

CASE NO. 20-4098

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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)
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 REPLY BRIEF

Frances C. Bassett
Jeremy J. Patterson
Patterson Earnhart Real Bird & Wilson LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-926-5292
Facsimile: 303-926-5293

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
GLOSSARY OF TERMS	iv
INTRODUCTION	1
REPLY TO THE APPELLEES’ STATEMENT OF THE CASE	3
A. Greg McKee Admitted Under Oath and in His Tribal Court Filings That He Diverts Water From Deep Creek Canal to Irrigate His Entire 121.14-acre Property.....	5
B. Contrary to Defendants’ Statements in Federal Court, Utah State Water Right 43-3202 Is Directly Implicated in the Tribal Court Suit and Tribal Court Judgment.....	10
C. Defendants Do Not Purchase Water from the Bureau of Indian Affairs to Irrigate the Lower 40 Acres of the McKee Property.....	13
D. The Ute Indian Tribe is the Beneficial Owner of the Water That Was Purportedly Transferred Outside of the UIIP Project Lands to the McKee Property Under the 1943 and 1946 Agreements.	17
LEGAL ARGUMENT	18
I. NEITHER LAW NOR LOGIC SUPPORTS THE DISTRICT COURT’S RULING THAT THE TRIBAL COURT LACKED JURISDICTION TO ADJUDICATE THE TRIBE’S CLAIMS THAT DEFENDANTS WERE TRESPASSING ONTO TRIBAL PROPERTY AND STEALING TRIBAL WATER.....	18
A. The Tribe’s Retained Sovereign Power Includes the Power to Exclude Non-Members From Misappropriating the Tribe’s Federally-Decreed Water Rights.	19
B. An Exercise of Retained Tribal Sovereignty Does Not Depend Upon a Conferral of Authority by the United States.	21
C. The Tribal Court Did Not Unlawfully Exercise Jurisdiction Over Utah State Water Right 43-3202.....	21

D. The United States Was Not a Necessary and Indispensable Party to the Tribal Court Suit.22

E. Neither Law Nor Logic Supports the District Court’s Ruling that the *Montana* Exceptions Do Not Apply Here—There is Abundant Uncontroverted Evidence of Long-Standing Direct and Indirect Consensual Commercial Relationships Between Defendants and the Ute Tribe and Tribal Member Frank Arrowchis, and the Defendants’ Open and Brazen Illegality Causes Obvious Harm to Tribal Self-Governance and Well-Being.23

F. The District Court’s Fatally Flawed Jurisdictional Analysis.28

CONCLUSION28

CERTIFICATE OF COMPLIANCE.....30

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS 31

CERTIFICATE OF SERVICE32

ADDENDUM33

App. II, at 197-20333

NRCE Investigative Report Pictures..... 41

App. II, at 212, 214..... 43

App. III, at 311-312, 316, 354-375..... 45

TABLE OF AUTHORITIES

Cases

18 U.S.C. § 1151(a)20
Choctaw and Chickasaw Nations v. Seitz, 193, F.2d 456, 461 (10th Cir. 1951)22
Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation,
 670 F.2d 900, 903 (10th Cir. 1982).....26
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982).....26
Montana v. United States, 450 U.S. 544, 565-66 (1981)..... 18, 19
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) 1, 19, 20
Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation, 862 F.3d 1236,
 1246 (10th Cir. 2017) 1, 19, 21, 28
Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 338
 (2008).....28
Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma, 874 F.2d 709, 710, 716
 (10th Cir. 1989)2

Statutes

18 U.S.C.A. § 1162(b) 3, 20
 25 U.S.C. § 1321(b) 3, 19
 25 U.S.C. § 19416
 25 U.S.C. §§ 1321-1326 20, 22
 28 U.S.C. § 1360(b)3
 55 Stat. 20914

Other Authorities

Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. Denv.
 Water L. Rev. 228, 292-93 (Spring 2015).....8
 Utah Code Ann. 73-3-3.....8
 Utah Constitution, art. III, §2..... 2, 20

GLOSSARY OF TERMS

BIA Bureau of Indian Affairs
UIIP Uintah Indian Irrigation Project

The Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe or Ute Tribe) respectfully submits its Reply Brief.

INTRODUCTION

In its Opening Brief, the Tribe argued that its inherent sovereign power to exclude nonmembers from tribal land, recognized by the Tenth Circuit in *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1246 (10th Cir. 2017), must logically encompass not just tribal *land*, but also the Tribe’s federally-decreed water rights. Op. Br. at 32-38. The United States Supreme Court has emphasized that in determining tribal jurisdiction over nonmembers, the jurisdictional analysis “does not depend ‘on mechanical or absolute conceptions of state or tribal sovereignty, but calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake.’” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (quotation omitted). Here, unfortunately, Defendants rely entirely on “mechanical” and “absolutist” conceptions of state and tribal sovereignty. And even more troubling, Defendants’ absolutist conceptions include the unfounded assertion that the State of Utah exercises absolute plenary control over the Tribe’s federally-decreed water rights. Turning a blind eye to more than a century of United State Supreme Court precedents, beginning with *Winters*—and the last ninety years of Federal Indian law and policy¹—Defendants assert,

¹ See Opening Brief at 13-14.

incorrectly, not once but twice, that Utah state law preempts federal law over the Tribe's federally-decreed water rights. Defendants first argue that "the power to regulate the [tribal] water administered by the United States in the Deep Creek Canal is vested in the State of Utah—not the Tribe." Ans. Br. at 19. And then, insisting "the State of Utah, rather than the Tribe has the authority to regulate the operations of the UIIP [Ute Indian Irrigation Project] and its appropriation, distribution, and use of the water." *Id.*

In contradiction to Defendants' baseless assertions, the district court record and appeal appendix include a memorandum from the Solicitor of the United States Department of Interior, dated November 14, 1960, stating that "[u]nder the Winter's Doctrine there appears to be no question but that the Indians' water rights of the Uintah and Ouray Reservation are not subject to the laws of the State of Utah." (underscore added) App. VIII at 1287. The record also includes a memorandum from the Regional Solicitor of the Department of Interior, dated June 28, 1988, which states, *inter alia*, "Congress has demonstrated an intent to preempt the operation of state water laws on Indian reservations as manifested in the disclaimers in many of the western states' organic acts, enabling acts, and constitutions, including these for Utah." (underscore added) App. VIII at 1298. *See Utah Constitution*, art. III, §2; *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 710, 716 (10th Cir. 1989) (construing state jurisdiction disclaimers to

disclaim both proprietary and governmental authority).

Bringing further confusion to the discussion, Defendants also cite to Public Law 280, Ans. Br. at 18, but apparently did not even bother to read Public Law 280. Had Defendants read Public Law 280, they would realize that it states, expressly and unequivocally, that no American state is authorized to regulate or to exercise “jurisdiction ... to adjudicate ... the ownership or right to possession” of any “real or personal property, *including water rights*, belonging to any Indian tribe, band, or community that is held in trust by the United States.” (emphasis added) 25 U.S.C. § 1321(b); 28 U.S.C. § 1360(b); 18 U.S.C.A. § 1162(b).

Therefore, the Court should categorically reject Defendants’ aberrant argument that Utah state law preempts federal and tribal jurisdiction over the Tribe’s federally-decreed water rights under the Cedarview Decree.

REPLY TO THE APPELLEES’ STATEMENT OF THE CASE

The McKee Defendants’ current attorneys are Defendants’ third set of attorneys in this dispute, and these current attorneys did not represent Defendants in the Tribal Court. Through their current counsel, the McKee Defendants show no fealty to (i) Defendants’ own prior admissions of fact and law in the Tribal Court, or (ii) to the undisputed evidence before the Tribal Court. Instead, before this Court—as they did earlier in the district court—counsel for the McKee Defendants manufacture new facts and ignore entirely, or flagrantly misrepresent, both the

McKee Defendants' admissions of fact and law in the Tribal Court, and the undisputed evidence admitted in the Tribal Court. So disturbed was the Tribe's counsel by these misrepresentations to the district court that the Tribe sought and was granted leave to clarify the Tribal Court's record in this case:

Defendants' factual recitation in federal court is 180-degrees the opposite of the undisputed evidence that was admitted into evidence in the Tribal Court, including Mr. McKee's own admissions made under oath at the preliminary injunction hearing conducted by the Tribal Court on March 25, 2013.

Tribe's Mtn. to Clarify, ECF No. 83 at 3, App. X at 1787, 1809.

