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UNITED STATES DISTRICT COURT DISTRICT OF UTAH

CENTRAL DIVISION

Lynn D. Becker, Plaintiff, v. Ute Indian Tribe of the Uintah and Ouray Reservation, a federally recognized Indian tribe; the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings, LLC, a Delaware LLC. Defendant(s).	**DEFENDANTS' RULE 12(b) MOTION TO DISMISS AND MEMORANDUM IN SUPPORT** Civil No. 2:25-cv-00643-DAK Judge: Dale A. Kimball

TABLE OF CONTENTS

Defendants Ute Indian Tribe of the Uintah and Ouray Reservation, a federally recognized Indian tribe (the "Tribe"); the Uintah and Ouray Tribal Business Committee (the "Business Committee"); and Ute Energy Holdings, LLC, a Delaware LLC ("Holdings") (together, the "Tribal Defendants") file this motion to dismiss the claims brought against them by Plaintiff Lynn Becker ("Becker"). To date, Becker has served only Holdings with pleadings in the case, and the Tribe and the Business Committee do not admit or waive service by including themselves in this motion. The Tribal Defendants seek dismissal of the claims against them under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. The Tribe and the Business Committee move for dismissal under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, and Holdings seeks dismissal of the claims against it under Federal Rule of Civil Procedure 12(b)(6)-(7) for failure to state a claim and failure to join a necessary and indispensable party under Rule 19. This motion incorporates by reference Holdings' (*i*) motion to strike the complaint and the exhibits thereto, and (*ii*) Holdings' objection to Becker's motion for a preliminary injunction, both of which are being filed consecutively to this motion to dismiss.

SUMMARY OF THE TRIBAL DEFENDANTS' MOTION

The issues raised in the Complaint have already been litigated and lost three times in the Tenth Circuit Court of Appeals.

The first was in *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 770 F.3d 944 (10th Cir. 2014) ("*Becker I*"), where the Tenth Circuit upheld granting the Tribe's motion to dismiss Becker's state law claims for lack of subject matter jurisdiction.

The second was in *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 868 F.3d 1199 (10th Cir. 2017) ("*Becker II*"). In *Becker II*, the Tenth Circuit held that the "exhaustion rule applies" and that "Mr. Becker has not shown a substantial likelihood of success of the exhaustion issue." *Id.* at 1205. The Tenth Circuit reversed and remanded to the district court "to proceed consistently with this opinion." *Id.* at 1206.

The third was in *Becker v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 11 F.4th 1140 (10th Cir. 2021), *cert denied*, 143 S. Ct. 273 (Mem) (2022) ("*Becker III*"). Here, again, the Tenth Circuit held that the exhaustion rule applies: "Becker 'has not yet obtained appellate review' of the Tribal Court's conclusions. 'Until [such] appellate review is complete, the [Ute Indian] Tribal Courts have not had a full opportunity to evaluate the [Tribe's] claim[s] and federal courts should not intervene." *Id.* at 1150 (alteration in original)(citation omitted)(quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987)).

Becker now seeks to avoid Tribal Court jurisdiction a fourth time without exhausting Tribal Court remedies. This latest complaint unreasonably multiplies the proceedings in this case, is patently groundless and vexatious and should be dismissed.

STATEMENT OF FACTS

Becker worked for the Ute Indian Tribe from March 2004 through October 2007 pursuant to an Independent Contractor Agreement ("IC Agreement") which the Tribal Court has held to be an illegal contract under both federal law and Ute Indian tribal law. *See, e.g.*, Tribal Court Order and Opinion of Feb. 28, 2018 (Becker Ex. 19, ECF

4-19, pp. 10-18), and Tribal Court's Third Opinion of October 31, 2023. Becker Ex. 31, ECF 5-11.

