The court thus concludes that first *Montana* exception does not support jurisdiction here.

Under the second *Montana* exception, 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." *Montana*, 450 U.S. at 566. "The second *Montana* exception may be invoked only if the challenged conduct could 'fairly be called catastrophic for tribal self-government.'" *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1246 (10th Cir. 2017) (quoting *Plains Commerce Bank*, 554 U.S. at 341).[4] In *Plains Commerce Bank*, the Supreme Court gave one example of what is not considered catastrophic: "[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.

The court does not doubt the vital importance of water in the arid lands on which the Reservation is located. *See, e.g.*, *Winters v. United States,* 207 U.S. 564, 576 (1908). But

[4] Noting the Supreme Court's observation in *Plains Commerce Bank* that "[n]either the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception," the Tribe seeks to dismiss the Court's narrow formulation of the scope of the second exception in that case as dicta. Dkt. No. 64 at 19 (quoting *Plains Commerce Bank*, 554 U.S. at 340–41). But regardless of what the lower courts may have done, the Supreme Court squarely held this exception did not apply. *See Plains Commerce Bank,* 554 U.S. at 341 ("Accordingly, we hold the second *Montana* exception inapplicable in this case."). In addition, the Tenth Circuit followed this formulation in *Norton* in accepting one claim and rejecting another. Even if the Court's formulation were "dicta all the way down," moreover, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1400 (2020), lower courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements," *Utah Republican Party v. Cox*, 892 F.3d 1066, 1079 (10th Cir. 2018) (cleaned up).

applying the standard from *Plains Commerce Bank* and *Norton,* the court cannot say that the diversion of a total of $142,718 worth of water over the course of sixteen years can "fairly be called catastrophic for tribal self-government."[5]

* * *

Because the Tribe lacks authority to regulate Defendants' diversion of the disputed water, the Tribal court lacked jurisdiction over this dispute. Defendants' motion for summary judgment is accordingly granted, and Plaintiff's motion is denied.

V.

In addition to moving for summary judgment, the Tribe has filed two other motions. As mentioned earlier, the Tribe seeks leave to amend its complaint to clarify that, by enforcing the Tribal Court's decision, it will also be enforcing a decree and permanent injunction entered by this court in 1923. *See supra* at 4–5. These allegations regarding the 1923 Decree are unnecessary to establish this court's subject matter jurisdiction, however—as this court has already held, it has federal question jurisdiction here because the Tribe seeks to enforce a Tribal Court judgment. Conversely, these allegations 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. And as discussed above, the proposed amended complaint does not allege any freestanding claims arising out of the 1923 Decree—rather, it remains an "an action to recognize, register, and enforce a tribal court money judgment under principles of comity." Dkt. No. 71-1 at 3. Even if the Tribe were permitted to amend its

[5] It is not clear that the Tribe seriously contends otherwise. In all of the Tribe's filings in this case, the court has found the word "catastrophic" only once—in a paragraph arguing that the Supreme Court's use of this word should be disregarded as dicta. *See* Dkt. No. 64 at 19.

complaint, then, summary judgment for Defendants would still be appropriate. The court accordingly denies the motion for leave to amend as futile. *See Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009).

The Tribe also filed a motion to clarify Defendants' diversion and use of the disputed water. *See* Dkt. No. 83. The court grants this motion and has relied on the Tribe's clarification in this opinion. Although the Tribe's clarifications were helpful, they ultimately did not change the court's analysis of the Tribal Court's authority.

VI.

The court emphasizes the limited scope of this decision. The court holds only that the Tribal Court lacked jurisdiction to adjudicate the dispute between the Tribe and Defendants. It does 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. The court's decision also does not bar the Tribe from bringing suit against Defendants in state or federal court. Nor is it the province of this court to evaluate the wisdom or justice of the United States' past and present stewardship of the water on which the Tribe depends for its existence and livelihood or of the limitations the Supreme Court and Tenth Circuit have imposed on tribal jurisdiction. Rather, this court's role is to apply the controlling decisions of those superior tribunals as faithfully as it is able to the facts presented here.

* * *

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED. Plaintiff's Motion for Summary Judgment is DENIED. Plaintiff's Motion for Leave to Clarify is GRANTED, but its Motion for Leave to Amend is DENIED. This action will be DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 28th day of August, 2020.

BY THE COURT:

Howard C. Nielson, Jr.
United States District Judge

ADDENDUM 5

Judgment Dismissing Complaint in *Ute Indian Tribe v. McKee, et al.*,
case number 2:18-cv-000314

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

District of Utah

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,

Plaintiff,

v.

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

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 2:18-cv-00314

IT IS ORDERED AND ADJUDGED

That Defendants' Motion for Summary Judgment is granted, and Plaintiff's action against Defendants is dismissed with prejudice.

August 28, 2020

Date

BY THE COURT:

Howard C. Nielson, Jr.
United States District Judge