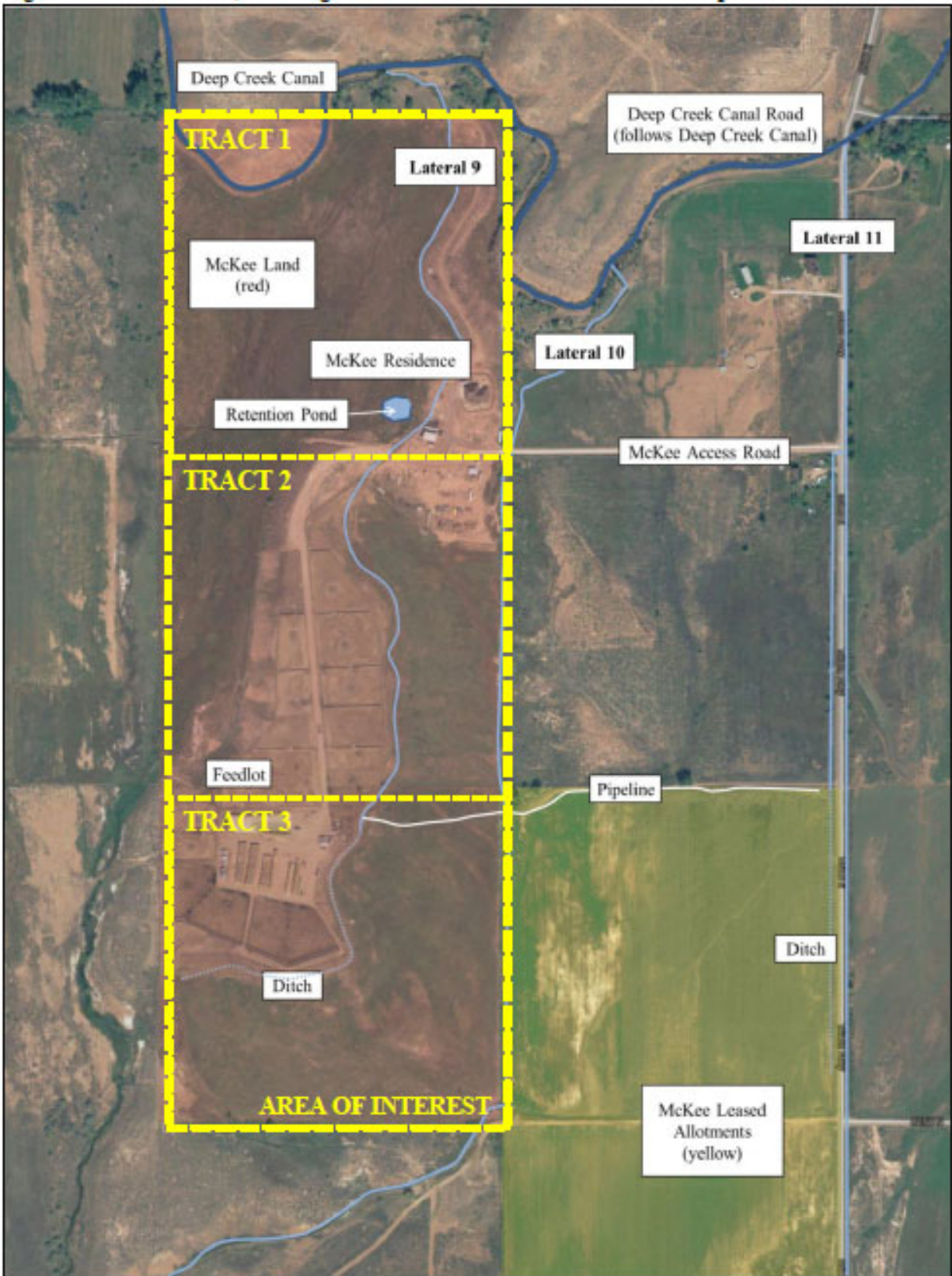
Hence, the Tribe—like a farmer separating wheat from chaff—must begin its Reply Brief by separating the undisputed evidence of record in the courts below from the McKee Defendants' fictionalized version of the record facts. It is helpful to begin with a mental image of the 121.14-acre McKee property. The property can be likened to three “vertically stacked” quarter-quarter sections of land (each quarter-quarter section consisting of approximately 40 acres), one 40-acre tract stacked atop the other, north to south, in Section 2, Township 1 South, Range 1 East, USBM, Uintah County, Utah. *See* App. II, 154-55. In the Tribal Court, the 3 quarter-quarter sections that comprise the 121.14-acre McKee property were designated as Tracts 1, 2 and 3, and generally referred to as such by the parties and the Tribal Court. The legal descriptions for the three adjoining McKee quarter-quarter sections are:

- the Northwest Quarter of the Northeast Quarter (NWNE) of Section 2, designated by the parties as “Tract 1” in the Tribal Court (but designated on BLM (U.S. Bureau of Land Management) Maps as “Lot 2”), consisting of 41.14 acres;
- the Southwest Quarter of the Northeast Quarter (SWNE) of Section 2, designated as Tract 2 in the Tribal Court suit, consisting of 40 acres; and
- the Northwest Quarter of the Southeast Quarter (NWSE) of Section 2, designated as Tract 3 in the Tribal Court suit, consisting of 40 acres.

The graphic duplicated on page 6, *infra*, is a reproduction of Plaintiff’s Tribal Court Exhibit 35, which is included in the district court record and the appeal appendix. *See* App. III at 309. Collectively, Tracts 1 and 2 were also referred to in the Tribal Court’s Findings and Conclusions as “the 81.14 acres consisting of Lot 2 and the SW/4 NE/4 of Section 2.” App. II at 120.

A. Greg McKee Admitted Under Oath and in His Tribal Court Filings That He Diverts Water From Deep Creek Canal to Irrigate His Entire 121.14-acre Property.

Currently represented by a third set of attorneys in federal court, the McKee Defendants seek to minimize the full extent of Defendants’ theft of tribal water. They do so by insisting that Defendants only divert water from Deep Creek Canal to irrigate the bottom third, or lower 40 acres, of the 121.14-acre McKee property (“Tract 3” in the Tribal Court Exhibits). And Defendants contend they irrigate the bottom 40 acres pursuant to valid binding contracts between McKee’s predecessors



in interest and the United States, a contention that is addressed *infra* at 13.

Defendants also assert that Utah State Water Right 43-3203, titled in Mr. McKee's name, "is not implicated by the Tribal Court Judgment." Ans. Br. at 3. However, the contentions (*i*) that Defendants only divert water from Deep Creek Canal to irrigate the lower 40 acres of the McKee property, and (*ii*) that Utah State Water Right 43-3203 "is not implicated by the Tribal Court Judgment" are categorically false. As noted in the Tribe's Motion to Clarify, Defendants make these contentions *for the first time* in the federal courts, and these contentions are 180-degrees the opposite of Defendants' admissions of fact and law and the undisputed evidence admitted into evidence in the Tribal Court. Mtn. to Clarify, App. X at 1787.

Represented in succession by two different attorneys in the Tribal Court, the McKee Defendants freely admitted to the Tribal Court that they irrigate the entire 121.14-acre McKee property with water diverted from Deep Creek Canal. Defendants also insist that State Water Right 43-3202 grants them the right to divert tribal water from Deep Creek Canal to irrigate the upper 81.14 acres (designated Tracts 1 and 2) of the 121.14-acre McKee Property. *See* G. McKee Testimony, App. IV at 599:14-22; and the argument of McKee attorney James Beckwith, describing the state water right as "pre-existing" and "transmitted via the Deep Creek Canal." App. VIII at 1316, ¶¶ 15-18.

In the Tribal Court the parties referred to Defendants’ Utah State Water Right 43-3203 as the “Goodrich Gulch Water Right.” They called it the “Goodrich Gulch Water Right” because both the source of water and the point of diversion for State Water Right 43-3203 is the Goodrich Gulch—not the Uinta River (the source water for the Ute Tribe’s adjudicated water right under the Cedarview Decree), or the Deep Creek Canal itself (which, pursuant to the Cedarview Decree, carries the Tribe’s federally-decreed tribal waters).

Utah is a prior appropriation water law state. This means the McKee Defendants’ right under Utah State Water Right 43-3203 is, by law, a narrowly conscribed right:

While courts have struggled with how best to describe this [prior appropriative water right] in traditional property law terms, it is clearly a highly circumscribed property interest. First, it is a property interest that can be lost through nonuse. Second, it is narrowly defined in terms of specifying a point of diversion, a maximum rate of diversion, a particular purpose of use, and a particular place of use.

Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. Denv. Water L. Rev. 228, 292-93 (Spring 2015). Like other prior appropriation states, Utah requires any change in the place or purpose of water use, or as pertinent here, any change in the point of diversion of a state water right to be determined only after prior notice to other affected water users and only if the requested change is approved by the Utah State Engineer. *See e.g.*, Utah Code Ann. 73-3-3, captioned “Changes to a Water Right.”

At the time of the Tribal Court proceedings in this case—and still today—the point of diversion for the Defendants’ State Water Right 43-3202 is the Goodrich Gulch, *not* the Deep Creek Canal. App. II, 245. And because the Goodrich Gulch lies north of the Deep Creek Canal—and north of the McKee property (*see* App. VIII at 1338)—the methodology approved by the Utah State Engineer in 1926 to deliver water from Goodrich Gulch to the McKee property, and continuing through today, has always been via a wooden flume that is supposed to carry Goodrich Gulch water over, above, and across the Deep Creek Canal. *See* 1926 Engineer’s Drawings approved by the Utah State Engineer, App. II, 271-74.

Yet, at the preliminary injunction hearing in the Tribal Court, Greg McKee readily admitted, under oath, that he diverts tribal water directly from the Deep Creek Canal to irrigate the entire 121.14-acre McKee property. Pointing to a demonstrative map of the McKee property, the Tribe’s undersigned counsel asked McKee to identify the point of diversion and source of water that he uses to irrigate all three tracts of the McKee property:

Tribe’s Counsel: Mr. McKee, I would like you to explain to the [Tribal] Court how these tracts of property are irrigated and the source of water for the irrigation.

Gregory McKee: How they’re irrigated?

Tribe’s Counsel: Yes.

Gregory McKee: They’re flood irrigated from a ditch.

Tribe's Counsel: And is that Deep Creek –does the water come from DeepCreek Canal?

Gregory McKee: Yes.