Since 2012, Becker has filed multiple lawsuits against the Ute Indian Tribe in both federal court and Utah state court, seeking millions of dollars in damages under the illegal IC Agreement. After years of litigation, the United States Tenth Circuit Court of Appeals ruled conclusively in 2021 and 2022 that (*i*) federal law requires Becker to exhaust tribal court remedies through the Ute Indian Tribal Courts, and that (*ii*) Utah state courts have no subject-matter jurisdiction to adjudicate Mr. Becker's claims against the Tribe. *Becker III*, 11 F.4th at 1150 (directing the Utah federal district court to dismiss Becker's federal court suit and requiring Becker to exhaust tribal court remedies through the Ute Indian "Tribal [Trial and] Appeals Court"); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 22 F.4th 892, 910-11 (10th Cir. 2022), *cert denied*, 143 S. Ct. 273 (Mem) (2022) (directing entry of a permanent injunction to enjoin Becker's state court lawsuit against the Tribe).

The Ute Indian Tribe, its Tribal Business Committee, and Ute Energy Holdings LLC (a wholly tribally-owned entity) commenced a Tribal Court lawsuit against Becker in 2016, seeking declaratory judgment relief and damages for fraud, constructive fraud, breach of fiduciary duty, and other claims.

On June 28, 2017, the Presiding Judge Pro Tem, the Honorable Thomas Weathers, entered an order that bifurcated the Tribal Court case into a Phase I and a Phase II. Exhibit A.

On January 10, 2018, the Chief Judge of the Tribal Court reassigned the Tribal Court case to the Honorable Terry L. Pechota, and Judge Pechota has presided over the case since the 2018 reassignment. Becker Ex. 27, ECF 5-7.

A four-day bench trial was scheduled to commence in Tribal Court on April 28, 2025. Exhibit B. In March 2025, Attorney Frances Bassett filed an emergency motion to vacate the trial setting due to impending death of her mother. *Id.* The Tribal Court granted the motion to vacate and directed the Tribe's counsel "to coordinate with the Court and opposing counsel in rescheduling the trial and in entering an amended scheduling order." Exhibit C. Thereafter, in attempting to coordinate a new trial setting, the Tribe's counsel verified that the earliest date on which the Tribal Court courtroom was open and that Judge Pechota and all expert witnesses would be available for a rescheduled trial would be September 22-25, 2025. The Tribe's attorneys so notified Mr. Becker's counsel, Attorney David Isom. Exhibit D. Thereafter, on August 4, 2025, the Tribe's counsel sent Attorney Isom an amended pretrial order for his review. Exhibit E. However, on that same day—and without any advance notice to the Tribe's attorneys—Mr. Becker filed this *third* federal lawsuit against the Tribe, its Tribal Business Committee, and Ute Energy Holdings in the U.S. District Court for the District of Utah, *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation et al.*, case number 2:25-cv-00643. The Tribe's attorneys learned of the filing via an email that Becker's Attorney, David Isom, sent at 8:42 p.m. that evening, enclosing a copy of the new complaint and Becker's motion to once again enjoin the Tribal Court suit. Exhibit F.

Attorney Isom never responded to the draft amended pretrial order the Tribe's attorney had sent him on August 4, 2025. Thus, on August 6, 2025, the Tribe's attorneys filed a formal request for trial setting with the Tribal Court. Exhibit G.

On August 12, 2025, Attorney Isom filed a pro forma objection to the request of Tribal Setting and a motion to recuse Judge Pechota. Exhibit H. That motion has been certified to another Tribal Court judge to decide. Exhibit I.

STANDARD OF REVIEW

I. Rule 12(b)(1) Standard of Review

A complaint must be dismissed under Rule 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one described by a jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus. v. Tinnerman*, 626 F. Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) and § 1346 (United States as a defendant). When considering a motion to dismiss pursuant to Rule 12(b)(1), the court must accept well-pleaded factual allegations as true and must construe them in the light most favorable to the non-moving party. *See Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007). A federal court is presumed to lack subject-matter jurisdiction until the plaintiff establishes otherwise. *Kokkonen*, 511 U.S. 375, 382 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.

1989). Therefore, the plaintiff bears the burden of proving the existence of subject-matter jurisdiction. Here, Becker has not met his burden and has not provided any evidence to support the finding of subject-matter jurisdiction.