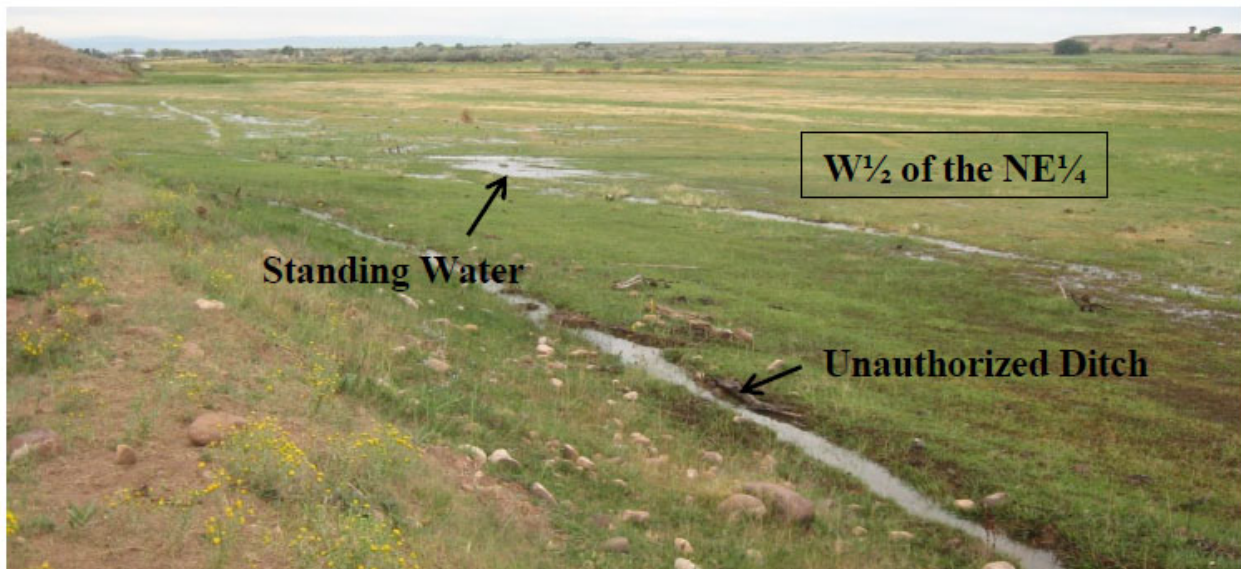
App. IV at 599:14-22.

B. Contrary to Defendants' Statements in Federal Court, Utah State Water Right 43-3202 Is Directly Implicated in the Tribal Court Suit and Tribal Court Judgment.

The McKee Defendants' assertion to this Court that Utah State Water Right 43-3202 “is not implicated by the Tribal Court Judgment,” Ans. Br. at 3, is categorically false. It was Defendants themselves who implicated State Water Right 43-3203 by insisting to the Tribal Court that State Water Right 43-3203 entitles Defendants to divert tribal water from Deep Creek Canal to irrigate the upper 81.14 acres of the 121.14-acre McKee property. *See* G. McKee Testimony, App. IV at 599:14-22; and argument of McKee attorney James Beckwith, describing the state water right as “pre-existing” and “transmitted via the Deep Creek Canal.” App. VIII at 1316, ¶¶ 15-18.

The Tribe's complaint in the Tribal Court disputed the McKee Defendants' legal contentions and sought both injunctive relief and monetary damages to compensate the Tribe for damages suffered by the Defendants' illegal diversion of tribal waters from Deep Creek Canal to irrigate the upper 81.14 acres of the 121.14-acre McKee property. App. II at 142-43, ¶¶ 23-26.

Defendants' extensive flood irrigation to the upper 81.14 acres of the 121.14-acre McKee property was documented, both (i) in multiple contemporaneous photographs taken by the Tribe's Water Engineer, Dr. Woldezion Mesghinna, Ph.D., P.E., and (ii) in Dr. Mesghinna's written investigative reports. App. II at 197-203, 204-225; App. III at 306-21, 353-75.



Several of Dr. Mesghinna's photos are reproduced in an Addendum attached to this Reply Brief. Dr. Mesghinna's written report concluded, in pertinent part:

3.3.1 The Deep Creek Canal

The Deep Creek Canal serves approximately 6,000 acres with Indian water rights.... Lands entitled to receive project water are identified under the 1905 Certificate of Appropriation of Water from the State of Utah. That Certificate does not include the land owned by Gregory McKee....

3.3.2. Utah State Water Rights Database

NRCE consulted the State of Utah water rights database to determine if Mr. McKee owns rights to an alternative surface water flow. This research indicated that Mr. McKee has a water right to Goodrich Gulch

for irrigation of 47.13 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2.²

The water right to Goodrich Gulch (43-3202) is for 0.62 cfs applicable to a 47.13 acre portion of the W $\frac{1}{2}$ NE $\frac{1}{4}$. There is no mention of a measurement device at the point of diversion from Goodrich Gulch More importantly, delivery infrastructure that is required to convey water from Goodrich Gulch to the W $\frac{1}{2}$ NE $\frac{1}{4}$ was not found. Mr. McKee currently uses Deep Creek Canal to deliver water to this area; however, he does not have a carriage agreement with the [Ute Indian Irrigation] Project allowing legal use of the Project infrastructure to convey the water from Goodrich Gulch.

App. II at 216. Dr. Mesghinna testified in the Tribal Court that the Utah State Engineer has never authorized a change in the point of diversion for State Water Right 43-3202 from Goodrich Gulch to the Deep Creek Canal. App. IV at 625:7 – 626:3; 651:15 – 652:25.

The Tribal Court made the following Findings of Fact with respect to State Water Right 43-3203:

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

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 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.

² The W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 2 are the same as Tracts 1 and 2 on the Tribe's Tribal Court Exhibit 38, reproduced on page 6, supra, and comprise the upper 81.14 acres of the 120-acre McKee property.

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. The Deed was introduced as Plaintiff’s Exhibit 22.

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.

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....

Dr. Mesghinna testified that surface water flows through Goodrich Gulch only intermittently, 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.”

App. II at 120-22, ¶¶ 24-28.

C. Defendants Do Not Purchase Water from the Bureau of Indian Affairs to Irrigate the Lower 40 Acres of the McKee Property.

The McKee Defendants claim they are entitled to divert water from the Deep Creek Canal to irrigate the lower 40 acres of the 121.14-acre McKee Property by virtue of “purchase contracts” between the Bureau of Indian Affairs (BIA) and the McKee’s predecessor-in-interest dating back to 1943 and 1946. Ans. Br. at 3; *see* Agreements, App. III at 294 and 298. Defendants first made this assertion as a

Statement of Undisputed Fact in their cross-motion for summary judgment in the district court. App. VI at 897. The Tribe disputed Defendants’ contentions of fact with evidentiary materials and countervailing declarations of disputed material facts. App. VIII at 1211-19. The Tribe’s evidentiary materials included a Declaration from the Tribe’s Water Engineer, Dr. Mesghinna, who testified that there is no purchase or sale of tribal water through the BIA for the lower 40 acres of the 121.14-acre McKee Property—not under the 1943 and 1946 Agreements, nor under any other federal law authorization. App. VIII, at 1400-01, ¶¶ 17-19.

The Tribe’s contradicting evidence also included a copy of the Act of May 28, 1941, 55 Stat. 209, the law under which the 1943 and 1946 Agreements were purportedly made. A copy of the 1941 Act is included in the district court record and the appeal appendix. App. VIII, 1393. The 1941 Act does not authorize the sale of the Tribe’s water. Rather, it allows the Secretary of Interior to “transfer water rights, *with the consent of the interested parties*, to other lands under said [Ute Indian Irrigation] project....” (emphasis added) App. VIII, 1394.

The Tribal Court made extensive findings of fact on Defendants’ claim that the 1943 and 1946 Agreements authorize Defendants to divert water from the Deep Creek Canal to irrigate the lower 40 acres of the 121.14-acre McKee property. App. II at 122-28, ¶¶ 29-46. The Tribal Court found, *inter alia*, that:

- the 1943 and 1946 Agreements were made without the consent of the Ute Tribe, which was an “interested party” within the meaning of the 1941 Act, meaning that the Tribe’s consent to the Agreements was required under the express terms of the 1941 Act, App. II at 122-24, ¶¶ 29-35;
- that the 1943 and 1946 Agreements purported to transfer tribal water to lands outside of the Ute Indian Irrigation Project, which exceeded the scope of the Congressional authorization under the 1941 Act, App. II at 122-24, ¶¶ 29-35;
- that after 1961 the chain of title for the McKee property contains no conveyance of the water rights purportedly transferred under the 1943 and 1946 Agreements, meaning, the Trial Court reasoned, that “it is entirely possible that the 1941 [Act] that was cited as authority for the 1943 and 1946 transfers 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 [Ute Indian Irrigation Project],” App. II at 124-26, ¶¶ 35-42;
- Defendant Greg McKee admitted under oath in the Tribal Court that he has no instrument of conveyance or other legal document that entitles

Defendants to use tribal water to irrigate the lower 40 acres of the 121.14-acre McKee property, App. II at 126, ¶ 43;

- because Mr. McKee leases other tribally-owned and allotment lands within the UIIP, annual billing invoices from the Department of Interior, Bureau of Indian Affairs, for annual operation and maintenance expenses do not establish Defendants' right to divert water from the Deep Creek Canal to irrigate the lower 40 acres of the McKee property, App. II at 126-27, ¶ 44; and
- that insofar as Defendants failed to answer the Tribe's written discovery, or to appear for a deposition in the Tribal Court suit, the Tribal Court would grant the Tribe's motion to sanction Defendants for their failure to comply with discovery by "drawing negative inferences and deeming the Defendants to have admitted the substance of the Tribe's Requests for Admissions." App. II at 127-28, ¶¶ 45-46.

The Indian Non-Alienation Act provides, in pertinent part:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

25 U.S.C. § 194. The Tribal Court concluded that the McKee Defendants had failed to establish their right to divert tribal waters from the Deep Creek Canal to irrigate

the McKee property. App. II at 133, ¶ 5.

D. The Ute Indian Tribe is the Beneficial Owner of the Water That Was Purportedly Transferred Outside of the UIIP Project Lands to the McKee Property Under the 1943 and 1946 Agreements.

There is no truth to Defendants’ claim that the water rights purportedly transferred under the 1943 and 1946 Agreements is “owned and titled in the name of the USA Indian Irrigation Services (“UIIS”).” Ans. Br. at 4. This allegation is spun from whole cloth, with no supporting evidence. Instead, the Court should read the 1916 complaint the United States filed in the *Cedarview* case to adjudicate the Tribe’s *Winters* reserved water rights on the Uinta and White Rocks rivers. Repeatedly, through the *Cedarview* complaint, the United States refers to the UIIP [Ute Indian Irrigation Project] as a project built by “the United States *and* said [Ute] Indians.” (emphasis added) App. VIII, 1258, 1280. Repeatedly through the *Cedarview* complaint, the United States makes clear that the *Winters* waters are not limited to water for Indian allotments, but also includes water for other Indian lands “reserved for special purposes.” App. VIII at 1258-59. And repeatedly through the 1916 complaint the United States asks the Court to adjudicate title to the waters conveyed through the UIIP in *both* the United States *and* the Ute Indians. App. VIII at 1280-84. In turn, the 1926 Cedarview Decree adjudicates title to those waters in the “United States, and the Secretary of the Interior as Trustees of the Indians.” App. II at 169.

LEGAL ARGUMENT

I. NEITHER LAW NOR LOGIC SUPPORTS THE DISTRICT COURT'S RULING THAT THE TRIBAL COURT LACKED JURISDICTION TO ADJUDICATE THE TRIBE'S CLAIMS THAT DEFENDANTS WERE TRESPASSING ONTO TRIBAL PROPERTY AND STEALING TRIBAL WATER.

The United States Supreme Court recognizes that tribes retain inherent sovereign power over non-Indians, even on non-Indian fee lands, to:

... regulate by taxation, licensing or other means, activities of non-members who enter consensual relationships with the tribe or its members, as by commercial dealing [or] ... when [non-Indian] conduct threatens or directly affects ... the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565-66 (1981) (emphasis added). The record before the tribal court (which was submitted in full to the federal district court) contains overwhelming evidence that the McKee Defendants had long-standing agricultural leases on tribal lands and long-standing commercial dealings with tribal member Frank Arrowchis. The evidence was also undisputed that Defendants' illegal trespass onto tribal property and theft of tribal waters had a "direct affect" on the political integrity, the economic security, and the health and welfare of the Ute Tribe. *Id.*

A. The Tribe’s Retained Sovereign Power Includes the Power to Exclude Non-Members From Misappropriating the Tribe’s Federally-Decreed Water Rights.

The Tribe contends that its inherent sovereign power to exclude nonmembers from tribal land, recognized by the Tenth Circuit in *Norton*, 862 F.3d at 1246, must logically encompass not just tribal *land*, but also the Tribe’s federally-decreed water rights. Op. Br. at 32-38. The Defendants’ response is a scatter-shot hodgepodge of factual inaccuracies and aberrant legal arguments. *Supra* at 1-2; Ans. Br. at 18-19.

Distilled to its essence, Defendants would have this Court adopt a mechanistic and absolutist standard: tribal courts would have no jurisdiction to address non-member conduct on fee land inside the exterior boundaries of an Indian reservation—no matter how egregious the non-member’s conduct, and no matter the spill-over harm to the Tribe’s “political integrity,” its “economic security,” or the “health or welfare of the tribe.” *Montana*, 450 U.S. at 565-66. In making this argument, Defendants’ skew laws and logic. Ans. Br. at 13. The same laws that the Supreme Court relied on in *Mescalero*, *supra*, to justify tribal jurisdiction over nonmember hunting and fishing—25 U.S.C. § 1321(b) and 18 U.S.C. §1162 (b)—equally support tribal jurisdiction over tribal waters. Public Law 280, 25 U.S.C. §§ 1321(b) and 1322(b), proscribes “the alienation ... of any real or personal property, *including water rights*, belonging to an Indian or any Indian tribe, band, or community that is held in trust by the United States.” (emphasis added) And both

statutes also prohibit state regulatory and adjudicatory jurisdiction over “any real or personal property, *including water rights*, belonging to ... any Indian tribe ... that is held in trust by the United States.” (emphasis added) The federal Criminal Code, 18 U.S.C. § 1162(b), mentions not only “hunting, trapping, or fishing,” but it also explicitly proscribes “the alienation ... of any real or personal property, *including water rights*, belonging to ... any Indian tribe ... that is held in trust by the United States.” (emphasis added) And for purposes of criminal jurisdiction, the federal Criminal Code defines Indian Country to encompass “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any [fee] patent.” 18 U.S.C. § 1151(a).

The foregoing federal laws—together with the State of Utah’s disclaimer of state jurisdiction over tribal property, Utah Constitution, art. III, §2—actually simplifies the Court’s jurisdictional analysis in this case because there is no state interest “at stake” for the Court to weigh. *Mescalero*, 462 U.S. at 333. The McKee Defendants have no right to make illegal diversions from the Tribe’s federally-decreed waters in the Deep Creek Canal. And under the express terms of Public Law 280, 25 U.S.C. §§ 1321-1326—together with the State of Utah’s disclaimer of jurisdiction over Indian property—the State of Utah possesses neither regulatory jurisdiction, nor adjudicatory jurisdiction, over the Tribe’s federally-decreed tribal waters that flow through the Deep Creek Canal.

B. An Exercise of Retained Tribal Sovereignty Does Not Depend Upon a Conferral of Authority by the United States.

Defendants contend the United States has not “conferred regulatory or adjudicatory jurisdiction” in the Ute Tribe over the tribal waters that flow through the Deep Creek Canal. Ans. Br. at 33. However, this argument misses the mark. When, as here, an Indian tribe acts to exclude nonmembers from its tribal territory and resources, the Tribe’s power is not dependent upon a conferral of authority from the Federal Government. That is because “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory,” and tribes retain “those aspects of sovereignty not withdrawn by treaty or statute, or by implication.” *Norton*, 862 F.3d at 1243. Therefore, an express conferral of adjudicatory jurisdiction is not necessary.

C. The Tribal Court Did Not Unlawfully Exercise Jurisdiction Over Utah State Water Right 43-3202.

Defendants further contend the United States has never conferred tribal adjudicatory jurisdiction over the McKee Defendants’ Utah State Water Right. Ans. Br. at 17-18. This argument amounts to pure obfuscation, pure smoke and mirrors. The Tribal Court made no adjudicatory rulings that impact the legality or scope of State Water Right 43-3202. The Tribal Court did nothing more than *read* the text of State Water Right 43-3202. And like anyone literate in the English language, with eyes to see and a brain to comprehend, the Tribal Court Judge simply read the text

of State Water Right 43-3202 and saw that the text itself states on its face, clearly and unambiguously, that the point of diversion for State Water Right 43-3202 is the Goodrich Gulch—not the Deep Creek Canal. In fact, in light of the State of Utah’s disclaimer of jurisdiction over tribal property, and the proscriptions under Public Law 280, 25 U.S.C. §§ 1321-1326, the Utah State Engineer possesses no regulatory power to authorize diversions of tribal water from the Deep Creek Canal. And state courts in Utah possess no adjudicatory jurisdiction to adjudicate the Tribe’s dispute with the McKee Defendants over their diversions of tribal waters from the Deep Creek Canal.

D. The United States Was Not a Necessary and Indispensable Party to the Tribal Court Suit.

It is reasonably inferable from the undisputed evidence before the Tribal Court that the Federal Government, through its agents and employees, knew or should have known of the Defendants’ flagrant misappropriation of tribal waters from the Deep Creek Canal, and yet had taken no action to stop it. *See* Tribal Court Findings of Fact Nos. 22-23, App. II at 119-20. In circumstances such as this, where the Federal Government fails or refuses to take action to protect tribal property, Indian tribes are not consigned, helpless, to the Federal Government’s inaction. Instead, the Tenth Circuit has ruled that Indian tribes can independently prosecute legal action to protect and seek legal redress related to their tribal property. *Choctaw and Chickasaw Nations v. Seitz*, 193, F.2d 456, 461 (10th Cir. 1951) (United States is

not an indispensable party to such lawsuits).

E. Neither Law Nor Logic Supports the District Court’s Ruling that the *Montana* Exceptions Do Not Apply Here—There is Abundant Uncontroverted Evidence of Long-Standing Direct and Indirect Consensual Commercial Relationships Between Defendants and the Ute Tribe and Tribal Member Frank Arrowchis, and the Defendants’ Open and Brazen Illegality Causes Obvious Harm to Tribal Self-Governance and Well-Being.

The Tribe’s tribal court complaint alleged multiple illegalities on the part of the McKee Defendants, not simply the theft of tribal water. For instance, Paragraphs 34–37 of the Tribe’s amended complaint alleged that Defendants were trespassing onto and illegally farming tribal lands:

34. [T]he Tribe has learned that Defendants have given valuable consideration to tribal member Frank Arrowchis, and in return Mr. Arrowchis has allowed Defendants to grow and harvest crops on 160 acres of tribally-owned land that is under assignment to Mr. Arrowchis.

35. All of the lands assigned to Frank Arrowchis are tribal lands located within the boundaries of the Uintah and Ouray Reservation. All of the assignments to Mr. Arrowchis are on record with the Tribe’s Assignment Committee.