A. Factual Standard of Review

In *Holt v. United States*, the Tenth Circuit categorized Rule 12(b)(1) motions into one of two categories: either a "facial attack on the complaint's allegations as to subject matter jurisdiction" or "a party may go beyond allegations contained in the complaints and challenge the facts upon which subject matter depends." *Holt v. United States*, 46 F.3d 1000, 1002-1003 (10th Cir. 1995). Thus, when the defense of tribal sovereign immunity is asserted, a court "may rely on evidence outside the pleadings in resolving the issue of tribal sovereign immunity without converting the motion to one for summary judgment." *Native American Distrib. v. Seneca-Cayuga Tobacco, Co.*, 491 F. Supp. 2d 1056 (N.D. Okla. 2007).

In *Native American Distributing*, the district court applied *Holt* and concluded that if the parties look to materials outside of the pleadings when litigating tribal sovereignty, the motion to dismiss is considered a factual attack, meaning that "a district court may not presume the truthfulness of the complaint's factual allegations." *Holt*, 46 F.3d at 1003. "Instead, a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rules 12(b)(1)." *Native American Distributing*, 491 F. Supp. 2d at 1061 (citing *Holt*, 46 F.3d at 1003 (internal citations omitted)). "In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56

motion." *Id*.

B. Facial Standard of Review

In contrast to a factual challenge, a facial challenge to subject-matter jurisdiction simply looks to the four corners of the complaint in determining whether the plaintiff's allegations are sufficient, if taken as true. *See Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). In this case, Holdings challenges both the existence of subject-matter jurisdiction (i.e., a factual challenge), and the sufficiency of the pleading of subject-matter jurisdiction (i.e., a facial or technical challenge).

II. Rule 12(b)(6) Standard of Review

In evaluating a motion to dismiss a claim for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *David v. City & County of Denver,* 101 F.3d 1344, 1352 (10th Cir. 1996). Although all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

ARGUMENT

I. Multiple subject matter jurisdictional grounds warrant the dismissal of this case

This case can be dismissed solely on the lack of subject matter jurisdiction based on the Tribal Defendants' facial challenge to the Court's subject matter jurisdiction. First, Becker's claims are not ripe for review, and under the doctrine of *res judicata* the Court lacks subject matter jurisdiction under Article III of the Constitution. Second, there is no federal-question jurisdiction for breach of contract and tort claims under Counts 5-8 of the Complaint, or for Counts 1-4 based on the tribal exhaustion doctrine as already ruled on in *Becker I* at 946 (dismissing Becker's state-law-based claims as "Federal courts are courts of limited jurisdiction") and in *Becker II* at 1205 as relied on in *Becker III* at 1150 (dismissing Becker's complaint until appellate review in the Tribal Court is complete). There is factually no subject matter jurisdiction because there has been no waiver of sovereign immunity.

A. There is no Article III jurisdiction because there is no ripe case or controversy

As a threshold issue, "whether a claim is ripe for review bears on a court's subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995). The Tenth Circuit explained that "[i]n order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy." *Gonzales*, 64 F.3d at 1498 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1975)). At its core, "[the] ripeness doctrine addresses a timing question: when in time

is it appropriate for a court to take up the asserted claim." *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008) (citation, quotation, and alternations omitted). To answer this inquiry, courts analyze both "the *fitness* of the issue for judicial resolution and (2) the *hardship* to the parties of withholding judicial consideration." *Rural Water Dist. No. 2 v. City of Glenpool,* 698 F.3d 1270, 1275 (10th Cir. 2012) (internal quotation marks omitted). The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015).

Here, as to the first prong, there is no claim fit for judicial resolution at the present juncture because this Court lacks subject matter jurisdiction over this case given Plaintiff's failure to exhaust tribal court remedies—as commanded to do so by the Tenth Circuit mandates issued in *Becker II* and *Becker III*. Thus, the case is not ripe and will not be ripe until tribal appellate review is complete. The mandates issued in *Becker II* and *Becker III* confirm this, as does Supreme Court precedent that guided the Tenth Circuit's reasoning in issuing those mandates. *See Iowa Mut.*, 480 U.S. at 17 ("Until appellate review is complete… []Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.")