* * * *

37. Because the arrangement between Defendants and Mr. Arrowchis is not lawful under tribal law, and because Defendants otherwise lack lawful authority to enter onto the Tribe’s Reservation, the Defendants’ presence on tribal lands under assignment to Mr. Arrowchis constitutes a trespass.

App. II at 145-46. The Tribe sought declaratory and injunctive relief against *both* the Defendants’ continued trespass onto tribal lands and Defendants’

misappropriation of tribal waters. App. II at 148-50, ¶¶ 46-58. In addition to Defendants' water theft, recounted *supra*, the Tribe established its other allegations of unlawful conduct on Defendants' part with the evidence summarized below which was presented to both the tribal court and the federal district court:

- A written "Farming Agreement" between Defendant McKee and tribal member Frank Arrowchis dated January 1, 2006, in which Defendant McKee agreed to farm 160-acres of tribal lands that were under assignment to tribal member Arrowchis. App. VIII, 1320.
- Defendant McKee's sworn declaration describing tribal member Frank Arrowchis as "a business associate of my family for decades." App. II at 256.
- A copy of Tribal Ordinance 94-001, which the Tribal Court found to be violated by the Farming Agreement between tribal member Arrowchis and Defendant McKee. App. VIII at 1321.
- Defendant McKee's sworn admission that he farms the 160 tribal acres under assignment to tribal member Frank Arrowchis. App. III at 426 (McKee Deposition testimony).
- Documentary records of Defendant McKee's multiple leases of tribal and allottee trust lands. App. V at 857-65; App. VI at 1015-24; App. VII at 1172-81.

The Tribal Court Findings of Facts state:

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 [McKee] does not dispute that he farms all or part of the Arrowchis assignments but contends that ... [his] arrangement [with Arrowchis] does not violate Ordinance 94-001. The language of the Ordinance is broad and the arrangement between Arrowchis and defendant [McKee] constitutes use by any person other than the family of Arrowchis.

App. II at 128-29, Finding No. 47. The Tribal Court recounted how the Tribal Court had issued injunctive orders in the fall of 2012, enjoining both (i) Defendants’ unlawful diversions of water from Deep Creek Canal, and (ii) Defendants’ unauthorized farming activities on tribal lands under assignment to tribal member Arrowchis. See Tribal Court Findings and Conclusions, “Procedural History,” App. II at 109-12. Yet, three years later, at the trial on the merits, the Tribal Court’s found that the McKee Defendants were continuing to openly violate the Tribe’s interim injunction orders:

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.

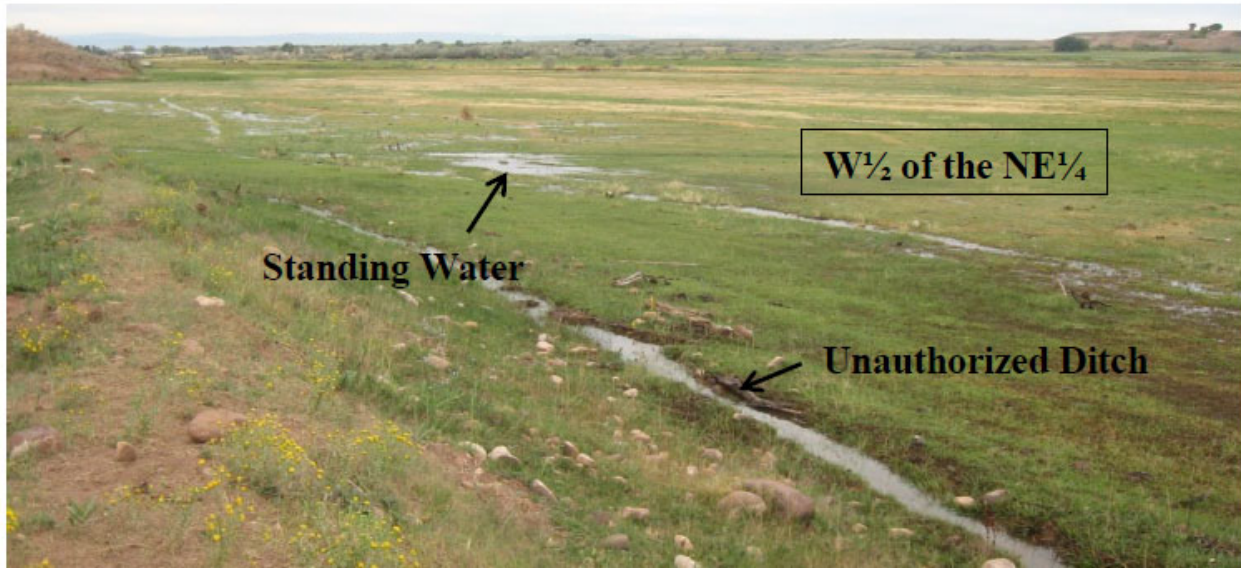
App. II at 129, Finding No. 48.

Considered as a whole, the circumstances described herein and in the Tribe’s Opening Brief are sufficient to establish a legitimate exercise of the Ute Tribe’s inherent sovereign power (i) to manage its tribal territory and resources, and (ii) to exclude nonmembers from its territory and resources. If Indian tribes can lawfully (1) tax a nonmember’s extraction of tribal mineral resources, *Merrion v. Jicarilla*

Apache Tribe, 455 U.S. 130, 140 (1982) (affirming tribes' inherent authority to tax nonmembers' severance of tribal oil/gas resources); (2) regulate nonmember hunting and fishing, *Mescalero*, 462 U.S. at 335; and (3) protect their tribal homeland from degradation and exploitation, *Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation*, 670 F.2d 900, 903 (10th Cir. 1982), then surely the Ute Indian Tribal Court can exercise adjudicatory jurisdiction to enjoin and remedy a nonmember's open and brazen trespass onto tribal lands and theft of tribal waters.

As they did in the district court, Defendants continue to distort and deny the full scope and extent of Defendants' theft of tribal waters. For example, Defendants falsely assert that McKee's diversion of tribal waters from Deep Creek Canal is "less than one thousandth of one percent of the Tribe's water." Ans. Br. at 35. Significantly, this calculation is limited to Defendants' flood irrigation of the bottom 40 acres of the 121.14-acre McKee property. Thus, in Federal court, Defendants continue to deny what they readily admitted to the Tribal Court—that Defendants also divert water from Deep Creek Canal to flood irrigate the upper 81.14-acres of the 121.14-acre McKee property. The contemporaneous photographs don't lie. The picture below—admitted as part of the undisputed evidence in the Tribal Court—shows both (i) standing water in the upper 81.14-acres, and (ii) an unauthorized ditch that McKee dug to facilitate the distribution of Deep Creek tribal water southward, down the full extent of the upper 81.14-acres of the 121.14-acre McKee property.

Standing water on Area 1, September 6, 2012.



The Defendants’ *de minimis* argument is frankly disturbing. What Defendants are really suggesting is that Federal courts can ignore, or even green-light, any individual non-Indian’s “*de minimis*” theft of tribal waters because, after all, those “[expletive] Indians have *too much* water anyway.” Defendants’ implication is completely false. There was not enough water a century ago in 1916, when the population was much smaller, but even then, 105 years ago, the United States alleged in its *Cedarview* complaint that:

The water supply of said Uintah River, except when said river is at stages of high flow, is and at all times has been insufficient to supply the needs of the United States and said [Ute] Indians for the irrigation of the irrigated lands lying under its and their said [irrigation] ditches....

App. VIII at 1280. The United States further alleged that the non-Indian diversions

of tribal waters in the early twentieth century had “caused the United States and said [Ute] Indians to suffer the damage of and to lose large and valuable agricultural crops.” *Id.* Dr. Mesghinna painted the same picture 103 years later in his Federal court declaration. App. VIII at 1401-03, ¶¶ 20-25.

F. The District Court’s Fatally Flawed Jurisdictional Analysis.

The Tenth Circuit should not affirm the summary judgment dismissal of the Tribe’s complaint for a lack of tribal court jurisdiction because the dismissal rests on indisputably incorrect classifications of the tribal and nonmember property interests involved in this case. Op. Br. at 24-32. Affirming the dismissal on this record will clearly violate the Supreme Court and Tenth Circuit admonitions that, in tribal jurisdiction cases, the jurisdictional status of property interests is “of critical importance” to a court’s jurisdictional analysis. *Norton*, 862 F.3d at 1245, quoting *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 338 (2008).

CONCLUSION

The Tribe urges the Court to hold that the district court erred in concluding that the Ute Indian Tribal Court lacked adjudicatory jurisdiction, and on that basis, further 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.

Respectfully submitted this 30th day of March, 2021.