Becker's Complaint relies on the exceptions to tribal court exhaustion identified in footnote 12 of *Iowa Mutual* in an attempt to circumvent tribal court exhaustion. ECF 2 at ¶ 54. Specifically, he asserts in his Complaint the Tribal Court action is patently violative of express jurisdictional prohibitions, exhaustion would serve no other purpose than delay, and the assertion of tribal court jurisdiction is motivated in bad

faith and to harass. *Id.* In addition to the fact the Tenth Circuit already rejected these meritless claims in *Becker II* and *Becker III*, these claims prove too much against the backdrop of the record.

Becker makes the assertion in his Complaint that "all parties now agree, and the tribal court has now held that tribal court jurisdiction over Becker's claims is expressly prohibited…" ECF 2 at ¶ 47**.** This statement is patently false, and Becker lost on this jurisdictional issue already in Tribal Court. *See* Tribal Cout Order and Opinion of Feb. 28, 2018. Becker Ex. 19, ECF 4-19. Section 1-2-3(5) its jurisdictional reach was ruled on multiple times in the Tribal Court in favor of Tribal Defendants, and *Becker III* mandated that until tribal appellate review is complete, federal courts should not intervene. *Becker III* at 1150. The only jurisdictional prohibition being violated here is on the part of Becker, through his refusal to abide by the *Becker II* and *Becker III* mandates.

Further, there is no delay nor any bad faith from Holdings despite Becker's false assertions to the contrary. As fleshed out in the above Statement of Facts section, the Tribal Court trial was set to commence in late April 2025. Exhibit B. However, the impending death of one of Holdings' attorney's mothers necessarily called for an emergency motion to vacate, which was filed and granted. *Id.* After this, the earliest date for which the Tribal Court and all expert witnesses had availability was September 22-25, 2025. Decl. of Frances Bassett ("Bassett Decl.") at ¶10. Thus, any "delay" is on account of circumstances beyond Holdings' attorneys' control, not because of bad faith as Becker falsely alleges. On these facts, Becker fails on the first ripeness prong

because he fails to presently provide this Court with any issue fit for judicial resolution.

Regarding the second hardship prong, there is no hardship for Becker because he can (and *must* per direction from the *Becker II* and *III* mandates) appeal any decisions he disagrees with in the trial court to the tribal appellate court. If still unsatisfied, he may appeal the Tribal Court's upholding of its jurisdiction in District Court. *Becker III* at 1150. In all actuality, any hardship suffered here would *not* be on Becker. Rather, hardship would be on the Tribe in allowing this case to proceed without exhausting tribal court remedies, because doing so would potentially injure the interests of the absent sovereign Tribe, including interfering with the orderly course of justice in the Tribal Court system. Since the issues presented in this federal court action are presently unfit for judicial resolution, and Becker would not suffer any hardship. Since he has tribal appellate court remedies available to him, this Court should find this case is not presently ripe under Article III of the Constitution, thus, Becker's suit fails due to the lack of subject matter jurisdiction.

This Court, however, "need not consider the ripeness of [Becker's] claims anew . . . because principles of *res judicata* bar the action until [Becker takes] steps to cure the deficiencies pointed out to [him] in [Becker III]." *Park Lake Resources Ltd. Liability v. U.S. Dept. of Agr.*, 378 F.3d 1132, 1135 (10th Cir. 2004). *See also Johnson v. Muelberger*, 71 S. Ct. 474, 476 (1951) ("The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.") (internal quotations omitted).