PATTERSON EARNHART REAL BIRD &
WILSON LLP

By: s/ Frances C. Bassett
Frances C. Bassett
Jeremy J. Patterson
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: 303-926-5292
Facsimile: 303-926-5293
Email: fbassett@nativelawgroup.com
Email: jpatterson@nativelawgroup.com

Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because this brief contains 6,500 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 REPLY BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Webroot, dated 03/30/21, 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 30th day of March, 2021, a copy of this **APPELLANT'S REPLY 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
J. Craig Smith
Jennie B. Garner
Devin L. Bybee
SMITH HARTVIGSEN, PLLC
257 East 200 South, Suite 500
Salt Lake City, Utah 84114
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 REPLY 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

- App. II, at 197-203
- NRCE Investigative Report Pictures
- App. II, at 212, 214
- App. III, at 311-312, 316, 354-375



Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 131 of 208

APPENDIX PAGE 124

APP 197
PHOTO #001



Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 132 of 208

APPENDIX PAGE 125

APP 198
PHOTO #002





Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 134 of 208

APPENDIX PAGE 127

APP 200
PHOTO #004



Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 135 of 208

APPENDIX PAGE 128

APP 201
PHOTO #005

Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 136 of 208

Index of pictures taken during field visit

Picture #	Direction	Description
1202	-	Headgate #95648*: legal diversion from Deep Creek Canal (DCC) into Lateral 9*
1203	-	Recent earthwork below diversions
1204	-	Weir #96788* showing a piece of 6" perforated PVC pipe
1205	SSE	Water standing on McKee property (does not have water rights)
1206	S	Purported location of pipe diversion
1207	SE	McKee property; foreground - illegal ditch containing illegal diversion
1208	SE	McKee property showing standing water on field without water right
1209		Illegal diversion on the west side of the fence line
1210	N	Illegal ditch in the foreground, fence line along which pipeline purportedly runs
1211	E	Illegal ditch
1212	SE	Illegal ditch
1213	SE	Illegal ditch
1214	S	Illegal ditch and irrigated property without water right
1215	E	Illegal ditch
1216	SE	McKee property showing standing water on field without water right
1217	SE	McKee property showing standing water on field without water right
1218	ESE	McKee property showing standing water on field without water right
1219	S	S. of purported pipeline location
1220	SSE	Water standing on McKee property (does not have water rights); foreground - illegal ditch
1221	SSE	Water standing on McKee property (does not have water rights)
1222		Purported location of pipeline - no pipeline found (will be checked following water turnoff)
1223	E	Purported location of pipeline
1224	E	Purported location of pipeline
1225		Purported location of pipeline - no pipeline found (will be checked following water turnoff)
1226	ENE	Illegal surface diversion and purported location of pipeline
1227	ESE	Apparent irrigation infrastructure and fairly recent earthwork
1228	E	Purported location of pipeline
1229		Halfway between legal turnout and main canal, along fenceline. North of fence. Water valve.
1230		Halfway between legal turnout and main canal, along fenceline. North of fence. Water valve.
1231	E	Foreground - housing of illegal valve
1232	W	Foreground - housing of illegal valve
1233	NW	Right side - downstream side of legal diversion from main canal; left side - illegal diversion
1234	NW	Illegal surface water diversion
1235	WSW	Illegal surface water diversion
1236		Headgate #95648: legal diversion from Deep Creek Canal (DCC) into Lateral 9*
1237	SSE	Recent earthwork near illegal surface water diversion
1238	SSW	Recent earthwork near illegal surface water diversion

APP 202

APPENDIX PAGE 129

Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 137 of 208

1239	ESE	Recent earthwork near illegal SW diversion
1240		Weir #96788 showing a piece of 6" perforated PVC pipe
1241		
1242		Irrigation culvert and recent earthwork (taken by Karmel Murdock)
1243		Recent earthwork damming diversion from legal lateral (taken by Karmel Murdock)
1244		Recent earthwork damming diversion from legal lateral (taken by Karmel Murdock)
1245		Recent earthwork damming diversion from legal lateral (taken by Karmel Murdock)
1246	SW	Illegal ditch running parallel to legal lateral (taken by KM)
1247	SW	McKee property showing standing water on field without water right; foreground: illegal ditch (taken by KM)
1248	S	Illegal ditch running parallel to legal lateral, also standing water on McKee property (taken by KM)
1249	SW	Water standing on McKee property (does not have water rights); foreground - illegal ditch
1250	WNW	Greg McKee and Chris ?
1251		Tracks of bulldozer near illegal diversion from DCC

*Lateral, headgate, and weir numbers taken from BIA irrigation infrastructure schematics

APP 203

APPENDIX PAGE 130

NRCE Investigative Report Pictures

Figure 3-1: Structures and features noted during site visit.

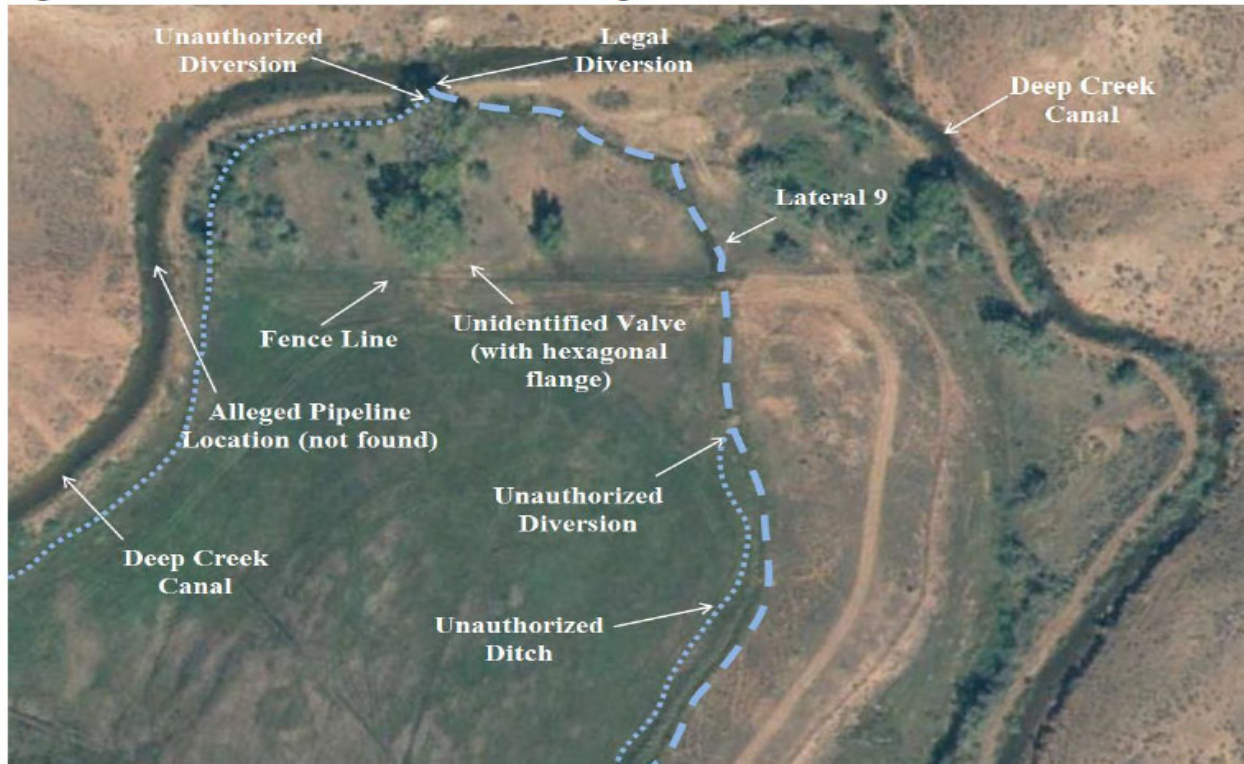
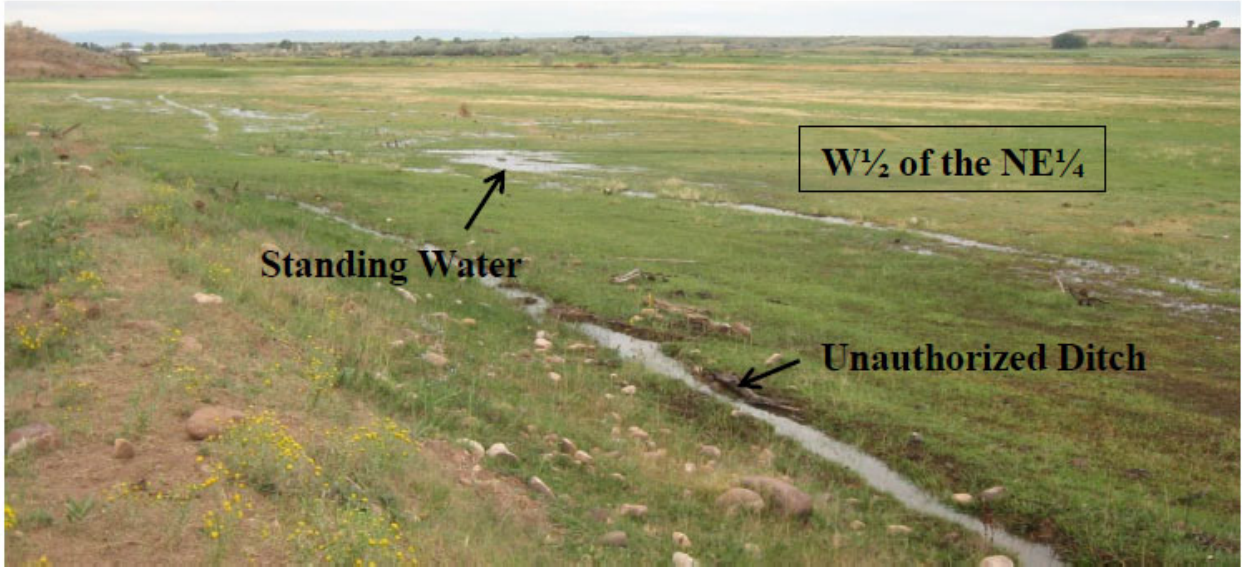


Figure 3-2: Water flow in Deep Creek Canal during the September 18, 2012 site visit.



Figure 3-4: Standing water on Area 1, September 6, 2012.



flow during the site visit at 12:00 p.m., once again preventing a thorough investigation of the canal bottom. Figure 3-2 illustrates the flow during the September 18 site visit.

Figure 3-1: Structures and features noted during site visit.