In *Park Lake Resources*, the Tenth Circuit ruled that this "is not the first time Plaintiffs have brought suit over what is in essence the same issue . . . . our dismissal

of the earlier action for lack of ripeness requires dismissal of this action as well." *Park Lake Resources Ltd., 378 F.3d* at 1133-1134. In upholding dismissal, the court ruled that, even though the prior litigation did not result in an adjudication on the merits, "it has issue-preclusive consequences with respect to the [jurisdictional ripeness] issue decided," noting that "suit may be brought again where a jurisdictional defect has been cured . . . ." *Id.* at 1136-1137 (quotations omitted). *See also Durfee v Duke*, 375 U.S. 106, 113-114 (1963) ("It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court . . . a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.")

Here, as in *Park Lake Resources*, Becker is again suing over the issue of Tribal Court jurisdiction. Here, the arguments Becker makes "are identical in substances to the factual and legal arguments . . . raised in 2016 and 2018, which arguments the Tenth Circuit rejected in *Becker II* and *Becker III*." Bassett Decl. at ¶ 7. *Becker III* dismissed these arguments, holding that if "the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction," Becker may challenge that ruling in the District Court. *Becker III* at 1150. Because it "does not make sense to allow [Becker] to begin the same suit over and over again in the same court . . . until [he] finally satisfies the jurisdictional requirements" (*Park Lake Resources Ltd*., 378 F.3d at 1138), the Complaint is barred by res judicata and should be dismissed.

B. There is no jurisdiction under the Declaratory Judgment Act because there is no actual controversy.

The Declaratory Judgment Act states in pertinent part that, "[i]n a case of actual

controversy within its jurisdiction ..., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Tenth Circuit has observed that this text presents two separate hurdles for parties seeking a declaratory judgment to overcome. S*ee Kunkel v. Cont'l Cas. Co.*, 866 F.2d 1269, 1273 (10th Cir.1989).

First, as relevant here, a declaratory judgment plaintiff must present the court with a suit based on an "actual controversy," a requirement the Supreme Court has repeatedly equated to the Constitution's case-or-controversy requirement. *See, e.g., Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40, 57 S. Ct. 461, 81 L. Ed. 617 (1937) ("The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense."); *MedImmune*, 127 S. Ct. at 771 (same). *See also* U.S. Const. Art. III § 2 ("The judicial Power shall extend to all Cases ... [and] Controversies....").

Here, as there is no actual controversy, there is no jurisdiction under the Declaratory Judgment Act, and the Complaint must be dismissed. *National Farmers Union* and *LaPlante* "established an inflexible bar to considering the merits of a petition by the federal court, and therefore require that a petition be dismissed when it appears that there has been a failure to exhaust [tribal remedies]," *Smith v. Moffet*, 947 F.2d 442, 445 (10th Cir.1991), and that the "requirement of exhaustion of tribal remedies is not discretionary, it is mandatory. If deference is called for, the district court may not

relieve the parties from exhausting tribal remedies." *Crawford v. Genuine Auto Parts, Co.*, 947 F.2d 1405, 1407 (9th Cir.1991), *cert. denied*, 502 U.S. 1096 (1992). Finally, disputes arising on the reservation, as this one did, that raise questions of tribal law and jurisdiction, as this one does, must first be addressed in the tribal court. *E.g., Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986). This reasoning is carried forward in the *Becker* III decision, ruling that "Out of respect for tribal self-government and self-determination, we conclude that questions the Tribe has raised regarding the validity of the agreement, as well as the threshold question of whether the Tribal Court has jurisdiction over the parties dispute, must be resolved in the first instance by the Tribal Court itself." *Becker III* at 1150. Because Becker has not carried his burden of proving that an actual controversy exists necessary to support subject matter jurisdiction under the Declaratory Judgment Act, his complaint should be dismissed.

C. There Is No Federal Question Jurisdiction

1. **Contract and tort disputes do not present a question of federal law**

Article III, Section 2 of the U.S. Constitution limits federal court jurisdiction to cases "arising under" the Constitution and laws of the United States. *Becker I* at 946. Federal question jurisdiction only exists if federal law is a direct element in the plaintiff's claim; it is not enough for federal law to be implicated indirectly or peripherally. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1267 (2009) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). A "suit arises under the law that creates the cause of action," *American Well Works v. Layne*, 241

U.S. 257 (1916), and therefore, only suits based on federal law, not state-law suits likely to provoke a federal law defense, create federal question jurisdiction. *Becker I* at 948-49. *See also*, *Louisville & Nashville R. Co.*, 211 U.S. at 149.