Figure 3-2: Water flow in Deep Creek Canal during the September 18, 2012 site visit.



Case 2:18-cv-00314-HCN-CMR Document 55-1 Filed 05/16/19 Page 148 of 208

NRCE, Inc.

Diversion Investigation

Figure 3-4: Standing water on Area 1, September 6, 2012.



- (3) NRCE observed the intake structure for the pipeline capable of delivering water from the south end of Lateral 9 east out of the area of interest (see Figure 1);
- (4) A permanent diversion structure, closed at the time of the visit, enables diversion from Lateral 9 to the east part of Tract 2 (see Figure 2);
- (5) According to Mr. Perank, the O&M Company is unable to perform maintenance on Lateral 11;
- (6) A pond is situated near the McKee residence in Tract 1, with no apparent inflow from Lateral 9 (see Figure 3).

Figure 2: Diversion structure to the east part of Tract 2 (NRCE, 6/3/2013).



Figure 3: Retention pond near McKee residence in Tract 1 (NRCE, 6/3/2013).



APP 311

APPENDIX PAGE 231

2.2 NRCE 2014 Site Visit

NRCE performed an additional site visit on April 9, 2014, accompanied by Mr. Perank. During the site visit, Mr. Perank indicated that the BIA intended to allow Mr. McKee to use the pipeline at the south end of Lateral 9 to convey water east to Lateral 11. Furthermore, Mr. Perank indicated that the BIA would not prevent Mr. McKee from irrigating Tract 3 during the 2014 irrigation season.

2.3 Summary of Site Visit Findings

The following is a summary of notable findings from the 2013 and 2014 site visits.

- (1) The temporary restraining order from 2013 preventing diversion down Lateral 9 was ineffective;
- (2) Permanent infrastructure capable of diverting water to the east part of Tract 2 exists on Lateral 9;
- (3) Mr. McKee uses Lateral 9 and a pipeline to convey water east in order to irrigate 65 acres on the E½ of the SE¼ of Section 2, outside of the area of interest;
- (4) The O&M Company has not maintained Lateral 11; and
- (5) Irrigation water was not being delivered through Lateral 9 to Tract 1 or the west part of Tract 2 on June 3, 2013, during NRCE's site visit.

APP 312

APPENDIX, PAGE 232

3.2 Livestock Water Use

The Utah AFO Assessment Form of June 23, 2010 shows that Greg McKee is the owner and operator of T&L Livestock Inc. (see Attachment 3). The form indicates that the maximum number of animals in the operation is 4,000, and that the estimated annual confinement is 120 days. Ownership and capacity of the feedlot was validated based on State of Utah CAFO records from 2012 to 2014 (Attachment 4). NRCE previously estimated that Mr. McKee was supporting 1,500 head of cattle in September, 2012 (NRCE, 2013).

Retaining the unit water requirement provided in the 2013 NRCE report (10 gallons per head per day) and the previously estimated population (1,500 head), and assuming a confinement period of 120 days, the cattle water requirement is approximately six acre-feet per year.

Records from Tridell-Lapoint Water Improvement District indicate that Mr. McKee was utilizing culinary water to support his feedlot in 2012; therefore water diversion from Deep Creek Canal to the feedlot was discontinued in 2012. If additional culinary water use records become available, the assessment of livestock water use may be updated.

3.3 Summary of Water Diversion

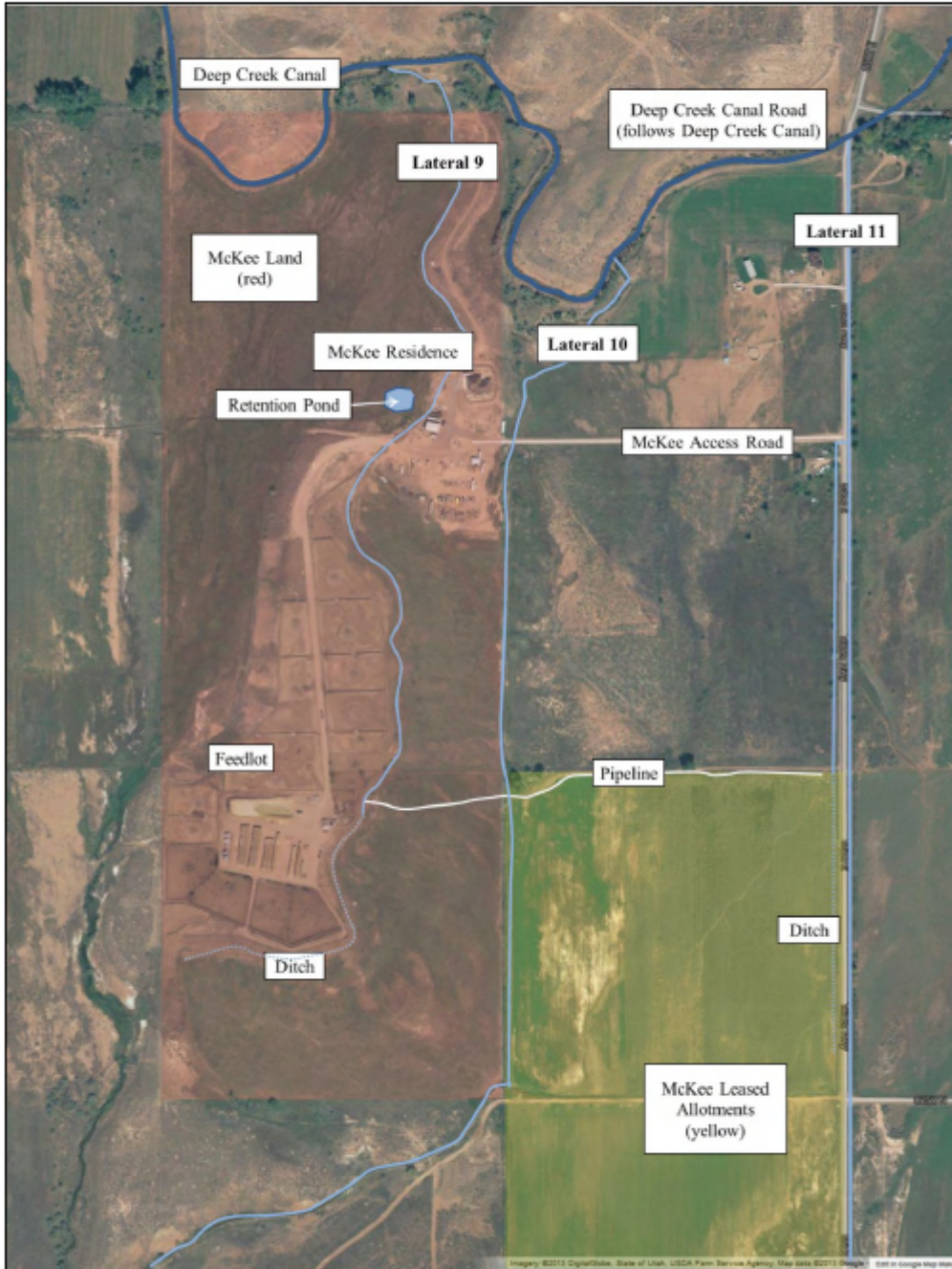
Total estimated water diversion from Deep Creek Canal between 1999 and 2014 is reflected in Table 4.

Table 4: Summary of water diversion from Deep Creek Canal to McKee farms, 1999-2014.

Year	Irrigation, AF		Livestock Water Use, AF	Total Water Use, AF
	Tracts 1 and 2	Tract 3		
1999 ^a	39	30	2	71
2000	109	84	6	198
2001	141	108	6	255
2002	68	52	6	125
2003	117	90	6	213
2004	128	99	6	233
2005	146	113	6	265
2006	120	93	6	218
2007	104	80	6	189
2008	124	95	6	225
2009	142	110	6	257
2010	147	114	6	267
2011	161	124	6	290
2012	101	78	0	178
2013	24	83	0	107
2014	117	90	0	207
Total	1,788	1,442	69	3,299

Notes: ^aWater use in 1999 is limited to water used after Mr. McKee’s father obtained full ownership of the property (August 3, 1999).

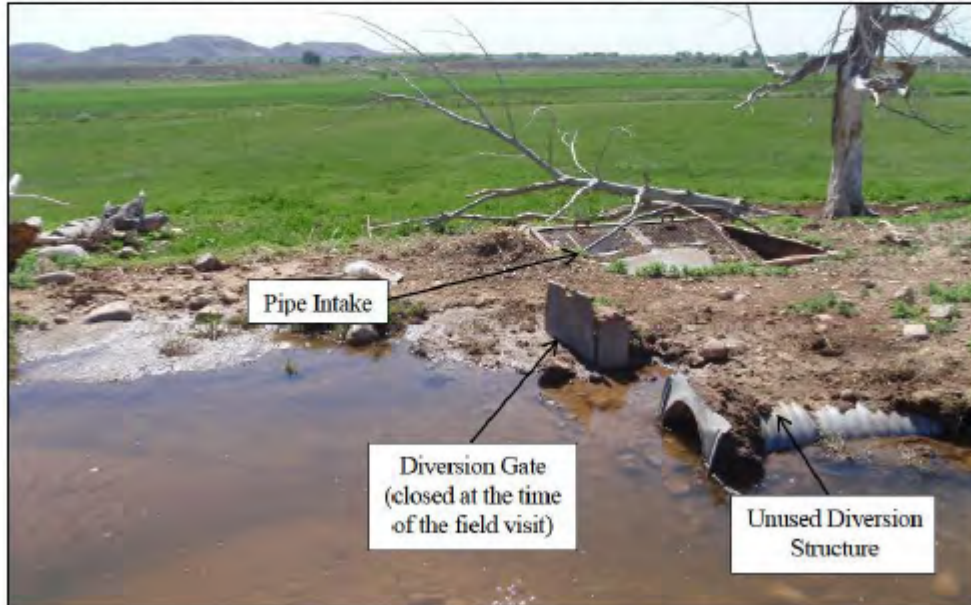
Figure 1: Area of interest and relevant infrastructure



APP 354

APPENDIX PAGE 274

Figure 2: Pipeline diverting water from the southern end of Lateral 9; irrigated land in the NW¼ SE¼, Section 2



Meeting with Zane Tahguy

NRCE met with Zane Tahguy, who replaced Steve Wimm as the manager of the O&M Company. Mr. Tahguy reiterated many of the things discussed with Mr. Perank, including the use of Lateral 9 for Mr. McKee's leased lands. Mr. Tahguy also indicated that maintenance has not been performed on the lateral fed by Mr. McKee's pipeline (Lateral 11) as it is not in use.