Becker's fifth claim for relief seeks an injunction and damages for breach of contract. ECF 2 at ¶¶150-160. Similarly, his sixth claim for relief alleges that a covenant of good faith and fair dealing "implied in every contract governed by Utah law, including [the IC Agreement]." (*Id.* at ¶ 162). His seventh and eighth claims allege the torts[1] of unjust enrichment and negligence. *Id.* at ¶¶ 164-171.

Becker does not, and cannot, allege that his breach of contract or tort claims presents a question of federal law. Becker's claims five through eight do not raise a federal question, instead raising state law claims. As such, Becker has failed to carry his burden of proving the existence of subject-matter jurisdiction and his complaint should be dismissed.

2. <u>The mandate rule requires dismissal of the complaint</u>

Becker I requires that the state law claims alleging breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, and negligence be dismissed. *Becker II* and *Becker III* require that Plaintiff exhaust tribal court remedies in turn requiring dismissal of claims 1-4 because there is no federal question presented here until Plaintiff exhausts those remedies.

[1] "Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." W. Page Keeton et al., <u>Prosser and Keeton on Torts</u> §1, at 2 (5th ed. 1984).

The Tenth Circuit has "taken a strict view of the tribal exhaustion rule and ha[s] held that 'federal courts should abstain when a suit sufficiently implicates Indian sovereignty or other important interests." *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498, 1507 (10th Cir. 1997) (quoting *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1542 (10th Cir.1995)). In *Becker III*, the Tenth Circuit adopted the mandate language from *Becker II*, ruling specifically that:

> In Becker II, this court previously concluded that the tribal "exhaustion rule applie[d]" to Becker's federal action and that, consequently, "the [T]ribal [C]ourt should consider in the first instance whether it ha[d] jurisdiction." Since Becker II issued, the Tribal Court has determined that it has jurisdiction over the Tribe's suit against Becker and has also agreed with the Tribe that the Agreement is void under both federal and tribal law. But, due in no small part to the district court's issuance of an injunction prohibiting the parties from proceeding in Tribal Court, Becker "has not yet obtained appellate review" of the Tribal Court's conclusions "Until [such] appellate review is complete, the [Ute Indian] Tribal Courts have not had a full opportunity to evaluate the [Tribe's] claim[s] and federal courts should not intervene." "If [and when] the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, [Becker] may challenge that ruling in the District Court." In the meantime, we conclude that the proper course of action is to remand to the district court with directions to dismiss Becker's federal action without prejudice. Necessarily, that requires us to reverse, without ruling on the merits, the preliminary injunction issued by the district court enjoining the Tribal Court proceedings and precluding the Tribal Court's orders from having effect in other proceedings.

Becker III at 1150 (internal citations omitted.) Thus, the *Becker II* and *Becker III* mandates require exhaustion of tribal court remedies through the tribal appellate court, and consequently, a federal question is not presented until Plaintiff does so.

As this court noted, "'laws of the case' rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit [and] of these rules, the most compelling is the mandate

rule." *Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473, 1516 (D. Utah 1996) (quoting *Casey v. Planned Parenthood of Se. Pennsylvania*, 14 F.3d 848, 856 (3d Cir. 1994) (overruled on other grounds). Moreover, "The so-called 'mandate rule is simply a subspecies of the venerable 'law of the case' doctrine, a staple of our common law as old as the Republic.'" *Ute Indian Tribe*, 935 F. Supp. at 1516-17; *see also Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir. 2002) ("'once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case' and there must be compliance with the reviewing court's mandate." (quoting *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah,* 114 F.3d 1513, 1520 (10th Cir.1997)). "In th[e] [Tenth] Circuit, 'The rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court.'" *Ute Indian Tribe*, 935 F. Supp. at 1517.

Applying the mandate rule, as well as the actual *Becker II* and *Becker III* mandates to this present action, Plaintiff's arguments as to why he need not exhaust tribal court remedies are inappropriate for the Court to consider at this stage because ""[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mut.*, 480 U.S. at 17. His attempt to bring his state law claims in federal court also violates the *Becker I* mandate.

To note, Plaintiff already failed to convince the Tenth Circuit that any exception to tribal court exhaustion applied. *Becker III* at 1150 ("Defendants have not persuaded us any of the narrow exceptions to the tribal exhaustion rule apply here.") It follows

that the same is true here, and this suit should be dismissed accordingly. As the First Circuit aptly noted regarding exceptions to tribal court exhaustion, relevant here, "[a]lthough claims of futility, bias, bad faith, and the like roll easily off the tongue, they are difficult to sustain." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 34 (1st Cir. 2000).

D. The complaint should be dismissed because the Tribe is a necessary and indispensable party that cannot be joined

Federal Rule of Civil Procedure 19 governs mandatory joinder of parties. Courts analyze Rule 19 issues through a three-part process. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001). First, the court determines whether a prospective party is required to be joined if feasible under Rule 19(a). Second, if so, the court "must then determine whether joinder is 'feasible.'" *Id.* Third, if joinder is not feasible, the court must determine, under Rule 19(b), whether the action can "in equity and good conscience" proceed *without* the party. Fed. R. Civ.P. 19(b). If not, the action "should be dismissed." *Id.*

Here, because the Tribe has an interest in the IC Agreement—which Becker worked under from March 2004 through October 2007 and which the Tribe asserts, and the Tribal Court held, is invalid—and because, absent Tribal participation, this litigation would impair the Tribe's ability to protect interests in its mineral trust estate and disrupt the ordinary course of justice in the Tribal Court system, the Tribe "must be joined" if feasible. Fed. R. Civ. P. 19(a). It is not, however, feasible to join the Tribe because the Tribe has not waived its sovereign immunity. Under Rule 19(b), dismissal is appropriate to protect the Tribe's unique sovereign interests in application and

interpretation of its laws and agreements, and to avoid confusion and further litigation as to rights under the IC Agreement. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008).

E. Factual Attack: subject-matter jurisdiction does not exist because sovereign immunity bars Becker's complaint

As a matter of law, Indian tribes and their governing bodies are not subject to suit unless a tribe has waived its sovereign immunity or Congress has expressly authorized the action. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1988). The issue of sovereign immunity is jurisdictional. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Indian tribes "enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id*. Tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). While Tribes can waive sovereign immunity, a court cannot find waivers of tribal immunity by inference or implication. Instead, to be enforceable a waiver of immunity must be clear, explicit and unambiguous." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In determining the issue of waiver, a court cannot consider perceived inequities under the facts of the particular case. *See Ute Dist. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998).

1. **The court must decide tribal sovereign immunity by Reference to Ute Tribal Law**

"Tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe v. Manufacturing Techs. Inc.*, 523 U.S. 751, 756 (1998). As such, "state law has no bearing on who has the authority to waive the Tribe's sovereign Immunity." *The Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, 2011 WL 4001088, at *6, Case No. C10-995RAJ at p. 10 ¶ 17 (W. D. Wash. 2011). However, as discussed in *Pilchuck*, this Court is required to apply Ute Tribal law in determining whether there has been a waiver of sovereign immunity. The court in *Pilchuck* noted that federal courts have readily deferred to tribal law, at least where tribal law provides explicit rules regarding sovereign immunity waivers, citing to *Memphis Biofuels, LLC v. Chickasaw Indian Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009), and *Sanderline v. Seminole Tribe*, 243 F.3d 1282, 1288 (11th Cir. 2001). *Pilchuck* concluded that "where tribal law includes specific provisions governing immunity waivers, federal courts respect those provisions." *Pilchuck*, at p. 11 ¶¶ 9-10. Unlike the tribe in *Pilchuck*, the Ute Tribe has a Law and Order Code that clearly delineates the procedure by which the Tribe's immunity is waived. Therefore, this Court should refer to Ute tribal law in determining whether there has been a waiver of the Tribe's sovereign immunity.