Site Visit Findings

Accompanied by Mr. Tahguy, NRCE performed a site visit on June 3, 2013, at about 10:00 AM. NRCE was able to access Mr. McKee's property and easily identify water conveyance down Lateral 9. A summary of the findings follows.

1. On June 3, 2013, water was being diverted from Deep Creek Canal down Lateral 9 (Figure 3)
2. Mr. McKee irrigates part of the NW¼ SE¼ (Figure 2) and part of the eastern half of the SW¼ NE¼ (Figure 4) through Lateral 9
3. Mr. McKee constructed a pipeline to convey water from the end of Lateral 9 (in the NW¼ SE¼) to a lateral on the eastern edge of Section 2; he uses this pipeline to supply water to the two allotments he leases (E½ SE¼) (Figure 1)

APP 355

APPENDIX PAGE 275

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 82 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 90
Natural Resources Consulting Engineers, Inc. McKee Diversion

4. There is fairly significant seepage through Deep Creek Canal (Figures 5 and 6)
5. Mr. McKee does not appear to be irrigating the northern parcel (NW¼ NE¼) (Figures 7 and 8)
6. There is a retention pond near the McKee residence; no diversions from Lateral 9 into the pond were located (Figures 1 and 9)

Figure 3: Diversion into Lateral 9 from Deep Creek Canal.



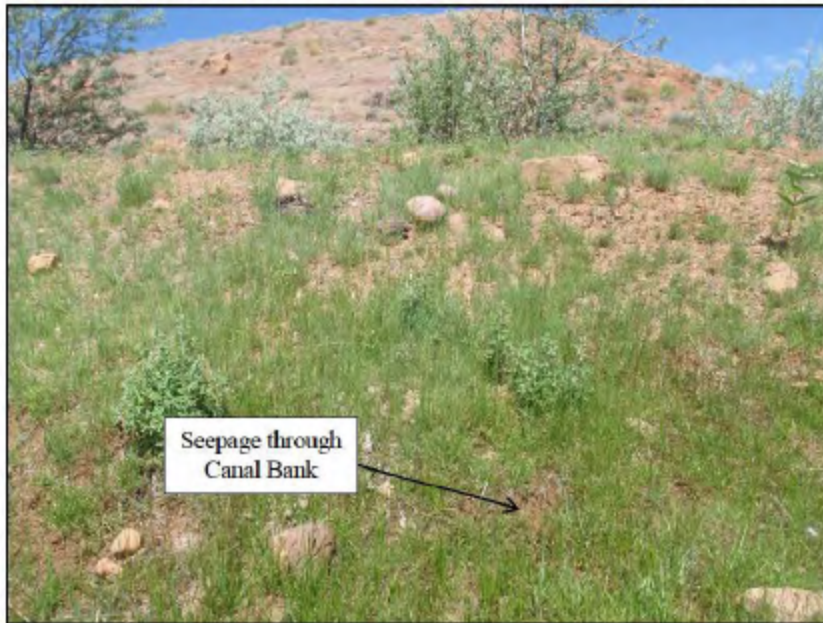
APP 356

APPENDIX PAGE 276

Figure 4: One of several diversion structures used to irrigate the east side of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2



Figure 5: Seepage through Deep Creek Canal near the northern border of Mr. McKee's land.



APP 357

APPENDIX PAGE 277

Figure 6: Detailed view of seepage shown in Figure 5.



Figure 7: Dry lateral previously used to divert Lateral 9 water onto NW¼ NE¼ from the west.



APP 358

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 85 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 93
Natural Resources Consulting Engineers, Inc. McKee Diversion

Figure 8: Blocked lateral previously used to divert Lateral 9 water onto NW¼ NE¼ from the east.



Figure 9: Retention pond near Mr. McKee's residence.



APP 359

APPENDIX PAGE 279

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 86 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 94
Natural Resources Consulting Engineers, Inc. McKee Diversion

Additional Information

Additional information regarding this issue can be found in the previously submitted *Investigation into Illegal Water Diversion from Deep Creek Canal* (NRCE, March 26, 2013), which contains information used to obtain the aforementioned temporary restraining order. A draft of this report was distributed to members of the BC on June 5, 2013.

A complete inventory of the photos taken during the site visit is included as Attachment A.

APP 360

APPENDIX PAGE 280

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 87 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 95
Natural Resources Consulting Engineers, Inc. McKee Diversion

Attachment A:
Photos Taken during June 3, 2013 Site Visit

APP 361

APPENDIX PAGE 281

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 88 of 212
 Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 96
 Natural Resources Consulting Engineers, Inc. McKee Diversion

Table A-1: Inventory of all pictures taken during 6/3/2013 site visit

Picture ID	Description
1	On McKee access road, looking upstream on Lateral 9, south of McKee residence
2	On McKee access road, looking NNW at retention pond and Tract 1
3	On McKee feedlot, at the end of Lateral 9, looking upstream; fence boundary separates Tracts 2 and 3
4	On McKee feedlot, Lateral 9 right-of-way, looking east at diversion structure to Tract 2
5	On McKee feedlot, at the end of Lateral 9, looking ESE at pipeline diversion structure; bypass flows irrigate the south end of Tract 3; no flow through pipeline during site visit
6	On McKee feedlot, middle of Tract 2, looking WSW at south end of Tract 2
7	On McKee feedlot, middle of Tract 2, looking WNW at middle of Tract 2
8	On McKee feedlot, middle of Tract 2, looking N at the west side of Tracts 1 and 2; Deep Creek in the background
9	On McKee residence access road, looking upstream on Lateral 10
10	On McKee residence access road, looking downstream on Lateral 10
11	On Deep Creek Canal road, looking downstream at Lateral 10 diversion from Deep Creek Canal
12	On Deep Creek Canal road, looking at Lateral 10 diversion works in Deep Creek Canal
13	On Deep Creek Canal road, looking at inflow to Lateral 9 just downstream of diversion from Deep Creek Canal
14	On Deep Creek Canal road, looking at inflow to Lateral 9 just downstream of diversion from Deep Creek Canal
15	On Deep Creek Canal road, looking at diversion works into Lateral 9 in Deep Creek Canal
16	Looking at previously used ditch that utilized Lateral 9 headworks to deliver water west from Canal diversion; seepage filled this and the ditch does not appear to be used currently
17	Further west (downstream) on ditch from picture 16; ditch apparently not used anymore
18	Looking east at diversion for previously used ditch that utilized Lateral 9 headworks to deliver water west from Canal diversion; shows seepage from the Lateral 9 diversion
19	On northern section boundary of Section 2, looking upstream at ditch running parallel to Deep Creek Canal; seepage has wet the canal, there was no flow from diversion works near Lateral 9
20	Seepage filled ditch parallel to Deep Creek Canal; no running water
21	Bank of Deep Creek Canal, looking NNW; illustrates seepage from Deep Creek Canal
22	Detailed view of seepage from Deep Creek Canal, shown in Picture 21
23	Diversion location for ditch that previously pulled water from Lateral 9 into Tract 1; overgrowth indicates that this diversion has not been used this year

APP 362

APPENDIX PAGE 282

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 89 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 97
Natural Resources Consulting Engineers, Inc. McKee Diversion

Figure A-1: Map illustrating location at which each picture was taken.



APP 363

APPENDIX PAGE 283

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 90 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 98
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 1



Picture 2



APP 364

APPENDIX PAGE 284

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 91 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 99
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 3



Picture 4



APP 365

APPENDIX PAGE 285

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 92 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 10
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 5



Picture 6



APP 366

APPENDIX PAGE 286

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 93 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 101
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 7



Picture 8



APP 367

APPENDIX PAGE 287

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 94 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 102
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 9



Picture 10



APP 368

APPENDIX PAGE 288

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 95 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 103
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 11



Picture 12



APP 369

APPENDIX PAGE 289

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 96 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 104
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 13



Picture 14



APP 370

APPENDIX PAGE 290

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 97 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 105
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 15



Picture 16



APP 371

APPENDIX PAGE 291

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 98 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 106
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 17



Picture 18



APP 372

APPENDIX PAGE 292

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 99 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 107
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 19



Picture 20



APP 373

APPENDIX PAGE 293

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 100 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 108
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 21



Picture 22



APP 374

APPENDIX PAGE 294

Case 2:18-cv-00314-HCN-CMR Document 55-2 Filed 05/16/19 Page 101 of 212
Appellate Case: 20-4098 Document: 010110473982 Date Filed: 02/01/2021 Page: 109
Natural Resources Consulting Engineers, Inc. McKee Diversion

Picture 23



APP 375

APPENDIX PAGE 295