2. **Holdings is immune from suit**

It is well settled that a Tribe's sovereign immunity extends to commercial activities undertaken by the Tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Techs.,*

Inc., 532 U.S. 751 (1998). "Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities." *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1291 (10th Cir. 2008) ("*Native American Distributing II*") (citing *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 532 U.S. 751, 759 (1998)). In analogizing tribal immunity to federal sovereign immunity, the Tenth Circuit noted that "officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of an express waiver of immunity." *Native American Distributing II*, 546 F.3d at 1295.

Holdings meets the threshold for extension of tribal sovereign immunity described in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187-88 (10th Cir. 2010). Holdings, like the commercial entities in *Breakthrough Management Group*, is an economic entity created under the Tribe's constitution and for the financial benefit of the Tribe; it is a "wholly owned" entity and tribal members comprise the entity board; the Tribe intended for Holdings to have sovereign immunity; Holdings is obligated to pay the Tribe; and Holdings promotes the Tribe's self-determination through the generation of revenues and the funding of diversified economic development. *Id*. at 1190-1195.

II. The Court lacks personal jurisdiction over the Tribe and the Business Committee and the complaint should be dismissed

As with subject matter jurisdiction, plaintiff has the burden of proving that the court has personal jurisdiction. *Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 970 F.3d 1269, 1281 (10th Cir. 2020).

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

Here, Becker has not established that the summons has been served on the Tribe or the Business Committee. For this additional reason, the complaint should be dismissed as against these entities.

III. Becker's complaint should be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6)

A Rule 12(b)(6) motion turns on whether Becker's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). To pass muster, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 547, which requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft*, 556 U.S. at 678. Under this standard, a claim need not be probable, but there must be facts showing more than a "sheer possibility" of wrongdoing. *Id.*

Here, the complaint fails to allege that Holdings caused any of the harms alleged. In fact, as alleged, on "April 27, 2005, Becker *and the Tribe* executed and entered into the [IC Agreement]." ECF 2 at ¶17 (emphasis supplied). Stemming from this reality, the allegations are that the Tribe breached the IC Agreement. *Id.* at ¶¶19-26. Nowhere does Becker allege that that Holdings was a party to the IC Agreement or that Holdings caused any harm to him. For this reason, the complaint fails to state a claim against Holdings upon which relief may be granted and the complaint must be dismissed.

CONCLUSION

Based on the facts and legal authorities cited herein, Becker has failed to meet his burden of proving the existence of subject matter jurisdiction and the complaint should be dismissed. Second, personal jurisdiction is lacking over the Tribe and the Business Committee, also warranting dismissal of the complaint. Third, Becker's complaint fails to state a claim upon which relief can be granted, and should therefore be dismissed under Rule 12(b)(6).

WHEREFORE, Holdings respectfully request that this honorable Court dismiss the claims against them with prejudice under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

DATED this 2nd day of September 2025.

/s/ J. Preston Stieff
J. Preston Stieff

Attorney for Defendants

Exhibit	Index of Exhibits
A	Scheduling Order in case no. cv-16253
B	Emergency Motion to Vacate Trial Setting in case no. cv-16253
C	Order Granting Emergency Motion to Vacate in case no. cv-16253
D	Email from F. Bassett to D. Isom re: Becker trial setting in case no. cv-16253
E	Email from F. Bassett to D. Isom re: proposed pretrial order in case no. cv-16253
F	Email from D. Isom to Tribal Counsel re: Attachments in case no. 25-cv-643
G	Request for Trial Setting filed in case no. cv-16253
H	Objection to Trial Setting and Motion for Recusal filed in case no. cv-16253
I	Order Certifying Motion for Disqualification, case no. cv-16253